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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas  
J. Cordell Maddox, Jr., Circuit Court Judge

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Civil Action No. 2021-CP-26-05002  
Appellate Case No. 2022-000596

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**Horry County, South Carolina, Appellant,**

**v.**

**Helicopter Solutions, Inc., d/b/a Helicopter Adventures, Freddie Rick, and  
Burroughs & Chapin Company, Inc., Respondents.**

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**RECORD ON APPEAL**

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and Freddie Rick

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|                               |   |                                    |
|-------------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA       | ) | IN THE COURT OF COMMON PLEAS       |
| COUNTY OF HORRY               | ) | FIFTEENTH JUDICIAL CIRCUIT         |
|                               | ) |                                    |
| Horry County, South Carolina, | ) | Civil Action No.: 2021-CP-26-05002 |
|                               | ) |                                    |
| Plaintiff,                    | ) |                                    |
|                               | ) |                                    |
| v.                            | ) |                                    |
|                               | ) |                                    |
| HELICOPTER SOLUTIONS, INC.    | ) |                                    |
| d/b/a Helicopter Adventures,  | ) | <b>ORDER OF DISMISSAL</b>          |
| FREDDIE RICK, and BURROUGHS   | ) |                                    |
| & CHAPIN COMPANY, INC.        | ) |                                    |
|                               | ) |                                    |
| Defendants,                   | ) |                                    |
|                               | ) |                                    |

Defendants Helicopter Solutions, Inc., d/b/a Helicopter Adventures, and Freddie Rick (collectively “Defendants”), filed a Motion to Dismiss or for Judgments on the Pleadings (“Motion”), arguing Plaintiff Horry County (“Plaintiff”) lacks standing in its claims for declaratory judgments and injunctive relief. Plaintiff filed a Response, and the Court heard oral arguments on the Motion. The Plaintiff was represented by Michael W. Battle; the Defendants were represented by Joseph M. McCulloch, Jr. The Court agrees with Defendants on the issue of standing and hereby grants the Motion with respect to all Plaintiff’s claims because the claims are not justiciable at this time, as the issues are not active or imminent.

Under South Carolina law, “[a] threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy.” *Peoples Fed. Sav. & Loan Ass’n of S.C. v. Res. Plan. Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004). “A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character.” *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423-24, 593 S.E.2d 462, 466-67 (2004). Under South Carolina law, “[a] plaintiff has standing . . . when he

sustained, or is in immediate danger of sustaining, actual prejudice or injury from the . . . action. To meet the ‘stringent’ test for standing, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Jowers v. S.C. Dep’t of Health & Env’t Control*, 423 S.C. 343, 353-54, 815 S.E.2d 446, 451 (2018).

“Declaratory judgment actions must involve an actual, justiciable controversy that is ripe for determination.” *Waters v. S.C. Land Res. Conservation Comm’n*, 321 S.C. 219, 228, 467 S.E.2d 913, 918 (1996). While some jurisdictions have made exceptions in declaratory judgment actions where the “ripening seeds” of an actual controversy exist, South Carolina declines to extend such exception where “the facts do not indicate an imminent violation of rights.” *Id.*

In the instant matter, it is undisputed that Defendants’ leasehold interest in the property at issue ends during the summer of 2023, and Horry County Ordinance 15-16 is not legally operative until January 1, 2024. As such, any alleged violation by Defendants of Ordinance 15-16 is contingent, hypothetical, and abstract. There are no facts on the record indicating that Defendants’ violation of Ordinance 15-16 is imminent, and because the Ordinance is not yet legally binding, Plaintiff has suffered no invasion of a legally protected interest sufficient to constitute an injury in fact. Plaintiff, therefore, lacks standing to bring the claims plead in their Complaint.

In light of the foregoing discussion and analysis, Defendants’ Motion to Dismiss is **GRANTED**.

**IT IS SO ORDERED.**

---

The Honorable J. Cordell Maddox, Jr.  
Horry County Common Pleas



## Horry Common Pleas

**Case Caption:** Horry County VS Helicopter Solutions, Inc. , defendant, et al

**Case Number:** 2021CP2605002

**Type:** Order/Dismissal

So Ordered

s/ J. Cordell Maddox Jr.

Electronically signed on 2022-04-22 15:30:10 page 3 of 3

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2021-CP-26-\_\_\_\_\_

HORRY COUNTY, South Carolina, )  
Plaintiff, )

v. )

**SUMMONS**

HELICOPTER SOLUTIONS, INC. )  
d/b/a Helicopter Adventures, )  
FREDDIE RICK, and )  
BURROUGHS & CHAPIN )  
COMPANY, INC. )  
Defendants. )

TO: THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscribers at their office at 1200 Main Street, Post Office Box 530, Conway, South Carolina 29528-0530, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint, or to otherwise responsively plead to the Complaint, or to otherwise appear and defend, within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

s/James R. Battle  
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*Attorney for Plaintiff Horry County*

[illegible]

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2021-CP-26-

HORRY COUNTY, South Carolina, )  
)  
Plaintiff, )

V.

## COMPLAINT

(Declaratory Relief and Injunction)

HELICOPTER SOLUTIONS, INC. )  
d/b/a Helicopter Adventures, )  
FREDDIE RICK, and )  
BURROUGHS & CHAPIN )  
COMPANY, INC. )  
Defendants. )

Plaintiff Horry County, by counsel, submits this Complaint for Declaratory Relief and Injunction against Defendant Helicopter Solutions, Inc. d/b/a Helicopter Adventures, Freddie Rick (collectively, “Helicopter Adventures” or “HA”) and Burroughs & Chapin Company, Inc. (“B&C”).

Helicopter Adventures is a helicopter sight-seeing business that has been operating at 1860 21st Avenue North (“the Property”) in Horry County since 2012. From its inception, the noise and disruption from HA’s fleet of helicopters has been the subject of frequent complaints from nearby residents and community members.

In 2016, due to safety concerns and the many complaints about the adverse impacts of HA's operations on the use and enjoyment of their properties, the County passed an Ordinance restricting heliports/helipads to Public Use Airports. The Ordinance requires nonconforming heliports/helipads to relocate to a conforming location by January 1, 2024.

HA has not relocated its helicopter sight-seeing business, and has stated its intent to continue operating at its nonconforming location unless the County provides HA a site to operate at Myrtle Beach International Airport (“MYR”).

Defendant B&C is a privately owned Real Estate Investment Trust that owns the Property and leases it to HA.

On Count 1 of its complaint, Horry County seeks a declaration that: (a) operation of a helicopter sight-seeing business at the Property must cease on or before January 1, 2024, (b) operation of a heliport at the Property past January 1, 2024 constitutes a public nuisance, and (c) HA and B&C are not entitled to any compensation or damages.

On Count 2 of its complaint, Horry County seeks an injunction to prevent Defendant HA from unlawfully operating a heliport anywhere other than at a Public Use Airport after January 1, 2024.

### **Parties**

1. Plaintiff Horry County, South Carolina, is a body politic and corporate, and one of forty-six counties of the State of South Carolina.
2. Defendant Helicopter Solutions, Inc. is a Nevada corporation that owns and operates a heliport at 1860 21st Ave North in Horry County.
3. Defendant Freddie Rick is the owner and president of Helicopter Solutions, Inc.
4. Defendant Burroughs & Chapin Company, Inc. is a South Carolina corporation that owns the Property at 1860 21st Ave North in Horry County.

### **Jurisdiction, Venue, and Standing**

5. Jurisdiction for this suit is conferred on the Court in part by S.C. Const. Art. V, § 1.

6. The Court has the power to issue declaratory judgments pursuant to SCRCP 57, and S.C. Code Ann. § 15-53-10—15-53-140.
7. The County has standing to institute an action for a declaratory judgment because a justiciable controversy exists between the County and the Defendants concerning the use of the Property. *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423 (2004) (“The Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy.”).
8. The County has standing to sue for injunctive relief based on a proposed violation of its zoning ordinance. *See* S.C. Code Ann. § 6-29-950 (providing that when land is proposed to be used in violation of a zoning ordinance, the appropriate government authority “may in addition to other remedies, institute injunction, mandamus, or other appropriate action to prevent the unlawful . . . use”).
9. Additionally, the County has standing to institute an action for a declaratory judgment and injunction because the “issue is of such public importance as to require its resolution for future guidance.” *Adams v. McMaster*, 432 S.C. 225, 235 (2020); *Davis v. Richland County Council*, 372 S.C. 497, 500 (2007).
10. Jurisdiction and venue are proper in this Court.

## **Facts**

### Helicopter Adventure’s Operation

11. Since 2012, Defendant HA has owned and operated a helicopter sight-seeing tour business at 1860 21st Ave North in Horry County, consisting of a heliport and a fleet of helicopters.

12. Burroughs & Chapin, Inc. owns the land on which HA operates its business and leases it to Defendant HA.
13. HA entered into a lease with an Initial Term of five years and nine months with Burroughs & Chapin on or about April 4, 2012. (Exhibit A, "Lease".)
14. The Lease contains a renewal option allowing HA, the tenant, to renew the Lease for an Extended Term of an additional five years and six months. (Ex. A at 1.)
15. The land where Defendant HA operates is zoned Amusement/Commercial (AC).
16. At the time Defendant HA opened its business, a helicopter sight-seeing business was a permitted use in the AC district. *See Helicopter Solutions, Inc. v. Hinde*, 414 S.C. 1 (2015).

Current Ordinance Restricting Heliports/Helipads

17. Soon after HA began operating helicopter flights, the County began receiving complaints from residents concerning the disruption caused by the frequent fly-overs, take-offs, and landings at HA's business.
18. Residents expressed frustration at the short-duration flights interrupting their daily lives, drowning out normal conversations, and impeding sleep patterns.
19. After receiving complaints for more than three years, on April 20, 2016, the Horry County Council adopted Ordinance 15-16. (Exhibit B, the "Ordinance".)
20. In the Ordinance's preamble, the County Council made a series of legislative findings, including the following:

WHEREAS, helicopter flights of a short duration, at low altitudes, primarily for tourist passengers, have increased in frequency and number over the years, and are a source of frustration among, and complaints from, County citizens; and

WHEREAS, frequent, low-altitude aircraft flight poses safety hazards to citizens and visitors on the ground, especially where such aircraft fly over residential areas, schools, and heavily populated sites such as retail shopping areas, outdoor tourist attractions, athletic facilities, and parks that attract visitors to the County; and

WHEREAS, safety risks for crew, passengers, and persons on the ground tend to increase with proximity to sites where take-off and landing operations occur; and

WHEREAS, helicopter operations are reported to produce an incessant roar that penetrates into homes, drowns out normal conversation, and interrupts sleep patterns, causing fatigue that results in poor performance at school, work, sporting activities, etc.; and

WHEREAS, negative effects of aircraft operations include significant noise impacts that disturb hearing, speech communication, sleep, and other activities, which reduce the use and enjoyment of outdoor amenities as well as indoor facilities in proximity to such aircraft operations; and,

WHEREAS, noise impacts from aircraft operations annoy and disturb citizens who live near those operations, as well as dampen the resale value for their residential properties; and

WHEREAS, steps to mitigate privacy and noise impacts include limiting the number and location of sites where nonemergency aircraft operations occur in the County, so as to consolidate the point sources for aircraft noise and thereby minimize the sites where such noise is generated; and

WHEREAS, public use airports are better suited for prompt emergency responses that may be required relative to aircraft take-off and landing operations, as compared with other locations in the County; and

WHEREAS, flights during dark hours exacerbate the noise impacts on citizens and complicate emergency response efforts; found among other things that “helicopter operations are reported to produce an incessant roar that penetrates into homes, drowns out normal conversation, and interrupts sleep patterns, causing fatigue that results in poor performance at school, work, sporting activities, etc.”

(Ex. B at 1.)

21. The Ordinance amended Horry County Code § 539 to provide that heliports/helipads shall be permitted only at Public-Use Airports. (Ex. B at 3.)

22. As amended under the Ordinance, heliport/helipad is defined in Horry County Code § 436.5 as

an area of land, water, or structure, either at ground level or elevated on a structure, that is used for the landing and take-off of one or more helicopters, which may or may not contain all or part of such auxiliary facilities as parking, waiting rooms,

administrative offices, hangars, fueling, passenger loading, cargo loading, and maintenance areas.

(Ex. B at 3.)

23. As amended, Horry County Code § 403 defines Airport (including Public Use Airport) as

an area of land or water which is used or intended for use for the landing and takeoff of aircraft, and any appurtenant areas which are used, or intended for use, for airport building or other airport facilities or right-of-way, together with all airport buildings and facilities located thereon. This includes any airport, heliport, helistop, vertiport, gliderport, seaplane base, ultralight flightpark, manned balloon launching facility, or other aircraft landing or takeoff area.

A) Public Use Airport – as defined by Section 503(17) of the Airport and Airway Improvement Act of 1982 means:

- a. Any public airport;
- b. Any privately owned reliever airport; and
- c. Any privately owned airport which is determined by the Secretary of the FAA to enplane annually 2,500 or more passengers and receive scheduled passenger service of aircraft.

B) Private Use Airport –means:

- a. All other airports not defined as Public Use Airport

(Ex. B at 2.)

24. Under the Ordinance, as codified in Horry County Code § 500.7, “[e]xisting heliports/helipads that were legally operating before the enactment of Section 539 in a place other than at a Public Use Airport shall discontinue, or be located in conformity with this ordinance, not later than January 1, 2024. (Ex. B at 2.)

25. Thus, the Ordinance provides for an amortization period of approximately seven years and eight months. (*Id.*)

26. The County determined that an amortization period of more than seven and a half years was a reasonable amortization period.

27. The County also reviewed the terms of HA's Lease with B&C in determining a reasonable amortization period.

28. On information and belief, after the County passed the Ordinance in 2016, and as the Initial Term of the Lease was coming to an end, HA chose to renew its Lease with B&C so that the Extended Term of the Lease ends during the summer of 2023. (Ex. A at 1.)

29. Thus, HA's Lease with B&C, including the Extended Term thereof, is set to expire before the Ordinance's amortization period concludes.

30. On December 9, 2019, the County mailed Defendant Rick a letter informing him that HA must cease its business at its current location and, if desired, be relocated to a Public Use Airport no later than January 1, 2024. (Exhibit C.)

31. On or about May 24, 2021, Defendant Rick informed the County that HA intends to continue operating at its current location unless and until the County provides him with a location at MYR, which is located in the City of Myrtle Beach.

32. B&C intends to allow HA to renew its Lease, or enter a new lease allowing operation of a heliport at the Property, after the Extended Term of the current Lease ends.

FOR A FIRST CAUSE OF ACTION  
(Declaratory Judgment)

33. The County realleges each fact set forth in the previous paragraphs of this complaint and incorporates them herein by reference.

34. Defendants HA and Freddie Rick are operating Helicopter Adventures as a heliport on Defendant B&C's land at a location that is not a Public Use Airport as defined in the Ordinance.

35. The Ordinance requires Defendants to cease operating a heliport at HA's current location on or before January 1, 2024.

36. Thus, the County is entitled to a declaratory judgment finding that operation of a heliport at 1860 21st Ave North in Horry County must cease on or before January 1, 2024.

37. “A nuisance is anything which works hurt, inconvenience, or damages; anything which essentially interferes with the enjoyment of life or property.” *Strong v. Winn-Dixie Stores, Inc.*, 240 S.C. 244, 253 (1962).

38. To be a “public nuisance,” a nuisance “must be in a public place or where the public frequently congregate, or where members of the public are likely to come within the range of its influence.” *Morrison v. Rawlinson*, 193 S.C. 25, 7 S.E.2d 635, 638 (1940).

39. Defendants’ operation of a heliport at 1860 21st Ave North creates excessive noise, wind, and disruptions for nearby residents, making it difficult for them to enjoy their own properties fully, to hold normal conversations, or to even sleep, and thus “interferes with the enjoyment of life or property.” *Strong*, 240 S.C. at 253.

40. Defendants’ operation of a heliport at 1860 21st Ave creates a nuisance in a public place. *Morrison*, 7 S.C. at 638.

41. Thus, the County is entitled to a declaration that the continuation of a heliport at 1860 21st Ave North in Horry County after January 1, 2024 is a public nuisance.

42. An amortization period is valid if reasonable. *Centaur, Inc. v. Richland County*, 301 S.C. 374, 381 (1990) (citing *Collins v. City of Spartanburg*, 281 S.C. 212 (1984)).

43. The reasonableness of an amortization period is determined based on “balancing the public gain against the private loss.” *Centaur, Inc.* 301 S.C. 374 at 381.

44. The public gain in this case is the elimination of a significant safety concern and a source of noise pollution, as well as eradicating the disruptive effects of HA’s operations on the use and enjoyment of numerous nearby properties, including many residences in the community.

45. The private loss to HA is minimal because HA will have been operating more than a decade, and because the Lease's Extended Term will expire, before the amortization period ends.

46. The private loss to B&C is also minimal because the amortization period allows HA to rent the property and pay rent for the full term of the Extended Lease.

47. The amortization period of more than seven years is reasonable because the public gain far outweighs the private loss.

48. The amortization period in the Ordinance allows HA full enjoyment of the terms of its Lease.

49. Thus, the County is entitled to a declaration that it does not owe any compensation or damages to HA or B&C.

FOR A SECOND CAUSE OF ACTION

(Injunction)

(Violation of § 539 of the Zoning Ordinance)

50. The County realleges each fact set forth in the previous paragraphs of this complaint and incorporates them herein by reference.

51. Under S.C. Code § 6-29-950, when land is proposed to be used in violation of a zoning ordinance, the appropriate government authority (in this case, the Horry County attorney) "may in addition to other remedies, institute injunction, mandamus, or other appropriate action to prevent the unlawful . . . use."

52. Defendant Freddie Rick has told the County that he will continue operating a heliport at 1860 21st Ave North in Horry County unless and until the County provides him an alternative location at MYR.

53. Thus, under S.C. § 6-29-950, the County is entitled to a permanent injunction to prevent Defendant HA from operating a heliport anywhere other than at a Public Use Airport after January 1, 2024.

### **Relief Requested**

54. Therefore, Horry County respectfully requests this Court to issue:

a. on the First Cause of Action of the Complaint, a declaratory judgment stating that (1) Operation of a heliport at 1860 21st Ave North must cease on or before January 1, 2024; (2) continued operation of a heliport at 1860 21st Ave North after January 1, 2024 constitutes a public nuisance; and (3) Defendants Helicopter Solutions, Inc., Freddie Rick, and B&C are not owed any compensation or damages.

b. on the Second Cause of Action of the Complaint, a permanent injunction prohibiting Defendants Helicopter Solutions, Inc. and Freddie Rick—as well as their officers, agents, servants, employees, and those persons in active concert or participation with them—from operating a heliport anywhere other than at a Public Use Airport after January 1, 2024.

c. an order taxing all costs to Defendants, and providing such other relief, including but not limited to attorney fees, sanctions, damages, and other monetary relief against Defendants, as this Court deems just and proper.

Signature Follows

Dated: July 30, 2021

Respectfully submitted,

*s/James R. Battle*

SC Bar #73604

BATTLE LAW FIRM, LLC

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Conway, SC 29526

(843) 248-4321

Email: [jbattle@battlelawsc.com](mailto:jbattle@battlelawsc.com)

*Attorney for Plaintiff Horry County*

LEASE

THIS LEASE made and entered into as of the day 4<sup>th</sup> of April, 2012 (the "Effective Date"), between BURROUGHS & CHAPIN COMPANY, INC., a South Carolina corporation ("Landlord"), and HELICOPTER SOLUTIONS, INC., a Nevada corporation, D/B/A HELICOPTER ADVENTURES ("Tenant").

WITNESSETH:

In consideration of the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree for themselves, their successors and assigns, as follows:

1. **PREMISES.** Landlord, in consideration of the rents, covenants, and agreements hereinafter reserved and contained to be paid and performed by Tenant, hereby demises and lets unto Tenant that certain land located off of 21<sup>st</sup> Avenue North Extension, Myrtle Beach, Horry County, South Carolina, having a physical address of 1860 21<sup>st</sup> Avenue North, Myrtle Beach, South Carolina 29577, containing approximately 5.52 acres, and being a portion of TMS #173-00-01-058 and 173-00-01-077, as depicted on EXHIBIT "A", attached hereto and made a part hereof ("Premises"), together with all rights, appurtenances, easements, and privileges thereto. Tenant's use and occupancy of the Premises shall be subject to all encumbrances of record or discernable from a visual inspection of the Premises. Tenant shall not do or permit anything to be done in or about the Premises that would in any way obstruct or interfere with other parties' easement or access rights across the Premises, including, without limitation, the power line facility and gravel road currently located upon the Premises.

2. **TERM.** This Lease shall be effective as of the Effective Date. The date upon which Landlord tenders possession of the Premises to Tenant shall be the "Commencement Date". In no event shall Tenant enter the Premises prior to compliance with Section 8 hereof. The term of this Lease (the "Initial Term") shall commence on the Commencement Date and shall expire on the date which is approximately five (5) Lease Years, as defined hereinafter, and nine (9) months after the earlier to occur of (i) one hundred twenty (120) days after Tenant receives requisite permits from the appropriate government agencies, or (ii) Tenant's commencement of business operations on the Premises (the "Rent Commencement Date"); provided, however, in no event shall the Rent Commencement Date occur more than one hundred eighty (180) days after the Commencement Date. If Landlord for any reason whatsoever cannot deliver possession of the Premises to Tenant in accordance with the terms hereof on or before the above-stated Commencement Date, this Lease shall not be void or voidable nor shall Landlord be liable to Tenant for any loss or damages resulting therefrom; but in that event, except to the extent that any such delay is attributable to Tenant or its agents, employees, contractors, affiliates, partners, subcontractors, licensees, invitees or subtenants, the Commencement Date shall be adjusted to be the date when Landlord does in fact deliver possession of the Premises to Tenant in accordance with the terms hereof. The term "Lease Year" means each successive period of twelve (12) full calendar months beginning upon the Rent Commencement Date. If the Rent Commencement Date occurs on a day other than the first day of a calendar month, then the period commencing with the Rent Commencement Date and ending on the last day of the calendar month in which the Rent Commencement Date occurs shall be added to the first Lease Year of the Initial Term.

Tenant shall have the option of extending the Term of this Lease (the "Renewal Option") for one (1) additional consecutive five (5) Lease Year and six (6) month period (the "Extended Term," the Extended Term, if exercised, and the Initial Term may collectively be referred to hereinafter as the "Term") provided that: (i) Tenant is not then in default of this Lease as described in Section 22 hereof, and no condition exists which with the passage of time or the giving of notice could ripen into such a default of this Lease; (ii) Tenant exercises the Renewal Option by notice to Landlord no later than two

Landlord [Signature]  
PPAB 1942193v2

Tenant [Signature]

Exhibit

A

hundred seventy (270) days prior to the expiration of the Initial Term; and (iii) Tenant is open and operating as the Permitted Use set forth herein in the Premises. The Extended Term shall be subject to the terms and conditions set forth in this Lease.

3. **BASE RENT.** (a) **Initial Term.** Commencing on the Rent Commencement Date and continuing through month thirty-six (36), Tenant shall pay and Landlord shall accept as rent ("**Base Rent**") for the Premises, equal monthly installments of Three Thousand and 00/100 Dollars (\$3,000.00).

For months thirty-seven (37) through sixty (60), Tenant shall pay and Landlord shall accept as Base Rent for the Premises equal monthly installments of Three Thousand Five Hundred and 00/100 Dollars (\$3,500.00).

For months sixty-one (61) through sixty-six (66), Tenant shall pay and Landlord shall accept as Base Rent for the Premises equal monthly installments of Three Thousand Five Hundred and 00/100 Dollars (\$3,500.00).

**Extended Term.** If the Renewal Option is exercised in compliance with this Lease, for months sixty-seven (67) through ninety-six (96), Tenant shall pay and Landlord shall accept as Base Rent for the Premises equal monthly installments of Five Thousand and 00/100 Dollars (\$5,000.00).

For months ninety-seven (97) through one hundred thirty-two (132), Tenant shall pay and Landlord shall accept as Base Rent for the Premises equal monthly installments of Five Thousand Five Hundred and 00/100 Dollars (\$5,500.00).

(b) In addition to Base Rent and other sums payable by Tenant hereunder, Tenant shall pay to Landlord percentage rent ("**Percentage Rent**," Percentage Rent, Base Rent, and other sums payable by Tenant hereunder are collectively referred to hereinafter as "**Rent**") which shall be the product of five percent (5%) of annual Gross Sales, as defined in Section 31(i) hereof, exceeding the following breakpoints in each Lease Year (each, a "**Percentage Breakpoints**"):

**Initial Term:**

Months 1 through 36: Five Hundred Thousand and 00/100 Dollars (\$500,000.00) per Lease Year;

Months 37 through 60: Five Hundred Eighty Thousand and 00/100 Dollars (\$580,000.00) per Lease Year; and,

Months 61 through 66: If the Renewal Option for the Extended Term is not exercised, the Percentage Breakpoint for months 61 through 66 of the Term shall be Five Hundred Eighty Thousand and 00/100 Dollars (\$580,000.00). If the Renewal Option for the Extended Term is exercised, the Percentage Breakpoint for months 61 through 72 of the Term shall be Eight Hundred Thousand and 00/100 Dollars (\$800,000.00)

**Extended Term:**

Months 67 through 96: Eight Hundred Thousand and 00/100 Dollars (\$800,000.00) per Lease Year; and,

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Months 97 through 132:

Eight Hundred Eighty Thousand and 00/100 Dollars  
(\$880,000.00) per Lease Year.

Beginning at the Rent Commencement Date, Tenant shall monitor Gross Sales on a monthly basis to determine if cumulative Gross Sales exceed the Percentage Breakpoint. If the cumulative monthly Gross Sales exceed the Percentage Breakpoint, Tenant shall begin paying Percentage Rent on a monthly basis the following month. Tenant shall report its Gross Sales in accordance with the terms of this Section and Section 31(i) "Statements of Gross Sales" and pay any additional Percentage Rent due. If Tenant paid excess Percentage Rent during the preceding Lease Year, such excess amount shall be credited to Percentage Rent due in the then-current Lease Year. At the end of the Term Landlord shall reimburse Tenant for any overpayment in the preceding Lease Year.

(i) Percentage Rent for Lease Year. On or before the sixtieth (60th) day following the end of each Lease Year, Tenant shall furnish to Landlord a statement certified by a Certified Public Accountant employed by Tenant, or by an officer of Tenant, of Gross Sales for the preceding Lease Year and shall tender therewith the additional Percentage Rent due, if any, for such Lease Year. If such Lease Year is Partial, the Percentage Breakpoint shall be prorated appropriately.

(ii) Books of Account and Landlord's Right to Audit. Tenant agrees to prepare in accordance with generally accepted accounting principles and to keep on the Premises or at its principal accounting office, accurate books of account and records of Gross Sales, including all federal, state, state sales tax and local tax returns relating to Tenant's Gross Sales. A copy of the state sales tax return compiled monthly by Tenant for Gross Sales related to the Premises shall be forwarded to Landlord by the 20th day of each month for the preceding calendar month. All books and records, including tax returns, with respect to Gross Sales for any Lease Year or partial Lease Year shall be kept by Tenant and open to examination or audit by Landlord for a period of four (4) years following the close of such Lease Year or partial Lease Year. Upon sixty (60) days prior notice to Tenant, Landlord or Landlord's agent shall have the right to conduct an examination or audit of Tenant's books and records. In any other case in which Landlord shall elect to examine or audit Tenant's books and records and such examination or audit shall reveal that Tenant has understated Gross Sales by three percent (3%) or more, Tenant agrees to pay to Landlord the reasonable cost of such examination or audit as additional Rent hereunder. In the event such examination or audit discloses that Tenant has understated Gross Sales by five percent (5%) or more, then in such event, in addition to being a default hereunder, Tenant shall promptly pay the cost of such audit together with Interest upon amounts so understated. Any additional Percentage Rent found due and owing as a result of such examination or audit shall immediately be due and payable.

4. USE OF PREMISES. (a) Tenant covenants and agrees that the Premises shall be used solely for purposes of the operation and maintenance of a helicopter tour ride facility, d/b/a Helicopter Adventures, and for no other purpose whatsoever without the prior written approval of Landlord (the "Permitted Use").

(b) Tenant agrees that Tenant (and if Tenant is a corporation or partnership, its officer, directors, stockholders, any affiliates or partners) shall not, directly or indirectly, operate, manage or have any interest in any other operation (unless in operation on the date of this Lease) or business which is similar to or in competition with the Permitted Use within a five (5) mile radius from the Premises, except in other properties owned and/or operated by Landlord.

(c) In the event that Tenant's use of the Premises is restricted, curtailed or prohibited by any law or ordinance such that Tenant is reasonably prohibited from operating for the Permitted Use, then Tenant may terminate this Lease upon sixty (60) days prior written notice to Landlord.

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5. **QUIET ENJOYMENT.** Tenant, upon paying the rents herein reserved and performing and observing all of the other terms, covenants, and conditions of this Lease on Tenant's part to be performed and observed, shall peaceably and quietly have, hold, and enjoy the Premises during the Term, subject to the terms of this Lease and to any agreements and encumbrances which are superior to this Lease or to which this Lease may be subordinated.

6. **TAXES.** Tenant shall pay promptly when due or make reimbursement to Landlord upon demand for all taxes imposed upon the Rent, this Lease, and Tenant's business operation, including, without limitation, all taxes imposed on or with respect to Tenant's personal property, inventory, and intangibles located on or used in connection with the Premises, all sales taxes, value added taxes, documentary taxes, stamp taxes, and other taxes assessed upon the consideration to be received by Landlord for this Lease. Landlord shall be responsible for real estate taxes, ad valorem taxes, and similar charges for the land, buildings and improvements comprising the Premises. Tenant shall not be obligated to pay any municipal, state, or federal income, or franchise tax which may be assessed against Landlord, except any such taxes which may be levied or assessed by reason of the carrying on of any enterprise upon the Premises by Tenant.

7. **UTILITIES.** Commencing upon the Commencement Date of this Lease, Tenant shall pay, prior to delinquency, all electricity, heat, water, sewer, trash removal, and all other utility charges and costs of any kind for utilities used or consumed at the Premises, including, without, limitation, any governmental "tap fees" or similar charges. Landlord is not responsible for any interruptions or curtailments in utility services. Landlord hereby reserves the right to grant perpetual utility and/or other easements over, under, and across the Premises to the applicable private, public, or governmental authorities for purposes of installing, constructing, reconstructing, using, operating, repairing, replacing, maintaining, relocating, and/or removing any utility lines and/or facilities. Tenant agrees, from time to time within ten (10) days of Landlord's request, to execute and deliver to Landlord any reasonable instruments presented to Tenant by Landlord which grant such utility and other easements over, across, and under the Premises to any applicable private, public, or governmental authorities for the purposes described hereinabove.

8. **INSURANCE REQUIRED OF TENANT.**

(a) With respect to Tenant's performance under this Lease, and in addition to Tenant's obligation to indemnify, Tenant shall at its sole cost and expense:

- (i) maintain the insurance coverages and limits required by this Section and any additional insurance and/or bonds required by law on or before the Commencement Date of the Lease or Tenant's entering the Premises for any purpose, and at all times during the Term;
- (ii) require its Contractor, as hereinafter defined, and each subcontractor who may perform work on the Premises or enter upon the work site to maintain coverages, requirements, and limits at least as broad as those listed in Section 11 hereof from the time when the Contractor or each subcontractor begins any work, throughout the term of the subcontractor's work;
- (iii) procure the required insurance from an insurance company eligible to do business in the State of South Carolina and having and maintaining a Financial Strength Rating of "A-" or better and a Financial Size Category of "VII" or better, as rated in the A.M. Best Key Rating Guide for

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Property and Casualty Insurance Companies, except that, in the case of Workers' Compensation insurance, Tenant may procure insurance from the state fund of the State of South Carolina; and

(iv) deliver to Landlord, certificates of insurance stating the types of insurance and policy limits. Tenant shall provide or will endeavor to have the issuing insurance company provide at least thirty (30) days advance written notice of cancellation, non-renewal, or reduction in coverage, terms, or limits to Landlord. Tenant shall deliver such certificates:

- 1) On or before the Effective Date of the Lease or Tenant's entering the Premises for any purpose and prior to commencement of any work therein; and
- 2) prior to expiration of any insurance policy required in this Section.

(b) The parties agree:

- (i) the failure of Landlord to demand such certificate of insurance or failure of Landlord to identify a deficiency will not be construed as a waiver of Tenant's obligation to maintain the insurance required under this Lease;
- (ii) that the insurance required under this Lease does not represent that coverage and limits will necessarily be adequate to protect Tenant, nor be deemed as a limitation on Tenant's liability to Landlord in this Lease;
- (iii) Tenant may meet the required insurance coverages and limits with any combination of primary and Umbrella/Excess liability insurance; and
- (iv) Tenant may not maintain a deductible that exceeds \$5,000 on any liability and not more than \$25,000 on any property policy without Landlord's prior written approval.

(c) The insurance required by this Section includes the following coverages:

- (i) Workers' Compensation insurance with benefits afforded under the laws of the State of South Carolina and Employers Liability insurance with limits of at least:  
 \$1,000,000 for Bodily Injury – each accident  
 \$1,000,000 for Bodily Injury by disease – policy limits  
 \$1,000,000 for Bodily Injury by disease – each employee
- (ii) Commercial General Liability insurance written on Insurance Services Office (ISO) Form CG 00 01 12 04 or a substitute form providing equivalent coverage, covering liability arising from the Premises, operations, personal injury, products/completed operations, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract) with limits of at least:  
 \$10,000,000 General Aggregate limit (per location basis)

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\$1,000,000 each occurrence limit for all bodily injury or property damage incurred in any one (1) occurrence  
 \$5,000,000 each occurrence limit for Personal Injury and Advertising Injury  
 \$5,000,000 Products/Completed Operations Aggregate limit  
 \$100,000 Damage to Rented Premises

- (iii) Automobile Liability Insurance, including hired and non-owned vehicles, in an amount not less than \$1,000,000 combined single limit for bodily injury and property damage
- (iv) Aircraft Hull and Liability Insurance with a liability limit of \$5,000,000 per occurrence per aircraft

The Commercial General Liability, Automobile Liability and Aircraft Hull and Liability insurance policies must:

- 1) include Landlord, Myrtle Beach Farms Company, Inc., and Landlord's lender, if any, as Additional Insureds. Tenant shall provide a copy of the Additional Insured endorsement to Landlord. The Additional Insured endorsement may either be specific to Landlord or may be "blanket" or "automatic" addressing any person or entity as required by contract. A copy of the Additional Insured endorsement must be provided within sixty (60) days of execution of this Lease and within sixty (60) days of the Commercial General Liability policy renewal;
- 2) include a waiver of subrogation in favor of Landlord;
- 3) be primary and non-contributory with respect to any insurance or self-insurance that is maintained by Landlord; and
- 4) the policy aggregate must be provided on a per location basis.
- (v) All-risk property insurance on a 100% replacement cost basis for all buildings and improvements Tenant may construct on the Premises, Tenant's personal property, decorations, trade fixtures, furnishing, equipment (except the helicopters shall be covered under the Aircraft Hull and Liability Insurance provided for in subsection (iv) above), alterations and repairs, improvements and betterments, and other contents located or placed therein, against loss or damage, and shall include business interruption. . The property insurance policy will include a waiver of subrogation in favor of Landlord.
- (vi) Environmental Insurance Liability with a \$1,000,000 per pollution conditions limit and a \$2,000,000 annual aggregate.

(d) If Tenant fails to obtain and provide any or all of the aforesaid insurance, Landlord may, but shall not be required to, purchase such insurance on behalf of Tenant and recover the cost of such insurance as additional Rent due under this Lease. Tenant agrees, as its own expense, to comply with all rules and regulations of the fire insurance rating organization having jurisdiction.

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9. **WAIVER OF SUBROGATION.** Landlord and Tenant hereby release each other and each party's officers, directors, employees, and agents from liability or responsibility for any loss or damage to their respective property covered by insurance policies, or which would have been covered by insurance if the party had complied with the terms and provisions of this Lease. This release shall apply to Landlord and Tenant and anyone claiming through or under Landlord or Tenant, by way of subrogation or otherwise, even if the occurrence was caused by the fault or negligence of Landlord or Tenant or anyone under their control. Each of Landlord and Tenant shall cause any property damage insurance which it maintains in respect to the Premises to contain a provision whereby the insurer waives any rights of subrogation against the other party.

10. **REPAIRS.** During the Term hereof, Tenant agrees to perform all construction, repairs, replacements, maintenance, and reconstruction, whether foreseeable or unforeseen, ordinary or extraordinary, structural or non-structural of the buildings and other improvements now or hereafter located on the Premises and all additions thereto or alterations thereof at Tenant's sole cost and expense. Tenant will not suffer or permit any waste or neglect of the Premises and will take such steps as often as may be necessary to keep the buildings, appurtenances, and other improvements on the Premises in a first-class and modern condition. Tenant shall keep the Premises in good order and condition and a good state of repair at all times, including without limitation, keeping same in a clean and sanitary condition, promptly removing all rubbish, litter, and surface waters, and resurfacing, marking and repairing of all parking areas, site lighting, walkways, and landscaping.

11. **IMPROVEMENTS.** The Premises are leased and Tenant accepts the same in their "as-is" and "where-is" condition. Landlord shall have no obligation to build or make any improvements thereon or thereto whatsoever. Tenant shall be permitted to construct a hangar building, office building, parking area, six (6) helipad concrete sites, and install a six (6) foot tall chain link fence around the Premises in accordance with **EXHIBIT "B"** (collectively, the "**Improvements**"). Subject to Landlord's prior written approval, Tenant shall be permitted to modify the gravel road located upon the Premises as required by the City of Myrtle Beach and Horry County to get permits necessary to operate on the Premises for the Permitted Use. Further, Tenant shall be permitted to modify the Improvements or make such other alterations to the Premises that Tenant shall deem necessary or desirable for the Permitted Use without Landlord's consent, provided that the total cost of any such modification or alteration does not exceed Seven Thousand Five Hundred and No/100 Dollars (\$7,500.00). Tenant shall not to make any other alterations, changes, additions, or improvements to the Premises without the prior written consent of Landlord, which may be withheld in Landlord's sole discretion. In the event Tenant wishes to make such alterations, changes, additions, or improvements for which Landlord's consent is required, Tenant shall submit three complete sets of Tenant's plans and specifications which have been stamped/sealed by an architect or engineer to Landlord in conjunction with Tenant's request for Landlord's consent. If approved by Landlord, said plans and specifications shall be the final plans and specifications, and no changes in excess of Seven Thousand Five Hundred and No/100 Dollars in construction costs shall be made without Landlord's prior written consent. Landlord agrees to review and comment on Tenant's request and plans and specifications within thirty (30) days after receipt; otherwise, such request and plans and specifications will be deemed denied by Landlord. If Landlord consents to Tenant's proposed alterations, changes, additions, or improvements to the Premises and approves Tenant's plans and specifications, all work erected or performed on the Premises shall be performed solely by Tenant at its sole cost and expense pursuant to such approved plans and specifications. Tenant agrees that no construction shall commence until Landlord approves said plans and specifications. Prior to commencement of construction on the Premises, a pre-construction coordination conference shall be held at or near the Premises. Landlord's representative, Landlord's contractor, Tenant's representative and Tenant's contractor shall attend such conference. Tenant shall be responsible for and agrees to obtain all building permits, other permits, utility services, and certificates of occupancy required in connection with

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the use and occupancy of the Premises. Not later than the expiration of this Lease, Tenant shall be permitted to remove any buildings or other improvements it has constructed on the Premises provided that Tenant restores the Premises to a neat and attractive condition and restores all damages to the Premises resulting from the installation or removal of any such building.

(b) Tenant and Tenant's contractor (the "Contractor") shall comply with the requirements set forth in this subsection (b). Tenant and Tenant's contractor shall enter into a construction contract in the form of the current edition of Document A101 of The American Institute of Architects in which the contractor agrees to perform Tenant's work required hereunder, and Tenant shall provide an executed copy of such contract to Landlord. Said contract shall provide, among other things, as follows:

- (i) That notwithstanding anything to the contrary, the Contractor will perform the work and furnish the materials required therefor on the sole credit of Tenant; that no lien for labor or materials will be filed or claimed by the Contractor against the Premises; that the Contractor will discharge any such lien filed or claims by any person or entity that furnishes labor or materials to the Premises; and that the Contractor will indemnify and save Landlord harmless from any and all costs and expenses, including reasonable attorneys' fees, suffered, or incurred as a result of any such lien that may be filed or claimed in connection with or arising out of the work; and
- (ii) That the Contractor shall furnish Tenant and Landlord with certificates of insurance setting forth the following coverages: (A) workmen's compensation insurance as required by the laws of the State of South Carolina or the United States; (B) bodily injury, including death, with limits of \$1,000,000.00 per person and \$2,000,000.00 per occurrence; (C) property damage, with limits of \$500,000.00; (D) motor vehicle liability and property damage in the amounts set forth in (B) and (C); and (E) Builder's Risk Insurance in the full amount of the contract.

12. **DAMAGE OR DESTRUCTION.** Tenant agrees that no damage or destruction to any buildings or improvements by fire, windstorm, or any other casualty shall entitle Tenant to surrender possession of the Premises or to terminate this Lease, or to violate any of its provisions, or to cause the abatement or rebate in the Rent then due or thereafter becoming due under the terms hereof. In the event all or any portion of the buildings or improvements on the Premises shall be damaged or destroyed, Tenant, at its sole cost and expense, shall promptly repair, restore, and rebuild same to the condition as existed immediately prior to such damage or destruction within one year from the date of such casualty. If Tenant shall be in default at any time while there remains outstanding any obligation from any insurance company to pay for the damage or any part thereof, then the claim against the insurance company shall be deemed immediately to become the absolute and unconditional property of Landlord. Upon curing of any such default all funds shall be paid to Tenant.

13. **CONDEMNATION.** In the event the entire Premises shall be appropriated or taken under the power of eminent domain by any public or quasi-public authority, this Lease shall terminate and expire as of the date of such taking or conveyance made in lieu thereof and Landlord and Tenant shall thereupon be released from any further duties or obligations hereunder. If a portion of the Premises is taken, or conveyance made in lieu thereof, then Rent shall be equitably apportioned according to the portion of the Premises so taken, and Tenant shall, at its own expense, restore the remaining portion of the

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Premises to operate as the Permitted Use. Tenant shall be entitled to pursue compensation for the taking of buildings, alterations and improvements to the Premises constructed by Tenant. Landlord will have the right to make a claim for all other compensation awarded or paid upon such a total or partial taking of the Premises.

14. **ASSIGNMENT OR SUBLETTING.** Tenant may not assign its interest in this Lease or sublet the all or part of the Premises without the prior written consent of Landlord, and upon such terms and conditions as Landlord may approve. A change in ownership of Tenant shall be an assignment of this Lease for purposes of this Section. Any assignment or sublease of the Premises shall not release or relieve Tenant from any obligations of this Lease. Tenant shall pay to Landlord, as additional Rent, the sum of Two Thousand and No/100 Dollars (\$2,000.00) to cover Landlord's administrative costs, overhead and counsel fees, plus all out-of-pocket expenses above such amount, in connection with such assignment or subletting consented to by Landlord and any and all additional costs and expenses incurred hereunder. Any assignee of Tenant shall assume Tenant's obligations hereunder and shall deliver to Landlord an assignment and assumption agreement in form satisfactory to Landlord within ten (10) days after the effective date of the assignment.

15. **ORDINANCES.** Tenant shall at its own cost and expense promptly observe and comply with all laws, rules, orders, zoning ordinances, regulations, and requirements applicable to the Premises and all buildings and improvements thereon, or to repairs or alterations thereof, and shall also at its own cost and expense promptly comply with all laws, rules, orders, and regulations. If Tenant fails to comply with any of the foregoing requirements, Landlord may, at its option and after thirty (30) days' written notice to Tenant of its intention to do so, comply with the same for the account of Tenant, and Tenant shall upon demand pay to Landlord the cost of such compliance including reasonable expenses, Interest, attorneys' fees, and costs incurred in connection therewith.

16. **FINANCING.** Tenant agrees that this Lease and all of Tenant's right, title, and interest in and to this Lease and the Premises is subject and subordinate to any mortgage, deed of trust, or other security instrument which Landlord may now or hereafter place upon all or any portion of the Premises (each, a "**Mortgage**") and to all renewals, modifications, amendments, and extensions thereof and to all the terms and provisions thereof. This provision is self-operative. Tenant agrees, however, to promptly execute any document or instrument which may be requested by Landlord or any mortgagee or lender holding a Mortgage (each, a "**Mortgagee**") evidencing such subordination. If any Mortgage is foreclosed (or if the Premises is transferred by a deed in lieu of foreclosure), then (a) the liability of any purchaser (including any Mortgagee) at such foreclosure sale (or deed in lieu thereof) (the "**Purchaser**") shall exist only for those liabilities which accrued while such Purchaser is the fee simple owner of the Premises; (b) Tenant shall, at such Purchaser's election, attorn to such Purchaser and recognize such Purchaser as the "landlord" under this Lease pursuant to all the terms and provisions of this Lease, and Tenant will promptly execute any such documents and instruments as may be necessary or appropriate to evidence such attornment; and (c) Tenant waives the provisions of any statute or rule of law, now or hereafter in effect, that provides Tenant any right to terminate this Lease or to otherwise adversely affect Landlord's interest in this Lease upon any such foreclosure proceeding. No Purchaser shall (i) be liable for any act or omission of any prior landlord (including Landlord) under this Lease, (ii) be subject to any offset, defense, claims, or counterclaim Tenant has (or may have) against any prior landlord (including Landlord) under this Lease, (iii) be bound by any prepayment of any rent due hereunder made more than one month in advance of its due date under this Lease, or (iv) be accountable for any security deposit paid by Tenant under this Lease (unless actually received by such Purchaser). Tenant agrees to give any Mortgagee a copy of any notice or default served upon Landlord by Tenant under this Lease. Tenant further agrees that if Landlord fails to cure any default by Landlord under this Lease within a reasonable period of time, then any such Mortgagee shall have an additional reasonable period of time to cure such default before Tenant may exercise any right or remedy under this Lease, at law, or in equity which

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Tenant may have on account of any such default by Landlord (provided in no event shall any such Mortgagee be required to cure any such default). Further, no Mortgagee shall be bound by any amendment or modification of this Lease unless such amendment or modification was consented to in writing by such Mortgagee. Any Mortgagee shall also have the right, in such Mortgagee's discretion, to subordinate its Mortgage to this Lease. If Tenant, within fifteen (15) days after Landlord's demand, fails to execute and deliver any instrument or document required to be executed by Tenant pursuant to this Section 16, then Landlord is hereby authorized to execute same as attorney-in-fact for the Tenant, such power being coupled with an interest.

17. **ESTOPPEL CERTIFICATE.** Tenant shall, from time to time within ten (10) days after Landlord's demand, execute and deliver to Landlord and/or Landlord's designee an estoppel certificate in a form acceptable to Landlord and/or Landlord's designee certifying (a) that this Lease is unmodified and in full force and effect (or if there have been modifications, that this Lease is in full force and effect as so modified), (b) the dates to which rent and other charges payable under this Lease have been paid, (c) that Landlord is not in default under this Lease (or if Tenant alleges a default, then (i) stating the nature of such alleged default, and (ii) the date of written notice provided to Landlord stating such default), and (d) such other matters as Landlord and/or such designee may require. If Tenant fails to execute and deliver to Landlord and/or Landlord's designee any such estoppel certificate within ten (10) days after Landlord's demand, then Tenant shall be automatically deemed to have approved such estoppel certificate in the form submitted to Tenant and all the matters set forth therein.

18. **INDEMNITY.** Tenant agrees to indemnify, defend, and save Landlord, its affiliates, subsidiaries, parents and each of its and their officers, directors, employees, agents, contractors, and servants harmless from and against any and all claims and demands (except such as result from the gross negligence or willful misconduct of Landlord, or its agents, contractors, servants, or employees) for, or in connection with, any accident, injury, or damage whatsoever caused to any person or property arising, directly or indirectly, out of the business conducted in or the use and/or occupancy of the Premises or occurring in, on or about the Premises or any part thereof, or arising directly or indirectly, from any act or omission of Tenant or any concessionaire or sub-tenant or their respective licensees, servants, agents, employees, or contractors, and from and against any and all costs, expenses, and liabilities incurred in connection with any such claims and/or proceedings brought thereon. The insurance coverage maintained by Tenant pursuant to this Lease shall support insurable aspects of the foregoing indemnity; provided, however, Tenant's liability pursuant to such indemnity shall not be limited to the amount or coverage of such insurance. The foregoing indemnification provision and the obligations arising thereunder shall survive any expiration or termination of this Lease in perpetuity.

19. **MECHANIC'S LIENS.** If any mechanic's lien or other lien or order for the payment of money shall be filed against the Premises or any building(s) or improvements thereon by reason of or arising out of any labor or material furnished or alleged to have been furnished to or for Tenant at the Premises, or for or by reason of any change, alteration, or addition by Tenant, or the cost or expense thereof, or any contract relating thereto, or against Landlord, then Tenant shall within thirty (30) days after the filing of any such lien cause the same to be cancelled and discharged of record by bond or otherwise at the expense of Tenant, and shall defend on behalf of Landlord, at Tenant's sole cost and expense, any action, suit, or proceeding which may be brought thereon or for the enforcement of such lien or order, and Tenant shall pay any damages and discharge any judgment entered thereon and shall indemnify and save harmless Landlord from any claim or damage resulting therefrom. If Tenant fails to perform its obligations under this Section, in addition to any other remedies available to Landlord under this Lease or otherwise, Landlord may at its option discharge such lien, in which event Tenant agrees to pay Landlord a sum equal to the amount of the lien thus discharged by Landlord plus Landlord's internal administrative costs, attorneys' fees, interest, expenses and damages thereby caused Landlord.

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20. **HAZARDOUS MATERIALS.** (a) Throughout the Term, Tenant and Tenant's employees, agents, invitees, licensees, and contractors shall not cause, permit, or allow any substances, chemicals, materials, or pollutants (whether solid, liquid, or gaseous) deemed to be toxic or hazardous or the manufacture, storage, transport, or disposal of which is regulated, governed, restricted, or prohibited by any federal, state, or local agency or authority, or under any federal, state, or local law, ordinance, rule, or regulation related to the environment, health, or safety (collectively, "**Environmental Laws**"), including, without limitation, any , hazardous substances, toxic substances, hazardous waste, asbestos, or asbestos containing materials (collectively, "**Hazardous Materials**") to be handled, placed, stored, dumped, released, manufactured, used, transported, or located on, in, under, or about the Premises; provided, however, Tenant shall be permitted to use and otherwise handle on the Premises such quantities of Hazardous Materials as are ordinarily and typically used and handled as part of the Permitted Use, including the use and storage of aviation fuel, aviation fuel storage trucks, trailers and related products, so long as such Hazardous Materials are used and handled in accordance with all Environmental Laws. Upon the expiration or earlier termination of this Lease, Tenant shall, at Tenant's sole cost and expense, remove all Hazardous Materials from the Premises, except to the extent placed upon the Premises by Landlord.

(b) Tenant shall give Landlord immediate written notice of any problem, spill, discharge, threatened discharge, or discovery of any Hazardous Materials on or about the Premises or claim thereof. If such problem, spill, discharge, threatened discharge, or discovery was caused by Tenant or any of Tenant's employees, agents, contractors, invitees, guests, or licensees, then such notice shall include a description of measures proposed to be taken by Tenant to contain and/or remediate the release of such Hazardous Materials and any resultant damage to or impact on property, persons, and/or the environment (which term includes, without limitation, soil, surface water, or groundwater). Upon Landlord's approval and at Tenant's own cost and expense, Tenant shall promptly take all steps necessary to clean up and remediate any release of such Hazardous Materials, comply with all Environmental Laws, and otherwise report and/or coordinate with Landlord and all appropriate governmental agencies.

(c) Tenant shall indemnify, release, defend (with counsel acceptable to Landlord), and hold Landlord and Landlord's agents, affiliates, representatives, officers, and employees harmless from and against all Liabilities (as defined below) suffered by, incurred by, or assessed against Landlord and/or Landlord's agents, affiliates, representatives, officers, and employees, whether incurred as a result of legal action taken by any governmental entity or agency, taken by any private claimant or taken by Landlord, as a result of the presence, disturbance, discharge, release, removal, or cleanup of any Hazardous Materials on, in, upon, or about the Premises (except to the extent placed on the Premises by Landlord), and/or other off-site property if caused directly or indirectly, in whole or in part, by the acts or omissions of Tenant or Tenant's agents, employees, contractors, representatives, or invitees. Tenant's obligations and liabilities under this Section 20 shall survive the expiration or earlier termination of this Lease. "**Liabilities**" means all liabilities, expenses, demands, damages (including punitive, exemplary, and consequential damages), costs, losses, causes of action, claims, attorneys' fees, other professional fees, penalties, fines, assessments, and charges.

21. **SIGNAGE.** Tenant shall submit all plans and specifications for all proposed signage on the Premises to Landlord for approval, prior to installation of said signage. Tenant shall fully comply with all applicable requirements of all jurisdictional regulatory requirements pertaining to signage and signage installation, including, but not limited to, the Sign Ordinance of the City of Myrtle Beach, South Carolina, if applicable.

22. **DEFAULT.** Tenant shall be in default hereunder if (a) Tenant fails to pay when due Rent and any other sums due under this Lease; (b) Tenant fails to observe and perform any of the other terms, covenants, and/or conditions of this Lease and such default shall continue for more than twenty (20) days after written notice from Landlord to Tenant; (c) Tenant fails to pay when due the Rent and any

Landlord  
PPAB 1942193-2

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Tenant

other sums payable under this Lease three or more times in any period of twelve (12) consecutive months; or (d) subject to Section 31(h), the Premises shall be abandoned (as defined below) or vacated for a period of more than thirty (30) consecutive days during the Term. If the nature of a default under (b) above is such that it cannot reasonably be cured within the aforesaid cure period, and work thereon shall be commenced within said period and diligently prosecuted to completion within sixty (60) days after Landlord's written notice to Tenant, then Landlord's rights under this Section shall be inapplicable. The Premises, all improvements, and all trade fixtures, equipment, and inventory therein shall be conclusively deemed abandoned by Tenant upon thirty (30) consecutive days' absence from the Premises by Tenant or its agents (unless such absence results from fire or other casualty or from remodeling, renovation, or expansion work being performed by Tenant in the Premises). In such event and in addition to Landlord's remedies set forth in this Section 22, Landlord may enter the Premises and may remove all such remaining trade fixtures, equipment, and inventory at Tenant's expense. All such property (except leased items not owned by Tenant) shall, at Landlord's option, become the property of Landlord, or said property may be placed in storage at Tenant's cost and expense, or sold, or otherwise disposed of, in which event the proceeds of such sale or other disposition shall belong to Landlord.

In the event of any default by Tenant, Landlord may (i) cure Tenant's default at Tenant's cost and expense, and/or (ii) re-enter the Premises and remove all persons and all or any property therefrom by any suitable action or proceeding at law, without being liable for any prosecution therefor or damages therefrom, and repossess and enjoy the Premises with all buildings, additions, alterations, and improvements, and Landlord may, at its option, repair, alter, remodel, and/or change the character of the improvements on the Premises as it may deem fit, and/or (iii) at any time relet the Premises or any part or parts thereof, as the agent of Tenant or in Landlord's own right, and/or (iv) terminate this Lease upon not less than fifteen (15) days' written notice to Tenant. The exercise by Landlord of any right granted in this Section shall not relieve Tenant from the obligation to make all rental payments and to fulfill all other covenants required by this Lease at the time and in the manner provided herein and if Landlord so desires all current and future rent and other monetary obligations due hereunder less the fair rental value of the Premises (adjusted to reflect the present value of said obligation as of said date using the statutory judgment interest rate in making said calculation) shall become immediately due and payable. Tenant throughout the remaining Term hereof shall pay Landlord, no later than the last day of each month during the Term, the then current excess, if any, of the sum of the unpaid rentals and costs to Landlord resulting from such default by Tenant over the proceeds, if any, received by Landlord from such reletting, if any, but Landlord shall have no liability to account to Tenant for any excess. Landlord shall not be required to relet the Premises nor exercise any other right granted to Landlord hereunder, nor shall Landlord be under any obligation to minimize Tenant's loss as a result of Tenant's default. If Landlord attempts to relet the Premises, Landlord shall be the sole judge as to whether or not a proposed tenant is suitable and acceptable.

In the event of a breach by Tenant of any of the covenants or provisions hereof, Landlord shall have, in addition to any other remedies which it may have, the right to invoke any other remedy allowed at law or in equity to enforce Landlord's rights or any of them, as if re-entry and other remedies were not herein provided. Tenant hereby waives its right to redeem in the event that it shall be dispossessed or this Lease terminated by reason of any default on its part. Tenant hereby agrees that notice to quit or surrender possession of the Premises shall not be required in the event of Tenant's default.

If Tenant shall at any time be in default hereunder, and if Landlord shall deem it necessary to engage attorneys to enforce its rights hereunder, the determination of such necessity to be in the sole discretion of Landlord, Landlord will be reimbursed by Tenant for its expenses incurred thereby, including but not limited to court costs and reasonable attorneys' fees.

Landlord  
PPAB 19421932

Tenant

The failure of Landlord to insist upon strict performance of any of the terms, conditions, and covenants herein shall not be deemed to be a waiver of any rights or remedies that Landlord may have and shall not be deemed a waiver of any subsequent breach or default in the terms, conditions, and covenants herein contained except as may be expressly waived in writing.

The maintenance of any action or proceeding to recover possession of the Premises, or any installment or installments of Rent or any other moneys that may be due or become due from Tenant to Landlord, shall not preclude Landlord from thereafter instituting and maintaining subsequent actions or proceedings for the recovery of possession of the Premises or of any other moneys that may be due or become due from Tenant. Any entry or reentry by Landlord shall not be deemed to absolve or discharge Tenant from liability hereunder.

If at any time during the Term there shall be filed by or against Tenant or any successor tenant then in possession under this Lease, in any court pursuant to any statute either of the United States or of any state, a petition (i) in bankruptcy, (ii) alleging insolvency, (iii) for reorganization, (iv) for the appointment of a receiver, or (v) for any relief under the Bankruptcy Code, or if a similar type of proceeding shall be filed, and said petition or proceeding shall not be dismissed within sixty (60) days following the date of said filing, then Landlord may terminate Tenant's rights under this Lease by notice in writing to Tenant, and thereupon Tenant shall immediately quit and surrender the Premises to Landlord, but Tenant shall continue to be liable for the payment of Rent and all other sums due hereunder.

23. **LANDLORD'S RIGHT TO INSPECT.** Upon reasonable prior notice to Tenant, Tenant agrees to permit Landlord to enter the Premises during Tenant's usual business hours to inspect the same and show same to prospective tenants or purchasers.

24. **SURRENDER OF PREMISES.** Tenant agrees, at the termination of this Lease, whether by limitation, forfeiture, or otherwise, to quit, surrender, and deliver to Landlord possession of the Premises with all the buildings and improvements thereon free from any liens thereon, in good condition and repair, ordinary wear and tear alone excepted, all of which shall become and remain the property of Landlord. Tenant's obligation to observe or perform this covenant shall survive the expiration or other termination of this Lease.

25. **NO REPRESENTATION.** Tenant acknowledges that Landlord has made no representations with respect to the physical condition of the Premises, the condition of any improvements thereon, or the laws, rules, orders, zoning, and building ordinances, regulations, and requirements of any authority applicable thereto, or that the Premises may be used for any purpose whatsoever.

26. **DEFINITION OF LANDLORD: LIABILITY OF LANDLORD LIMITED.** The term "Landlord" as used in this Lease means only the owner for the time being of the land which constitutes the Premises, so that in the event of any assignment, transfer, or other conveyance of Landlord's rights under this Lease, Landlord shall be and hereby is entirely freed and relieved of all covenants and obligations of Landlord hereunder as to matters occurring subsequent to the date of said assignment, transfer, or conveyance, and it shall be deemed and construed without further agreement between the parties or their successors in interest, or between the parties and the purchaser at any such sale, or the successor to Landlord by reason of any assignment, transfer, or other conveyance of Landlord's interest in this Lease, that such purchaser or successor has assumed and agreed to perform all of Landlord's obligations hereunder. The preceding sentence shall also be applicable to all successor landlords. Notwithstanding anything to the contrary provided in this Lease, it is agreed that Landlord, its successors and assigns, shall have absolutely no personal or individual liability with respect to any of the terms, covenants, and conditions of this Lease, and Tenant hereby expressly agrees that it shall look solely to the equity of Landlord or its successor(s) in interest in the Premises for the satisfaction of each

Landlord  
PPAB 1942193v2

Tenant

and every remedy of Tenant in the event of any breach by Landlord or by such successor in interest of any of the terms, covenants, and conditions of this Lease to be performed by Landlord, such exculpation of personal liability to be absolute and without any exception whatsoever. Tenant covenants that no execution shall be levied against Landlord, but only against the Premises, and all judgments shall be so indexed.

27. **BROKER**. The parties represent to each other that Keller Williams Realty, Inc. (the "**Broker**") has acted as broker in connection with this transaction, and that no other broker or finder has brought the Premises to the attention of Tenant, or Tenant to the attention of Landlord, and that no other broker or finder is entitled to a commission or other compensation in connection with this transaction. Landlord shall pay to Broker a commission in accordance with that separate written agreement between Landlord and Broker. Each party agrees to indemnify the other party for all costs and expenses incurred, including reasonable attorneys' fees, as a result of the claim of any broker or finder other than Broker, based on dealings with said party.

28. **NOTICES**. Whenever notice shall be given by either party to the other (each, a "**Notice**") Notice shall be in writing addressed to the address of the party being notified at the address set forth below or to such other address as a party may from time to time designate by five (5) business days' Notice to the other party. For purposes of this Lease, "business days" shall refer to days other than Saturdays, Sundays, and federal or state observed holidays. Notice may be given by hand delivery, nationally recognized express service which documents receipt of its deliveries, or by postage paid certified or registered mail with return receipt requested. Each Notice which is given, served, or sent in the manner specified in this Section 28 shall be deemed to have been given and received as of the date it is delivered or as of the date on which delivery is refused or unclaimed by the addressee upon presentation. Notice addresses are as follows:

| <b><u>LANDLORD:</u></b>                       | <b><u>TENANT:</u></b>                                    |
|-----------------------------------------------|----------------------------------------------------------|
| Burroughs & Chapin Company, Inc.              | Helicopter Solutions, Inc., d/b/a/ Helicopter Adventures |
| 8820 Marina Parkway                           | P.O. Box 311                                             |
| Myrtle Beach, South Carolina 29572            | Davin, West Virginia 25617                               |
| <b><u>Attention:</u></b> Lease Administration | <b><u>Attention:</u></b> Freddie Rick                    |

29. **HOLDING OVER**. Tenant may not remain upon the Premises after the day of expiration of the Term without Landlord's written approval. With Landlord's approval, Tenant shall become a tenant-at-will and any such holding over shall not constitute an extension of the Lease. During such holding over, Tenant shall pay one hundred fifty percent (150%) of the Rent in effect as of the expiration of the Term. If Tenant holds over without Landlord's written consent, Tenant shall also be a tenant at sufferance and shall pay one hundred fifty percent (150%) of the then-effective Rent until Tenant surrenders possession. Nothing contained herein shall be interpreted to grant permission to Tenant to holdover or to deprive Landlord of any rights and remedies with respect thereto. Such occupancy shall be subject to all the terms, covenants and conditions of this Lease, except that any Renewal Option shall be of no force or effect.

30. **SECURITY DEPOSIT**. As security for the faithful performance by Tenant of all of the terms and conditions of this Lease on Tenant's part to be performed, Tenant shall within five (5) days following the Effective Date deposit with Landlord the amount of Twenty Thousand and /100 Dollars (\$20,000.00) (the "**Security Deposit**"). The Security Deposit (a) shall be retained by Landlord as security for Tenant's payment of Rent and performance of all of Tenant's other obligations under the provisions of

Landlord  
PPAB 1942198v

Tenant

the Lease; (b) shall not be deemed to represent payment of any Rent; and, (c) shall not bear interest while retained by Landlord. Upon termination of this Lease, so long as Tenant is not in default of this Lease, any portion of the Security Deposit which is not applied or retained pursuant to past due Rent or damages to the Premises shall be returned to Tenant within thirty (30) days after the expiration of the Term. Landlord shall have the right to apply any part of the Security Deposit to cure any Event of Default. The application of the Security Deposit to secure the obligations of Tenant pursuant to this Lease shall be at the sole discretion of Landlord. If all or any part of the Security Deposit is so applied, Tenant shall restore the Security Deposit to Twenty Thousand and /100 Dollars (\$20,000.00) upon demand. It is expressly understood that this remedy is in addition to all other remedies vested in Landlord.

31. **OTHER PROVISIONS.** (a) **Short Form of Lease.** The parties agree that they will, at the request of either of them, promptly execute duplicate originals of an instrument in recordable form which will constitute a short form of Lease setting forth a description of the Premises, the Term, and any other portions hereof except monetary provisions as either party may request. Financial terms of this Lease shall be kept confidential and Landlord and Tenant shall not disclose such information to any person or entity other than their respective financial or legal consultants or as required by applicable legal authority.

(b) **Entire Agreement.** This Lease, contains the entire agreement of the parties and may not be amended, modified, released, or discharged, in whole or in part, except by an instrument in writing signed by the parties.

(c) **Captions.** The captions contained in this Lease are for convenience and reference only, and shall not be held to explain, modify, amplify, or aid in the interpretation, construction, or meanings of the provisions of this Lease to which they relate.

(d) **Provisions Severable.** If any provision of this Lease shall to any extent be invalid or unenforceable, the remainder of this Lease or the application of such provision or any portion thereof to any person or circumstances shall not be affected thereby, and each valid provision or portion thereof shall be enforceable to the fullest extent permitted by law.

(e) **Relationship of Parties.** Nothing contained in this Lease shall be construed to make the parties partners or joint venturers or to render either of said parties liable for the debts or obligations of the other, except as expressly provided in this Lease.

(f) **Nuisance.** Tenant covenants that it will not create or maintain or allow others to create or maintain any nuisance on the Premises.

(g) **Successors.** Subject to the provisions of this Lease, the covenants, conditions, and agreements contained herein shall bind and inure to the benefit of Landlord and Tenant and their respective successors, heirs, and assigns.

(h) **Continuous Operation by Tenant.** Tenant shall operate 100% of the Premises for the Permitted Use during the entire Term. Tenant's normal hours of operation shall be as follows: Tenant shall open for business on the Premises no earlier than 9:00 a.m. and close no later than 10:00 p.m. Monday through Sunday. Notwithstanding the foregoing, Tenant shall be permitted to close its operation upon the Premises between November 1<sup>st</sup> and March 31<sup>st</sup> of any Lease Year.

(i) **Statements of Gross Sales.** Tenant shall submit an executed copy of the State Sales Use Tax (ST3) report for the Term of this Lease. Further, on or before the twentieth (20<sup>th</sup>) day of each calendar month during the Term, Tenant shall furnish to Landlord a written statement of Gross

Landlord  
PPAB 194219372

Tenant

Sales, net sales and revenues for the preceding calendar month, with sales verification, signed by Tenant. In the event Tenant shall fail to deliver any such statement to Landlord on the due date, in addition to all other rights and remedies available to Landlord, a late charge of Three Hundred and 00/100 Dollars (\$300.00) shall be paid by Tenant as additional Rent hereunder for each such late statement. Should the delinquency continue for more than thirty (30) days, Tenant shall pay a late charge of one and one-half (1½) percent per month compounded monthly, and the same shall be treated as additional Rent. "**Gross Sales**" means the sum of the actual sales prices of all goods, wares and merchandise sold, leased, licensed, or delivered and the actual charges for all services performed by Tenant or by any subtenant, licensee or concessionaire in, at, from or arising out of the use of the Premises, including admissions ticket sales, whether for wholesale, retail, cash, credit, or trade-ins or otherwise, or any other transaction for which a tenant or any subtenant, licensee, concessionaire or other person in the normal and customary course of its business would credit or attribute to its operations at the Premises or any part thereof. Tenant's statements of Gross Sales shall also provide separate reports of Gross Sales of (a) admissions fees, (b) food and beverage, and (c) other.

(j) Interest. Whenever this Lease refers to "Interest" same shall be computed at a rate equal to eighteen percent (18%). If, however, payment of Interest at such rate by Tenant (or by the tenant then in possession having succeeded to Tenant's interest in accordance with the terms of this Lease) should be unlawful, that is, violative of usury statutes or otherwise, then Interest shall, as against such party, be computed at the maximum contract rate payable by such party.

(k) Landlord's Lien. Landlord shall have, and Tenant hereby grants, a security interest in all furnishings, equipment, fixtures, inventory, accounts receivable, chattel paper, documents, instruments, and goods which are or are to become fixtures, together with all items now or hereafter affixed thereto, wherever located, whether now owned or existing or hereafter acquired or arising, and all cash and non-cash proceeds of the foregoing, including, but not limited to insurance proceeds. The security interest is granted for the purpose of securing the payment of Rent, other charges, assessments, penalties, and damages herein covenanted to be paid by Tenant, and for the purposes of securing the performance of all other obligations of Tenant hereunder. Upon Tenant's default or breach of any covenants of this Lease, Landlord shall have all remedies available under the laws of the State of South Carolina, including, but not limited to the right to take possession of the above-mentioned property and dispose of it by sale in a commercially reasonable manner. Tenant hereby agrees to execute and deliver from time to time financing statements at Landlord's request for the purpose of serving notice to third parties of the security interest herein granted. Tenant shall upon demand reimburse Landlord for all filing and recording fees and taxes incurred in connection with filing and recording such financing statements. In addition, Tenant agrees to pay as an administrative charge, the amount of \$300.00 for the review and/or processing of any requested subordination of Landlord's lien.

(l) Late Payments. Should Tenant fail to pay when due any installment of Rent or any other sum payable to Landlord under the terms of this Lease, then Interest shall accrue from and after the date on which any such sum was originally due, and such Interest together with a late charge of \$200.00 to cover the extra expense in handling such delinquency shall be paid by Tenant to Landlord at the time of payment of the delinquent sum.

(m) Applicable Law, Venue. This Lease shall be governed, construed, and enforced in accordance with the laws of the State of South Carolina. Venue for any dispute shall be proper solely in Horry County, South Carolina. In addition, the parties agree to mandatorily refer any lawsuit, claim, and/or dispute resulting in litigation, to the Horry County Master-In-Equity for final disposition, or a Special Referee if the Master-In-Equity has a conflict of interest.

Landlord  
PPAB 1942193-02

Tenant

(n) Waiver of Trial by Jury. Landlord and Tenant hereby mutually, intentionally and knowingly waive any and all rights to trial by jury in any action, proceeding, claim, crossclaim, counterclaim, or third-party complaint brought by either party for any matters whatsoever arising out of, or in anyway connected with, this Lease, the relationship of Landlord and Tenant, the Premises, any business on the Premises, pre-lease discussion or negotiations, or any other matter whatsoever between or involving the parties.

(o) Force Majeure. Neither Landlord nor Tenant shall be liable for any delay or failure to perform its nonmonetary obligations hereunder due to (and the time for performance of any covenant shall be deemed extended by the time last due to) any causes beyond its reasonable control, including, without limitation, fire, accident, act of the public enemy, war, rebellion, insurrection, sabotage, transportation delay, shortages of material, labor, energy or machinery, or act of God, act of government or the judiciary.

(p) Right of First Refusal to Purchase. During the Term, Tenant shall have a right of first refusal to purchase (the "Right of First Refusal to Purchase") the Premises. If Landlord receives an offer to purchase the Premises from a third party which Landlord wishes to accept (which may be, without limitation, documents commonly referred to as a "letter of intent" or "memorandum of understanding"), Landlord shall deliver a copy of or other information concerning such offer to Tenant, and Tenant shall thereafter have three (3) business days in which to exceed such offer by One Thousand and 00/100 Dollars (\$1,000.00) in aggregate and provide Landlord with a Fifty Thousand and 00/100 Dollars (\$50,000.00) non-refundable deposit (the "Non-Refundable Deposit") to secure the purchase or reject such offer by written notice given to Landlord in compliance with the requirements of this Lease. The Right of First Refusal to Purchase shall apply only with respect to the land subject to the third party offer, and may not be exercised with respect to only a portion thereof. If Tenant rejects such offer or fails to accept the same in writing and provide Landlord the Non-Refundable Deposit within such three (3) business day period, or if no purchase agreement for the land subject to the third party offer shall have been executed by Tenant within thirty (30) days following Landlord's initial preparation of same, then Landlord shall be free to sell such land to such third party on substantially similar terms and conditions to those offered to Tenant in the foregoing manner, and this Section shall be of no further force or effect.

The Right of First Refusal to Purchase shall, at Landlord's election, be null and void if Tenant is currently in default under this Lease upon the date that Landlord would otherwise notify Tenant of the offer concerning the sale of such land, or at any time thereafter and before completion of the sale of such land. After Tenant validly exercises the Right of First Refusal to Purchase, the parties shall execute a purchase agreement for such land promptly after Landlord shall prepare the same.

The Right of First Refusal to Purchase is personal to Tenant and may not be exercised by any other entity. If this Lease or Tenant's right to possession of the Premises shall terminate in any manner whatsoever before Tenant shall exercise the Right of First Refusal to Purchase, or if Tenant shall have subleased or assigned this Lease or its right to possess all or any portion of the Premises, then immediately upon such termination, sublease or assignment, the Right of First Refusal to Purchase shall simultaneously terminate and become null and void. Under no circumstances whatsoever shall a subtenant under a sublease of the Premises, or the assignee under a full or a partial assignment of the Lease, have any right to exercise the Right of First Refusal to Purchase. The Right of First Refusal shall not be available to Tenant in the event that any third party elects to purchase the Premises and/or additional land pursuant to (i) a purchase option, (ii) right of first refusal, or (iii) right of first option that is in existence as of the Effective Date.

[Signature Page to Follow]

IN WITNESS WHEREOF, the parties have executed this Lease under seal as of the Effective Date.

**LANDLORD:**

**BURROUGHS & CHAPIN COMPANY, INC.,**  
a South Carolina corporation

**WITNESSES:**

Name: Ka. [Signature]

Name: Melissa Allen [Signature]

By: [Signature]

Name: Patrick J. Walsh

Title: Scriber Vice President

**TENANT:**

**HELICOPTER SOLUTIONS, INC.,**  
a Nevada corporation, d/b/a/ Helicopter Adventures

**WITNESSES:**

Name: [Signature]

Name: Melissa Allen [Signature]

By: [Signature]

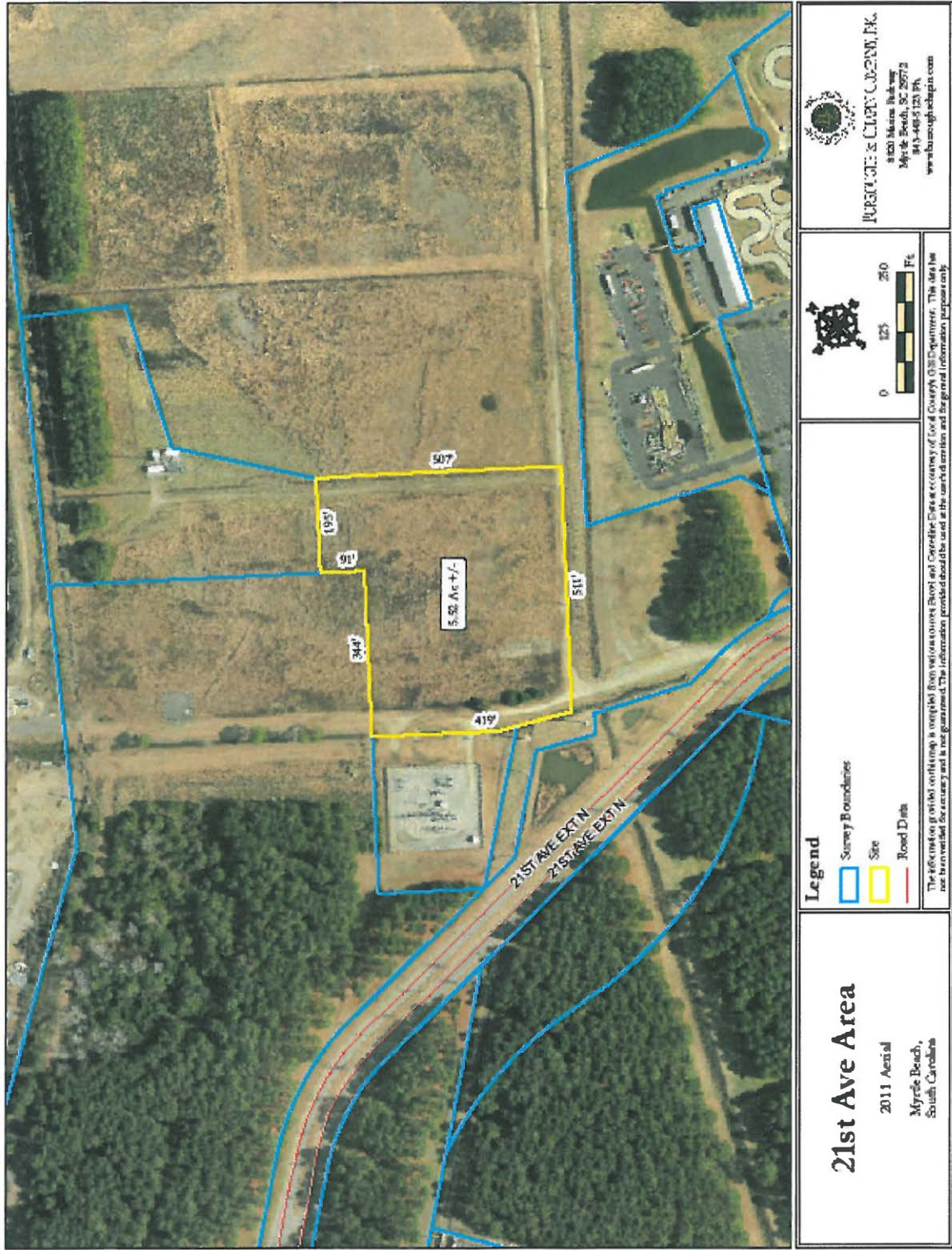
Name: FREDDIE RICK

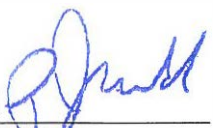
Title: PRESIDENT

Landlord  
PPAB 1942193.2

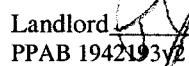
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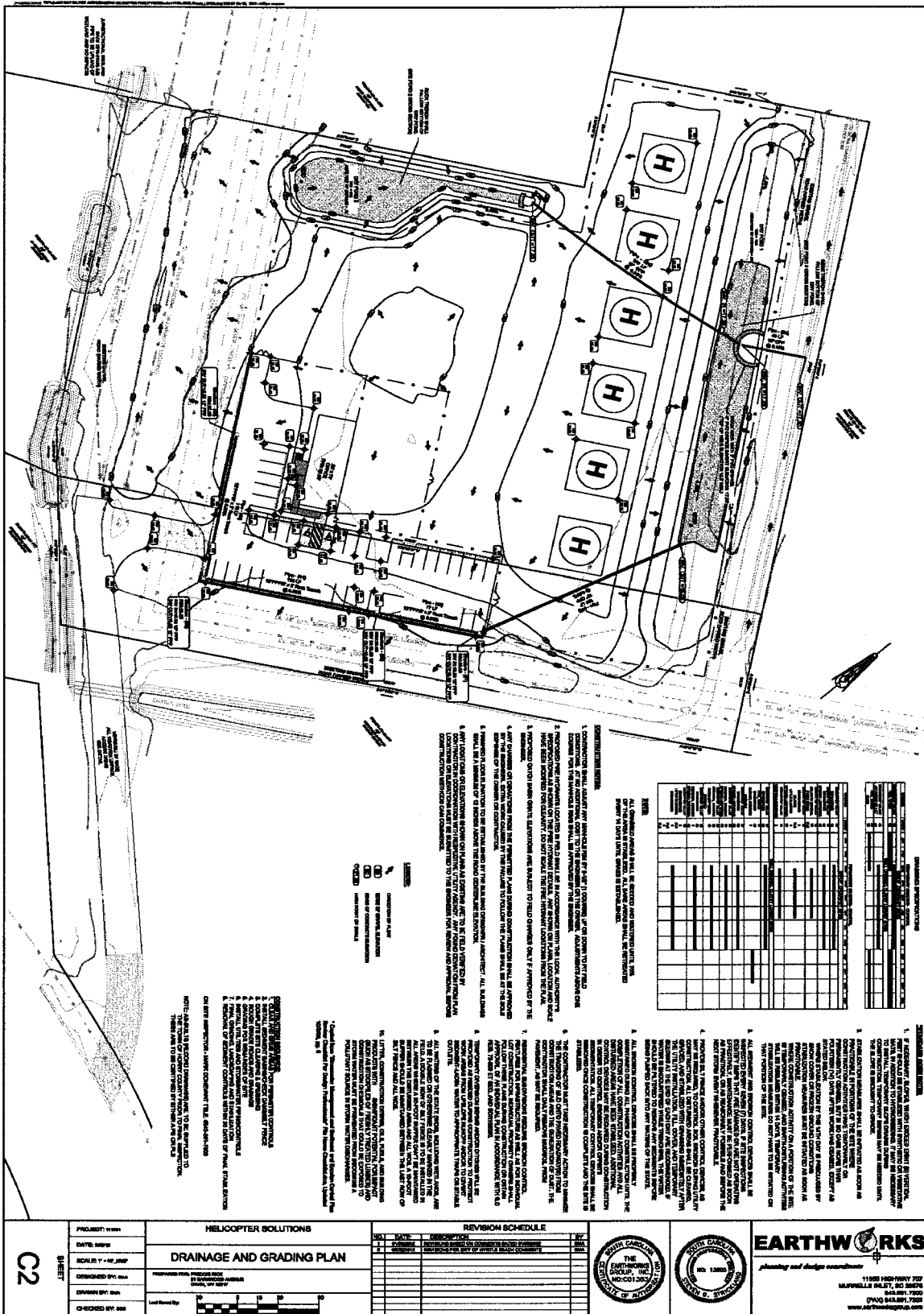
**EXHIBIT "A"**  
**Premises**



Landlord   
PPAB 1942193v2

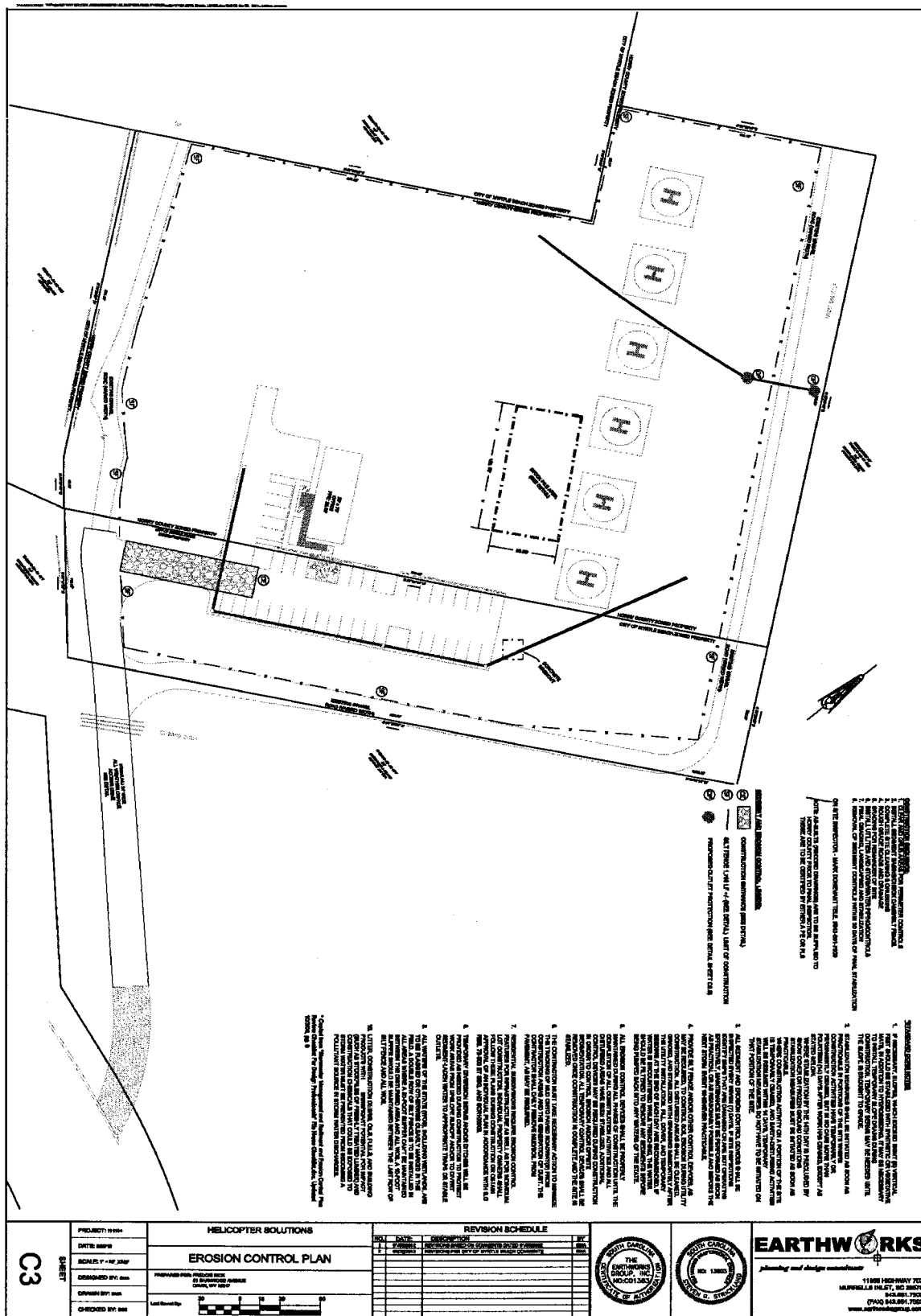
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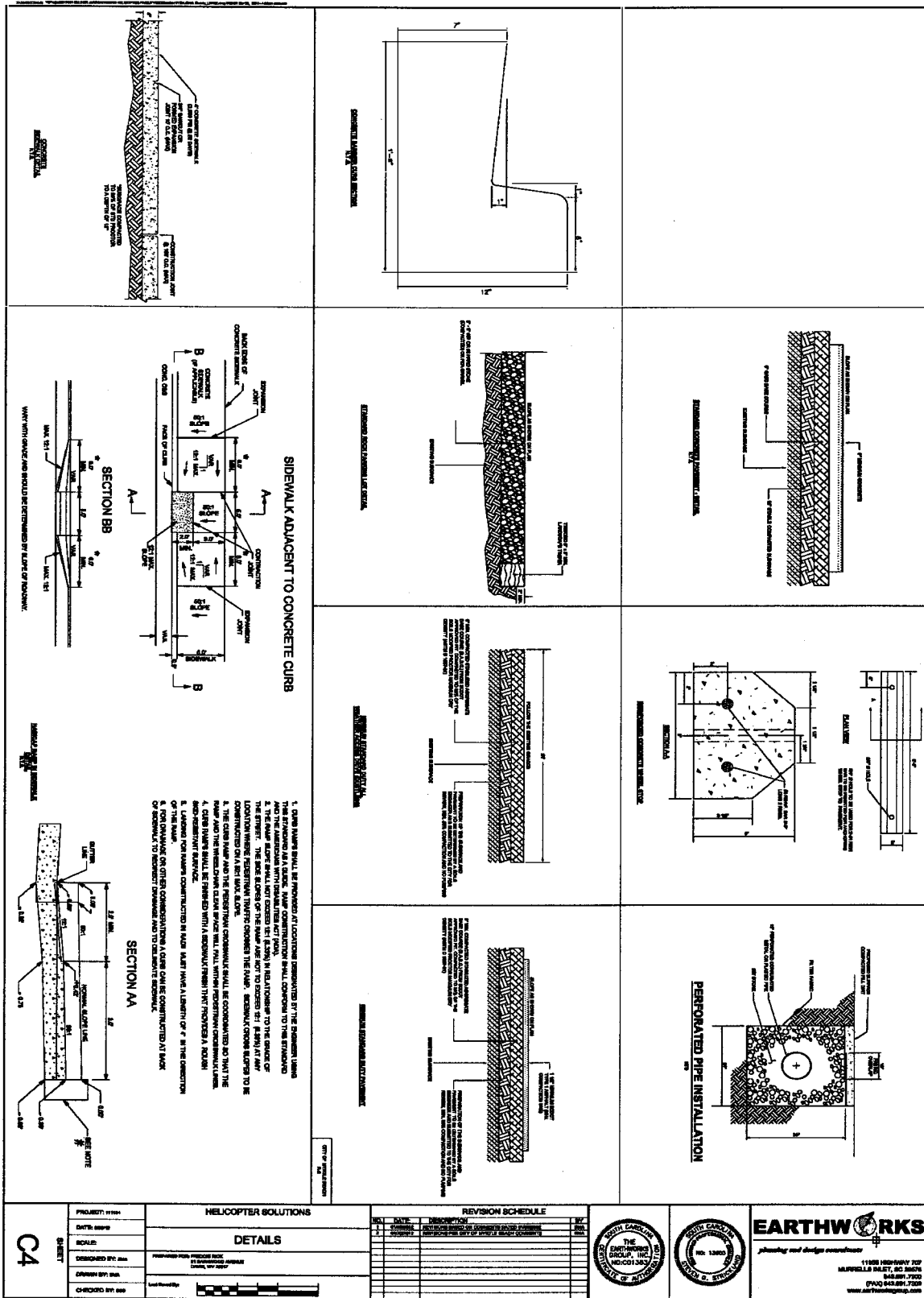
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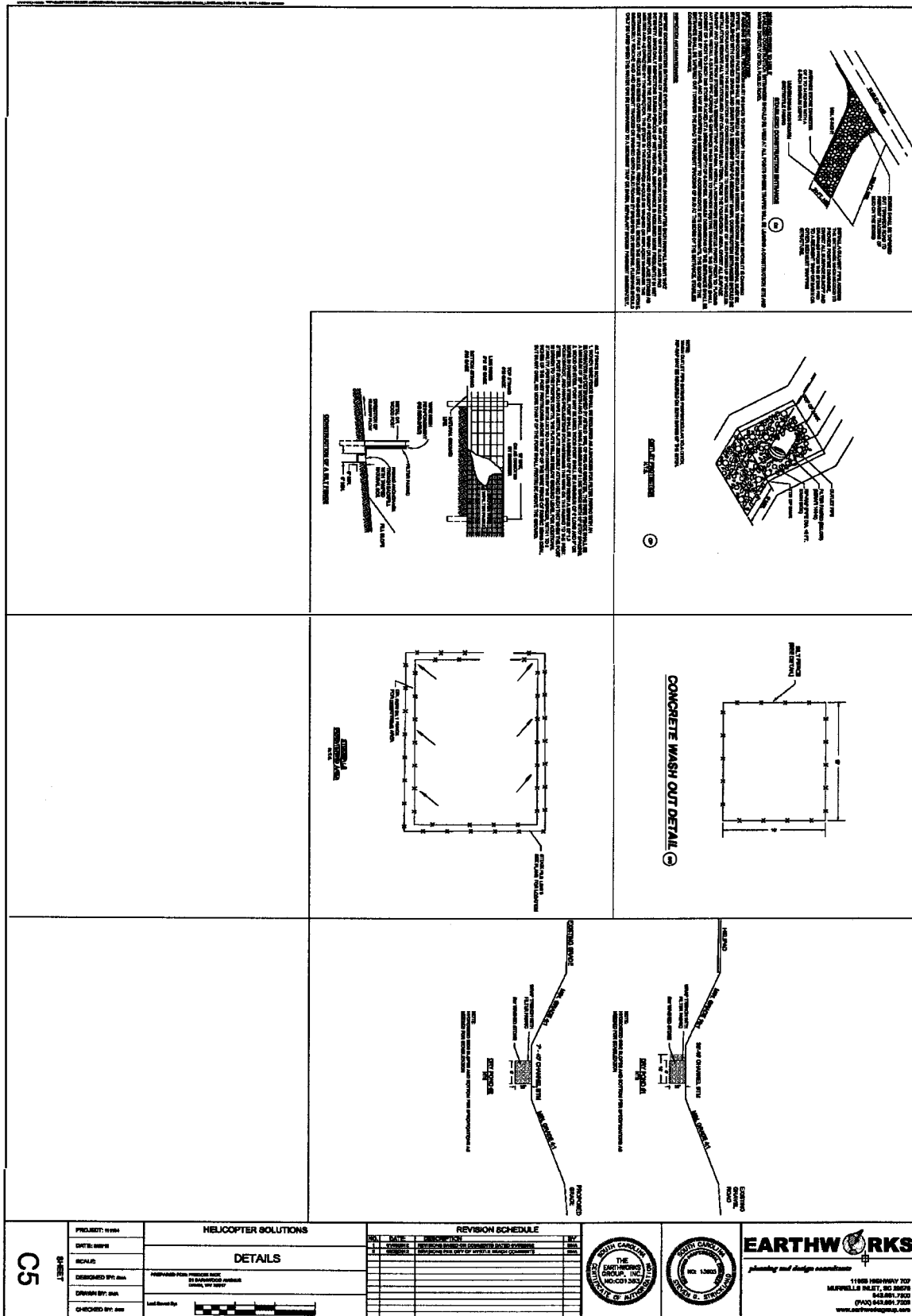
Landlord  
PPAB 1942193/2

Tenant



Landlord  
PPAB 19421932

Tenant *[Signature]*



Landlord  
PPAB 1942193

Tenant

## LEASE GUARANTY

THIS LEASE GUARANTY (this "Guaranty") made as of the 4<sup>th</sup> day of April, 2012 by Freddie Rick, a resident of the State of West Virginia, having an address of 32 Barkwood Avenue, Davin, West Virginia 25617, as guarantor ("Guarantor"), in favor of Burroughs & Chapin Company, Inc., a South Carolina corporation ("Landlord").

WHEREAS, contemporaneously herewith, Helicopter Solutions, Inc., a Nevada corporation ("Tenant"), executed that certain lease dated of even date herewith (the "Lease"), the terms and conditions of which Lease are hereby incorporated herein by reference, for certain premises containing approximately 4.12 acres in Myrtle Beach, South Carolina, as further described in the Lease (the "Premises").

WHEREAS, as a condition to Landlord's execution of the Lease, Landlord is requiring that Guarantor execute and deliver to Landlord this Guaranty.

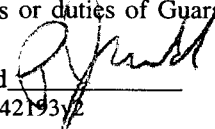
WHEREAS, to induce Landlord to execute the Lease and with the understanding that Landlord would not execute the Lease without Guarantor's execution and delivery to Landlord of this Guaranty, Guarantor desires to guaranty Tenant's performance under the Lease as hereinafter provided.

NOW, THEREFORE, in consideration of, and as an inducement for the granting, execution and delivery of the Lease, and other good and valuable consideration, the adequacy and sufficiency of which Guarantor specifically acknowledges, Guarantor agrees as follows:

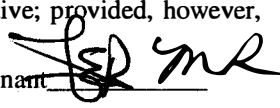
1. **Guaranty.** Guarantor guarantees to Landlord: (a) the full and prompt payment of all rent and additional sums payable by Tenant under the Lease; and (b) the full, faithful and prompt performance and observance of all the covenants, terms, conditions, obligations and agreements required to be performed and observed by Tenant under the Lease. In addition, all losses, damages, reasonable attorneys' fees and other costs and expenses incurred by Landlord in connection with or incidental to the enforcement of this Guaranty or the performance of any of Guarantor's obligations under this Guaranty shall immediately be payable by Guarantor to Landlord. Guarantor does hereby become surety to Landlord for and with respect to all of the aforesaid obligations of Tenant under the Lease.

2. **Covenants.** Guarantor hereby covenants and agrees to and with Landlord that if Tenant defaults in the payment of any rent or other sums payable by Tenant under the Lease or in the performance of any of the covenants, terms, conditions, obligations or agreements contained in the Lease, Guarantor will immediately: (a) pay such rent or other sums to Landlord and any arrears thereof (including all interest and late fees); (b) faithfully perform and fulfill all such covenants, terms, conditions, obligations and agreements; and (c) pay to Landlord all damages, costs and expenses that Landlord incurs as a result of any default by Tenant under the Lease (including, without limitation, attorneys' fees incurred by landlord as a result of such default). This Guaranty is a primary, absolute, continuing and unconditional guaranty of payment and of performance. Guarantor's liability hereunder is direct and may be enforced by Landlord without Landlord being required to resort to any other right, remedy or security. Guarantor hereby expressly agrees that the validity of this Guaranty and the obligations of Guarantor hereunder shall not be terminated, affected or impaired by reason of the assertion or the failure to assert by Landlord against Tenant of any of the rights or remedies reserved to Landlord pursuant to the provisions of the Lease.

3. **Non-Release.** This Guaranty shall not be released, discharged, terminated or in any way impaired by (a) any amendment, modification, extension or renewal of the Lease (whether material or otherwise), or any assignment or transfer of the Lease or this Guaranty; (b) any exercise or non-exercise of any of Landlord's rights, remedies or privileges under the Lease or this Guaranty, or any waiver, consent or approval by Landlord with respect to any of the covenants, terms, conditions or agreements contained in the Lease; (c) the granting of any indulgences or extensions of time to Tenant; (d) any defenses, setoffs or counterclaims of Tenant; or (e) the voluntary or involuntary liquidation or dissolution of Tenant, the sale of substantially all of the assets of Tenant, or other similar proceeding affecting Tenant or any of Tenant's assets. Guarantor further acknowledges and agrees that this Guaranty is in addition to any other guaranty in favor of Landlord in connection with the Lease, and that such other guaranty shall not in any way limit, impair, reduce, affect or diminish this Guaranty or the obligations, liabilities or duties of Guarantor under this Guaranty. This Section 3 shall be self-operative; provided, however,

Landlord   
PPAB 194219372

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Tenant 

Guarantor agrees to execute and deliver to Landlord upon demand such agreements and/or instruments as requested by Landlord to further evidence and/or implement the terms and provisions of this Section 3, including, without limitation, such consents and/or approvals requested by Landlord in connection with any amendment, modification, extension or renewal of the Lease (whether material or otherwise), or any assignment or transfer the Lease.

4. **Rejection of Lease.** This Guaranty will continue unchanged by any bankruptcy, reorganization or insolvency of Tenant or any successor or assignee thereof, or by a disaffirmance or abandonment of the Lease by a trustee of Tenant. If the Lease is rejected or disaffirmed by Tenant or Tenant's trustee in bankruptcy pursuant to any bankruptcy law or any other law affecting creditor's rights, then Guarantor shall, and does hereby (without the necessity of any further agreement or act), assume all obligations and liabilities of Tenant under the Lease to the same extent as if (a) Guarantor were originally named tenant under the Lease; and (b) there had been no such rejection or disaffirmance. Guarantor shall, upon Landlord's request, promptly confirm in writing such assumption. No limitation on the liability of Tenant under the Lease which may now or hereafter be imposed by any federal, state or other statute, law, regulation or court decision shall in any way limit the obligations of Guarantor hereunder, which obligations are co-extensive with Tenant's obligations set forth in the Lease without regard to any such statutory or legal limitation.

5. **Waiver of Notice; Other Waivers.** Guarantor has been advised of the following rights and hereby waives: (a) presentment, demand for payment, and protest of non-performance under the Lease; (b) notice of any kind, including, but not limited to, notice of acceptance, notice of default and/or notice of any obligations or liabilities contracted or incurred by Tenant; (c) any right to require Landlord to enforce its rights and remedies against Tenant under the Lease or otherwise; (d) any right to require Landlord to proceed against any security held from Tenant; (e) any right of subrogation against Tenant by reason of any payment or act of performance by or on behalf of Guarantor in connection with this Guaranty; and (f) any right to indemnity, reimbursement or contribution which Guarantor now or hereafter shall have against Tenant by reason of any payment or act of performance by or on behalf of Guarantor in connection with this Guaranty. In addition, Guarantor hereby unconditionally and irrevocably waives any duty on the part of Landlord to disclose to Guarantor any matter, fact or thing relating to the Lease or to the business, condition (financial or otherwise), operations, performance, properties or prospects of Tenant now or hereafter known by Landlord, and in no event shall Landlord be required to provide Guarantor with any information or documentation relating to the Lease or to Tenant.

6. **Joint and Several Liability.** Guarantor's liability shall be primary and joint and several with that of Tenant and any other guarantor of the Lease, notwithstanding the fact that Guarantor has had no prior notice of any default or of any forbearance or extension. Landlord may proceed against Guarantor under this Guaranty without initiating or exhausting any legal remedy against Tenant or such other guarantor and may proceed against Tenant, Guarantor and such other guarantor separately or concurrently.

7. **Assignment by Landlord.** Landlord may, without notice to Guarantor, assign this Guaranty in whole or in part.

8. **Guarantor's Warranties and Representations.** Guarantor warrants and represents to Landlord that the making and performance of this Guaranty by Guarantor will not result in any breach of any term, condition or provision of, or constitute a default under, any contract, agreement or other instrument to which Guarantor is a party or by which it may be bound, or result in any breach of any regulation, order, writ, injunction or decree of any court or any commission, board or other administrative agency entered in any proceeding to which Guarantor is a party or by which it may be bound.

Landlord  
PPAB 1942193v2

Tenant

9. **Miscellaneous.**

(a) No Waiver. All of Landlord's rights and remedies under the Lease and under this Guaranty are intended to be distinct, separate and cumulative and no such right and remedy therein or herein mentioned is intended to be in exclusion of or a waiver of any of the others.

(b) Inducement. Guarantor hereby acknowledges and agrees that (a) the Lease is a direct material benefit to Guarantor; (b) Guarantor has a direct, material pecuniary interest in Tenant; and (c) Landlord would not have executed the Lease without the benefit of this Guaranty.

(c) Successors and Assigns. This Guaranty shall be legally binding upon Guarantor and its successors, heirs and assigns and shall inure to the benefit of Landlord and its successors and assigns.

(d) Governing Law. This Guaranty shall be governed by the laws of the State where the Premises is located (without application of choice of law provisions), and Guarantor hereby irrevocably agrees to non-exclusive personal jurisdiction in the State where the Premises is located.

(e) Invalidity. The invalidity or unenforceability of any term herein shall not affect the validity or enforceability of any other term.

(f) Modification. This Guaranty may not be modified, amended or terminated other than by an agreement in writing signed by Landlord.

(g) Counterparts. This Guaranty may be executed in two or more counterparts, each of which shall be deemed an original but all of which taken together shall constitute one and the same instrument.

(h) Financial Statements. Upon Landlord's written request, Guarantor shall, within ten (10) days of Landlord's request, furnish to Landlord or Landlord's designee financial statements describing Guarantor's then current financial condition in form and content acceptable to Landlord or such designee.

(i) Waiver of Jury Trial. LANDLORD AND GUARANTOR MUTUALLY AGREE THAT THEY HEREBY WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER AGAINST THE OTHER AS TO ANY MATTERS ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS GUARANTY.

[SIGNATURES ON FOLLOWING PAGE]

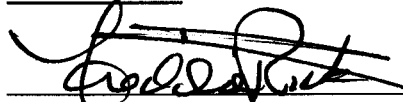
Landlord  
PPAB 1942193v2

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Tenant

IN WITNESS WHEREOF, Guarantor, intending to be legally bound hereby, has caused this Guaranty to be executed, sealed and delivered effective as of the date first above written.

**GUARANTOR:**

  
Freddie Rick (SEAL)  
Social Security # 437-27-1917

STATE OF S.C.

COUNTY OF Horry

I, Melissa Allen Felix, a Notary Public for the above State and County, hereby certify that Freddie Rick personally came before me this day and acknowledged the execution of the foregoing instrument.

WITNESS my hand and official seal, this the 4th day of April, 2012.  
My commission Expires 6-16-2020 Melissa Allen Felix  
Notary Public

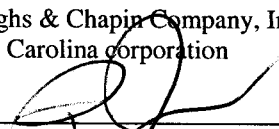
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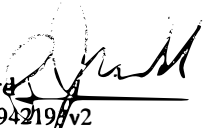
Accepted this 4th day of April, 2012.



**LANDLORD:**

Burroughs & Chapin Company, Inc.,  
a South Carolina corporation

By:   
Patrick J. Walsh  
Senior Vice President

Landlord   
PPAB 194219/v2

Tenant 

## LEASE GUARANTY

THIS LEASE GUARANTY (this "Guaranty") made as of the 4<sup>th</sup> day of April, 2012 by Mitzi Rick, a resident of the State of West Virginia, having an address of 32 Barkwood Avenue, Davin, West Virginia 25617, as guarantor ("Guarantor"), in favor of Burroughs & Chapin Company, Inc., a South Carolina corporation ("Landlord").

WHEREAS, contemporaneously herewith, Helicopter Solutions, Inc., a Nevada corporation ("Tenant"), executed that certain lease dated of even date herewith (the "Lease"), the terms and conditions of which Lease are hereby incorporated herein by reference, for certain premises containing approximately 4.12 acres in Myrtle Beach, South Carolina, as further described in the Lease (the "Premises").

WHEREAS, as a condition to Landlord's execution of the Lease, Landlord is requiring that Guarantor execute and deliver to Landlord this Guaranty.

WHEREAS, to induce Landlord to execute the Lease and with the understanding that Landlord would not execute the Lease without Guarantor's execution and delivery to Landlord of this Guaranty, Guarantor desires to guaranty Tenant's performance under the Lease as hereinafter provided.

NOW, THEREFORE, in consideration of, and as an inducement for the granting, execution and delivery of the Lease, and other good and valuable consideration, the adequacy and sufficiency of which Guarantor specifically acknowledges, Guarantor agrees as follows:

1. **Guaranty.** Guarantor guarantees to Landlord: (a) the full and prompt payment of all rent and additional sums payable by Tenant under the Lease; and (b) the full, faithful and prompt performance and observance of all the covenants, terms, conditions, obligations and agreements required to be performed and observed by Tenant under the Lease. In addition, all losses, damages, reasonable attorneys' fees and other costs and expenses incurred by Landlord in connection with or incidental to the enforcement of this Guaranty or the performance of any of Guarantor's obligations under this Guaranty shall immediately be payable by Guarantor to Landlord. Guarantor does hereby become surety to Landlord for and with respect to all of the aforesaid obligations of Tenant under the Lease.

2. **Covenants.** Guarantor hereby covenants and agrees to and with Landlord that if Tenant defaults in the payment of any rent or other sums payable by Tenant under the Lease or in the performance of any of the covenants, terms, conditions, obligations or agreements contained in the Lease, Guarantor will immediately: (a) pay such rent or other sums to Landlord and any arrears thereof (including all interest and late fees); (b) faithfully perform and fulfill all such covenants, terms, conditions, obligations and agreements; and (c) pay to Landlord all damages, costs and expenses that Landlord incurs as a result of any default by Tenant under the Lease (including, without limitation, attorneys' fees incurred by landlord as a result of such default). This Guaranty is a primary, absolute, continuing and unconditional guaranty of payment and of performance. Guarantor's liability hereunder is direct and may be enforced by Landlord without Landlord being required to resort to any other right, remedy or security. Guarantor hereby expressly agrees that the validity of this Guaranty and the obligations of Guarantor hereunder shall not be terminated, affected or impaired by reason of the assertion or the failure to assert by Landlord against Tenant of any of the rights or remedies reserved to Landlord pursuant to the provisions of the Lease.

3. **Non-Release.** This Guaranty shall not be released, discharged, terminated or in any way impaired by (a) any amendment, modification, extension or renewal of the Lease (whether material or otherwise), or any assignment or transfer of the Lease or this Guaranty; (b) any exercise or non-exercise of any of Landlord's rights, remedies or privileges under the Lease or this Guaranty, or any waiver, consent or approval by Landlord with respect to any of the covenants, terms, conditions or agreements contained in the Lease; (c) the granting of any indulgences or extensions of time to Tenant; (d) any defenses, setoffs or counterclaims of Tenant; or (e) the voluntary or involuntary liquidation or dissolution of Tenant, the sale of substantially all of the assets of Tenant, or other similar proceeding affecting Tenant or any of Tenant's assets. Guarantor further acknowledges and agrees that this Guaranty is in addition to any other guaranty in favor of Landlord in connection with the Lease, and that such other guaranty shall not in any way limit, impair, reduce, affect or diminish this Guaranty or the obligations, liabilities or duties of Guarantor under this Guaranty. This Section 3 shall be self-operative; provided, however,

Landlord [Signature]  
PPAB 1942193/2

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Tenant [Signature]

Guarantor agrees to execute and deliver to Landlord upon demand such agreements and/or instruments as requested by Landlord to further evidence and/or implement the terms and provisions of this Section 3, including, without limitation, such consents and/or approvals requested by Landlord in connection with any amendment, modification, extension or renewal of the Lease (whether material or otherwise), or any assignment or transfer the Lease.

4. **Rejection of Lease.** This Guaranty will continue unchanged by any bankruptcy, reorganization or insolvency of Tenant or any successor or assignee thereof, or by a disaffirmance or abandonment of the Lease by a trustee of Tenant. If the Lease is rejected or disaffirmed by Tenant or Tenant's trustee in bankruptcy pursuant to any bankruptcy law or any other law affecting creditor's rights, then Guarantor shall, and does hereby (without the necessity of any further agreement or act), assume all obligations and liabilities of Tenant under the Lease to the same extent as if (a) Guarantor were originally named tenant under the Lease; and (b) there had been no such rejection or disaffirmance. Guarantor shall, upon Landlord's request, promptly confirm in writing such assumption. No limitation on the liability of Tenant under the Lease which may now or hereafter be imposed by any federal, state or other statute, law, regulation or court decision shall in any way limit the obligations of Guarantor hereunder, which obligations are co-extensive with Tenant's obligations set forth in the Lease without regard to any such statutory or legal limitation.

5. **Waiver of Notice; Other Waivers.** Guarantor has been advised of the following rights and hereby waives: (a) presentment, demand for payment, and protest of non-performance under the Lease; (b) notice of any kind, including, but not limited to, notice of acceptance, notice of default and/or notice of any obligations or liabilities contracted or incurred by Tenant; (c) any right to require Landlord to enforce its rights and remedies against Tenant under the Lease or otherwise; (d) any right to require Landlord to proceed against any security held from Tenant; (e) any right of subrogation against Tenant by reason of any payment or act of performance by or on behalf of Guarantor in connection with this Guaranty; and (f) any right to indemnity, reimbursement or contribution which Guarantor now or hereafter shall have against Tenant by reason of any payment or act of performance by or on behalf of Guarantor in connection with this Guaranty. In addition, Guarantor hereby unconditionally and irrevocably waives any duty on the part of Landlord to disclose to Guarantor any matter, fact or thing relating to the Lease or to the business, condition (financial or otherwise), operations, performance, properties or prospects of Tenant now or hereafter known by Landlord, and in no event shall Landlord be required to provide Guarantor with any information or documentation relating to the Lease or to Tenant.

6. **Joint and Several Liability.** Guarantor's liability shall be primary and joint and several with that of Tenant and any other guarantor of the Lease, notwithstanding the fact that Guarantor has had no prior notice of any default or of any forbearance or extension. Landlord may proceed against Guarantor under this Guaranty without initiating or exhausting any legal remedy against Tenant or such other guarantor and may proceed against Tenant, Guarantor and such other guarantor separately or concurrently.

7. **Assignment by Landlord.** Landlord may, without notice to Guarantor, assign this Guaranty in whole or in part.

8. **Guarantor's Warranties and Representations.** Guarantor warrants and represents to Landlord that the making and performance of this Guaranty by Guarantor will not result in any breach of any term, condition or provision of, or constitute a default under, any contract, agreement or other instrument to which Guarantor is a party or by which it may be bound, or result in any breach of any regulation, order, writ, injunction or decree of any court or any commission, board or other administrative agency entered in any proceeding to which Guarantor is a party or by which it may be bound.

Landlord  
PPAB 19421932

Tenant

9. **Miscellaneous.**

(a) No Waiver. All of Landlord's rights and remedies under the Lease and under this Guaranty are intended to be distinct, separate and cumulative and no such right and remedy therein or herein mentioned is intended to be in exclusion of or a waiver of any of the others.

(b) Inducement. Guarantor hereby acknowledges and agrees that (a) the Lease is a direct material benefit to Guarantor; (b) Guarantor has a direct, material pecuniary interest in Tenant; and (c) Landlord would not have executed the Lease without the benefit of this Guaranty.

(c) Successors and Assigns. This Guaranty shall be legally binding upon Guarantor and its successors, heirs and assigns and shall inure to the benefit of Landlord and its successors and assigns.

(d) Governing Law. This Guaranty shall be governed by the laws of the State where the Premises is located (without application of choice of law provisions), and Guarantor hereby irrevocably agrees to non-exclusive personal jurisdiction in the State where the Premises is located.

(e) Invalidity. The invalidity or unenforceability of any term herein shall not affect the validity or enforceability of any other term.

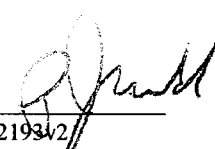
(f) Modification. This Guaranty may not be modified, amended or terminated other than by an agreement in writing signed by Landlord.

(g) Counterparts. This Guaranty may be executed in two or more counterparts, each of which shall be deemed an original but all of which taken together shall constitute one and the same instrument.

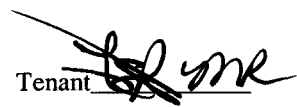
(h) Financial Statements. Upon Landlord's written request, Guarantor shall, within ten (10) days of Landlord's request, furnish to Landlord or Landlord's designee financial statements describing Guarantor's then current financial condition in form and content acceptable to Landlord or such designee.

(i) Waiver of Jury Trial. LANDLORD AND GUARANTOR MUTUALLY AGREE THAT THEY HEREBY WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER AGAINST THE OTHER AS TO ANY MATTERS ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS GUARANTY.

[SIGNATURES ON FOLLOWING PAGE]

Landlord   
PPAB 19421934/2

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Tenant 

IN WITNESS WHEREOF, Guarantor, intending to be legally bound hereby, has caused this Guaranty to be executed, sealed and delivered effective as of the date first above written.

**GUARANTOR:**

Mitzi Rick (SEAL)  
Mitzi Rick  
Social Security # 233-06-3991

STATE OF S.C.

COUNTY OF Horry

Mitzi Rick Melissa Allen Felix, a Notary Public for the above State and County, hereby certify that Mitzi Rick personally came before me this day and acknowledged the execution of the foregoing instrument.

WITNESS my hand and official seal, this the 4th day of April, 2012.

My commission Expires 6-16-2020

Melissa Allen Felix  
Notary Public

[NOTA Y SEAL]

Accepted this 4th day of April, 2012.



**LANDLORD:**

Burroughs & Chapin Company, Inc.,  
a South Carolina corporation

By: Patrick J. Walsh  
Senior Vice President

Landlord  
PPAB 1942193v2

Tenant

COUNTY OF HORRY )  
 )  
STATE OF SOUTH CAROLINA )

**ORDINANCE NO. 15-16**

**AN ORDINANCE TO AMEND APPENDIX B, ZONING ORDINANCE OF THE HORRY COUNTY CODE OF ORDINANCES PERTAINING TO AERONAUTICAL USES.**

**WHEREAS**, the airports and other associated air travel are important to the economic success of Horry County; and,

**WHEREAS**, there are many possible negative impacts related to the location of these types of facilities; and,

**WHEREAS**, helicopter flights of a short duration, at low altitudes, primarily for tourist passengers, have increased in frequency and number over the years, and are a source of frustration among, and complaints from, County citizens; and

**WHEREAS**, frequent, low-altitude aircraft flight poses safety hazards to citizens and visitors on the ground, especially where such aircraft fly over residential areas, schools, and heavily populated sites such as retail shopping areas, outdoor tourist attractions, athletic facilities, and parks that attract visitors to the County; and

**WHEREAS**, safety risks for crew, passengers, and persons on the ground tend to increase with proximity to sites where take-off and landing operations occur; and

**WHEREAS**, helicopter operations are reported to produce an incessant roar that penetrates into homes, drowns out normal conversation, and interrupts sleep patterns, causing fatigue that results in poor performance at school, work, sporting activities, etc.; and

**WHEREAS**, negative effects of aircraft operations include significant noise impacts that disturb hearing, speech communication, sleep, and other activities, which reduce the use and enjoyment of outdoor amenities as well as indoor facilities in proximity to such aircraft operations; and,

**WHEREAS**, noise impacts from aircraft operations annoy and disturb citizens who live near those operations, as well as dampen the resale value for their residential properties; and

**WHEREAS**, steps to mitigate privacy and noise impacts include limiting the number and location of sites where nonemergency aircraft operations occur in the County, so as to consolidate the point sources for aircraft noise and thereby minimize the sites where such noise is generated; and

**WHEREAS**, public use airports are better suited for prompt emergency responses that may be required relative to aircraft take-off and landing operations, as compared with other locations in the County; and

**WHEREAS**, flights during dark hours exacerbate the noise impacts on citizens and complicate emergency response efforts; and

**WHEREAS**, there is a need for the regulation of to regulate these facilities to protect, preserve, and promote the health, safety, and welfare of all citizens of, and visitors to, the County while balancing the need for air travel; and,

WHEREAS, it is the intent of the County Council to establish and provide for a suitable location for these types of facilities.

NOW THEREFORE, by the power and authority granted to the Horry County Council by the Constitution of the State of South Carolina and the powers granted to the County by the General Assembly of the State, it is ordained and enacted that:

1. Amendment of Appendix B, Zoning Ordinance, Article IV. Article IV of the Zoning Ordinance is hereby amended to add the following definitions:  
(All text shown underlined and bolded shall be added)

**403 Airport.**

Is an area of land or water which is used or intended for use for the landing and takeoff of aircraft, and any appurtenant areas which are used, or intended for use, for airport building or other airport facilities or rights-of-way, together with all airport buildings and facilities located thereon. This includes any airport, heliport, helistop, vertiport, gliderport, seaplane base, ultralight flightpark, manned balloon launching facility, or other aircraft landing or takeoff area.

- A) Public Use Airport – as defined by Section 503 (17) of the Airport and Airway Improvement Act of 1982 means
  - a. Any public airport
  - b. Any privately owned reliever airport, and
  - c. Any privately owned airport which is determine by the Secretary of the FAA to enplane annually 2,500 or more passengers and receive scheduled passenger service of aircraft
- B) Private Use Airport – means
  - a. All other airports not defined as Public Use Airport

**436.5 Heliport/-Helipad.**

Is an area of land, water, or structure, either at ground level or elevated on a structure, that is used for the landing and take-off of one or more helicopters, ~~whose surface shall be of such material that dust, dirt, or other objectionable matter will not be blown onto adjoining property by helicopter operations,~~ which may or may not contain all or part of such auxiliary facilities as parking, waiting rooms, administrative offices, hangars, fueling, passenger loading, cargo loading, and maintenance areas.

2. Amendment of Appendix B, Zoning Ordinance, Article V, Section 512. Section 512 of the Zoning Ordinance pertaining to the Accessory Uses is hereby amended as follows:

(c) Helipads shall be considered accessory uses incidental and subordinate to hospitals, law enforcement, and firefighting.

3. Amendment of Appendix B, Zoning Ordinance, Article V, “General Provisions.” Article V of the ~~Horry County Code of Zoning~~ Ordinance is amended to add the following sections.

500.7 Existing Heliports and Helipads that were legally operating before the enactment of Section 539 in a place other than at a Public Use Airport shall discontinue, or be located in conformity with this ordinance, not later than January 1, 2024.

**539. Heliports/Helipads**

- A. Heliports and Helipads shall ~~only~~ be permitted ~~only~~ at Public- Use Airports ~~or, except that a helipad may be permitted as an accessory per Section 512.~~
- B. To promote uniform helipad standards within Horry County, any proposed heliport / helipad should comply with all heliport design guideline recommendations in FAA Advisory Circular 150/5390-2C Heliport Design, and as subsequently amended. In addition, a proposed heliport / helipad must comply with 14 CFR Part 157 – Notice of Construction, Alteration, Activation, and Deactivation of Airports, NFPA 418 Standard for Heliports, and the South Carolina Airports Act.
4. Amendment of Appendix B, Zoning Ordinance, Article VII, Section 702.2. Section 702.2 of the Zoning Ordinance pertaining to the Forest Agriculture (FA) district is hereby amended as follows:  
(All text in ~~striketrough~~ shall be deleted and all text shown underlined and bolded shall be added)
- (E) Private Use Airports Airfields together with subordinate uses ~~and radio and/or television station and transmission towers provided that such use complies with any adopted standards for communication towers.~~
1. Private Residential subdivision Airpark hangars, subject to Article XII, Section 1206.
5. Amendment of Appendix B, Zoning Ordinance, Article VII, Section 703.2. Section 703.2 of the Zoning Ordinance pertaining to the Commercial Forest Agricultural (CFA) district is hereby amended as follows:  
(All text in ~~striketrough~~ shall be deleted and all text shown underlined and bolded shall be added)
- (E) Private Use Airports Airfields together with subordinate uses ~~and radio and/or television station and transmission towers provided that such use complies with any adopted standards for communication towers.~~
1. Private Residential subdivision Airpark hangars, subject to Article XII, Section 1206.
6. Amendment of Appendix B, Zoning Ordinance, Article VII, Section 712.1(A). Article VII, Section 712.1 (A) of the Zoning Ordinance pertaining to the Amusement Commercial (AC) is hereby amended as follows:  
(All text in ~~striketrough~~ shall be deleted and all text shown underlined and bolded shall be added)
- Establishments providing entertainment primarily as a commercial activity, including but not limited to theaters, billiard halls, pool halls, bowling alleys, water slides, skating rinks, dance halls, shooting galleries, gift and novelty shops, taverns, clubs, amusement parks, piers, arcades, miniature and par-three golf, driving ranges, boardwalks, bath houses, and sight-seeing depots tour facilities for tours by land or water.
7. Amendment of Appendix B, Zoning Ordinance, Article VII, Section 734.1. Article VII, Section 734.1 of the Zoning Ordinance pertaining to the Outdoor Amusement Commercial (AM2) district is hereby amended to add the following :
- (O) Sight-seeing tour facilities for tours by land or water.

8. **Amendment of Appendix B, Zoning Ordinance, Article VII, Section 724.4 C** Section 724.4C Transportation Related Services District (TRS) is hereby amended as follows:  
(All text in ~~strikethrough~~ shall be deleted.)

The Transportation Related Services District provides opportunities to locate and develop businesses generally reliant on the automobile or focused on providing services for automobiles, public or private transportation facilities, services, and communications facilities. Uses in this district are generally located where accessibility to the transportation system is good and exposure to the public is substantial. Uses in this district are generally classified in Major Groups 41, 45, 52, and 55 of the Standard Industrial Code (SIC).

9. **Amendment of Appendix B, Zoning Ordinance, Article VII, Section 742** Section 742 Passenger & Product Transportation (PA1) is hereby amended as follows:

|     |                                                |                                      |
|-----|------------------------------------------------|--------------------------------------|
| (B) | Airports, airport terminals & related services | All business types defined in SIC 45 |
|-----|------------------------------------------------|--------------------------------------|

10. **Amendment of Appendix B, Zoning Ordinance, Article XII, Section 1206** is hereby amended as follows:  
(All text in ~~strikethrough~~ shall be deleted. All text shown **underlined and bolded** shall be added.)

1206. Private **Residential subdivision** airparks and hangars.

- A. Applicability—Private **Residential subdivision** airparks shall be allowed to contain hangars as subordinate uses on fee simple or in-common lots, subject to the following conditions.
1. Separation from Residential—All proposed hangars shall be located a minimum of forty (40) feet from any residentially used or zoned lot outside of the residential airpark. The distance shall be measured from the proposed hangar to the residential zoning line or residentially used lot line.
  2. Minimum Lot Area: 5,000 square feet, with a minimum lot width of fifty (50) feet.
  3. Minimum separation of structures shall be twenty (20) feet.
  4. Setbacks shall be:
    - Front: 30 feet
    - Sides: 10 feet
    - Rear: 20 feet
    - Exterior setback: 40 feet
  5. No commercial uses shall be associated with hangars.
  6. Hangars may not be converted for residential use. Should the hangar lot be combined with a residential lot, or enlarged for residential development in the future, the minimum residential lot size shall be met for the district.
  7. ~~Landscaping shall meet the requirements of section 527.~~

11. **Severability**: If a Section, Sub-section, or part of this Ordinance shall be deemed or found to conflict with a provision of South Carolina law, or other pre-emptive legal principle, then that Section, Sub-section, or part of this Ordinance shall be deemed ineffective, but the remaining parts of this Ordinance shall remain in full force and effect.

12. **Conflict with Preceding Ordinances:** If a Section, Sub-section or provision of this Ordinance shall conflict with the provisions of a Section, Sub-section or part of a preceding Ordinance of Horry County, then the preceding Section, Sub-section, or part shall be deemed repealed and no longer in effect.

13. **Effective Date:** This Ordinance shall become effective upon third reading.

**AND IT IS SO ORDAINED, ENACTED AND ORDERED** this 19th day of April, 2016.

**HORRY COUNTY COUNCIL**



Mark Lazarus, Chairman

Harold G. Worley, District 1  
Jimmy Washington, District 3  
Tyler Servant, District 5  
Vacant, District 7  
W. Paul Prince, District 9  
Al Allen, District 11

Bill Howard, District 2  
Gary Loftus, District 4  
Cam Crawford, District 6  
Johnny Vaught, District 8  
Jody Prince, District 10

Attest:



Patricia S. Hartley, Clerk to Council

|                 |                  |
|-----------------|------------------|
| First Reading:  | February 9, 2016 |
| Second Reading: | March 1, 2016    |
| Third Reading:  | April 19, 2016   |

**HORRY COUNTY  
ATTORNEY'S OFFICE**

Arrigo P. Carotti  
County Attorney  
1301 Second Avenue  
Conway, South Carolina 29526  
[carottia@horrycounty.org](mailto:carottia@horrycounty.org)



Post Office Box 1236  
Conway, South Carolina  
29528-1236

Phone: (843) 915-5270  
Fax: (843) 915-6270

December 9, 2019

Mr. Freddie Rick, President/Owner  
Helicopter Solutions, Inc. d/b/a Helicopter Adventures  
1860 21<sup>st</sup> Avenue North  
Myrtle Beach, SC 29577

Mr. Freddie Rick, President/Owner  
Helicopter Solutions, Inc. d/b/a Helicopter Adventures  
Route 10 Combs Addition  
Davin, West Virginia 25617

Mr. Freddie Rick, President/Owner  
Helicopter Solutions, Inc. d/b/a Helicopter Adventures  
P.O. Box 311  
Davin, West Virginia 25617

Mr. Freddie Rick, President/Owner  
Helicopter Solutions, Inc. d/b/a Helicopter Adventures  
3225 McLeod Dr. Suite 100  
Las Vegas, Nevada 89121

Mr. Freddie Rick, President/Owner  
Helicopter Solutions, Inc. d/b/a Helicopter Adventures  
RR 10  
Davin, West Virginia 25617

Mr. Freddie Rick, President/Owner  
Helicopter Solutions, Inc. d/b/a Helicopter Adventures  
c/o Northwest Registered Agent, LLC  
6650 Rivers Ave., Suite 100  
Charleston, South Carolina 29406

**Re: Cessation/Relocation of operations**

Dear Mr. Rick:

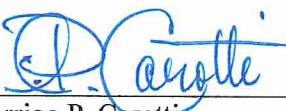
As you are aware, Horry County Council enacted Ordinance 15-16 on April 19, 2016. A copy of the recently enacted Ordinance was forwarded to your then attorney on April 28, 2016. Please see attached.

In short, the Ordinance requires Helicopter Adventures to cease business at its current location and, if desired, to be re-located to a Public Use Airport, by no later than January 1, 2024.

If you are planning to relocate, arrangements are needing to be made by Horry County Government to coordinate that effort. Please contact me at your earliest convenience so that we may discuss further and if you are planning to relocate to begin that process. I look forward to hearing back from you.

Hoping you have a wonderful holiday season.

Sincerely,

  
\_\_\_\_\_  
Arrigo P. Carotti

ELECTRONICALLY FILED - 2021 Jul 30 10:57 AM - HORRY - COMMON PLEAS - CASE#2021CP2605002

Exhibit

C

COUNTY OF HORRY )  
 )  
STATE OF SOUTH CAROLINA )

**ORDINANCE NO. 15-16**

**AN ORDINANCE TO AMEND APPENDIX B, ZONING ORDINANCE OF THE HORRY COUNTY CODE OF ORDINANCES PERTAINING TO AERONAUTICAL USES.**

**WHEREAS**, the airports and other associated air travel are important to the economic success of Horry County; and,

**WHEREAS**, there are many possible negative impacts related to the location of these types of facilities; and,

**WHEREAS**, helicopter flights of a short duration, at low altitudes, primarily for tourist passengers, have increased in frequency and number over the years, and are a source of frustration among, and complaints from, County citizens; and

**WHEREAS**, frequent, low-altitude aircraft flight poses safety hazards to citizens and visitors on the ground, especially where such aircraft fly over residential areas, schools, and heavily populated sites such as retail shopping areas, outdoor tourist attractions, athletic facilities, and parks that attract visitors to the County; and

**WHEREAS**, safety risks for crew, passengers, and persons on the ground tend to increase with proximity to sites where take-off and landing operations occur; and

**WHEREAS**, helicopter operations are reported to produce an incessant roar that penetrates into homes, drowns out normal conversation, and interrupts sleep patterns, causing fatigue that results in poor performance at school, work, sporting activities, etc.; and

**WHEREAS**, negative effects of aircraft operations include significant noise impacts that disturb hearing, speech communication, sleep, and other activities, which reduce the use and enjoyment of outdoor amenities as well as indoor facilities in proximity to such aircraft operations; and,

**WHEREAS**, noise impacts from aircraft operations annoy and disturb citizens who live near those operations, as well as dampen the resale value for their residential properties; and

**WHEREAS**, steps to mitigate privacy and noise impacts include limiting the number and location of sites where nonemergency aircraft operations occur in the County, so as to consolidate the point sources for aircraft noise and thereby minimize the sites where such noise is generated; and

**WHEREAS**, public use airports are better suited for prompt emergency responses that may be required relative to aircraft take-off and landing operations, as compared with other locations in the County; and

**WHEREAS**, flights during dark hours exacerbate the noise impacts on citizens and complicate emergency response efforts; and

**WHEREAS**, there is a need for the regulation of to regulate these facilities to protect, preserve, and promote the health, safety, and welfare of all citizens of, and visitors to, the County while balancing the need for air travel; and,

WHEREAS, it is the intent of the County Council to establish and provide for a suitable location for these types of facilities.

NOW THEREFORE, by the power and authority granted to the Horry County Council by the Constitution of the State of South Carolina and the powers granted to the County by the General Assembly of the State, it is ordained and enacted that:

1. Amendment of Appendix B, Zoning Ordinance, Article IV. Article IV of the Zoning Ordinance is hereby amended to add the following definitions:  
(All text shown underlined and bolded shall be added)

**403 Airport.**

Is an area of land or water which is used or intended for use for the landing and takeoff of aircraft, and any appurtenant areas which are used, or intended for use, for airport building or other airport facilities or rights-of-way, together with all airport buildings and facilities located thereon. This includes any airport, heliport, helistop, vertiport, gliderport, seaplane base, ultralight flightpark, manned balloon launching facility, or other aircraft landing or takeoff area.

- A) Public Use Airport – as defined by Section 503 (17) of the Airport and Airway Improvement Act of 1982 means
  - a. Any public airport
  - b. Any privately owned reliever airport, and
  - c. Any privately owned airport which is determine by the Secretary of the FAA to enplane annually 2,500 or more passengers and receive scheduled passenger service of aircraft
- B) Private Use Airport – means
  - a. All other airports not defined as Public Use Airport

**436.5 Heliport/-Helipad.**

Is an area of land, water, or structure, either at ground level or elevated on a structure, that is used for the landing and take-off of one or more helicopters, ~~whose surface shall be of such material that dust, dirt, or other objectionable matter will not be blown onto adjoining property by helicopter operations,~~ which may or may not contain all or part of such auxiliary facilities as parking, waiting rooms, administrative offices, hangars, fueling, passenger loading, cargo loading, and maintenance areas.

2. Amendment of Appendix B, Zoning Ordinance, Article V, Section 512. Section 512 of the Zoning Ordinance pertaining to the Accessory Uses is hereby amended as follows:

(c) Helipads shall be considered accessory uses incidental and subordinate to hospitals, law enforcement, and firefighting.

3. Amendment of Appendix B, Zoning Ordinance, Article V, “General Provisions.” Article V of the ~~Horry County Code of Zoning~~ Ordinance is amended to add the following sections.

500.7 Existing Heliports and Helipads that were legally operating before the enactment of Section 539 in a place other than at a Public Use Airport shall discontinue, or be located in conformity with this ordinance, not later than January 1, 2024.

**539. Heliports/Helipads**

- A. Heliports and Helipads shall ~~only~~ be permitted ~~only~~ at Public- Use Airports ~~or, except that a helipad may be permitted as an accessory per Section 512.~~
- B. To promote uniform helipad standards within Horry County, any proposed heliport / helipad should comply with all heliport design guideline recommendations in FAA Advisory Circular 150/5390-2C Heliport Design, and as subsequently amended. In addition, a proposed heliport / helipad must comply with 14 CFR Part 157 – Notice of Construction, Alteration, Activation, and Deactivation of Airports, NFPA 418 Standard for Heliports, and the South Carolina Airports Act.
4. Amendment of Appendix B, Zoning Ordinance, Article VII, Section 702.2. Section 702.2 of the Zoning Ordinance pertaining to the Forest Agriculture (FA) district is hereby amended as follows:  
(All text in ~~striketrough~~ shall be deleted and all text shown underlined and bolded shall be added)
- (E) Private Use Airports Airfields together with subordinate uses ~~and radio and/or television station and transmission towers provided that such use complies with any adopted standards for communication towers.~~
1. Private Residential subdivision Airpark hangars, subject to Article XII, Section 1206.
5. Amendment of Appendix B, Zoning Ordinance, Article VII, Section 703.2. Section 703.2 of the Zoning Ordinance pertaining to the Commercial Forest Agricultural (CFA) district is hereby amended as follows:  
(All text in ~~striketrough~~ shall be deleted and all text shown underlined and bolded shall be added)
- (E) Private Use Airports Airfields together with subordinate uses ~~and radio and/or television station and transmission towers provided that such use complies with any adopted standards for communication towers.~~
1. Private Residential subdivision Airpark hangars, subject to Article XII, Section 1206.
6. Amendment of Appendix B, Zoning Ordinance, Article VII, Section 712.1(A). Article VII, Section 712.1 (A) of the Zoning Ordinance pertaining to the Amusement Commercial (AC) is hereby amended as follows:  
(All text in ~~striketrough~~ shall be deleted and all text shown underlined and bolded shall be added)
- Establishments providing entertainment primarily as a commercial activity, including but not limited to theaters, billiard halls, pool halls, bowling alleys, water slides, skating rinks, dance halls, shooting galleries, gift and novelty shops, taverns, clubs, amusement parks, piers, arcades, miniature and par-three golf, driving ranges, boardwalks, bath houses, and sight-seeing depots tour facilities for tours by land or water.
7. Amendment of Appendix B, Zoning Ordinance, Article VII, Section 734.1. Article VII, Section 734.1 of the Zoning Ordinance pertaining to the Outdoor Amusement Commercial (AM2) district is hereby amended to add the following :
- (O) Sight-seeing tour facilities for tours by land or water.

8. **Amendment of Appendix B, Zoning Ordinance, Article VII, Section 724.4 C** Section 724.4C Transportation Related Services District (TRS) is hereby amended as follows:  
(All text in ~~strikethrough~~ shall be deleted.)

The Transportation Related Services District provides opportunities to locate and develop businesses generally reliant on the automobile or focused on providing services for automobiles, public or private transportation facilities, services, and communications facilities. Uses in this district are generally located where accessibility to the transportation system is good and exposure to the public is substantial. Uses in this district are generally classified in Major Groups 41, 45, 52, and 55 of the Standard Industrial Code (SIC).

9. **Amendment of Appendix B, Zoning Ordinance, Article VII, Section 742** Section 742 Passenger & Product Transportation (PA1) is hereby amended as follows:

|     |                                                |                                      |
|-----|------------------------------------------------|--------------------------------------|
| (B) | Airports, airport terminals & related services | All business types defined in SIC 45 |
|-----|------------------------------------------------|--------------------------------------|

10. **Amendment of Appendix B, Zoning Ordinance, Article XII, Section 1206** is hereby amended as follows:  
(All text in ~~strikethrough~~ shall be deleted. All text shown **underlined and bolded** shall be added.)

1206. Private **Residential subdivision** airparks and hangars.

- A. Applicability—Private **Residential subdivision** airparks shall be allowed to contain hangars as subordinate uses on fee simple or in-common lots, subject to the following conditions.
1. Separation from Residential—All proposed hangars shall be located a minimum of forty (40) feet from any residentially used or zoned lot outside of the residential airpark. The distance shall be measured from the proposed hangar to the residential zoning line or residentially used lot line.
  2. Minimum Lot Area: 5,000 square feet, with a minimum lot width of fifty (50) feet.
  3. Minimum separation of structures shall be twenty (20) feet.
  4. Setbacks shall be:  
Front: 30 feet  
Sides: 10 feet  
Rear: 20 feet  
Exterior setback: 40 feet
  5. No commercial uses shall be associated with hangars.
  6. Hangars may not be converted for residential use. Should the hangar lot be combined with a residential lot, or enlarged for residential development in the future, the minimum residential lot size shall be met for the district.
  7. ~~Landscaping shall meet the requirements of section 527.~~

11. **Severability**: If a Section, Sub-section, or part of this Ordinance shall be deemed or found to conflict with a provision of South Carolina law, or other pre-emptive legal principle, then that Section, Sub-section, or part of this Ordinance shall be deemed ineffective, but the remaining parts of this Ordinance shall remain in full force and effect.

12. **Conflict with Preceding Ordinances:** If a Section, Sub-section or provision of this Ordinance shall conflict with the provisions of a Section, Sub-section or part of a preceding Ordinance of Horry County, then the preceding Section, Sub-section, or part shall be deemed repealed and no longer in effect.

13. **Effective Date:** This Ordinance shall become effective upon third reading.

**AND IT IS SO ORDAINED, ENACTED AND ORDERED** this 19th day of April, 2016.

**HORRY COUNTY COUNCIL**



Mark Lazarus, Chairman

Harold G. Worley, District 1  
Jimmy Washington, District 3  
Tyler Servant, District 5  
Vacant, District 7  
W. Paul Prince, District 9  
Al Allen, District 11

Bill Howard, District 2  
Gary Loftus, District 4  
Cam Crawford, District 6  
Johnny Vaught, District 8  
Jody Prince, District 10

Attest:



Patricia S. Hartley, Clerk to Council

|                 |                  |
|-----------------|------------------|
| First Reading:  | February 9, 2016 |
| Second Reading: | March 1, 2016    |
| Third Reading:  | April 19, 2016   |

|                               |   |                                   |
|-------------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA       | ) | IN THE COURT OF COMMON PLEAS      |
|                               | ) | FIFTEENTH JUDICIAL CIRCUIT        |
| COUNTY OF HORRY               | ) | CIVIL ACTION NO. 2021-CP-26-05002 |
|                               | ) |                                   |
| HORRY COUNTY, SOUTH CAROLINA, | ) |                                   |
|                               | ) |                                   |
| Plaintiff,                    | ) |                                   |
|                               | ) | <b>ANSWER OF DEFENDANT</b>        |
| v.                            | ) | <b>BURROUGHS &amp; CHAPIN</b>     |
|                               | ) | <b>COMPANY, INC.</b>              |
| HELICOPTER SOLUTIONS, INC.,   | ) |                                   |
| d/b/a HELICOPTER ADVENTURES,  | ) |                                   |
| FREDDIE RICK, and BURROUGHS & | ) |                                   |
| CHAPIN COMPANY, INC.,         | ) |                                   |
|                               | ) |                                   |
| Defendants.                   | ) |                                   |
| _____                         | ) |                                   |

Defendant Burroughs & Chapin Company, Inc. (“Defendant”) above-named, answering the Complaint of the Plaintiff, Horry County, South Carolina (“Plaintiff”), states as follows:

**FOR A FIRST DEFENSE**

1. Each and every allegation of the Plaintiff’s Complaint not specifically admitted is denied.
2. Plaintiff’s Complaint begins with a long preamble (pgs. 1 – 2), which purports to characterize and restate the contents of Plaintiff’s Complaint. A preamble, which sets forth no factual allegations against a party, requires no response. However, to the extent this Court deems a response necessary, the allegations of Plaintiff’s preamble are denied, save insofar as it is admitted that Helicopter Solutions d/b/a Helicopter Adventures (“Helicopter Adventures”) is a sight-seeing business that operates upon land owned by Burroughs & Chapin Co., Inc., a privately-owned Real Estate Investment Trust (“REIT”), and/or its sister and subsidiary corporations. Helicopter Adventures conducts business at 1860 21<sup>st</sup> Ave. North, and has so operated since approximately 2012, pursuant to a written lease.

**FOR A SECOND DEFENSE AND BY WAY OF ANSWER TO  
PLAINTIFF'S COMPLAINT**

3. Paragraphs 1 is admitted.

4. Regarding Paragraph 2, this Defendant admits only so much of this Paragraph as admit that co-defendant Helicopter Solutions owns and operates a helicopter sightseeing business that utilizes a heliport at 1860 21<sup>st</sup> Ave. North in Horry County, South Carolina. The remaining allegations of Paragraph 2 are denied.

5. Paragraph 3 is admitted, upon information and belief.

6. Paragraph 4 is admitted.

**FOR A THIRD DEFENSE**

7. Paragraphs 5 – 6 are conclusions of law, and therefore require no response.

8. Deny Paragraphs 7 - 8 as to this Defendant, as no facts exist giving rise to a case or controversy between this Defendant and Plaintiff.

9. Paragraph 9 concerns a conclusion of law, and therefore requires no response.

10. Defendant does not contest this Court's jurisdiction over this matter, nor venue.

**FOR A FOURTH DEFENSE**

11. The preceding paragraphs are incorporated herein as fully as if set forth verbatim.

12. Paragraph 11 is admitted.

13. Responding to Paragraph 12, Defendant admits that it owns the land on which Helicopter Adventures currently operates its business, and Defendant currently leases this property to Helicopter Adventures pursuant to a Lease Agreement. The Lease Agreement is set to expire on August 31, 2023 with no option for renewal.

14. Responding to Paragraph 13, Defendant admits it entered into a Lease Agreement with Helicopter Adventures on April 4, 2012. The Lease Agreement speaks for itself, and

Defendant craves reference to said Lease Agreement and denies all allegations inconsistent with the express terms of this Lease Agreement.

15. Responding to Paragraph 14, the Lease Agreement speaks for itself, and Defendant craves reference to said Lease Agreement and denies all allegations inconsistent with the express terms of this Lease Agreement.

16. Paragraphs 15 and 16 are admitted.

17. Defendant is without sufficient information to form a belief as to the allegations contained in Paragraphs 17 - 18, and therefore they are denied.

18. Responding to Paragraphs 19 - 25, Defendant admits that the Horry County Council adopted Ordinance 15-16 on April 20, 2016, a legislative act with independent legal significance, and Defendant denies any allegation inconsistent with the terms of the ordinance.

19. Defendant is without sufficient information to form a belief as to the allegations of Paragraphs 26 – 27, and therefore deny the same.

20. Paragraphs 28 – 29 concern the terms of a written instrument, and Defendant craves reference to the instrument, denying any allegations inconsistent therewith. Paragraph 29 correctly asserts that the lease between this Defendant and Helicopter Adventures is set to expire prior to January 1, 2024.

21. Defendant is without sufficient information to form a belief as to the allegations contained in Paragraphs 30 – 31, and therefore they are denied.

22. Paragraph 32 is denied and Defendant demands strict proof thereof. Responding further, the current Lease Agreement between Defendant and Helicopter Adventures speaks for itself, and is set to expire August 31, 2023 with no option for renewal. This Defendant has not

formed any intent to enter into a new lease with Helicopter Adventures for the subject premises, or otherwise to enter into any agreement in contravention of Ordinance 15.16.

**FOR A FIFTH DEFENSE AND BY WAY OF ANSWER TO PLAINTIFF'S  
FIRST CAUSE OF ACTION (DECLARATORY JUDGMENT)**

23. The preceding Paragraphs are incorporated herein as fully as if set forth verbatim.

24. Responding to Paragraph 34, Defendant admits that Helicopter Adventures and, upon information and belief Freddie Rick, are currently operating Helicopter Adventures as a heliport on Defendant's land pursuant to a Lease Agreement. The remaining statements in Paragraph 34 concern conclusions of law, and therefore require no response.

25. Paragraph 35 is a conclusion of law, and therefore requires no response.

26. Paragraph 36 is denied as to this Defendant. The term of the lease expires, by its express terms, prior to January 1, 2024 with no option for renewal.

27. Paragraphs 37 – 38 are conclusions of law, and therefore require no response

28. Responding to Paragraphs 39 - 40, Defendant denies that it "operates" a heliport at 1860 21<sup>st</sup> Ave North. The remaining allegations contained in Paragraphs 39 and 40 are conclusions of law, and therefore require no response.

29. Paragraph 41 is denied. The term of the lease expires, by its express terms, prior to January 1, 2024 with no option for renewal.

30. Paragraphs 42 – 43 are conclusions of law, and therefore require no response.

31. Deny Paragraph 44 as to this Defendant. The lease between Helicopter Adventures and this Defendant has not created a "safety concern," and operations upon the leased premises have been lawful, and are expected to so continue, during the term of the lease.

32. Paragraph 45 appears to concern a party other than this Defendant, and therefore requires no response. To the extent a response is required, the allegations of this Paragraph are denied.

33. Responding to the allegations of Paragraph 46, Defendant has insufficient information to form a belief as to the loss that may be suffered by virtue of the remedy sought by Plaintiff, as Plaintiff seeks, *inter alia*, attorney's fees, "sanctions," "damages," and the costs of this action. Therefore, Paragraph 46 is denied.

34. Paragraph 47 is a conclusion of law, and therefore requires no response.

35. Responding to Paragraph 48, the current Lease Agreement between Defendant and Helicopter Adventures speaks for itself, and Defendant craves reference to the Lease Agreement and deny any allegations inconsistent therewith. The Lease Agreement is set to expire on August 31, 2023 with no option for renewal.

36. Paragraph 49 is denied.

**FOR A SIXTH DEFENSE AND BY WAY OF ANSWER TO PLAINTIFF'S  
SECOND CAUSE OF ACTION (INJUNCTION)**

37. The preceding Paragraphs are incorporated herein as fully as if set forth verbatim.

38. Paragraph 51 concerns a conclusion of law, and therefore requires no response.

39. Defendant is without sufficient information to form a belief as to the allegations contained in Paragraph 52, and therefore they are denied.

40. Paragraph 53 concerns a conclusion of law, and therefore requires no response.

**FOR A SEVENTH DEFENSE AND BY WAY OF ANSWER TO THE  
PLAINTIFF'S "RELIEF REQUESTED"**

41. Defendant denies Paragraph 54, including all subsections.

**FOR AN EIGHTH AND AFFIRMATIVE DEFENSE**  
**(Failure to State a Claim)**

42. The Complaint fails to state facts sufficient to state a claim upon which relief can be granted, and therefore should be dismissed pursuant to 12(b)(6), SCRCP.

**FOR A NINTH AND AFFIRMATIVE DEFENSE**  
**(Estoppel and/or Laches)**

43. Defendant pleads estoppel and/or laches as a bar to the Plaintiff's claims in this matter.

**FOR A TENTH AND AFFIRMATIVE DEFENSE**  
**(Reservation and non-waiver)**

44. Defendant expressly reserves the right to amend this responsive pleading and assert all available defenses to which it finds it is entitled during the course of this litigation.

**FOR AN ELEVENTH AND AFFIRMATIVE DEFENSE**

45. No justiciable controversy exists between Plaintiff and this Defendant; wherefore, Plaintiff lacks standing to obtain a declaratory judgment or seek other prospective relief against this Party.

WHEREFORE, having fully answered the Complaint of the Plaintiff, Defendant requests that the Complaint be dismissed with prejudice, that Defendant be awarded the costs of defending this matter, and for such other relief as the Court deems just and proper.

*[Signature on following page]*

MCANGUS GOUDELOCK & COURIE, L.L.C.

s/J Harrison Berry

J. CHRISTOPHER CLARK (SC Bar No. 68434)

chris.clark@mgclaw.com

J. HARRISON BERRY (SC Bar No. 103798)

harrison.berry@mgclaw.com

Post Office Box 1349

2411 North Oak Street, Suite 401 (29577)

Myrtle Beach, South Carolina 29578

Telephone: (843) 848-6000

Facsimile: (843) 449-2306

ATTORNEYS FOR BURROUGHS & CHAPIN  
COMPANY, INC.

August 27, 2021

|                                             |   |                                         |
|---------------------------------------------|---|-----------------------------------------|
| STATE OF SOUTH CAROLINA                     | ) | IN THE COURT OF COMMON PLEAS            |
|                                             | ) |                                         |
| COUNTY OF HORRY                             | ) | FIFTEENTH JUDICIAL CIRCUIT              |
|                                             | ) |                                         |
| Horry County, South Carolina,               | ) | Civil Action No.: 2021-CP-26-05002      |
|                                             | ) |                                         |
| Plaintiff,                                  | ) |                                         |
|                                             | ) | <b>ANSWER OF DEFENDANTS</b>             |
| vs.                                         | ) | <b>HELICOPTER SOLUTIONS, INC. D/B/A</b> |
|                                             | ) | <b>HELICOPTER ADVENTURES AND</b>        |
| Helicopter Solutions, Inc. d/b/a Helicopter | ) | <b>FREDDIE RICK</b>                     |
| Adventures, Freddie Rick, and Burroughs     | ) |                                         |
| & Chapin Company, Inc.,                     | ) |                                         |
|                                             | ) |                                         |
| Defendants.                                 | ) |                                         |
|                                             | ) |                                         |

---

Defendants Helicopter Solutions, Inc. d/b/a Helicopter Adventures and Freddie Rick (collectively “Defendants”), reserving the right to file a motion under Rule 12 of the South Carolina Rules of Civil Procedure, or any other dispositive motion, respond to the Complaint of Plaintiff Horry County, South Carolina by denying each and every allegation not hereinafter specifically admitted, demanding strict proof thereof, and further respond as follows:

**FOR A FIRST DEFENSE AND BY WAY OF MOTION TO DISMISS OR FOR JUDGMENT ON THE PLEADINGS**

1. The Complaint fails to set forth sufficient facts to constitute a cause of action and, therefore, should be dismissed pursuant to Rule 12(b)(6), SCRCPP. Alternatively, Defendants are entitled to judgment on the pleadings pursuant to Rule 12(c), SCRCPP. Defendants crave reference to their separately filed Motion to Dismiss or For Judgment on the Pleadings.

**FOR A SECOND DEFENSE AND BY WAY OF ANSWER**

2. Each and every allegation not herein specifically admitted is denied and strict proof thereof demanded.

3. Plaintiff’s Complaint begins with a lengthy preamble/introduction on pages 1-2

which purports to summarize and restate the contents of the Complaint. This preamble, which sets forth no factual allegations against the parties, requires no response. To the extent a response is required, Defendants admit only so much of the allegations of the preamble/introduction contained in the unnumbered paragraphs on pages 1-2 of the Complaint that Defendant Helicopter Solutions, Inc. d/b/a Helicopter Adventures is a helicopter sight-seeing business operating at 1860 21<sup>st</sup> Avenue North in Horry County since 2012 upon land which is upon information and belief owned by Co-Defendant Burroughs & Chapin Co., Inc. or a related entity. All remaining allegations of the preamble/introduction are denied and strict proof thereof demanded.

4. Defendants admit the allegations of Paragraph 1.

5. Defendants admit so much of Paragraph 2 as alleges it owns and operates a helicopter sightseeing business that uses a heliport located at 1860 21<sup>st</sup> Avenue North in Horry County, South Carolina. All remaining allegations of Paragraph 2 are denied and strict proof thereof demanded.

6. Defendants admit the allegations of Paragraph 3.

7. Defendants admit the allegations of Paragraph 4, upon information and belief.

8. Paragraphs 5 and 6 are conclusions of law to which no response is required. To the extent a response is required, Defendants deny the allegations of Paragraphs 5 and 6 and demand strict proof thereof.

9. Defendants deny the allegations of Paragraphs 7, 8, and 9 and demand strict proof thereof.

10. In response to Paragraph 10, Defendants do not contest the Court's jurisdiction or venue, but states that no justiciable controversy exists.

11. Defendants admit the allegations of Paragraphs 11 and 12.

12. In response to Paragraph 13, Defendants admit Defendant Helicopter Solutions, Inc. entered into a Lease Agreement with Co-Defendant Burroughs & Chapin on April 4, 2012. The Lease Agreement speaks for itself and Defendants crave reference to the Lease Agreement and deny all allegations of Paragraph 13 inconsistent with the Lease Agreement and demand strict proof thereof.

13. In response to Paragraph 14, the Lease Agreement speaks for itself and Defendants crave reference to the Lease Agreement, deny all allegations of Paragraph 14 inconsistent with the Lease Agreement and demand strict proof thereof.

14. Defendants admit the allegations of Paragraphs 15 and 16.

15. Defendants lack sufficient information to form a belief as to the allegations of Paragraphs 17 and 18 and therefore deny the same and demand strict proof thereof.

16. Defendants admit only so much of Paragraph 19 as alleged Horry County Council adopted Ordinance 15-16 on April 20, 2016, upon information and belief. Defendants lack sufficient information regarding the remaining allegations of Paragraph 19 and therefore deny the same and demand strict proof thereof.

17. In response to Paragraph 20, Defendants crave reference to the text of the Ordinance and deny any portion of Paragraph 20 that misstates or misquotes its contents and demands strict proof thereof. To the extent Plaintiff intends to allege that the substance of legislative findings quoted in Paragraph 20 are accurate, Defendants deny all allegations of Paragraph 20 and demand strict proof thereof.

18. In response to Paragraphs 21 through 25, Defendants crave reference to text of the Ordinance and deny any allegations of Paragraphs 21 through 25 that are inconsistent with or mischaracterize or misstate the Ordinance and demand strict proof thereof.

19. Defendants lack sufficient information to form a belief as to the allegations of Paragraphs 26 and 27 and therefore deny the same and demand strict proof thereof.

20. Defendants admit so much of Paragraph 28 as alleges it renewed the Lease Agreement for an Extended Term as defined in the Lease Agreement. Defendants lack sufficient information to form a belief as the remaining allegations of Paragraph 28 and therefore deny the same and demand strict proof thereof.

21. Defendants admit the allegations of Paragraph 29, upon information and belief.

22. In response to Paragraph 30, Defendants crave reference to text of the letter referenced and denies any allegations of Paragraph 30 that are inconsistent with or mischaracterize or misstate the contents of the letter and demand strict proof thereof.

23. Defendants deny the allegations of Paragraph 31 and demand strict proof thereof.

24. Upon information and belief, Defendants deny the allegations of Paragraph 32 and demand strict proof thereof. In further response to Paragraph 32, Defendants crave refence to the Answer of Co-Defendant Burroughs & Chapin stating “the current Lease Agreement between [Burroughs & Chapin] and Helicopter Adventures speaks for itself, and is set to expire August 31, 2023 with no option for renewal. [Burroughs & Chapin] has not formed any intent to enter into a new lease with Helicopter Adventures for the subject premises, or otherwise enter into any agreement in contravention of Ordinance 15.16.” (See Answer of Defendant Burroughs & Chapin, ¶22).

25. In response to Paragraph 33, Defendants restate and reallege their responses to Paragraphs 1 through 32.

26. In response to Paragraph 34, Defendants admit Defendant Helicopter Solutions, Inc. is operating Helicopter Adventures at a heliport on Co-Defendant’s land pursuant to the Lease

Agreement. The remaining allegations of Paragraph 34 constitute conclusions of law to which no response is required. To the extent a response is required, Defendants deny the remaining allegations of Paragraph 34 and demand strict proof thereof.

27. Paragraph 35 is a conclusion of law which requires no response. To the extent a response is required, Defendants deny the allegations of Paragraph 35 and demand strict proof thereof.

28. Defendants deny the allegations of Paragraph 36 and demand strict proof thereof.

29. Paragraphs 37 and 38 are conclusions of law which require no response. To the extent a response is required, Defendants deny any allegations in Paragraphs 37 and 38 that misstate, mischaracterize, or misapply South Carolina law or take the quoted language out of context and demand strict proof thereof. Defendants further deny any allegations in Paragraphs 37 and 38 that allege or could be construed as alleging Defendants create or act as a nuisance or public nuisance and demand strict proof thereof.

30. Defendants deny the allegations of Paragraphs 39, 40, and 41 and demand strict proof thereof.

31. Paragraphs 42 and 43 are conclusions of law which require no response. To the extent a response is required, Defendants deny any allegations in Paragraphs 42 and 43 that misstate, mischaracterize, or misapply South Carolina law or take the quoted or paraphrased language out of context and demand strict proof thereof.

32. Defendants deny the allegations of Paragraphs 44, 45, 46, 47, 48 and 49 and demand strict proof thereof.

33. In response to Paragraph 50, Defendants restate and reallege their responses to Paragraphs 1 through 49.

34. Paragraph 51 is a conclusion of law which requires no response. To the extent a response is required, Defendants deny any allegations in Paragraph 50 that misstate, mischaracterize, or misapply South Carolina law or take the quoted or paraphrased language out of context and demand strict proof thereof. Defendants further deny Paragraph 50 to the extent it alleges or could be construed as alleging Defendants are in violation of a zoning ordinance or that Plaintiff is entitled to any remedy in this action, including but not limited to injunctive relief, and demand strict proof thereof.

35. Defendants deny the allegations of Paragraph 52 and 53 and demand strict proof thereof.

36. Defendants deny the allegations of Paragraph 54, including all subparts, and specifically deny Plaintiff is entitled to the relief requested in this Paragraph.

**FOR A THIRD DEFENSE**

37. Plaintiff lacks standing to obtain a declaratory judgment, injunction or other prospective relief against Defendants and therefore no justiciable controversy exists and this action must be dismissed.

**FOR A FOURTH DEFENSE**

38. Plaintiff's claims are barred by the doctrines of laches and unclean hands.

**FOR A FIFTH DEFENSE**

39. Plaintiff's claims are barred by the doctrines of waiver and estoppel.

**FOR A SIXTH DEFENSE**

40. The claims and issues asserted by Plaintiff are not ripe for adjudication and therefore no justiciable controversy exists and this action must be dismissed.

**FOR A SEVENTH DEFENSE**

41. To the extent it is alleged, Defendants deny that their conduct constitutes a nuisance and assert the defense of contributory or comparative negligence with respect to any nuisance claim asserted by the Plaintiff. Specifically, Defendants are entitled to a determination of the percentage which Plaintiff's negligence contributed to any resulting damages and to a reduction of any amount awarded by an amount equal to the percentage of Plaintiff's own negligence unless Plaintiff's comparative negligence contributed more than 50% to the cause of the damages and, in that event, Plaintiff's claims should be barred.

**FOR AN EIGHTH DEFENSE**

42. To the extent it is alleged, Defendants deny that their conduct constitutes a nuisance. Defendants will show their use of the land as a heliport is specifically authorized by law and conducted in a lawful and reasonable manner and therefore is not a public nuisance as a matter of law.

**FOR A NINTH DEFENSE**

43. To the extent it is alleged, Defendants deny that their conduct constitutes a nuisance. Defendants will show their operations do not constitute a public nuisance because they do not impact the public at large or a sufficiently significant number of members of the public.

**FOR A TENTH DEFENSE**

44. To the extent it is alleged, Defendants deny that their conduct constitutes a nuisance and will show that they have acquired a prescriptive right to conduct their operations on the subject property.

**FOR AN ELEVENTH DEFENSE**

45. To the extent it is alleged, Defendants deny that their conduct constitutes a nuisance

and will show that Plaintiff's claim is barred by the doctrines of express and/or implied assumption of the risk or consent in that Plaintiff and/or those allegedly complaining regarding Defendants' operation assumed the risk by coming to the alleged nuisance. Alternatively, Plaintiff's assumption of risk should be considered as a facet of Plaintiff's comparative negligence.

**FOR AN TWELFTH DEFENSE**

46. Some or all of Plaintiff's claims and allegations may be preempted by federal law.

**FOR A THIRTEENTH DEFENSE**

47. The Complaint generally seeks "damages, and other monetary relief." To the extent Plaintiff intends to seek punitive damages, Defendants plead any and all applicable rights and protections afforded to it under the South Carolina Fairness in Civil Justice Act of 2011, codified at South Carolina Code Annotated Sections 15-32-510 to 15-32-540, including but not limited to any limitations or restrictions on punitive damages and the right to bifurcate the trial as to the issue of punitive damages, as a defense to Plaintiff's claims or request for an award of punitive damages (the entitlement to which is strictly denied).

**FOR A FOURTEENTH DEFENSE**

48. The Complaint generally seeks "damages, and other monetary relief." To the extent Plaintiff intends to seek punitive damages, punitive damages, as currently awarded in South Carolina, are violative of the United States Constitution and South Carolina Constitution, as well as the holding of *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), and the cases upon which it is based.

Furthermore, the U.S. Constitution's Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly [do not] represent," *Phillip Morris USA v. Williams*, 549 U.S. 346, 353, 27 S.Ct. 1057,

1063 (2007), and, therefore, to the extent that Plaintiff seeks an award of punitive damages for potential or speculative harm to non-parties to the present action, such prayer for relief is unconstitutional and must be struck from the pleadings and is otherwise inadmissible at trial. In addition, punitive damages are to be limited to an amount that is no greater than the award of actual damages, as explicated within *Exxon Shipping Company v. Baker*, 128 S. Ct. 2605 (2008).

**FOR A FIFTEENTH DEFENSE**

49. To the extent the Complaint seeks “damages or other monetary relief,” Plaintiff’s recovery must be reduced or offset by amounts it has received or will receive from others for the same damages claimed in this lawsuit.

**FOR A SIXTEENTH DEFENSE**

50. To the extent the Complaint seeks “damages or other monetary relief,” Plaintiff’s recovery must be barred or reduced to the extent it failed to mitigate its damages.

**FOR A SEVENTEENTH DEFENSE**

51. To the extent Plaintiff alleges Defendants’ current operations on the property or Defendants’ continued operations on the property up to January 1, 2024 constitute a nuisance and to the extent Plaintiff seeks damages or monetary relief for the same, Plaintiff’s claims are barred by the applicable statute of limitations.

**FOR AN EIGHTEENTH DEFENSE**

52. Defendants incorporate by reference as if set forth herein verbatim any applicable defenses asserted by their Co-Defendant consistent herewith verbatim.

**FOR A NINETEENTH DEFENSE**

53. Defendants specifically reserve and do not waive any additional and/or affirmative defenses as may be made available or revealed during the course of the investigation and/or

discovery in this case, as well as the right to amend their Answer to assert the same.

WHEREFORE, having fully answered Plaintiff's Complaint, subject to any and all motions, qualifications, or other pleadings, Defendants pray that this action be dismissed with prejudice and that Defendants be awarded costs and attorneys' fees as well as such other and further relief as this Honorable Court deems just and proper.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS  
HELICOPTER SOLUTIONS, INC. D/B/A  
HELICOPTER ADVENTURES AND  
FREDDIE RICK

October 1, 2021  
Columbia, South Carolina

|                                             |   |                                         |
|---------------------------------------------|---|-----------------------------------------|
| STATE OF SOUTH CAROLINA                     | ) | IN THE COURT OF COMMON PLEAS            |
|                                             | ) |                                         |
| COUNTY OF HORRY                             | ) | FIFTEENTH JUDICIAL CIRCUIT              |
|                                             | ) |                                         |
| Horry County, South Carolina,               | ) | Civil Action No.: 2021-CP-26-05002      |
|                                             | ) |                                         |
| Plaintiff,                                  | ) |                                         |
|                                             | ) |                                         |
| vs.                                         | ) | <b>DEFENDANTS HELICOPTER</b>            |
|                                             | ) | <b>SOLUTIONS, INC. D/B/A HELICOPTER</b> |
| Helicopter Solutions, Inc. d/b/a Helicopter | ) | <b>ADVENTURES &amp; FREDDIE RICK'S</b>  |
| Adventures, Freddie Rick, and Burroughs     | ) | <b>MOTION TO DISMISS OR FOR</b>         |
| & Chapin Company, Inc.,                     | ) | <b>JUDGMENT ON THE PLEADINGS</b>        |
|                                             | ) |                                         |
| Defendants.                                 | ) |                                         |
|                                             | ) |                                         |

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Defendants Helicopter Solutions, Inc., d/b/a Helicopter Adventures and Freddie Rick (collectively “Defendants”), by and through their undersigned counsel, hereby move pursuant to Rules 12(b)(6) and 12(c) of the South Carolina Rules of Civil Procedure to dismiss this action or enter judgment on the pleadings in Defendants’ favor. Defendants so move on the following grounds:

1. Plaintiff’s Causes of Action are not ripe and Plaintiff lacks standing as to all claims included in its Complaint. Thus, Plaintiff’s claims are not justiciable.

2. In its Complaint, Plaintiff requests the following: (1) a declaratory judgment finding that operation of a heliport at 1860 21<sup>st</sup> Ave North in Horry County (hereinafter “the Subject Property”) must cease before January 1, 2024 (hereinafter “Count 1”); (2) a declaratory judgment that the continuation of a heliport at the Subject Property after January 1, 2024, is a public nuisance (hereinafter “Count 2”); and (3) a permanent injunction to prevent Defendant HA from operating a heliport anywhere other than at a Public Use Airport after January 1, 2024 (hereinafter “Count 3”).

3. Under South Carolina law, “[a] threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy.” *Peoples Fed. Sav. & Loan Ass’n of S.C. v. Res. Plan. Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004). “A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character.” *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423–24, 593 S.E.2d 462, 466–67 (2004).

4. “Declaratory judgment actions must involve an actual, justiciable controversy that is ripe for determination.” *Waters v. S.C. Land Res. Conservation Comm’n*, 321 S.C. 219, 228, 467 S.E.2d 913, 918 (1996). While some jurisdictions have made exceptions in declaratory judgment actions where the “ripening seeds” of an actual controversy exist, South Carolina declines to extend such exception where “the facts do not indicate an imminent violation of rights.” *Id.*

5. Under South Carolina law, “[a] plaintiff has standing . . . when he sustained, or is in immediate danger of sustaining, actual prejudice or injury from the . . . action. To meet the “stringent” test for standing, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Jowers v. S.C. Dep’t of Health & Env’t Control*, 423 S.C. 343, 353–54, 815 S.E.2d 446, 451 (2018).

6. As Plaintiff pleads in its Complaint, Defendants’ leasehold interest in the Subject Property ends during the Summer of 2023. Defendants have not yet agreed to a renewal of the Lease Agreement.

7. As Plaintiff pleads in its Complaint, Horry County Ordinance 15-16 is not legally operative until January 1, 2024.

8. Accordingly, Defendants' use of the Subject Property after the operative date of Ordinance 15-16 is "contingent, hypothetical, [and] abstract," and Plaintiff has not pled any facts indicating that Defendants' violation of the ordinance is in any way "imminent" as required under South Carolina law. Additionally, since the Ordinance is not yet legally operative as to Defendants, Plaintiff has not suffered any invasion of a legally protected interest sufficient to constitute an "injury in fact."

9. Therefore, Plaintiff lacks standing to bring any of the claims alleged in the Complaint, and such claims are not ripe for judicial review.

10. Plaintiff failed to plead facts sufficient to entitle it to injunctive relief against an anticipated nuisance, and to the extent Plaintiff did plead sufficient facts, Plaintiff's attempts to regulate aircraft noise, timing of aircraft operations, air traffic patterns, or air traffic altitudes are preempted by federal law.

11. Under South Carolina law, "[t]o entitle one to injunctive relief against a threatened or anticipated nuisance, public or private, it must appear that a nuisance will inevitably or necessarily result from the act or thing which it is sought to enjoin. It is not enough to show that the anticipated acts threatened to or may become a nuisance, but the evidence must show that a nuisance is inevitable from the proposed use of the premises or will necessarily result." *Strong v. Winn-Dixie Stores, Inc.*, 240 S.C. 244, 254, 125 S.E.2d 628, 633 (1962).

12. As noted above, Plaintiff seeks injunctive relief on the basis that Defendants' operation of a heliport on the Subject Property after January 1, 2024, is a public nuisance.

13. Because such conduct is entirely speculative and not at all inevitable, Plaintiff's requests for a declaratory judgment and injunction should be dismissed.

14. Additionally, “in light of the pervasive nature of the scheme of federal regulation of aircraft noise, as evidenced by the Noise Control Act of 1972, the FAA and the Environmental Protection Agency [have] full control over airport noise, preempting local control. . . . Local [regulations] prohibiting night operations and proscribing air traffic patterns [are also] preempted.” *Hoagland v. Town of Clear Lake, Ind.*, 415 F.3d 693, 697 (7th Cir. 2005) (citing *Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973)).

15. To the extent Plaintiff attempts to declare Defendants’ helicopter operations a public nuisance in order to regulate aircraft noise, timing of aircraft operations, air traffic patterns, or air traffic altitudes, it is preempted by federal law, and therefore unconstitutional.

16. Next, Plaintiff has failed to plead the elements necessary for a county to obtain injunctive relief authorized by a statute. Under well-established South Carolina law, “[i]n order for a [county] to get an injunction which is specifically authorized by statute for a zoning violation they must show: (1) that it has an ordinance covering the situation; and (2) that there is a violation of that ordinance.” *Cty. of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 905 (Ct. App. 2002) (quoting *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000)).

17. As Plaintiff pleads in its Complaint, “[t]he land where Defendant HA operates is zoned Amusement/Commercial (AC)” and “[a] helicopter sightseeing business [is] a permitted use in an AC district.”

18. As Plaintiff pleads in its Complaint, Horry County Ordinance 15-16 is not legally operative as to Defendants operations until January 1, 2024, thus Defendants cannot be held in violation until January 1, 2024.

19. As Plaintiff pleads in its Complaint, Defendants' leasehold interest in the subject property ends in the Summer of 2023 and Defendants have not agreed to a renewal.

20. Thus, Plaintiff cannot show that (1) there is a currently effective ordinance covering the complained of situation or (2) that any ordinance has been violated by the complained of activities. Further, as noted above, Plaintiff cannot even show that a violation of the ordinance after its operative date of January 1, 2024, is imminent.

21. Accordingly, Plaintiff has failed to plead the elements necessary for a county to obtain an injunction authorized by statute under South Carolina law.

22. Finally, if Defendants' Motion is granted by this Court, Defendants are entitled to attorney's fees. "Under [S.C. Code] section 15-77-300, a party defending an action brought by a South Carolina political subdivision may recover attorney's fees and costs if three prerequisites are met: first, the contesting party must be the 'prevailing' party; second, the court must find 'that the agency acted without substantial justification in pressing its claim against the party'; and third, the court must find 'that there are no special circumstances that would make the award of attorney's fees unjust.'" *Richland Cty. v. Kaiser*, 351 S.C. 89, 96-97, 567 S.E.2d 260, 263-64 (Ct. App. 2002).

23. As outlined in this Motion, Plaintiff has acted without substantial justification by bringing claims that are hypothetical, abstract, and conjectural, without pleading any ripe or legally recoverable harms. Defendants are private citizens/entities that must defend this action with their own funds, and therefore, the circumstances make the award of attorney's fees just. Thus, if this Court grants this Motion, Defendants are entitled to recover attorney's fees and other costs as the Court would deem just and proper.

In further support of this Motion, Defendants rely on the pleadings, any supporting Memoranda of Law they may file, and such oral argument as the Court may hear.

Respectfully submitted,

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HELICOPTER ADVENTURES AND  
FREDDIE RICK

**DEFENDANTS HELICOPTER  
SOLUTIONS, INC. D/B/A  
HELICOPTER ADVENTURES &  
FREDDIE RICK'S MOTION TO  
DISMISS OR FOR JUDGMENT ON  
THE PLEADINGS**

October 1, 2021  
Columbia, South Carolina

|                                             |   |                                         |
|---------------------------------------------|---|-----------------------------------------|
| STATE OF SOUTH CAROLINA                     | ) | IN THE COURT OF COMMON PLEAS            |
|                                             | ) |                                         |
| COUNTY OF HORRY                             | ) | FIFTEENTH JUDICIAL CIRCUIT              |
|                                             | ) |                                         |
| Horry County, South Carolina,               | ) | Civil Action No.: 2021-CP-26-05002      |
|                                             | ) |                                         |
| Plaintiff,                                  | ) |                                         |
|                                             | ) |                                         |
| vs.                                         | ) | <b>MEMORANDUM IN SUPPORT OF</b>         |
|                                             | ) | <b>DEFENDANTS HELICOPTER</b>            |
| Helicopter Solutions, Inc. d/b/a Helicopter | ) | <b>SOLUTIONS, INC. D/B/A HELICOPTER</b> |
| Solutions, Freddie Rick, and Burroughs &    | ) | <b>SOLUTIONS &amp; FREDDIE RICK'S</b>   |
| Chapin Company, Inc.,                       | ) | <b>MOTION TO DISMISS OR FOR</b>         |
|                                             | ) | <b>JUDGMENT ON THE PLEADINGS</b>        |
| Defendants.                                 | ) |                                         |
|                                             | ) |                                         |

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Defendants Helicopter Solutions, Inc., d/b/a Helicopter Solutions and Freddie Rick (collectively “Defendants”), filed a Motion to Dismiss on October 4, 2021, pursuant to Rules 12(b)(6) and 12(c) of the South Carolina Rules of Civil Procedure to dismiss this action or enter judgment on the pleadings in Defendants’ favor. For the reasons set forth below, Defendants respectfully request this Court to grant Defendants’ Motion.

#### **FACTUAL/PROCEDURAL BACKGROUND**

In this declaratory judgment/injunctive relief action, Plaintiff Horry County (“the County”) seeks to prevent Defendants from operating a heliport on property leased from Defendant Burroughs & Chapin Company, Inc., after January 2024, more than two years after this action was filed. Specifically, the County requests a declaratory judgment stating that (1) operation of a heliport at 1860 21<sup>st</sup> Ave North (the “subject property”) must cease on or before January 1, 2024; (2) continued operation of a heliport at the subject property after January 1, 2024, constitutes a public nuisance; and (3) Defendants are not owed compensation or damages. (Compl. ¶ 54). Further, The County requests a permanent injunction prohibiting Defendants from operating a heliport anywhere other than at a Public Use Airport after January 1, 2024. (Compl. ¶ 54).

The relationship between the parties dates back to 2010 when Defendant Freddie Rick (“Defendant Rick”), who owns Defendant Helicopter Solutions, Inc. (“Helicopter Solutions”), initially contacted the Myrtle Beach and North Myrtle Beach airports to determine whether he could operate his helicopter sight-seeing business from either site. *See Helicopter Sols., Inc. v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015). However, neither airport would allow this type of business. Instead, Defendant Rick decided to lease the subject property from Defendant Burroughs & Chapin, Inc. *Id.*

At the time Defendants first leased the subject property, it was zoned Amusement/Commercial. While helicopter sight-seeing facilities were not specifically referenced in any zoning district provisions, an Horry County ordinance allowed the land to be used for “sight-seeing depots.” *Id.* at 4, 776 S.E.2d at 755. After significant planning, the Horry County Planning & Zoning, Code Enforcement, Engineering, and Stormwater Department conducted a series of site plan reviews and revisions, but ultimately approved Defendants’ use of the subject property for his helicopter tour business. *Id.* at 6, 776 S.E.2d at 755-756. Subsequently, a neighboring property owner filed an appeal to the County’s zoning board which overturned the Zoning Administrator’s decision. *Id.* at 6-7, 776 S.E.2d at 756. Helicopter Solutions appealed the decision, and in September 2015, the South Carolina Court of Appeals held that a helicopter sight-seeing tour business fell within the range of permitted uses in Horry County Amusement/Commercial zoning districts. *Id.* at 13, 776 S.E.2d at 759. Defendants then continued to lawfully operate their helicopter sight-seeing business on the subject property.

On April 20, 2016, seven (7) months after the Court of Appeals held Defendant Rick’s business was permitted under the zoning code, the Horry County Council adopted Ordinance 15-16 (“the Ordinance”) (Compl. ¶ 19). As noted in the Complaint, the Ordinance amended Horry

County Code § 539 to provide that heliports/helipads shall be permitted only at Public-Use Airports. (Compl. ¶ 21). **Notably, by its very terms, the Ordinance does not take effect until January 1, 2024.** (Compl. ¶ 24).

Defendants' lease on the subject property expires in August 2023, well before the Ordinance takes effect. (Compl. ¶ 28). Even so, the County alleges it mailed Defendant Rick a letter notifying him that he must cease his business on the subject property before January 1, 2024. (Compl. ¶ 30). The Complaint alleges that Defendant Rick informed the County that he intends to continue operating his helicopter business at the subject property until the County allows him to operate it from a public-use airport pursuant to the Ordinance. (Compl. ¶ 31). Again, we note that the lease on the subject property ends in the summer of 2023, and there are currently no plans for its extension.

#### **LAW/ANALYSIS**

“Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action.” *Doe v. Marion*, 361 S.C. 463, 468, 605 S.E.2d 556, 559 (Ct. App. 2004), *aff'd*, 373 S.C. 390, 645 S.E.2d 245 (2007). “A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the Plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court.” *Id.* In so doing, the Court “must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief.” *Id.* at 469, 605 S.E.2d at 559.

With regard to a motion for judgment on the pleadings under Rule 12(c), the Court may dismiss a claim when the pleadings are so defective that taking all the facts alleged as true, no cause of action or defense is stated. *Diminich v. 2001 Enterprises, Inc.*, 292 S. C. 141, 355 S. E. 2d 275 (1987). Judgment on the pleadings shall be granted “where there is no issue of fact raised

by the complaint that would entitle the plaintiff to judgment if resolved in plaintiff's favor." *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009).

In this case, the County requested the following relief: (1) a declaratory judgment finding that operation of a heliport at the subject property must cease before January 1, 2024, (2) a declaratory judgment that the continuation of a heliport at the Subject Property after January 1, 2024, is a public nuisance (hereinafter "Count 2"); and (3) a permanent injunction to prevent Defendant HA from operating a heliport anywhere other than at a Public Use Airport after January 1, 2024 (hereinafter "Count 3"). (Compl. ¶ 54). This court should dismiss the Complaint because 1) the claims set forth therein are not justiciable; 2) the County failed to plead facts sufficient to entitle it to injunctive relief against an anticipated nuisance; and 3) its attempted regulation is preempted by federal law. Further, pursuant to S.C. Code § 15-77-300, Defendants are entitled to attorney's fees and costs incurred in defending this action.

**I. The County's causes of action are not justiciable because its claims are not ripe and it lacks standing.**

Under South Carolina law, "[a] threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy." *Peoples Fed. Sav. & Loan Ass'n of S.C. v. Res. Plan. Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423-24, 593 S.E.2d 462, 466-67 (2004). Further, "[d]eclaratory judgment actions must involve an actual, justiciable controversy that is ripe for determination." *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 228, 467 S.E.2d 913, 918 (1996). While some jurisdictions have made exceptions in declaratory judgment actions where the "ripening seeds" of an actual controversy exist, South

Carolina declines to extend such exception where “the facts do not indicate an imminent violation of rights.” *Id.*

In determining ripeness, under Article III of the United States Constitution, “federal courts use a two-factor test: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration.” *Id.* at 227, 467 S.E.2d at 918.

In *Waters v. S.C. Land Resources Conservation Com’n*, residents of Lexington County, South Carolina brought an action against the J.M. Huber Corporation (“Huber”) to prevent Huber from future mining of adjacent property out of concerns that the mining operation would have adverse effects on the environment. *Id.* at 222, 467 S.E.2d at 915. While Huber held a leasehold interest in this property, Huber had not yet modified its permit to allow mining of the property. *Id.* at 227, 467 S.E.2d at 917. The *Waters* plaintiffs claimed, in part, that the South Carolina Mining Act violated their procedural due process rights because it would allow Huber to expand its mining permit to other lands it leased without proper notice in the future. *Id.*

The South Carolina Supreme Court held the procedural due process claim was not ripe for adjudication because Huber had not yet applied for a modification to mine adjacent land that it leased nor was there any indication that Huber ever would. *Id.* at 228, 467 S.E.2d at 918. Further, the Court held that “the mere act of applying to modify will not in and of itself violate appellants’ constitutional rights.” *Id.* The Court reasoned that “[i]t is not enough that a threat of possible injury currently exists; the mere threat of potential injury is too contingent or remote to support present adjudication.” *Id.*

In this case, the County requests that this Court enjoin a particular use of Defendants’ leased land in the future; namely, the County wants this Court to grant injunctive or declaratory relief to prevent Defendants from operating after the Ordinance takes effect on January 1, 2024.

Just as the South Carolina Supreme Court found that Huber’s future application to mine property it leased was too contingent or remote to support adjudication, Defendants’ use of the subject property for helicopter tours after January 1, 2024, in this case is likewise too contingent and remote to support adjudication. Whether injunctive or declaratory relief is needed to prevent Defendants from using the subject property for helicopter tours will not materialize for another two years when the Ordinance proscribing this use takes effect. This is exactly the kind of “contingent, hypothetical, [and] abstract,” threat of injury that South Carolina courts consistently reject. *Sunset Cay, LLC*, 357 S.C. at 423–24, 593 S.E.2d at 466–67.

Additionally, as the County pleads in its Complaint, Defendants’ leasehold interest in the subject property ends in August 2013. Neither Defendants nor Co-Defendant Burroughs & Chapin have expressed an intent to extend this lease. Defendant Burroughs & Chapin has stated in its Answer that the lease expires on August 31, 2023, with no option for renewal. (B&C Ans. ¶13). Defendant Burroughs & Chapin further denies it intends to renew the lease and explicitly states it “has not formed any intent to enter into a new lease with Helicopter Adventures for the subject premises, or otherwise to enter into any agreement in contravention of Ordinance 15.16.” (Compl. ¶32; B&C Ans. ¶ 22). Thus, not only is Defendants’ future use of the property for helicopter operations speculative, when the Ordinance takes effect, Defendants may not even have an interest in the subject property at all. Because the County requests relief for a speculative, hypothetical, and contingent injury, this Court should dismiss this action.

Similarly, as outlined above, the pleadings, if taken as true, do not demonstrate any issue that would entitle the plaintiff to judgment if resolved in plaintiff’s favor. The Complaint acknowledges that Defendants’ lease expires in August 2023, before the Ordinance becomes effective. Based on the pleadings, there is no issue to resolve in the County’s favor and judgment

on the pleadings in favor of Defendants is warranted.

Next, the County lacks standing to bring its claims. Under South Carolina law, “[a] plaintiff has standing . . . when he sustained, or is in immediate danger of sustaining, actual prejudice or injury from the . . . action. To meet the ‘stringent’ test for standing, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Jowers v. S.C. Dep’t of Health & Env’t Control*, 423 S.C. 343, 353–54, 815 S.E.2d 446, 451 (2018).

As noted above and acknowledged in the Complaint, Defendants’ leasehold interest in the subject property ends in August 2023. The lease has not been renewed. The only allegation pled that Defendants may violate the statute is an alleged statement by Defendant Rick that he intends to continue operating at the subject property until the County provides him with a location at a public use airport. Defendants have denied this allegation. (Ans. ¶23). However, as acknowledged by the County, Defendants are within their rights to operate Helicopter Solutions from the subject property until January 1, 2024. *Helicopter Sols., Inc.*, 414 S.C. 1, 776 S.E.2d 753.

Defendants’ hypothetical future violation of an Ordinance which does not take effect for nearly two years, and which regulates conduct on property that Defendants may not even have an interest in when the harm arises, is entirely conjectural. Accordingly, Plaintiff has not pled any facts demonstrating Defendants’ violation of the ordinance is in any way “imminent” or that it suffered an invasion of a legally protected interest sufficient to constitute an “injury in fact.”

Therefore, the County lacks standing to bring any of the claims alleged in the Complaint, and such claims are not justiciable.

**II. The County fails to plead facts sufficient to entitle it to injunctive relieve against an anticipated nuisance, and to the extent the County did plead sufficient facts, its attempts to regulate aircraft noise, timing of aircraft operations, air traffic patterns, or air traffic altitudes are preempted by federal law.**

Under South Carolina law, “[t]o entitle one to injunctive relief against a threatened or anticipated nuisance, public or private, it must appear that a nuisance will inevitably or necessarily result from the act or thing which it is sought to enjoin. It is not enough to show that the anticipated acts threatened to or may become a nuisance, but the evidence must show that a nuisance is inevitable from the proposed use of the premises or will necessarily result.” *Strong v. Winn-Dixie Stores, Inc.*, 240 S.C. 244, 254, 125 S.E.2d 628, 633 (1962).

As noted above, the County seeks injunctive relief on the basis that Defendants’ operation of a heliport on the subject property after January 1, 2024, is a public nuisance. This “anticipated nuisance” is not enough to entitle the County to injunctive relief under clearly established South Carolina law. Because such conduct is entirely speculative and not at all inevitable, the request for a declaratory judgment and injunction should be dismissed.

Next, the County has failed to plead the elements necessary for the County to obtain injunctive relief authorized by a statute. Under South Carolina law, “[i]n order for a [County] to get an injunction which is specifically authorized by statute for a zoning violation they must show: (1) that it has an ordinance covering the situation; and (2) that there is a violation of that ordinance.” *Cty. of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 905 (Ct. App. 2002) (quoting *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000)).

As the County pleads in its Complaint, “[t]he land where Defendant HA operates is zoned Amusement/Commercial (AC)” and “[a] helicopter sightseeing business [is] a permitted use in an AC district.” Additionally, the Complaint acknowledges that Ordinance 15-16 is not legally operative as to Defendants’ operations until January 1, 2024. Because the Ordinance is not legally effective until January 1, 2024, the County cannot show that (1) there is a currently effective

ordinance covering the complained of situation or (2) that any ordinance has been violated by the complained of activities as required to obtain injunctive relief. In fact, the County cannot even show that Defendants are likely to violate the Ordinance. As the County pleads in its Complaint, and all parties acknowledge, Defendants' leasehold interest in the subject property ends in August 2023 and Defendants have not agreed to a renewal. Accordingly, the County has failed to plead the elements necessary for a county to obtain an injunction under South Carolina law.

Additionally, "in light of the pervasive nature of the scheme of federal regulation of aircraft noise, as evidenced by the Noise Control Act of 1972, the FAA and the Environmental Protection Agency [have] full control over airport noise, preempting local control. . . . Local [regulations] prohibiting night operations and proscribing air traffic patterns [are also] preempted." *Hoagland v. Town of Clear Lake, Ind.*, 415 F.3d 693, 697 (7th Cir. 2005) (citing *Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973)). To the extent the County attempts to declare Defendants' helicopter operations a public nuisance in order to regulate aircraft noise, timing of aircraft operations, air traffic patterns, or air traffic altitudes, it is preempted by federal law, and therefore unconstitutional.

The Supreme Court has interpreted the Supremacy Clause of the U.S. Constitution to elevate federal law above state or local laws in three primary scenarios: (1) where Congress has occupied the field to the exclusion of parallel state regulation, or (2) where the dominant interests of the federal government preclude state intervention, or (3) where the administration of state acts would conflict with the operation of the federal plan. *Pennsylvania v. Nelson*, 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956). Preemption is predicated upon Congressional intent to monopolize an area of legislation. *Hillsborough County v. Automated Medical Labs, Inc.*, 471 U.S. 707, 105 S. Ct. 2371, 85 L. Ed. 2d 640 (1985).

In *City of Burbank v. Lockheed Air Terminal*, the city attempted to enact an ordinance establishing a curfew on the takeoff and landing of jets from a privately owned airport. The Court held that the ordinance was unconstitutional because it was preempted by the Supremacy Clause. In so holding, the Court cited language from Justice Jackson's opinion in *Northwest Airlines, Inc. v. Minnesota*, which states:

Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.

The Court further reasoned that "it is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption." *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633, 93 S. Ct. 1854, 1860, 36 L. Ed. 2d 547 (1973). The Court concluded that although states may generally regulate noise through exercise of the police power, "[t]he pervasive control vested in the EPA and the FAA . . . left no room for curfews or other local controls." *Id.* 411 U.S. at 638.

Just as federal FAA and EPA regulations preempted the City of Burbank's ordinance from restricting flights from a private airport in *City of Burbank*, FAA and EPA regulations should preempt Horry County's action for declaratory and injunctive relief in this case. Further, to the extent this Court determines that this case should not be dismissed, Defendants alternatively assert that the Ordinance itself is preempted by federal law.

**III. Finally, if Defendants' Motion is granted by this Court, Defendants are entitled to attorney's fees.**

"Under [S.C. Code] section 15-77-300, a party defending an action brought by a South Carolina political subdivision may recover attorney's fees and costs if three prerequisites are met: first, the contesting party must be the 'prevailing' party; second, the court must find 'that the

agency acted without substantial justification in pressing its claim against the party’; and third, the court must find ‘that there are no special circumstances that would make the award of attorney’s fees unjust.’” *Richland Cty. v. Kaiser*, 351 S.C. 89, 96–97, 567 S.E.2d 260, 263–64 (Ct. App. 2002).

As outlined in this memorandum, the County has acted without substantial justification by bringing claims that are hypothetical, abstract, and conjectural, without pleading any ripe or legally recoverable harms. Defendants are private citizens/entities that must defend this unwarranted action with their own resources, and therefore, the circumstances make the award of attorney’s fees just. Thus, if this Court grants this Motion, Defendants are entitled to recover attorney’s fees and other costs as the Court would deem just and proper.

### **CONCLUSION**

For the foregoing reasons, Defendants respectfully request the Court dismiss this matter or enter judgment on the pleadings in their favor. Defendants further request the Court order the County to pay the attorneys’ fees and costs incurred by Defendants with respect to this matter.

**[Signature Page to Follow]**

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS  
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HELICOPTER SOLUTIONS AND  
FREDDIE RICK

**MEMORANDUM IN SUPPORT OF  
DEFENDANTS HELICOPTER  
SOLUTIONS, INC. D/B/A  
HELICOPTER SOLUTIONS &  
FREDDIE RICK'S MOTION TO  
DISMISS OR FOR JUDGMENT ON  
THE PLEADINGS**

January 24, 2022  
Columbia, South Carolina

|                              |   |                                     |
|------------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA      | ) | IN THE COURT OF COMMON PLEAS        |
|                              | ) | FIFTEENTH JUDICIAL CIRCUIT          |
| COUNTY OF HORRY              | ) | CIVIL ACTION NO. 2021-CP-26-05002   |
|                              | ) |                                     |
| HORRY COUNTY, South Carolina | ) |                                     |
|                              | ) |                                     |
| Plaintiff,                   | ) |                                     |
|                              | ) |                                     |
| v.                           | ) | <b>HORRY COUNTY’S RESPONSE TO</b>   |
|                              | ) | <b>HELICOPTER SOLUTIONS, INC.’S</b> |
| HELICOPTER SOLUTIONS, INC.   | ) | <b>AND FREDDIE RICK’S MOTION TO</b> |
| d/b/a Helicopter Adventures, | ) | <b>DISMISS</b>                      |
| FREDDIE RICK, and            | ) |                                     |
| BURROUGHS & CHAPIN           | ) |                                     |
| COMPANY, INC.                | ) |                                     |
|                              | ) |                                     |
| Defendants.                  | ) |                                     |

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Helicopter Adventures, Inc. and its owner, Freddie Ricks (the “HA Defendants” or “HA”) seek dismissal of Horry County’s action to declare the rights and obligations of the parties under a 2016 County ordinance (Ordinance 15-16 or the “Ordinance”) regulating the HA Defendants’ helicopter sightseeing business at 1860 N. 21st Avenue North in Horry County.

The Ordinance requires the business to cease December 31, 2023, but Ricks has told the County that he has no intent to cease operations “unless and until” the County finds him an alternate site. The County seeks a declaration that its 2016 ordinance is valid, that the HA Defendants must comply, and that the County has no duty to provide them an alternative site.

Because there is a present, judicial controversy between the parties that would benefit from a declaration of the parties’ rights and obligations under the Ordinance, the County is entitled to a declaratory judgment now—and need not wait for the opposing parties to file an eleventh-hour challenge to the ordinance. *Cf. Capital Outdoor Advert., Inc. v. City of Raleigh*, 446 S.E.2d 289, 298 (N.C. 1994) (“Litigation has already added more than five years to the amortization grace period, and twenty-seven billboards required to be removed on or before 24

April 1989 are still standing. *Much of the inequity resulting from such cases may be prevented by an early determination of the legal issues presented.*") (emphasis added).

For these reasons, Horry County requests that the Court deny the HA Defendants' motion to dismiss.

## **I. Standard of Review**

A trial judge may dismiss a claim only when the defendant demonstrates the plaintiff's "failure to state facts sufficient to constitute a cause of action" in the pleadings filed with the court. Rule 12(b)(6), SCRPC. "The trial court must dispose of a motion for failure to state a cause of action based solely upon the allegations set forth on the face of the complaint." *Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987). "The motion cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case." *Id.* All properly pleaded factual allegations are deemed admitted for the purposes of considering a motion for judgment on the pleadings. *Russell v. Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991).

## **II. Argument**

### **A. The County presents a justiciable claim for declaratory judgment.**

"Justiciability encompasses ... ripeness ... and standing." *James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010). Ripeness involves avoiding resolution of purely hypothetical controversies. *Colleton Cty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cty.*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006). The related doctrine of standing requires "a personal stake in the subject matter of the lawsuit." *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001).

The Declaratory Judgments Act provides that “[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” S.C. Code Ann. § 15–53–20 (1976).

The Act specifically provides for the declaration of rights under a local government’s ordinance: “Any person ... whose rights, status, or other legal relations are affected by a statute [or] municipal ordinance ... may have determined any question of construction or validity arising under the ... statute [or] ordinance ... and obtain a declaration of rights, status or other legal relations thereunder.” S.C. Code Ann. § 15–53–30 (1976); see also Rule 57, SCRCP.

Moreover, the Act is a “proper vehicle in which to bring a controversy before the court when there is an existing controversy *or at least the ripening seeds of a controversy*.”<sup>1</sup> *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) (emphasis added) (quoting *Waller v. Waller*, 220 S.C. 212, 223, 66 S.E.2d 876, 882 (1951)).

It is quite true that a declaratory judgment should not deal with moot or abstract matters or constitute a merely advisory opinion, and to this end there should be an existing controversy, or at least the ‘ripening seeds of a controversy,’ as stated in 16 *Am. Jur.* 284, but the basic purpose of the act is to provide for declaratory judgments *without awaiting a breach of existing rights*. The presence of an actual controversy in the case at bar is sufficiently shown by the pleadings in behalf of the appellant and the brief of his counsel.

*Waller v. Waller*, 220 S.C. 212, 223, 66 S.E.2d 876, 882 (1951) (emphasis added).

Under governing law, the controversy between the County and the HA Defendants is ripe for resolution under the Declaratory Judgment Acts, which specifically provides for the declaration of rights under an ordinance such as Horry County Ordinance 15-16.

First, Mr. Ricks has expressly stated his intent to remain at his present location unless and until Horry County provides him with an alternative site—a duty that the County contends it has

<sup>1</sup> Contrary to the HA Defendants’ motion, the “ripening seeds of a controversy” standard *has* been followed in South Carolina, including in our Supreme Court’s 2004 *Sunset Cay* decision.

no obligation to perform. The County expressly alleged this fact in its Complaint at page 2 (top paragraph) and page 8 (¶ 31 (“On or about May 24, 2021, Defendant Rick informed the County that HA intends to continue operating at its current location unless and until the County provides him with a location at MYR, which is located in the City of Myrtle Beach.”).)

At the motion to dismiss stage, the Court may consider only the County’s factual allegations—not the denials of any answer or an argument in a brief. *Brown*, 291 S.C. at 366, 353 S.E.2d at 698. The County’s factual allegation that Ricks intends to defy the County’s ordinance by continuing to operate indefinitely is “deemed admitted for the purposes of considering a motion” under Rule 12(b), regardless of whether that motion is to dismiss or for judgment on the pleadings. *Russell*, 305 S.C. at 89, 406 S.E.2d at 339.<sup>2</sup>

Second, the County and the Defendants have a strong interest in obtaining a judicial declaration now that Ricks and his company must comply with the Ordinance. S.C. Code Ann. § 15–53–30 (providing that a court may issue a declaration of rights and legal relations pertaining to “any question of construction or validity arising under the ... [an] ordinance ....”).

The County Council passed the Ordinance in 2016, and provided an amortization period of more than seven years for the HA Defendants’ to recoup their investment at their present location. This time frame is more than triple the amortization periods that have been upheld by the South Carolina Supreme Court. *See, e.g., Centaur, Inc. v. Richland County*, 301 S.C. 374, 392 S.E.2d 165 (1990) (upholding two-year amortization period for nonconforming businesses).

<sup>2</sup> The same (that the allegation must be deemed admitted) is also true of the County’s allegation that Burroughs & Chapin “intends to allow HA to renew its Lease, or enter into a new lease allowing operation of a heliport at the Property, after the Extended Term of the current Lease ends.” (Compl. ¶ 32.) However, it is not necessary to resolve anything about lease arrangements to dispose of the HA Defendants’ motion to dismiss because HA Defendants’ intent to continue operating at their present location indefinitely, in violation of the Ordinance, creates a justiciable controversy now. A private party can violate a zoning ordinance regardless of whether they have a lease with another private party.

Absent a declaration now, the HA Defendants could wait until the eleventh hour, just before December 31, 2021, to file an action for injunctive relief to challenge the validity of the Ordinance. They could argue that the ordinance is preempted, unconstitutional, etc., and urge the Court to issue a temporary injunction to prevent the Ordinance from being enforced until these important issues can be resolved, which could take years to occur.

Delay in challenging an amortization period under the amortization period has almost run is common practice in multiple areas of land use law. The result is that an already-years-long amortization period would get extended for years by virtue of the litigation, thwarting the policy adopted by the elected representatives of the people in the community. *See* Compl. Ex. B, Ordinance 15-16 at 1-2 (preamble identifying negative impacts on the community sought to be addressed by the Ordinance).

Even if the Court does not grant a temporary injunction at the eleventh hour, the harm cause by the delay in resolving the issues is done. If the County enforces its Ordinance before the judicial dust settles, then it risks significant monetary damages if a Court later determines that it stopped a multi-million dollar business under an Ordinance that is for some reason invalid.

The Declaratory Judgments Act exists to avoid exactly this kind of Hobbesian choice. As our Supreme Court explained more than 70 years ago, “the basic purpose of the act is to provide for declaratory judgments without awaiting a breach of existing rights.” *Waller*, 220 S.C. at 223, 66 S.E.2d at 882; *Capital Outdoor Advert., Inc. v. City of Raleigh*, 446 S.E.2d 289, 298 (N.C. 1994) (encouraging the “early determination of the legal issues presented” to prevent the “inequity result from such cases”).

The HA Defendants’ arguments to the contrary are unavailing. Showing their cards, they say that they “have not yet agreed to a renewal of the Lease Agreement.” (Mot. Dismiss at 2 ¶ 6.)

But the Complaint alleges that the HA Defendants' intend to continue operating unless and until the County does something that it has no duty to do. That is the only fact that can be considered at this stage.

Moreover, whether a lease presently exists between two private parties does not negate the present controversy between the County and the HA Defendants about the parties duties—that is, their “rights, status, or other legal relations”—under the Ordinance. The County says that it has no duty to find an alternative site for their business; HA says that the County does have such a duty, and that it is going to continue operating indefinitely at its present location unless and until the County fulfills that duty.

The HA Defendants confuse the issues when they conflate the County's request for a declaratory judgment with the County's separate claim for injunctive relief. Under the Act, a declaration of rights is appropriate “whether or not further relief is or could be claimed.” S.C. Code Ann. § 15–53–20. So the validity of the County's claim for declaratory relief does not depend upon the ripeness *vel non* of another claim for relief contained in the Complaint.

The HA Defendants also press the canard that the Ordinance is not “legally operative.” Of course, the Ordinance has been “legally operative” since it was passed six years ago, in 2016. It prohibits any helicopter sightseeing operating in any location other than at a public use airport. It immediately rendered HA a nonconforming use of land, with all of the restrictions that apply to such uses. The time period given for nonconforming uses to terminate has been decreasing for several years, and continues to do so day by day. There is no theory under which the County must wait until January 1, 2024 to obtain a determination of “the legal relations” under the Ordinance between the County and a recalcitrant party who disclaims a duty to obey the Ordinance.

The HA Defendants could, of course, resolve the issue by coming into Court, and stating on the record, that they do not dispute the validity of Ordinance and that they will not operate their business at its present location after December 31, 2023. This understanding could be reduced to a consent order and the matter could be resolved in a binding court order. This the HA Defendants will not do, showing that there is a *bona fide* dispute between them and the County.

**B. The HA Defendants' remaining arguments are makeweight.**

The HA Defendants' motion contains other arguments that are easily disposed of.

First, the motion spends considerable time on the argument that the County is not entitled to a present injunction. As explained above, the request for injunctive relief is separate from the County's request for declaratory relief, and is dependent upon it. In other words, if the Court concludes—as the County will urge on the merits—that the Ordinance is valid, then the County would be entitled to an injunction against any party's stated intent to violate the Ordinance. The hope, of course, would be that the Court's declaration of rights under the Ordinance would settle the issue, and that all parties will act in accordance with the Court's declaration.

But this argument only proves the need for a declarations of rights, because that is the surest means for the Court to avoid having to grant injunctive relief—temporary or otherwise—against any party. Resolving the parties' rights now means that there is time for the orderly presentation of legal claims, so that coercive relief against a party does not become necessary. The mere fact that the County has included a claim for potential relief that it may need to seek in the wake of a declaratory judgment does not justify dismissal of the request for that declaratory judgment.

Second, the HA Defendants claim that the Ordinance is preempted. It is not. Federal preemption arises from the Supremacy Clause of the U.S. Constitution. U.S. Const. Art. VI, cl. 2.

State preemption of local law is evaluated under the same framework as federal preemption of state law. *South Carolina State Ports Authority v. Jasper County*, 368 S.C. 388, 397-401 (2006). Preemption of a local law occurs through (1) express preemption, (2) implied field preemption, or (3) implied conflict preemption. *Id.* “Express preemption occurs when [Congress or] the General Assembly declares in express terms its intention to preclude local action in a given area.” *Id.* at 397. “Under implied preemption, an ordinance is preempted when the . . . statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates [national] or statewide uniformity.” *Id.* “Conflict preemption occurs when the ordinance hinders the accomplishment of the statute’s purpose or when the ordinance conflicts with the statute such that compliance with both is impossible.” *Id.* at 401.

Under the Federal Aviation Act, “[t]he United States government has exclusive sovereignty of *airspace* of the United States.” 49 U.S.C. § 40103(a)(1) (emphasis added). *Hoagland v. Town of Clear Lake, Indiana*, 344 F. Supp. 2d 1150, 1156 (N.D. Ind. 2004) (collecting cases).

But federal preemption does not extend to state and local land-use regulations, even if those regulations pertain to the locations of airports. *Broadbent v. Allison*, 155 F. Supp. 2d 520, 524 (W.D.N.C. 2001) (“deciding whether to allow planes to land and takeoff from a certain location is a quintessential land use issue over which state and local governments possess near-plenary authority”) (quoted in *Hoagland*, 344 F. Supp. 2d at 1158); *see also Gustafson v. City of Lake Angelus*, 76 F.3d 778, 790 (6th Cir. 1996) (upholding ordinance prohibiting the landing of seaplanes on a lake because “[f]ederal preemption of airspace under [the Federal Aviation Act] does not limit the right of local governments to designate and regulate aircraft landing areas”). In *Hoagland*, pursuant to a dispute between a Town and the owner of a private heliport, the

Northern District of Indiana concluded that federal preemption of aviation did not prevent a Town from amending its ordinance to require a special use permit for an “[a]ircraft landing strip, pad, or space.” *Hoagland*, 344 F. Supp. 2d at 1153-59.

Likewise, state law does not preempt the Ordinance. The South Carolina Airports Act gives counties and municipalities broad authority to enact police power regulations for airports, which encompasses private heliports and helipads. S.C. Code § 55-9-230 (“Counties . . . acquiring, establishing, developing, operating, maintaining, controlling or having an interest in airports . . . may promulgate, amend and enforce police regulations for these entities . . . .”); S.C. Code § 55-1-5 (definition of airport includes “any area, private or public, . . . which is used or which is made available for the landing and take-off of aircraft,” including heliports). This demonstrates the General Assembly’s specific intent to *allow* counties to regulate airports within their jurisdiction, so any claim of express or implied preemption of the entire field of airport regulations fails.

Third, the HA Defendants claim they are entitled to attorneys’ fees for the County’s effort to seek a declaration of its rights and duties relative to the Ordinance. This argument is a non-starter.

The HA Defendants cite the relevant statute and one case, which *reversed* an award of attorneys’ fees against a county. *Richland Cty. v. Kaiser*, 351 S.C. 89, 96, 567 S.E.2d 260, 263 (Ct. App. 2002). Here, the HA Defendants have not yet been determined to be a “prevailing party,” as the motion to dismiss has not yet been resolved. Even if the motion were successful, it would only result in a dismissal without prejudice, not a dismissal on the merits. Thus, it is doubtful that a dismissal based on justiciability alone would ever warrant attorneys’ fees.

Nor could the HA Defendants satisfy the second element, i.e., that the County acted without substantial justification in pressing its claim for declaratory relief. As explained above, Mr. Ricks says he has no intent to discontinue his helicopter operation, so this is exactly the kind of case where declaratory relief is appropriate. It was only after several months of negotiations with Mr. Ricks, and his expression of recalcitrance at obeying the Ordinance, that the County filed this suit for a judicial declaration to settle the rights of the parties.

Finally, any award of attorneys' fees would be unjust. The County is seeking to avoid a last-minute lawsuit and the potential risk of millions of dollars in economic damages (ultimately payable by the citizens of Horry County) by obtaining a timely declaration of rights relative to Ordinance 15-16 and its amortization provision. As the North Carolina Supreme Court explain, it is precisely these kinds of cases where an early judicial determination of rights *should* be sought.

### **III. Conclusion**

The County has a right to obtain a judicial determination of its rights and duties relative to Helicopter Adventures and Ordinance 15-16. S.C. Code Ann. § 15-53-30 (1976); see also Rule 57, SCRCP. There is a present, existing controversy between the parties that can, and should, be resolved now rather than later. Thus, the County requests that the Court deny the motion to dismiss.

Dated: January 24, 2022

Respectfully submitted,

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RECEIVED

May 03 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Hon. J. Cordell Maddox, Jr., Circuit Court Judge

---

CASE NO.: 2021-CP-26-05002

Horry County, South Carolina,.....Appellant,

v.

Helicopter Solutions, Inc d/b/a Helicopter Adventures, Freddie Rick, and  
Burroughs and Chapin Company, Inc.....Respondents

---

NOTICE OF APPEAL

---

Appellant, Horry County appeals the Order of Dismissal of the Honorable J. Cordell Maddox, Jr. in connection with the above captioned lawsuit. Judge Maddox's order was electronically signed and filed on April 22, 2022. A copy of his order is attached hereto as Exhibit "A". Appellant received notice of the final order attached as Exhibit "A" on April 22, 2022.

S/ Michael W. Battle

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May 03 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Hon. J. Cordell Maddox, Jr., Circuit Court Judge

CASE NO.: 2021-CP-26-05002

Horry County, South Carolina,.....Appellant,

v.

Helicopter Solutions, Inc d/b/a Helicopter Adventures, Freddie Rick, and  
Burroughs and Chapin Company, Inc.....Respondents

PROOF OF SERVICE

I certify that I have this 3rd day of May 2022 served a copy of a Notice of Appeal on Attorneys of Record listed below by depositing a copy of same in the US Mail.

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|-------------------------------|---|----------------------------|
| State of South Carolina       | ) | Court of Common Pleas      |
|                               | ) | Fifteenth Judicial Circuit |
| County of Horry               | ) | Case No. 2021-CP-26-05002  |
|                               | ) |                            |
|                               | ) |                            |
| Horry County, South Carolina, | ) |                            |
|                               | ) |                            |
| Plaintiff,                    | ) |                            |
|                               | ) |                            |
| -vs-                          | ) | Transcript of Record       |
|                               | ) |                            |
|                               | ) |                            |
| Helicopter Solutions, Inc.,   | ) |                            |
| d/b/a Helicopter Adventures,  | ) |                            |
| Freddie Rick, and Burroughs & | ) |                            |
| Chapin Company, Inc.,         | ) |                            |
|                               | ) |                            |
| Defendants.                   | ) |                            |
|                               | ) |                            |

January 25, 2022  
Via WebEx Virtual Courtroom

B E F O R E:

The Honorable J. Cordell Maddox, Jr., Judge

A P P E A R A N C E S:

Scott Bergthold, Esquire  
Michael W. Battle, Esquire  
Attorneys for the Plaintiff

Joseph McCulloch, Esquire  
James C. Clark, Esquire  
Christian Stegmaier, Esquire  
Attorneys for the Defendants

Proceedings taken down electronically

Transcribed by:  
Krystal J. Smith  
Official Circuit Court Reporter

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(No Exhibits Presented)

COURT REPORTER LEGEND

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| dashes   | --    | intentional or purposeful interruption |
|          |       | or change in thought                   |
| ellipses | . . . | trailing off                           |
| [ph]     |       | phonetically written                   |
| [sic]    |       | written as said                        |

1 JANUARY 25, 2022

2 (WHEREUPON, the proceedings were commenced via WebEx  
3 virtual courtroom.)

4 THE COURT: All right. This next case is Horry County  
5 versus Helicopter Solutions. It's a motion to dismiss. Is  
6 that correct?

7 MR. BERGTHOLD: Yes, Your Honor. This is Scott  
8 Bergthold on behalf of Horry County. I believe it's the  
9 defendants' -- the Helicopter Adventures defendants' motion  
10 to dismiss.

11 THE COURT: Okay. And who is -- who will be speaking  
12 because I don't hear any -- oh, I can't -- I can't hear you,  
13 Joe. I heard the last part of what you said, but not the  
14 beginning.

15 MR. MCCULLOCH: Judge, can you hear me?

16 THE COURT: I can now, yeah.

17 MR. MCCULLOCH: Excellent. I'm sorry. I stepped away  
18 for just a moment and you came back and surprised me.

19 THE COURT: Well, you know, it wouldn't be the first  
20 time I'm sure I surprised you with something stupid. So, you  
21 know, go ahead.

22 MR. MCCULLOCH: Judge, this is our motion, and I guess  
23 let me begin by saying I have just gotten over COVID. So Mr.  
24 Battle catches me in a weakened state this morning, but this  
25 is my first day back in the office. But I don't -- I'm not

1 too much afraid of being a long-hauler because I don't think  
2 I've got that much time left anyway, but --

3 THE COURT: Well, I -- you know -- well, we'll talk  
4 about this when it's over, but I do want to ask you something  
5 about it. And are you okay?

6 MR. MCCULLOCH: I'm fine, Judge. Just my -- I'm a  
7 little hoarse, but, you know, I've got that Kevin Costner  
8 voice. I should do podcasts maybe.

9 THE COURT: Yeah. You need to do something without  
10 visuals if you want to pass for Kevin Costner.

11 Our clerk of court up here, who as I said earlier I've  
12 slandered him badly, but he was one of those people that at  
13 the beginning of all this process thought it was the Dekalb  
14 County Democratic Women's Club he was trying to defeat. It  
15 was a political issue, and he's a long-hauler and, boy, he  
16 has really had a tough time.

17 And my wife Donna just gets madder and madder every day  
18 at our vaccination rate. And as of last night, I think we  
19 were 32 percent positive, which is just embarrassing, but  
20 anyway, I'm sorry.

21 MR. MCCULLOCH: No, sir.

22 THE COURT: It's your motion. You go ahead.

23 MR. MCCULLOCH: I marvel at it all.

24 THE COURT: Yeah.

25 MR. MCCULLOCH: I should mention Christian Stegmaier,

1 co-counsel, has indicated to me this morning he had  
2 difficulty getting in. I see his name up, but -- so maybe he  
3 has --

4 MR. STEGMAIER: Joe, can --

5 MR. MCCULLOCH: -- been successful.

6 MR. STEGMAIER: Can you hear me, Joe?

7 MR. MCCULLOCH: Yes.

8 THE COURT: We can hear you, but not see you.

9 MR. STEGMAIER: Yeah. I can't -- I can't see anybody,  
10 but I can hear everything. So that's good enough.

11 THE COURT: Okay.

12 MR. MCCULLOCH: Christian, you're not missing anything  
13 in terms of the visual, but --

14 THE COURT: No. Really this is a -- this is an ugly  
15 bunch of people on here.

16 MR. MCCULLOCH: Judge, if I may, I will begin by saying  
17 that this is our motion to dismiss under 12. It's a 12(b)  
18 motion, and this has been briefed and re-briefed. So you  
19 should have our fairly explanatory motion to dismiss filed  
20 some time ago, a memorandum in support of the motion to  
21 dismiss, which was filed Friday or Monday -- I'm sorry I  
22 don't recall which -- and a motion filed in opposition by  
23 opposing counsel I think yesterday.

24 So there's a lot of information there that kind of boils  
25 this motion down to the simplicity that we believe and have

1 filed a motion asking you to dismiss this lawsuit because it  
2 is not an active justiciable controversy. And we've provided  
3 cases in support of that concept, Your Honor, and we believe  
4 the plaintiff does not at this time have any immediate basis  
5 to file this action, which was filed in July of I guess this  
6 year. I don't know what year we're in. Last year, and the  
7 -- we just don't think the issues are ripe.

8 And, Your Honor, I sent a message to your law clerk  
9 asking him to have at his fingertips and ultimately your  
10 fingertips the complaint, the answer of Burroughs & Chapin,  
11 who is the other defendant in this matter, as well as our  
12 answer because I think that those -- there are several --  
13 three paragraphs or four paragraphs that I think are  
14 dispositive on this issue.

15 So let me again say that this action is an action  
16 brought by Horry County against our clients, the Helicopter  
17 Adventures and its owner, Freddie Rick. The action seeks a  
18 declaratory judgment I guess in essence on the legality of an  
19 ordinance enacted by Horry County in 2016, the purpose of  
20 which was to control helicopter activities in Horry County  
21 and to require that in January of 2024 that no helicopter-  
22 based activity could occur in Horry County except unless  
23 located on its airport -- the Myrtle Beach International  
24 Airport grounds.

25 It also seeks a finding by this Court that if Mr. Rick

1 or anyone, I guess Mr. Rick in specific, continued operation  
2 of his helicopter activities on private land rented from  
3 Burroughs & Chapin, if he continued that activity after  
4 January 1 of 2024, that he would be engaged in a public  
5 nuisance, and Horry County seeks a temporary and permanent  
6 injunction or I guess a permanent injunction that would only  
7 come to fruition if, again, Freddie Rick and his operation  
8 continued after January 1 of 2024.

9 So I think Your Honor gets the sense right off the bat  
10 that there is no immediacy and no -- no injury capable. The  
11 only person injured currently by this lawsuit is my client,  
12 who was engaged in negotiations to relocate his facility to  
13 the airbase, the Myrtle Beach airbase, and in the form of --  
14 he's injured in the form of having to defend a lawsuit that  
15 should not have been filed.

16 So, Your Honor, in furtherance of simplicity, if I could  
17 ask you to look at the complaint of the plaintiff,  
18 specifically paragraph 31 and 32.

19 THE COURT: Let me see if he's got that. Oh, I'm  
20 getting -- yep, he's going to bring that in. So we're in  
21 different rooms.

22 MR. MCCULLOCH: I can read it. It's not long.

23 THE COURT: Okay.

24 MR. MCCULLOCH: Paragraph 31 of the plaintiff's  
25 complaint says that on or about May 24, 2021, Defendant Rick

1 informed the County that HA, which is Helicopter Adventures,  
2 intends to continue operating at its current location unless  
3 and until the County provides him with a location at MYR,  
4 which is the acronym for Myrtle Beach International, located  
5 in the city of Myrtle Beach.

6 It states that, Your Honor, in the complaint, and I  
7 mentioned that to you because it appears that that is the  
8 sole basis of standing asserted by the plaintiff.

9 In their recently filed response and motion to -- in  
10 opposition to our motion to dismiss, they state on the first  
11 page: the ordinance requires the business to cease December  
12 31, 2023. I'm calling that January 1 of 2024, but Ricks  
13 [sic] has told the County that he has no intent to cease  
14 operations unless and until the County finds him an  
15 alternative site. They go on to say on the sixth page of  
16 their memorandum in opposition to this motion that that is  
17 the only fact that can be considered at this stage.

18 Well, Your Honor, that's simple and simplistic.  
19 Paragraph 31 is out of context I would suggest, but it  
20 certainly is without context and was a statement made in May  
21 of 2021, maybe made by Mr. Rick.

22 In the complaint and the paragraph following that,  
23 paragraph 32, it says B&C -- that is Burroughs & Chapin --  
24 intends to allow Helicopter Adventures to renew its lease or  
25 enter a new lease allowing operation of a heliport at the

1 property after the extended term of the current lease ends.

2 And, Your Honor, that becomes extremely important for a  
3 couple of reasons.

4 First, it just isn't true and, second, this lease ends.  
5 The lease that -- Mr. Rick operates his Helicopter Adventures  
6 on a private piece of property owned by Burroughs & Chapin.  
7 The lease ends in August of 2023. So he would have no ground  
8 to operate on, first and foremost.

9 Now, Your Honor, if you would, look at the answer filed  
10 by Burroughs & Chapin. And I apologize for jogging you  
11 through documents, but --

12 THE COURT: I need the exercise. I'm good.

13 MR. MCCULLOCH: Well, this is the simplest way to  
14 explain this to you, Judge.

15 THE COURT: Okay.

16 MR. MCCULLOCH: If you'd refer to paragraph 22, this is  
17 Burroughs & Chapin, the landlord, stating in their answer to  
18 this lawsuit that the paragraph I just read -- that they  
19 intend to lease -- to renew their lease or enter a new lease  
20 with Mr. Ricks and Helicopter Adventures.

21 Paragraph 22 in their answer states paragraph 32 is  
22 denied and demand strict proof. Responding further, the  
23 current lease agreement between defendant and Helicopter  
24 Adventures speaks for itself and is set to expire August 31,  
25 2023, with no option for renewal. This defendant has not

1 formed any intent to enter into a new lease with Helicopter  
2 Adventures for the subject premises or otherwise to enter  
3 into any agreement in contravention of Ordinance 15.16.

4 So that should suggest to you, Judge, that the statement  
5 made in the complaint by the plaintiff is just simply based  
6 on not -- it doesn't have to be false information. Perhaps  
7 it's a misunderstanding, if I give them the benefit of the  
8 doubt, but I don't know what a denial and the fact that this  
9 lease on the premises that is objected to by Horry County, he  
10 will cease to have any legal authority to operate in August  
11 of 2023, further eliminating any controversy here, Your  
12 Honor, or any justiciable controversy.

13 And last, Your Honor, if you would, look at the answer  
14 filed by Helicopter Adventures and Mr. Ricks. Do you have  
15 that, Your Honor? And we would specifically refer to  
16 paragraph 24.

17 THE COURT: Okay.

18 MR. MCCULLOCH: Once again, Your Honor, upon information  
19 and belief, defendants deny the allegations of paragraph 32,  
20 demanding strict proof. In further response to paragraph 32  
21 -- bear in mind 32 is the paragraph in which it is asserted  
22 that this business about -- I should say, Your Honor, that  
23 since I read to you from the complaint of plaintiff  
24 paragraphs 31 in which he allegedly said he was going to  
25 operate no matter what, that is denied in paragraph 23 of Mr.

1 Rick and Helicopter Adventures' answer.

2 And then specific again to whether Burroughs -- what  
3 Burroughs & Chapin's intention was, the defendant suggests  
4 reference to that and, Your Honor, I can say as an officer of  
5 the Court that, you know, Burroughs & Chapin has been  
6 steadfast in that position as set forth in their answer.

7 And, you know, the law that applies here, which we have  
8 set forth in our briefing, is very clear. An issue is not  
9 ripe for litigation unless there is a justiciable controversy  
10 and -- and where there is a real immediacy of injury, and  
11 that just simply cannot be the case here. Mr. Rick and  
12 Helicopter Adventures will lose their home on or about August  
13 31st of 2023.

14 This lawsuit is brought based upon a misstatement and  
15 also in anticipation of some problem that would require  
16 leapfrogging over about four ifs. If Mr. Rick is still in  
17 business, if Burroughs & Chapin changes their mind, if the  
18 County doesn't amend its current ordinance enacted in 2016,  
19 which is operable but doesn't become effective because it  
20 grandfathers in the -- there are only two helicopter  
21 operations in the county. One is located on the base; ours  
22 is not. And it is grandfathered until January 1 or -- or  
23 December 31st of 2023 or January 1, 2024.

24 So that is when this issue would be ripe if something  
25 happens to the lease, if Mr. Rick hasn't moved, if the County

1 and our negotiations with the County to relocate him to the  
2 airbase fail. All of those ifs have to be leapfrogged over  
3 to turn this into a ripe justiciable controversy.

4 We have cited *Strange v. Winn-Dixie*, which says it is  
5 not enough to show that anticipated acts may become a  
6 nuisance. They've asked this declaration of nuisance.  
7 They've asked for the Court to spend its time declaring after  
8 an evaluation of this ordinance making certain declarations  
9 when under the *Jowers v. DHEC* case they haven't met the  
10 immediate injury standard because they can't.

11 And, Your Honor, I will simply say that as to the -- two  
12 things in conclusion. First, as recently as last week -- and  
13 I say this, Your Honor, because of the position that the  
14 plaintiffs take here, that some statement completely out of  
15 context made to somebody in May of 2021 gives them standing.  
16 I would say to you, Your Honor, as recently as last week he  
17 offered a voluntary dismissal of this action and agreed that  
18 if the lease was not -- when his lease expired, we would  
19 cease operations. I don't know how we can do better than  
20 that.

21 But, Your Honor, as to the other issues raised in our  
22 brief and our motion, I don't want to spend the Court's time  
23 on the preemption issue because I don't think you need to  
24 reach that. I think we have briefed it. Both sides have  
25 briefed it. I don't happen to agree with them.

1       The *Hoagland* case is an interesting case from -- gosh, I  
2 think it's the Ninth Circuit. We always like things from the  
3 West Coast.

4       We cannot find a reported case on the subject of the  
5 applicability of -- and I don't -- I'll see if I can find  
6 that code section, Your Honor. It is the statute that  
7 enacted by our state legislature on the subject of -- let's  
8 see -- 55-9-230, the South Carolina Airports Act, giving  
9 counties and municipalities broad authority to enact police  
10 power regulations for airports.

11       You know, there's no reported case on that. So it would  
12 be a virgin issue, but I do not believe, Your Honor, that we  
13 need to get to that virginal issue of preemption because I  
14 think that this case can and should be decided on you -- by  
15 you on the basis that there is no ripe issue, there is no  
16 standing, there is no justiciable controversy.

17       There is only a series of hypotheticals that the  
18 plaintiffs rely upon to ask the Court to take its valuable  
19 time to leapfrog over a bunch of ifs and engage in premature  
20 considerations and decision-making. So for all of those  
21 reasons, Your Honor, we would ask that the case be dismissed.

22       THE COURT: Yeah. And just in a plain-speaking manner,  
23 why was -- excuse me -- why was this filed so early?

24       MR. BERGTHOLD: Mr. Bergthold, Your Honor, on behalf of  
25 Horry County. This was filed because of the history of

1 negotiations that Mr. McCulloch discussed in his argument.  
2 It got to the point where Mr. Ricks made it very clear to the  
3 County that I intend to continue operating indefinitely at my  
4 present location unless and until the County assures me and  
5 provides me a site at MYR. We've been in negotiations for  
6 Mr. -- with Mr. Ricks for years and would never have filed  
7 this lawsuit had he not made his recalcitrance to obeying the  
8 law -- obeying the ordinance clear.

9 But I think the most important thing on this motion,  
10 Your Honor, is what's been completely skipped by the  
11 defendants' presentation, and that is the standard. The  
12 standard under Rule 12(b), Your Honor, is that you determine  
13 a motion to dismiss solely based on the complaint's  
14 allegations and any inferences deducible from the allegations  
15 of the complaint, and those facts as alleged in the complaint  
16 are deemed admitted and the motion must be denied, Your  
17 Honor, if the plaintiff is entitled to any relief on any  
18 theory of the case under those facts as alleged.

19 Everything that Mr. McCulloch talked to you about was  
20 their answers. It relied entirely on things outside the  
21 scope of what Rule 12(b) allows a Court to consider.

22 Paragraph 31 is very clear. On or about May 24th, 2021  
23 -- and I'll tell you it was in a conversation between Mr.  
24 Ricks and the County attorney. Mr. Ricks said I'm planning  
25 to stay where I'm at unless and until Horry County provides

1 me a site at MYR, period.

2 THE COURT: Well --

3 MR. BERGTHOLD: For purposes --

4 THE COURT: Let's say that Horry County says we are not  
5 going to, and if you take a helicopter off, you're going to  
6 be arrested, which is I assume what they would do. I mean  
7 this is sort of unique because you're asking me to project --  
8 I almost said three years in advance, but two years in  
9 advance to prohibit him from doing something in two years  
10 that, if the County correctly passes an ordinance, he won't  
11 be able to do anyway.

12 MR. BERGTHOLD: Well, Your Honor --

13 THE COURT: And I don't mind you disagreeing with me. I  
14 mean I've --

15 MR. BERGTHOLD: Your Honor --

16 THE COURT: This is -- this is free-flowing as far as  
17 I'm concerned.

18 MR. BERGTHOLD: Well, the first and most important thing  
19 is you don't consider anything that Mr. McCulloch just said  
20 based on the answer or the positions taken by his clients or  
21 Burroughs & Chapin. That's -- that's the baseline law that  
22 undercuts 80 percent of what he argued.

23 The second thing is the reason we did it is because,  
24 Your Honor, as we explained in our brief, that the basic  
25 purpose of the Declaratory Judgment Act is to provide a

1 declaration of the rights and the duties of the parties  
2 before a breach of rights takes place. And if he had never  
3 said that, if he had never indicated that he was going to be  
4 recalcitrant in obeying the ordinance, we wouldn't be here,  
5 but he did.

6 We alleged in paragraph 31 that he did, and the law has  
7 to be accepted as true and, therefore, the motion has to be  
8 denied. We also, Your Honor, in paragraph 32 alleged that  
9 Burroughs & Chapin intends to renew their lease or at least  
10 go month-to-month with Mr. Ricks while this plays out.

11 And the reason that we filed this lawsuit two years in  
12 advance is we want whatever claims they want to make against  
13 the ordinance resolved now. We want to know what the  
14 County's duties are. Otherwise, what happens in these cases,  
15 Your Honor -- and I represented Horry County on all the adult  
16 entertainment litigation. This happens a lot in sign  
17 litigation where there's amortization clauses for billboards,  
18 but this is one involving a helicopter business.

19 And what happens is that the businesses that are  
20 affected by the ordinance, it immediately renders them in  
21 nonconforming use. It immediately requires helicopter  
22 operations to occur in a public use airport and it  
23 immediately starts the clock ticking on when a nonconforming  
24 use has to conform.

25 And so what these guys do is they wait until the 11th

1 hour, a month, two months before -- this happened to be in  
2 Columbia with an adult bookstore, Your Honor, where they wait  
3 until the last minute, the month before they have to move,  
4 and then they file a federal lawsuit, they file a state court  
5 lawsuit. They allege it's a taking, it's unconstitutional,  
6 it's invalid, preemptive, whatever.

7 And then they go to the Court, and they say, Your Honor,  
8 we want a temporary injunction, and at that point the Court  
9 is looking at a host of issues. You've got a multimillion-  
10 dollar business that says we have to stop operating in a  
11 month and then -- and then if the Court grants a temporary  
12 injunction, it completely thwarts the purposes of the seven-  
13 year amortization provision. We've laid out the case law,  
14 Your Honor, that says in South Carolina a two-year  
15 amortization period is enough, but we more than tripled that  
16 to give seven years.

17 But what happens is when these eleventh-hour lawsuits  
18 are filed, then seven years becomes ten years. Or let's say  
19 a temporary injunction is denied. Then the County is faced  
20 with the Hobbesian or Hobbesian choice, however you want to  
21 say that word, between either stopping a multimillion-dollar  
22 business that is operating and generating profits and risking  
23 significant financial damages, and that's the choice that the  
24 Declaratory Judgment Act is designed to prevent parties from  
25 having to make. They can have a declaration of the rights in

1 advance.

2       This whole thing about Burroughs & Chapin, it doesn't  
3 matter. Mr. -- that is not the most relevant thing. You  
4 can't consider Burroughs & Chapin's response to the  
5 allegation in paragraph 32, but even if you did, the party  
6 that's currently operating can say I intend to violate your  
7 ordinance, and regardless of whether they have a contract  
8 with another private party to stay in there, that doesn't  
9 negate what Mr. Ricks told the County attorney on May 24th of  
10 last year. So the case law is clear, Your Honor, that the  
11 purpose -- the basic purpose of the Declaratory Judgment Act  
12 is to allow for precisely this sort of case.

13       And normally, I wouldn't go into this, but Mr. McCulloch  
14 did. He said, well, even as recently as last week we offered  
15 them a voluntary dismissal. Well, we sent our draft and it  
16 said you agree to basically what you're saying in court and  
17 you're not going to operate past this date and you agree to a  
18 consent order.

19       They refused to consent to that. In fact, they sent us  
20 back something that their version of the decrees from Mrs.  
21 Amy Neuschafer said, quote, so long as ordinance 15-16 is  
22 legally enforceable, the HA defendants agreed to cease their  
23 helicopter operations on the property no later than 12:01  
24 a.m., January 1, 2024, unless the lease is extended beyond  
25 that date. That's what they sent back to us.

1        So they literally are saying even though our current  
2 lease stops in August of 2023, we'll cease our operations no  
3 later than January 1 of 2024, but that's conditioned on two  
4 statements: if the ordinance is legally enforceable and  
5 unless -- and unless the lease is extended beyond January 1,  
6 2024.

7        So the whole reason that they could come in here and  
8 they could end this and they could say we'll enter a consent  
9 decree and we will not -- we will enter a binding court  
10 order, but they will not do that and when we offered them the  
11 chance to do that, this is what they sent back to us. So all  
12 this does is prove that we have an entitlement to a  
13 declaratory judgment.

14        Now, let me point out the issues about nuisance and  
15 injunction. Your Honor, the most recent case on injunctions  
16 is the case that we did for Greenville County that came out  
17 last month from the Supreme Court of South Carolina. It's  
18 called *Greenville Bistro*. So I'm very familiar and it's  
19 favorable to the County. I'm very familiar with the  
20 standard, but right now the declaratory judgment statute says  
21 that you can get a determination of your legal rights and  
22 status regardless of any other relief that is or could be  
23 claimed.

24        So the declaratory judgment relief that we are seeking  
25 is wholly independent of any injunctive relief and wholly

1 independent of any claim that operating past January 1, 2024,  
2 would be a nuisance. In fact, the legislature in its  
3 Declaratory Judgment Act has specifically specified that you  
4 can get a declaratory judgment about your rights and  
5 liabilities under a county ordinance, and that is South  
6 Carolina Code Annotated 15-53-30, and that says that a party  
7 may determine any question of construction or validity  
8 arising under a statute or ordinance. And so that's what  
9 we're here doing because Mr. Ricks said what he said and  
10 that's the only fact that can be considered at this stage of  
11 the game.

12 THE COURT: Has this ordinance been passed?

13 MR. BERGTHOLD: Six years ago. Yeah. The ordinance has  
14 been on the books and is legally operative and has been that  
15 way since October, I think, or April, Your Honor, of 2016.  
16 So it's a binding ordinance that has present implications and  
17 liabilities that need to be resolved.

18 If they had entered -- if they had agreed to our order  
19 last week, we wouldn't be here, but they didn't. They came  
20 back with contingencies.

21 THE COURT: And I don't have -- I have the complaint.  
22 Because this was switched so late, I have -- they are  
23 printing your briefs, which I'll have to read, but there's an  
24 ordinance that's been in place that will affect this lease in  
25 2024?

1 MR. BERGTHOLD: Well, Your Honor, it renders them  
2 nonconforming right now, and it prohibits -- and it requires  
3 them to cease operations no later than January 1, 2024.

4 And what we're here for is a declaration of the validity  
5 of the ordinance and the rights thereunder so that we don't  
6 get a lawsuit from Mr. McCulloch or anybody or Burroughs &  
7 Chapin or anybody else in the latter half of 2023 that then  
8 takes the seven-year amortization and extends it into a ten-  
9 year amortization while the liabilities and the rights of the  
10 parties are being determined.

11 That's the entire purpose of the Declaratory Judgment  
12 Act. They had the opportunity to enter into a consent order.  
13 We offered that. They came back and said, well, as long as  
14 your ordinance is legally enforceable and as long as we  
15 haven't extended the lease. That's why we're here.

16 MR. CLARK: Your Honor, this is Chris Clark. I  
17 represent the Burroughs & Chapin Company. I'm mindful of the  
18 fact that this hearing was scheduled for 15 minutes, but I  
19 thought since my client was mentioned so much, maybe I should  
20 say something so they know that I'm on the record.

21 THE COURT: Go ahead. After you had to assist me in  
22 that last one, yeah. Don't worry about it. Go ahead.

23 MR. CLARK: No, no, no, no. The arguments were well  
24 taken, but the only thing that I would add regarding  
25 Burroughs & Chapin is there was much discussion just now

1 about renewal of a -- of a lease or extension of a -- of a  
2 lease.

3 Your Honor, it's undisputed that the lease expires in  
4 August of 2023, and the lease is referenced expressly in the  
5 pleading of Horry County. Therefore, the terms of that lease  
6 can be considered by the Court. Horry County has brought  
7 that into evidence.

8 There is no lease to renew pursuant to the express terms  
9 of the instrument after August of 2023. Mr. Ricks could get  
10 on a call and say, listen, in January 2024 I'm going to  
11 operate a brothel or a munitions plant on that premises. He  
12 doesn't have a lease to do that. It's completely  
13 speculative.

14 And certainly, there's been no expression of Burroughs &  
15 Chapin supporting that. Certainly, none has been presented  
16 today.

17 THE COURT: I mean I'm assuming that there has been an  
18 historical animosity or litigiousness between Horry County  
19 and Burroughs & Chapin, and that that made -- is that sort of  
20 underlying, if we're just speaking honestly, that you  
21 anticipate that this is going to be something brought up in  
22 the future?

23 I mean if the ordinance was passed in 2016 and it goes  
24 into effect and prohibits these people eight years later from  
25 not flying a helicopter off the property, do you anticipate

1   them waiting until November of 2024 and then challenging the  
2   validity of the -- of the ordinance? I mean --

3           MR. BERGTHOLD: Your Honor, I'm not the local Horry  
4   County attorney, but I will say my understanding from my  
5   client is there have been some, you know -- you know,  
6   everything's fine until push comes to shove and then the  
7   shove results in litigation.

8           But the main thing is Mr. -- Burroughs & Chapin isn't  
9   the one engaging in the -- in the zoning use. Helicopter  
10   Adventures is the entity and the party engaging in the zoning  
11   use. They said they're going to do that continuously unless  
12   and until the County assumes and performs on the burden that  
13   we say the County does not have under the ordinance, and that  
14   is to provide them an alternative site for a helicopter  
15   sightseeing tour company.

16           So the reality is we don't -- it's true you can consider  
17   the lease, but it doesn't matter when the allegation in  
18   paragraph 32 is that they do intend to renew the lease. And  
19   when we get the documents from the lawyers, they say we'll  
20   stop on January 1 if the ordinance is valid and unless the  
21   lease is extended past that date.

22           If everybody's representations, whether it's Burroughs &  
23   Chapin or Helicopter Adventures, were true, we would've  
24   gotten this order done, but we didn't, and we think that  
25   discovery will show that there has been communications

1 between Burroughs & Chapin and Helicopter Adventures and Mr.  
2 Rick that this is going -- they're going to keep this  
3 multimillion-dollar business in place, which they currently  
4 do not have a solid ability to relocate to MYR, as long as  
5 possible because the costs -- the profits from this business,  
6 which are -- which is very, very lucrative, both for the  
7 landowner and especially for the business operator, make that  
8 warranted, but this is why at a 12(b)(6) motion the Court  
9 does not consider what Mr. Clark is saying about Burroughs &  
10 Chapin's position or what Mr. McCulloch is saying about his  
11 clients' position. You only consider paragraphs 31 and 32,  
12 which we allege is an intent to violate.

13 And the discovery shows maybe there will be a complete  
14 absence of this correspondence, but we think otherwise and we  
15 know otherwise. We know that there's a *bona fide* dispute  
16 because if not, then Mr. Ricks would have accepted the  
17 consent order we sent last week instead of changing it and  
18 adding the conditions that we think are the reasons that we  
19 need to be in front of the Court to get a resolution of the  
20 rights under the ordinance now.

21 THE COURT: Who represents Mr. Ricks?

22 MR. MCCULLOCH: I do, Your Honor.

23 THE COURT: Okay.

24 MR. MCCULLOCH: Your Honor, may I respond?

25 THE COURT: Sure.

1 MR. BATTLE: Before you do that, Judge, I'd like to say  
2 a couple of words. I'm the local counsel here for Horry  
3 County, and I'd like to put it in simple terms.

4 THE COURT: Yeah.

5 MR. BATTLE: 15-53-30 gives the Court authority to  
6 decide how an ordinance may affect or impact somebody. This  
7 ordinance has an immediate impact on how Burroughs & Chapin  
8 can use its property in the future and how it can use it now.

9 If they wanted to enter into a five-year lease tomorrow  
10 with some other helicopter company, they couldn't do that and  
11 stay in compliance with the order. Their rights under the --  
12 under the lease -- the Court has the authority and is given  
13 special statutory standing to determine how -- it's kind of  
14 -- as to how they can use their property or how this  
15 ordinance affects their property.

16 It's a little bit like a restrictive covenant on a piece  
17 of property. You have the right to determine and the Court  
18 has the right and the parties have the right to allow the  
19 parties to get a decision as to how this ordinance will  
20 affect this particular property that exists now and is  
21 currently on the property.

22 Mr. McCulloch's issues about the lease and whether  
23 they'll be there or will not be there really doesn't affect  
24 the immediacy and the statutory right to have this  
25 determined, the rights as to the party as to the ordinance

1 and their property. In addition, Mr. McCulloch's client has  
2 a leasehold interest, which is currently an interest in the  
3 property.

4 So we have the right and you have the right to issue  
5 this particular -- and let us go forward and do discovery and  
6 find out what really is going on.

7 THE COURT: Okay.

8 MR. BERGTHOLD: And, Your Honor, there were two cases  
9 that I would point the Court to. They're mentioned in our  
10 brief, but they're helpful. They are both cases in which  
11 future contingent events related to present rights, and one  
12 is the *Sunset Cay* case from the Supreme Court in 2004.  
13 Basically, a developer wanted to extend a sewer line.

14 THE COURT: Right.

15 MR. BERGTHOLD: He didn't petition the council and he  
16 didn't go through the application process, but there was  
17 correspondence between the parties where their positions were  
18 hardened, like what we allege in our complaint happened here.

19 And then number two is the *Waller* case. This goes all  
20 the way back to 1951. It's a -- it's a will case, but the  
21 interesting thing is the whole contingency was whether the  
22 children of the testator would have issue, would have their  
23 own children and, if not, then the reversion of the estate  
24 would go back to a different child in the offspring of the  
25 testator. And the living children, none of them had kids.

1        So we want a declaration and a construction of this  
2 document, and the parties argued about whether there was a  
3 contingency. You know, they could have kids, they could not  
4 have kids in the future, and the Court said the purpose of  
5 the Declaratory Judgment Act is to settle rights that can be  
6 decided in advance -- and this is one of those cases -- even  
7 when there's just the ripening seeds of a justiciable  
8 controversy, and we've clearly passed that. We've been  
9 negotiating for years, and we've hit a bullhead.

10        THE COURT: Okay. Yeah, Mr. McCulloch, anything in  
11 response? And I will -- I don't have -- again, because of my  
12 switching of this the way I did it, I don't have your memos  
13 printed. They're doing that now and I'll obviously read  
14 everything, but I'd be happy to hear from you.

15        MR. MCCULLOCH: Thank you, Your Honor. I'll try to be  
16 brief and not plow up the same ground.

17        I don't agree with opposing counsel that you can't  
18 consider anything but paragraphs 31 and 32 of their  
19 complaint. You certainly, as pointed out by Mr. Clark, may  
20 consider the lease.

21        And he stole my thunder a little bit there, but the  
22 lease is attached as Exhibit A, and there are two pertinent  
23 paragraphs, paragraph 2 which sets forth the term, but I  
24 think as Mr. Clark said, presumably I won't have any  
25 objections from these other lawyers that the date that this

1 leasehold interest of Helicopter Adventures and Mr. Rick ends  
2 is August 31 of 2023.

3 I can say, Your Honor, that I have never received -- in  
4 my conversations with Burroughs & Chapin, I've never seen  
5 them relent on the position they assert in their answer, that  
6 they have no intention of violating the ordinance by  
7 extending this lease.

8 So, Your Honor, the other paragraph that is pertinent to  
9 your consideration is paragraph -- let me see -- 31 -- excuse  
10 me -- paragraph 15 of the lease. This lease is, again,  
11 Exhibit A, and all that paragraph says is that the tenant  
12 shall observe and comply with all ordinances.

13 And I point this out to you, Your Honor, because,  
14 frankly, the case law is so clear on this point that it goes  
15 -- it takes me back to my first year in law school. I  
16 happened to be in civil procedure with Justice Hearn, who  
17 constantly accuses me of not paying attention in that class,  
18 but the fact is it is Law School 101.

19 As stated in *Pee Dee Electric Co-op v. Carolina Power &*  
20 *Light*, a justiciable controversy is a real and substantial  
21 controversy which is ripe and appropriate for judicial  
22 determination as distinguished from a contingent hypothetical  
23 or abstract dispute.

24 Counsel for plaintiff says, well, we would just want to  
25 go ahead and have you spend the Court's time because you

1 don't have anything else to do because it may occur that Mr.  
2 Rick overstays his lease or it may occur that Burroughs &  
3 Chapin extends the lease. I've spent some time in Horry  
4 County litigating, in fact litigating with Horry County and  
5 Burroughs & Chapin and, frankly, my experience is that  
6 Burroughs & Chapin generally works hand in glove with the  
7 County, not litigious in nature in terms of its relationship.

8 My point is simply this, Your Honor. August 31 of 2023  
9 is six months from the date that this ordinance enacted in  
10 2016 would become effective against Mr. Rick. At that point  
11 in time, if Mr. Rick yahoos the lease, if he determined to  
12 violate the terms of the lease, all of the remedies as  
13 follows exist for the plaintiffs and Burroughs & Chapin both  
14 to swing into action.

15 Burroughs & Chapin can immediately move under paragraph  
16 15 to evict him with 30 days' notice, and he's out of there  
17 with no right to remain. Of course, Horry County has its own  
18 police department. They can go have him arrested. They can  
19 immediately file for an injunction to stop his activity,  
20 which they would then be entitled to do, I guess, and my  
21 guess is at that point when an issue is, frankly, a hell of a  
22 lot more pregnant than it is today, they would likely get a  
23 permanent injunction and get the relief they seek. And if  
24 Mr. Rick at that point in time, which I think is far-fetched,  
25 chose to attack the statute -- the ordinance on its legality,

1 he'd be doing it at a time when he's been put out of business  
2 by a judge like you.

3 So the remedies that exist are so potent as of September  
4 1 of 2023 as to diffuse any suggestion that somehow the  
5 County is so potentially and anticipatorily injured or  
6 subject to injury that they have no recourse except to ask  
7 this Court to do what they asked you to do, Judge.

8 And what we ask you to do is to find that this is  
9 ridiculous, that there is no controversy here. There is no  
10 injury to them that -- no immediate injury for sure and ask  
11 you to dismiss their complaint.

12 And, frankly, Your Honor, I seldom ask for attorney's  
13 fees, but I do ask that Mr. Rick -- and I would not say to  
14 the Court -- I've been involved in negotiations prior to my  
15 engagement in this case, which happened sometime after the  
16 filing of this lawsuit in July of 2021. So I don't know the  
17 history of whether it's been pleasant discussions with Mr.  
18 Rick or not.

19 It really doesn't matter because I'm in charge of those  
20 discussions now and we've been in discussions with the County  
21 attorney, and we hope that this result does not sour the  
22 attitudes of the County in terms of its willingness to  
23 negotiate in good faith, but this lawsuit should be  
24 dismissed, Your Honor, for all the reasons we've stated.  
25 Thank you.

1 THE COURT: Okay. Yeah. I don't have COVID. I've  
2 swallowed something here this morning that's just driving me  
3 crazy.

4 All right. Look, let me -- give me -- as I've told  
5 everybody this morning, my travel schedule -- I think I'm  
6 being punished by somebody at Court Administration because I  
7 am not back in Anderson until March 1st basically, but I will  
8 have this stuff printed, I will read it, take it under  
9 advisement, and let you guys know something within the next  
10 two to three -- two weeks.

11 MR. MCCULLOCH: Judge, may I remind you, you were going  
12 to ask me something?

13 THE COURT: I just -- I think -- I think I got it. It  
14 was about the long-term effects, you know. That -- I mean,  
15 you know, here I am coughing and, you know, I have had 30  
16 negative tests because of my job and the travel and because  
17 my wife and I have done some international travel. I've had  
18 30 negative, but this cough that I have because I ate a piece  
19 of cornbread this morning could clear out this whole floor.  
20 It drives me crazy.

21 MR. MCCULLOCH: Judge, I will tell you last week I had a  
22 positive test and then a negative test and then a third test  
23 which was positive. So don't trust the quicky test. They  
24 apparently are not very reliable.

25 THE COURT: No. Apparently not. No, and I -- no. And

1 I've had my sinus cavities cleaned every time. I've had one  
2 quicky and 29 tests, and they've all been required because of  
3 the court system rules and contact. And we've had a lot of  
4 people here that have had it.

5 So -- all right. Well, I will take it under advisement,  
6 and I appreciate your fine arguments. And I get it. I just  
7 need to read through it and make sure I'm on the right page  
8 with everybody.

9 MR. MCCULLOCH: Thank you, Your Honor.

10 MR. BERGTHOLD: Thank you, Your Honor.

11 MR. BATTLE: Thank you, Judge.

12 THE COURT: Thank y'all. Be safe.

13 MR. MCCULLOCH: Yes, sir.

14 (WHEREUPON, the proceedings ended.)

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16 --- END REQUESTED TRANSCRIPT ---

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Oct 26 2022

## Certificate of Compliance with Rule 210(g)

SC Court of Appeals

I certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

s/ Michael W. Battle

Michael W. Battle

## Proof of Service

I certify that on October 26, 2022, a copy of this **Record on Appeal** was served by transmitting a copy of same in PDF format via e-mail to the lawyers' e-mail addresses listed below:

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