

STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable R. Kirk Griffin, Circuit Court Judge

Case No. 2019-CP-22-00212

Appellate Case No. 2023-000646

The Gulfstream Café, Inc.Appellant,

v.

Georgetown County; Georgetown County Council;
And Steve Goggans, individually and in his official
Capacity as Georgetown County Councilmember Respondents.

RESPONDENTS' INITIAL BRIEF

Henrietta U. Golding, SC Bar No. 2173
Taylor K. Voegel, SC Bar No. 104770
BURR & FORMAN LLP
2411 N. Oak Street Suite 206 (29577)
Post Office Box 336
Myrtle Beach, SC 29578-0336
Phone: 843.444.1107

Counsel for the Respondents

Myrtle Beach, South Carolina

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the circuit court erred in denying Appellant’s substantive due process claims under the South Carolina and United States Constitutions?
 - A. Whether the circuit court erred in referencing the “shocks the conscience” standard?
 - B. Whether the circuit court erred in finding Appellant was not deprived of a property right because it never had exclusive use of the parking lot and Ordinance 2018-40 did not prohibit Appellant from using the parking lot?
- II. Whether the circuit court erred in finding Ordinance 2018-40 was not arbitrary and capricious but rather, rationally related to a legitimate government interest because the rebuilt store and restaurant will comply with enhanced flooding and building standards that did not exist in the original building?
- III. Whether the circuit court erred in holding Ordinance 2018-40 was valid and Goggans’ initial involvement in an application for a minor zoning amendment could not be extrapolated as unlawful involvement in the passage of Ordinance 2018-40 concerning Version 3.0?
- IV. Whether the circuit court erred in denying Appellant’s takings and inverse condemnation claims under the South Carolina and United States Constitutions?
 - A. Whether the circuit court applied an incorrect standard to Appellant’s inverse condemnation claim?
 - B. Whether the circuit court erred in finding a *per se* taking had not occurred and that Appellant did not meet the *Penn Central* test?
- V. Whether the circuit court erred in denying Appellant’s procedural due process claims under the South Carolina and United States Constitutions?
- VI. Whether the circuit court erred in denying Appellant’s claim for attorneys’ fees and in awarding costs to Respondents?

INTRODUCTION

Appellant The Gulfstream Café, Inc. has attempted for years to stop the re-opening of a competitor restaurant with which it shares a parking lot. In its continued attempt to stifle competition, Appellant brought this lawsuit seeking a declaration that a Georgetown County ordinance, Ordinance 2018-40 (the “Ordinance”), violated Appellant’s constitutional rights. The circuit court correctly found that the passage of the Ordinance did not violate any of Appellant’s rights.

In order to reverse the circuit court, this Court would have to disregard well-established state law and engage in legal gymnastics to contort existing law. Every point and alleged deficiency that Appellant complains of was presented to the Georgetown Planning Department, the Georgetown Planning Commission, and Georgetown County Council at numerous times. Appellant would have this Court give absolutely no weight to those legislative processes. Setting aside Appellant’s misconstruction of the trial evidence and the circuit court’s order, Appellant in essence argues that the subject Ordinance should never have been passed, regardless of its legislative process, deliberation, or facts considered. Appellant argues that a perfect process, with a proposed building the same size as the former, dilapidated building, would not have permitted the ordinance to pass. As it made clear at trial and in its post-trial briefing, despite existing state law and the separation of powers, Appellant wants the Court to determine whether the passage of Ordinance 2018-40 was a “good” or “bad” decision. In sum, Appellant wants the Court to substitute its judgment for the judgment of a legislative body.

As the Court is aware, even if it were to share Appellant’s disagreement with the County’s decision to adopt Ordinance 2018-40, it may not substitute its own judgment to invalidate a duly passed ordinance. The circuit court correctly found that the evidence presented at trial showed that the Georgetown County governing bodies did not deprive Appellant of any constitutional rights.

Consequently, Appellant's thinly veiled attempt to quash competition is not supported by its legal claims and ultimately, Appellant's referendum on Respondents' legislative act belongs "at the polls, not the courts." *Bear Enters. v. Cnty. of Greenville*, 319 S.C. 137, 139 n.1, 459 S.E.2d at 885 n.1 (Ct. App. 1995).

STATEMENT OF THE CASE

On March 8, 2019, Appellant filed this lawsuit against not only Georgetown County, but each County Council member individually and in their official capacities. (Compl., Mar. 8, 2019.) Appellant alleged eight causes of action: (1) declaratory judgment that approval of the applicant's application for a major amendment is invalid; (2) violation of substantive due process pursuant to Article I, Section 3 of the South Carolina Constitution; (3) relief under 42 U.S.C. § 1983 for violation of right to substantive due process pursuant to the United States Constitution; (4) violation of right to procedural due process pursuant to Article I, Section 3 of the South Carolina Constitution; (5) relief under 42 U.S.C. § 1983 for violation of right to procedural due process pursuant to the United States Constitution; (6) violation of South Carolina's Takings Clause, Article I, Section 13 of the South Carolina Constitution; (7) inverse condemnation; and (8) attorneys' fees. (*Id.*) Respondents filed their answer on April 11, 2019, denying the allegations against them, and Respondents filed an amended answer on August 11, 2021. (Answer, Apr. 11, 2019 & Am. Answer, Aug. 11, 2021.) By consent order entered December 14, 2021, all individual defendants, with the exception of Respondent Goggans, were dismissed from the action.¹ (Consent Order of Dismissal, Dec. 14, 2021.)

¹ Appellant's dismissal of these individual councilmembers occurred only after Respondents filed their Motion for Summary Judgment on October 22, 2021. (Defs.' Mot. for Summ. J. & Defs.' Mem. in Supp. of Their Mot. for Summ. J., Oct. 22, 2021.)

Commencing August 29, 2022, a four-day bench trial was held before the Honorable R. Kirk Griffin. Subsequently, the parties submitted post-trial briefs and post-trial reply briefs. (Defs.’ Post-Trial Br., Sept. 15, 2022; Pl.’s Post-Trial Br., Sept. 15, 2022; Defs.’ Reply to Pl.’s Post-Trial Br., Sept. 27, 2022; Pl.’s Post-Trial Reply Br., Sept. 27, 2022.) On February 3, 2023, the circuit court issued its ruling by formal written order, finding in favor of the defendants on all causes of action. (Order, Feb. 3, 2023.)

On February 13, 2023, Appellant filed a motion to alter or amend, to which Respondents filed a response, and to which Appellant filed a reply. (Pl.’s Mot. to Alter or Amend J., Feb. 13, 2023; Defs.’ Resp. to Pl.’s Mot. to Alter or Amend J., Mar. 3, 2023; Pl.’s Reply in Supp. of Mot. to Alter or Amend, Mar. 13, 2023.) By order dated April 3, 2023, the circuit court denied Appellant’s motion. (Order, Apr. 3, 2023.) On April 24, 2023, Appellant filed and served its notice of appeal. (Notice of Appeal, Apr. 24, 2023.)

On February 13, 2023, Respondents filed a motion for costs accompanied by an itemized statement of costs. (Defs.’ Mot. for Costs, Feb. 13, 2023.) Appellant filed a response to Respondents’ motion for costs on March 15, 2023. (Pl.’s Resp. to Defs.’ Mot. for Costs, Mar. 15, 2023.) The circuit court issued an order granting costs on May 26, 2023. (Order, May 26, 2023.) Appellant served and filed an amended notice of appeal to include an appeal of the circuit court’s order awarding Respondents’ costs on June 7, 2023. (Am. Notice of Appeal, June 7, 2023.)

FACTS

The Marlin Quay Planned Development

In 1982, Georgetown County enacted an ordinance permitting the creation of one of the first Planned Developments² (“PD”) in Georgetown County named Marlin Quay. (Tr. 336:20-22; Pl.’s Ex. 1.) Under South Carolina law, local governments are empowered to create PDs in order to provide for more flexibility in land developments, among other objectives. S.C. Code Ann. § 6-29-740. According to the trial testimony of Holly Richardson, Georgetown County’s Director of Planning and Code Enforcement, Georgetown County currently contains over one hundred PDs, and each PD stands alone as its own zoning district with its own zoning ordinance and requirements. (Tr. 335:17-18; 335:23—336:6.)

The Marlin Quay PD is located on South Waccamaw Drive in the southern portion of Garden City, South Carolina. (Tr. 170:8-9; Pl.’s Ex. 1.) Its western side sits directly adjacent to a body of water known as Murrells Inlet, while the eastern boundary is South Waccamaw Drive, which runs parallel with oceanfront homes facing the Atlantic Ocean. (Pl.’s Ex. 1.) Since its formation in 1982, this PD has contained the Marlin Quay Condominiums, a horizontal property regime with sixty units, a marina with sixty boat slips (“the Marina”), the Gulfstream Café, and the Marlin Quay Marina Store and Restaurant. (Pl.’s Ex. 1.) Many residential/vacation homes and at least 400 to 500 condominium units are within walking distance of the PD. (Tr. 193:4-7.)

As depicted in the Preliminary Master Plan, which accompanies the 1982 ordinance creating the Marlin Quay PD, three areas for parking are shown, including seventeen spaces³ for the Gulfstream Café, approximately sixty parking spaces between the Marina Store and Restaurant

² This PD was previously known as a “Planned Unit Development,” or a “PUD.” (Pl.’s Ex. 1.) The change in name is merely semantic for purposes of this case.

³ Today, The Gulfstream Café now has twenty-three parking spaces exclusive to its business, none of which are part of the Parking Lot at issue here. (Tr. 169:9-16; 201:3-10.)

and the Gulfstream Café (“the Parking Lot”), and private parking for the Marlin Quay Condominiums. (Pl.’s Ex. 1.)

Since 1995, Appellant has owned the Gulfstream Café, which was an existing restaurant that operated as a restaurant since 1985. (Tr. 186:18-20; 203:11-17; 148:13-18.) At that time and at the time of trial, the Marlin Quay PD existed with the approved uses being: the Marlin Quay Condominiums; the Marlin Quay Marina Store and Restaurant; the Marina with boat slips; and the Gulfstream Café. (Pl.’s Ex. 1; Tr. 377:10-13; 379:23—380:2; 431:5-20.) Although there have been amendments to the PD since its creation, there have been no amendments to the PD’s parking requirements. (Tr. 336:23—337:6; 527:5-7.)

This controversy relates to the use of the Parking Lot. Appellant does not own the Parking Lot, and Appellant’s right to use it derives from a non-exclusive easement identified in written easements. (Pl.’s Exs. 2 & 3.) The Parking Lot easement guarantees Appellant neither a certain number of parking spaces within the Parking Lot nor an exclusive right to use any particular space. (Pl.’s Exs. 2 & 3; Tr. 203:6-20.) Instead, Appellant possesses a non-exclusive right to use the Parking Lot, which it obtained in 1986 and 1990 through easements granted by a previous property owner, Marlin Quay Marina Corporation. (Pl.’s Exs. 2 & 3.) Specifically, these easements granted Appellant a nonexclusive “right of ingress and egress” “together with the rights of vehicular and pedestrian access and also for the purpose of maintenance, repair, alteration and/or improvements.” (*Id.*) Currently, in addition to Appellant possessing the non-exclusive right to use the sixty-one⁴ spaces in the Parking Lot, Appellant also owns seventeen parking spaces that are exclusively for

⁴ One of the sixty-two parking spaces was reduced in size from a standard parking space to three and a half or four feet due to the fire department’s installation of an electrical box. (Tr. 201:11—202:6.)

the Gulfstream Café, as well as six parking spaces under its restaurant, which are primarily used by its employees. (Tr. 200:18—201:14.)

For many years, the Marlin Quay PD contained two restaurants: The Gulfstream Café and the Marlin Quay Marina Store and Restaurant. (Tr. 431:5-20.) The old Marlin Quay Marina Store and Restaurant was a one-and-a-half-story, cinder-block building, with the first floor being on the ground level, next to the Marina. (Tr. 238: 25—239:1.) Since August 2014, the Parking Lot has been owned by Palmetto Industrial Development LLC (“Palmetto”). (Tr. 163:6-7.) When Palmetto purchased the Marlin Quay Marina Store and Restaurant, the building was in need of repair and did not comply with current flood requirements per the Federal Emergency Management Agency (“FEMA”) regulations, Americans with Disabilities Act (“ADA”) regulations, or current fire and building codes. (Tr. 304:12-17; 425:1-10; 426:25—429:9; 495:20—496:11; 524:17—525:2; 525:8-11; 525:24—526:15; 527:10-13.) The old building also encroached onto the Marlin Quay Condominiums’ property. (Tr. 425:11—426:4.)

In 2016, Palmetto hired a local architectural firm, Steve Goggans Associates (“SGA”) for the design of a replacement Marina Store and Restaurant. (Tr. 468:14-20.) SGA was formed in 1987 by Steve Goggans, a Georgetown resident and architect. (Tr. 494:6-13.) Since its formation, SGA has been located in Pawleys Island, South Carolina. (Tr. 494:18-20.) Mr. Goggans served as a member of Georgetown County Council from 2014 to 2022. (Tr. 459:19-22.)

MQ1 or 1.0 (Minor Amendment) Application

Given the state of the Marina Store and Restaurant, Palmetto sought to rebuild the store and restaurant. (Tr. 468:18-20.) In 2016, Palmetto submitted a request for a minor zoning amendment to the Marlin Quay PD, which was submitted to Georgetown County Planning and Zoning Department. (Tr. 217:17-25; 372:18-23.) Pursuant to Article VI, Section 619.301 of the

2018 Zoning Ordinance, minor amendments to a PD are considered by the Zoning Administrator. (Defs.' Ex. 1.) Boyd Johnson, then-Director of Planning and Code Enforcement, testified that the zoning application was accepted as a minor amendment. (Tr. 417:5-24.) Subsequently, in November 2016, Palmetto received a demolition permit from Georgetown County and demolished the existing Marina Store and Restaurant. (Tr. 496:12-22.)

Appellant objected to the zoning amendment application being considered as a minor amendment, arguing that it should be considered a major amendment. (Tr. 225:5-9; 228:17—229:1.) On that ground, Appellant appealed the minor amendment interpretation to the Georgetown County Board of Zoning Appeals (“the Board”).⁵ (*Id.*; Tr. 225:25—226:6.) At the hearing before the Board of Zoning Appeals, Mr. Goggans appeared as a witness, in his capacity as the project architect. (Tr. 464:25—465:1.) At the time of his testimony, Mr. Goggans was unaware that his appearance as the architect may be considered a violation of his ethical obligations as a councilmember. (Tr. 492:2-6.) Several months later, Appellant filed a complaint with the South Carolina Ethics Commission (“the Commission”) against Mr. Goggans. (Tr. 492:7-11.) Then, in September 2019, by Consent Order,⁶ Mr. Goggans received a written warning and paid a civil penalty of \$1,000.00. (Tr. 492:15-24.)

MQ2 or 2.0 (Major Amendment) Application

At the trial of this action, Mr. Johnson, the former Director of Planning and Code Enforcement, testified that because of Appellant’s position that the amendment should be

⁵ The Board affirmed the interpretation of the zoning amendment application as one for a minor amendment. (Tr. 417:5-24.)

⁶ Pursuant to the court reporter’s records filed September 1, 2022, this Consent Order, Plaintiff’s Exhibit 57, was identified but not entered into evidence. (Receipt for Exs., p. 3; Tr. 6:13.) Thus, the Order’s specific findings set forth therein, as mentioned in Appellant’s closing argument, were improper. (Tr. 625:15—626:17; 627:11-18.)

presented as a major amendment, Palmetto submitted a zoning amendment application (referred to as “MQ2” or “2.0”) on November 3, 2017—this time as a major amendment to the Marlin Quay PD pursuant to Section 619.302 of the 2018 Georgetown County Zoning Ordinance.⁷ (Pl.’s Exs. 1 & 12; Tr. 417:5—418:4.)

At trial, Mr. Goggans testified that although Palmetto continued to employ SGA for the project, he no longer served as the lead architect, and he had no contacts with the Georgetown County Planning and Zoning Department. (Tr. 464:8-9; 497:15—498:10.) On December 21, 2017, the Georgetown County Planning Commission heard this 2.0 zoning application. (Pl.’s Exs. 14 & 15.) The minutes of the Planning Commission meeting state that representatives of Appellant appeared and spoke in opposition. (Pl.’s Ex. 15.) Specifically, two attorneys for Appellant spoke at the hearing: George Redman and Simon Bloom, who expressed concerns about the increased size of the proposed building as well as alleged violations of various zoning ordinances concerning parking and total square footage. (*Id.*) At the close of the hearing, the Planning Commission recommended approval of the application, which became proposed Ordinance 2018-03, with a requirement that the seating capacity for the restaurant be limited to 110 seats—the same number of seats that existed in the old building. (*Id.*)

Ordinance 2018-03 was presented to Georgetown County Council for a first reading on January 9, 2018, a second reading on February 13, 2018, and a third reading on February 27, 2018.

⁷ In seeking a major amendment to a PD, an applicant is required to submit an application that is subsequently presented to the Planning Commission for a public hearing wherein the public has an opportunity to speak. (Tr. 418:5-16.) After the Planning Commission hears the application, the Planning Commission makes a recommendation as to whether the amendment should be adopted or rejected, and the application and the Planning Commission’s recommendation are then submitted to Georgetown County Council. (*Id.*) County Council holds three separate, public readings of the proposed zoning amendment—which provide the public opportunities to speak to County Council—and the Councilmembers vote on a proposal’s passage at the conclusion of the third reading. (*Id.*)

(Defs.' Exs. 6, 7, & 8.) At each reading of Ordinance 2018-03, Mr. Goggans recused himself and remained absent during discussions and voting on the ordinance. (*Id.*) At each reading, representatives of Appellant appeared, and its representatives, including Appellant's legal counsel, spoke in opposition. (*See id.*) At the final reading, County Council voted to adopt Ordinance 2018-03. (Defs.' Ex. 9.) This Ordinance required the following:

- Heated square footage for the new structure to not exceed 4,598;
- 62 parking spaces to be provided, including three compact spaces to be located underneath the new structure;
- The structure to not exceed a 45-foot height limit measured at the midpoint of the roof; and
- The total seating capacity to not exceed 110 persons.

(*Id.*) Neither Appellant nor any other third party appealed the passage of this Ordinance, MQ2./2.0. Consequently, as of February 27, 2018, the Marlin Quay PD was amended to allow the rebuild of the Marina Store and Restaurant, subject to the aforementioned requirements. (Defs.' Exs. 8 & 9.)

Lawsuit by Appellant Against Palmetto

In November 2016, Appellant filed a lawsuit—civil action number 2016-CP-22-00961—against Palmetto, alleging interference with its easement rights. In June 2018, a jury trial awarded Appellant a \$1,000.00 jury verdict. (Pl.'s Ex. 18.) The trial judge issued an injunction stating that Palmetto cannot interfere in the Appellant's nonexclusive easement rights and directing that the rebuild be located within the former building's footprint. (Defs.' Ex. 24.) In granting Appellant's motion to alter or amend the judgment, the trial judge directed Palmetto not to expand the outside boundaries of any new building beyond the outside boundaries of the old building. (Defs.' Ex. 24; Tr. 176:7-9; 426:13-19.) Because the existing PD, as amended, had a portion of the new building located slightly outside the footprint of the old building, on August 27, 2018, Palmetto filed a zoning application for a major amendment to the PD for the purpose of locating the new building

inside the footprint, in order to comply with the court order. (Pl.'s Ex. 20; Tr. 176:10-14; 309:12-19; 426:13-19.)

MQ3 or 3.0 (Major Amendment) Application

Palmetto's third application, referred to as "3.0" during the trial, provided that its purpose was to comply with the court order. (Pl.'s Ex. 20, pg. 5.) Palmetto's attorney delivered to the Georgetown County Planning and Zoning Department, by cover letter dated August 27, 2018, the 3.0 PD amendment application, a check in the amount of \$262.50 for the application fee, and stamped envelopes to be used for mailing required notice to property owners within a 400-foot radius of the affected property. (Defs.' Ex. 10; Pl.'s Ex. 20.)

Upon acceptance of the application, a hearing date before the Georgetown County Planning Commission was set for October 18, 2018. (Tr. 421:2-8.) The Planning and Zoning Department prepared and sent out a Notice of Public Hearing to not one, but two, local newspapers: The Coastal Observer and The Georgetown Times. (Defs.' Exs. 13 & 14.) In addition, the Planning and Zoning Department posted a sign at the Marlin Quay PD announcing an upcoming Planning Commission hearing and providing contact information. (Defs.' Ex. 11.) The Planning and Zoning Department staff also obtained a listing of the property owners within 400 feet of the affected site pursuant to the tax map. (Pl.'s Ex. 22.) The tax map property owners' list identified Appellant as well as Palmetto and the Marlin Quay Homeowners' Association as property owners within the 400-foot radius. (*Id.*) The Planning and Zoning Department mailed these identified property owners a letter setting forth Notice of the Public Hearing as well as a map reflecting the parcel affected by the application. (*Id.*)

The tax map did not identify each condominium unit owner, but rather, the Association. (Tr. 318:3-11.) Accordingly, the Planning and Zoning Department sent the Notice of Public

Hearing, and accompanying map of the affected property to Nancy Gardner, Community Manager at Surfside Realty Company, the management company for the Marlin Quay Homeowners' Association. (Pl.'s Ex. 21.) The Association emailed the Notice and Map of the affected property to all Marlin Quay unit owners. (Tr. 318:3-17.) This was the usual and customary method to notify condominium unit owners.⁸ (Tr. 324:4-7.) Ms. Gardner sent the unit owners the Notice. (Pl.'s Ex. 26.)

The Planning Commission heard the 3.0 zoning application on October 18, 2018. (Pl.'s Ex. 34.) Approximately one week prior to the hearing, the Planning and Zoning Department submitted its Staff Report to the Commission. (Pl.'s Ex. 35.) This Staff Report contained a comparison of the square footage between the proposed 3.0 amendment and the specifications set forth in the existing PD. (*Id.*) The comparison chart identified the total heated and unheated space of the restaurant, and the chart showed that the 3.0 amendment would result in a reduction of 466 square feet of heated space while noting there was no change in the total heated square footage. (*Id.*) Appellant's representatives attended this meeting and spoke to the Commission. (Pl.'s Ex. 37.)

The Planning Commission voted unanimously to recommend approval to County Council of the proposed Ordinance 2018-40. (Pl.'s Ex. 37.) Readings were held before County Council on November 13, 2018, December 11, 2018, and January 8, 2019. (Pl.'s Exs. 42, 44, & 45.)⁹ As at the hearing before the Planning Commission, representatives for Appellant attended each of the

⁸ Ms. Richardson testified that the Planning and Zoning Department does not conduct title searches before sending out the notices because the Zoning Ordinance specifically provides that only property owners identified by the tax map be provided notice. (Tr. 323:11-14; 337:16-18.) *See* Defs.' Ex. 1, GEORGETOWN COUNTY, S.C., ZONING ORDINANCES art. XVII, § 1702.206 ("A list of all property owners, *as reflected by the tax records*, to whom letters are addressed must accompany the application.") (emphasis added).

⁹ Mr. Goggans recused himself at each reading of Ordinance 2018-40, including Council's vote on its adoption of the Ordinance. (Pl.'s Exs. 85 & 86.)

readings and spoke in opposition at each opportunity to do so. (Pl.’s Exs. 37, 44, & 45; Tr. 207:13-23.) At the conclusion of the third reading on January 8, 2019, the Councilmembers voted to amend the PD, being Ordinance 2018-40. (Pl.’s Ex. 46.) The only changes made to the existing PD, as a result of the passage of Ordinance 2018-40, was that the proposed building be located within the footprint of the old building, per order of the Court, and it not exceed a forty-seven-foot height limit. (Tr. 309:20-22; 366:8-17; Defs.’ Ex. 9; Pl.’s Ex. 46.) Stated differently, the passage of Ordinance 2018-40 did not change the heated square footage (beyond reducing the total by two square feet), the sixty-two parking spaces, or the seating capacity of 110, all of which were enacted as part of the PD in February 2018 through the passage of Ordinance 2018-03. (*Id.*) Appellant initiated this litigation on March 8, 2019. (Compl., Mar. 8, 2019.)

STANDARD OF REVIEW

“An issue regarding interpretation of a legislative enactment is a question of law.” *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) (citing *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011)). “In an action at law tried without a jury, an appellate court’s scope of review extends merely to the correction of errors of law.” *S.C. Dep’t of Transp. v. Horry Cnty.*, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011) (quoting *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009)) (internal quotation marks omitted). “[The Supreme Court] will not disturb the trial court’s factual findings unless they are without evidence reasonably supporting those findings.” *Id.*

“A municipal ordinance is a legislative enactment and is presumed to be constitutional.” *Ani Creation, Inc. v. City of Myrtle Beach Bd. of Zoning Appeals*, -- S.E.2d --, 2023 WL 4221865, at *3 (June 28, 2023) (quoting *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1992)) (internal quotation marks omitted). “Every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only

when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution.” *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 296, 737 S.E.2d 601, 609 (2013) (quoting *McMaster*, 395 S.C. at 504, 719 S.E.2d at 663) (internal quotations marks omitted). “The authority of a municipality to enact zoning ordinances, restricting the use of privately owned property is founded in the police power.” *McMaster*, 395 S.C. at 505, 719 S.E.2d at 663 (2011) (citation and internal quotation marks omitted). “Thus, when a local city council enacts a zoning ordinance after considering all of the relevant facts, the Court should not disturb the council’s action unless the council’s findings were arbitrary and capricious or had no reasonable relation to a lawful purpose.” *Ani Creation, Inc.*, 2023 WL 4221865, at *4 (citing *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965)).

“The burden of proving the invalidity of a zoning ordinance is on the party attacking it, and it is incumbent upon [the challenger] to show the arbitrary and capricious character of the ordinance through clear and convincing evidence.” *Dunes*, 401 S.C. at 298, 737 S.E.2d at 610 (quoting *Willoughby*, 306 S.C. at 422, 412 S.E.2d at 425) (internal quotation marks omitted). The attacking party has the burden to establish “by clear and convincing evidence that the acts of the city council were arbitrary, unreasonable, and unjust.” *Ani Creation, Inc.*, 2023 WL 4221865, at *4 (citing *Bibco Corp. v. City of Sumter*, 332 S.C. 45, 52, 504 S.E.2d 112, 116 (1998)).

“It is not the function of the courts to pass upon the wisdom or folly of municipal ordinances or regulations.” *Dunes*, 401 S.C. at 300, 737 S.E.2d at 611. “The power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations.” *Rush*, 246 S.C. at 276, 143 S.E.2d at 531. “The Court will not overturn the action of the City if the decision is fairly debatable

because the City’s action is presumed to have been a valid exercise of power and it is not the prerogative of the Court to pass upon the wisdom of the decision.” *Ani Creation, Inc.*, 2023 WL 4221865, at *4 (quoting *Rushing v. City of Greenville*, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975)) (internal quotation marks omitted).

ARGUMENT

I. Respondents did not violate Appellant’s state or federal substantive due process rights.

When reviewing an alleged violation of federal substantive due process rights, a claimant must demonstrate “(1) that [it] had property or a property interest; (2) that the state deprived them of this property or property interest; and (3) that the state’s action falls so far beyond the other limits of legitimate governmental authority that no process could cure the deficiency.” *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 328 (4th Cir. 2005) (citation omitted) (internal quotation marks omitted). For a government actor’s conduct to rise to the level of a substantive due process violation, the actor’s conduct must be “intended to injure in some way unjustifiable by any government interest [which] is the sort of official action most likely to rise to the conscience-shocking level.” *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998). “Irrationality and arbitrariness imply a most stringent standard against which state action is to be measured in assessing a substantive due process claim.” *Rucker v. Harford Cnty., Md.*, 946 F.2d 278, 281 (4th Cir. 1991).

Similarly, South Carolina appellate courts have held, “In reviewing substantive due process challenges to municipal ordinances, a court must consider whether the ordinance bears a reasonable relationship to *any* legitimate interest of the government.” *McMaster*, 395 S.C. at 505, 719 S.E.2d at 663 (citation omitted) (emphasis in original). “In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a

cognizable property interest rooted in state law.” *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 96, 596 S.E.2d 917, 922 (2004) (citation omitted). “The State’s deprivation of the property interest must fall so far beyond the outer boundaries of legitimate governmental authority that no process could remedy the deficiency.” *Harbit v. City of Charleston*, 382 S.C. 383, 394, 675 S.E.2d 776, 782 (Ct. App. 2009) (citing *Sunrise*, 420 F.3d at 328). Stated differently, “in the context of a zoning action involving property, it must be clear that the state’s action ‘has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.’” *Dunes*, 401 S.C. at 297, 737 S.E.2d at 610 (citation omitted).

“If the propriety of the Council’s decision is even ‘fairly debatable,’ [the court] cannot inject [its] judgment into a review of their decision, but must leave that decision undisturbed.” *Bear*, 319 S.C. at 140, 459 S.E.2d at 885 (citation omitted). “The financial situation or pecuniary hardship of a single owner affords no adequate grounds for putting forth this extraordinary power [of invalidating zoning restrictions] affecting other property owners as well as the public.” *Rush*, 246 S.C. at 281, 143 S.E.2d at 533.

A. The circuit court did not err in referencing the “shocks the conscience” language.

Changing course from its understanding of the proper standard at trial,¹⁰ Appellant now asserts that the circuit court used a “shocks the conscience” analysis *instead of* a rational basis review. (Appellant’s Initial Br., p. 17.) Appellant misstates the deliberations of the circuit court. The circuit court not only conducted a rational basis review, but it also cited identical language in

¹⁰ See Tr. 624:16-19 (Appellant’s counsel in closing argument asserted, “*If that doesn’t shock the conscience*, if that’s not clear and convincing evidence that this decision was arbitrary and capricious, frankly, I just don’t know what is.”) (emphasis added).

its order that Appellant cites in its brief.¹¹ Appellant further errs in arguing that the circuit court improperly referenced “shocking the conscience” language.

In *Siena Corp. v. Mayor & City Council of Rockville Maryland*, the Court of Appeals for the Fourth Circuit, in deciding whether an amendment to a zoning ordinance violated the claimants’ substantive due process rights, noted that:

State deprivation of a protected property interest violates substantive due process only if it is “so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies.” . . . The state action must be “conscience shocking, in a constitutional sense.”

873 F.3d 456, 63-64 (4th Cir. 2017) (citation omitted). The circuit court did not erroneously acknowledge the conscience-shocking language and, more importantly, the circuit court proceeded to conduct a rational basis analysis.¹² The circuit court did not apply incorrect law by citing the judicial conscience-shocking language. Nonetheless, Appellant fails to give any weight to the circuit court’s ruling that Ordinance 2018-40 was rationally related to a legitimate state interest. “[W]hatever doesn’t make any difference, doesn’t matter.” *McCall v. Finley*, 294 S.C. 1, 4, 362

¹¹ In its order, the circuit court cited to language in the *Dunes* case, which Appellant also cites: “In the context of a zoning action involving property, it must be clear that the state’s action has no foundation in reason and is mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.” (Order, Feb. 3, 2023, p. 8; Appellant’s Initial Br., p. 16-17) (quoting *Dunes*, 401 S.C. at 297, 373 S.E.2d at 610 (citation and internal quotation marks omitted)).

¹² See Order, Feb. 3, 2023, pp. 9-10 (finding Appellant was not deprived of its property interest because it still maintained a non-exclusive right of ingress and egress over the Parking Lot, the ordinance was rationally related to a legitimate govern purpose of complying with federal flood and disability regulations as well as current fire and building codes, and the County imposed some requirements on the new building, such as limited the seating capacity to that of the former building and limited the amount of heated square footage, which was not arbitrary or capricious).

S.E.2d 26, 28 (Ct. App. 1987); *State v. Reyes*, 423 S.C. 394, 406, 853 S.E.2d 334, 340 (2020) (quoting *State v. Jolly*, 304 S.C. 34, 39, 402 S.E.2d 895, 898 (Ct. App. 1991)).

B. Appellant did not demonstrate a deprivation of its property rights.

Appellant further asserts that because Appellant’s expert and a manager testified the restaurant’s business will suffer due to decreased parking, the circuit court erred when it found that Appellant had not been deprived of a property right. In an attempt to invert the burden of proof, Appellant contends the circuit court’s “conclusion that Respondents have not deprived [Appellant] of its property interest is entirely without evidence” (Appellant’s Initial Br., p. 20.) *See Ani Creation, Inc.*, 2023 WL 4221865, at *8 (dismissing appellants’ argument that a zoning ordinance was arbitrary and capricious because the city allegedly “did not submit any proof that the prohibited retail uses impacted public safety” because appellants—not the city—had the burden of proof). As the circuit court found, the passage of Ordinance 2018-40 does not deprive Appellant of its non-exclusive right of ingress and egress over the Parking Lot. Although Appellant would like to convert its non-exclusive easement right to an exclusive easement at night, such an interpretation exceeds the interest granted to Appellant in the easement. *See Easement*, Black’s Law Dictionary (11th ed. 2019) (defining “nonexclusive easement” as a “common easement,” which is “[a]n easement allowing the servient landowner to share in the benefit of the easement”).

Appellant also argues that the circuit court erred in not finding Appellant will lose its right to operate its restaurant.¹³ Relying on two statements by its witnesses, Appellant contends the

¹³ Appellant cites to several cases to support its contention that “South Carolina law also recognizes the property interest of owners of real property to continued use of their property,” meaning Appellant had a right to continue using its property as a restaurant. (Appellant’s Initial Br., pp. 18-19.) The cases cited by Appellant are inapposite in that those cases dealt with the rezoning of one’s property. *Byrd v. City of N. Augusta*, 261 S.C. 591, 593-94, 201 S.E.2d 744, 745 (1974) (property owners challenged rezoning of land from commercial to residential); *Friarsgate v. Town of Irmo*, 290 S.C. 266, 268, 349 S.E.2d 891, 893 (Ct. App. 1986) (property owner challenged ordinance that placed its property in a single family residential district which prohibited use of the property

passage of Ordinance 2018-40 will result in the closure of its restaurant. However, as is the theme throughout its brief, Appellant ignores its witnesses' testimony on cross-examination. Specifically, Appellant's general manager and experts conceded they had no knowledge of the percentage of transportation methods—whether driving, walking, bussing, ride sharing or bicycling—that Appellant's patrons use to frequent the restaurant. (Tr. 193:8—195:7; 455:17—457:6; 562:20—564:5.) Moreover, Appellant's expert, Moring, admitted he had not reviewed Appellant's tax returns or financial information¹⁴ prior to making his determination that Appellant will be “devastated” by the passage of Ordinance 2018-40 alone. (Tr. 453:15—454:24.) Moring further conceded that Appellant had not listed its restaurant for sale. (Tr. 453:19—454:24; 458:25—459:2.) The circuit court heard all the evidence, considered Appellant's witnesses' testimony, correctly weighed their credibility, and found Appellant did not meet its burden of demonstrating a deprivation of its property rights. “A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property.” *Dunes*, 401 S.C. at 296, 737 S.E.2d at 609-10 (quoting *Harbit*, 382 S.C. at 394, 675 S.E.2d at 782) (internal quotation marks omitted).

C. The passage of Ordinance 2018-40 was not arbitrary or capricious because strict adherence to Article XI was not mandatory, the passage of Ordinance 2018-40 provided for the construction of a safer, code-compliant building, and

for condominiums for which property owner previously obtained building permits); *Scott v. Greenville Cnty.*, 716 F.2d 1409, 1412-13 (4th Cir. 1983) (property owner sued county officials for violations of his constitutional rights where county officials allegedly conspired to rezone property from multi-family dwellings to single family homes in order to deny property owner's permit to build multi-family low-income housing complex). Ordinance 2018-40 permits the construction of a new Marina Store and Restaurant building; it does not change the zoning of the Marlin Quay PD. Appellant is not prevented from operating its restaurant according to Ordinance 2018-40.

¹⁴ Similarly, Appellant's expert appraiser, Knight, also conceded he had not reviewed Appellant's tax returns or financial information prior to making his determination that Appellant would suffer financial loss. (Tr. 657:20—568:6.)

the limitations set forth in Ordinance 2018-40 were rationally related to a legitimate government interest.

Appellant contends the passage of Ordinance 2018-40 was arbitrary and capricious because the Planning Department “ignored” Article XI of the Zoning Code. Appellant entirely disregards—and indeed, fails to even mention—the law of this State governing planned developments.

Local governments, such as Georgetown County, have statutory authority to create planned developments and thereafter to amend those PDs. Specifically, South Carolina Code Section 6-29-740 provides in full:

In order to achieve the objectives of the comprehensive plan of the locality and to allow flexibility in development that will result in improved design, character, and quality of new mixed use developments and preserve natural and scenic features of open spaces, the local governing authority may provide for the establishment of planned development districts as amendments to a locally adopted zoning ordinance and official zoning map. The adopted planned development map is the zoning district map for the property. The planned development provisions must encourage innovative site planning for residential, commercial, institutional, and industrial developments within planned development districts. *Planned development districts may provide for variations from other ordinances and the regulations of other established zoning districts concerning use, setbacks, lot size, density, bulk, and other requirements to accommodate flexibility in the arrangement of uses for the general purpose of promoting and protecting the public health, safety, and general welfare.* Amendments to a planned development district may be authorized by ordinance of the governing authority after recommendation from the planning commission. These amendments constitute zoning ordinance amendments and must follow the prescribed procedures for the amendments. The adopted plan may include a method for minor modifications to the site plan or development provisions.

(Emphasis added.) As expressly provided by the statute, the legislature has recognized the purpose of planning developments as providing flexibility, and specifically, “variations from other ordinances . . . concerning . . . other requirements to accommodate flexibility”

“Courts cannot become city planners but can only correct injustices when they are clearly shown to result from municipal action.” *Knowles v. City of Aiken*, 305 S.C. 219, 222, 407 S.E.2d

639, 642 (1991) (citation and internal quotation marks omitted). “In order to successfully assault a city’s zoning decision, a citizen must establish that the decision was arbitrary and unreasonable.” *Id.* at 224, 407 S.E.2d at 642 (citation omitted).

In this case, two consecutive directors of planning and code enforcement, Richardson and Johnson, testified that planned developments create distinct and separate zoning ordinances and do not necessarily require adherence to other portions of Georgetown County’s general Zoning Ordinance. Specifically, Richardson and Johnson both explained that in the context of a PD, Georgetown County Ordinance Article XI, titled “Off-Street Parking Regulations,” may be referenced as a guide when evaluating parking, but its application is not required for PDs. Given that the Parking Lot was used by multiple parties and that the Marlin Quay PD was one of the first PDs in the County, the Planning and Zoning Department imposed a limitation on the new Marina Store and Restaurant to the same seating capacity as the original building.¹⁵

Both Richardson and Johnson further explained that even if Article XI were applicable to this PD, Section 1101, titled “General Requirements,” would not apply to the proposed Marina Store and Restaurant because it is neither “initial construction” nor a change in use. Appellant presented no evidence or zoning or planning expert to testify that in PDs, the application of general ordinances such as Article XI are mandatory or that the plain language of Article XI does not exclude the planned Marina Store and Restaurant.¹⁶ Furthermore, Appellant’s counsel’s arguments

¹⁵ Appellant faults Richardson and Johnson for discussing parking with Goggans at the time of submission of the first application for MQ1 or 1.0, but such correspondence simply evidences Richardson and Johnson’s reference to Article XI as a guide when examining the application for the new Marina and Store Restaurant building.

¹⁶ Appellant asserts the circuit court erred in finding Appellant presented no “expert testimony on the issue of PDs not being an exception to Article XI” because Appellant’s expert, Robert Castles, who was qualified an expert in civil engineering, testified his job often required him to interpret and apply zoning ordinance, and Castles found no exceptions to the parking requirements in the zoning ordinance. (Appellant’s Initial Br., p. 23.) Appellant misunderstands the circuit court’s

are not evidence, nor are they able to usurp the interpretation of the local planning department.¹⁷ See *Clear Channel Outdoor v. City of Myrtle Beach*, 360 S.C. 459, 465, 602 S.E.2d 76, 79 (Ct. App. 2004) (citing *Purdy v. Moise*, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953)) (“Courts are bound to afford substantial deference to the decisions of those charged with interpreting and applying local zoning ordinances.”); cf. *Kurschner v. City of Camden Plan. Comm’n*, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008) (citing S.C. Code Ann. § 6-29-340) (“The legislature expressly granted [] discretionary authority in the area of local planning to the Commission.”).¹⁸

finding and trial testimony. Specifically, the circuit court noted that Appellant presented no experts in zoning or planning or otherwise offer evidence that Article XI was a requirement and not a guide. (Order, Feb. 3, 2023, p. 9.) Castles conceded that planned developments can have their own requirement separate and apart from the zoning ordinance. (Tr. 521:4-15.) Moreover, Castles agreed that when there is a difference of opinion as to the interpretation of a zoning ordinance between an applicant and a zoning department, the interpretation of the zoning department is what the applicant must abide by. (Tr. 524:1-8.)

Although Appellant represents that Richardson testified “that the PD sections of the Zoning Ordinance were silent on parking requirements,” and therefore, only Article XI provides any “rules” as to parking, Appellant deliberately ignores the remainder of Richardson’s testimony wherein she explained the Marlin Quay PD conceptual plan set forth the parking lot at issue and notwithstanding, planned developments operate as “an ordinance that stands on its own . . . [that] can deviate from any article in the zoning ordinance [because] [t]hat’s the purpose of the planned development. So, it can be different from Article XI” (Tr. 257:11—258:10.) In light of the requirements placed on the construction of the new Marina Store and Restaurant in an effort to maintain the same demand on the Parking Lot as contemplated by the PD’s conceptual plan, the passage of Ordinance 2018-40 did not create a nonconforming use because the use did not change nor did Article XI apply. See *Vulcan Materials Co. v. Greenville Cnty. Bd. of Zoning Appeals*, 342 S.C. 480, 496 n.13, 536 S.E.2d 892, 900 n.13 (Ct. App. 2000) (noting a “nonconforming use” refers to “a use of property which existed lawfully before the enactment of a zoning ordinance and may continue afterwards even though the use does not comply with the zoning restriction”).

¹⁷ Richardson and Johnson confirmed that although Article XI was referenced as a guide in discussing Palmetto’s application, Article XI was not mandatory for the Marlin Quay PD. Thus, Appellant’s insistence that all parties “agreed” Article XI parking calculations were mandatory based on emails is not supported by the parties’ testimony as to what they meant at that time.

¹⁸ Appellant relies on this Court’s ruling in *Peterson Outdoor Advertising v. City of Myrtle Beach* in support of its assertion that the Planning Department set forth arbitrary and capricious rules not within its ordinances. 327 S.C. 230, 489 S.E.2d 630 (1997). However, the issue of whether a particular ordinance was applicable was not before the Court in that case; rather, the Court had to

The Planning Department recommended approval of the 3.0 application so long as the heated square footage remained the same and the seating capacity remained limited to 110 seats as with the former building. (Pl.’s Ex. 35.) Indeed, the Planning Department’s recommendation struck a balance between permitting the construction of a safer building while also limiting the capacity of the restaurant so as to not overburden the parking lot than how it had previously existed. *See* Tr. 287:20—288:3 (Q: “Are you saying that’s in the best interest of the public health, safety, and welfare?” A: “I’m saying that we reviewed the building. We reviewed the building for a new safer building that met code requirements. We worked to limit the square footage amount, we worked to limit the seating capacity to retain it as to what was there with the redevelopment of a new safer building for the public.”).¹⁹ Nothing could be more rationally and logically related to the interest of furthering the public’s health, safety, and welfare. *See Berman v. Parker*, 348 U.S. 26, 33 (1954) (“The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”); *McMaster*, 395 S.C. at 507-08, 719

determine whether the governing body unconstitutionally applied an ordinance at issue. *Peterson*, 327 S.C. at 234, 489 S.E.2d at 632. Moreover, the application of the ordinance at issue in *Peterson* did not concern a PD, but rather, whether an application for billboards would be approved. Accordingly, such case is inapposite here.

¹⁹ Appellant contends the “decision to approve 3.0 was [] completely baseless because approval of the Application required 3.0 to have the same seating capacity as the old building and the County limited the heated square footage of 3.0 [and such] parameters have no basis whatsoever in the Zoning Ordinance.” (Appellant’s Initial Br., p. 24.) However, the very language of Article XI contemplates application for initial construction or conversion in use of any building that might produce “an increase in . . . floor area [or] seating” (Defs.’ Ex. 1, p. 241.) Similarly, Appellant’s contention that the passage of Ordinance 2018-40 will “dramatically increase” a “nonconforming use,” i.e., the Parking Lot, and such approval was not rational is specious at best. (Appellant’s Initial Br., pp. 26-27.) As detailed above, limiting the seating capacity and heated square footage would not result in a “dramatic increase” in parking.

S.E.2d at 664 (“Where the rational relationship standard is utilized, the law must be upheld if it furthers any legitimate governmental purpose.”).²⁰

Appellant’s contention that there was no logic in “permit[ing] a building more than twice the size of the old building,” which allegedly created a public safety issue, is wholly unsupported by the evidence. Richardson, Johnson, and Goggans each confirmed that the building had to be larger in size in order to comply with FEMA, ADA, and building and fire code regulations. (Tr. 426:25—430:2.) Indeed, Goggans testified the new building could not be repaired in order to comply with such codes. (Tr. 495:20—496:11.) Although Appellant asserted that the building could have been smaller and still complied with federal, state, and local laws, Appellant offered absolutely no evidence to support that notion. *S.C. Dep’t of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (citations omitted) (“Arguments made by counsel are not evidence.”).²¹

II. The circuit court did not err in refusing to declare Ordinance 2018-40 void or in finding Goggans did not act unlawfully.

Appellant next makes the tenuous assertion that Goggans was involved in development of plans for 1.0 and interfacing with the County, and thus, all of the allegedly improper interpretations

²⁰ Appellant further asserted that “Kirk testified that there have already been accidents in front of the restaurants due to a paucity of available parking.” (Appellant’s Initial Br., p. 22.) No such testimony exists in the record. Specifically, Kirk’s testimony on the topic of accidents set forth only one incident in July of 2021 wherein a vehicle leaving the marina was hit at the north entrance. (Tr. 153:5-11.) Kirk did not testify as to the cause of the accident, nor was any other evidence of this single accident offered.

²¹ Appellant also argued that if federal legislation and building and fire codes were requirements for the 3.0 application, then Article XI should have been complied with as well. This argument is specious and entirely ignores the purview of the Planning Department and the statutory law of South Carolina. *See* S.C. Code Ann. § 6-29-740 (noting the flexibility of planned developments and the ability of PDs to vary from “other ordinances and the regulations of other established zoning districts”) (emphasis added).

and “parameters” were determined at 1.0 stage, so that the passage of applications for 2.0 and 3.0—even though major and not minor amendments—was “infected.” Specifically, Appellant contends that it was improper for SGA to remain the architect for the project and for Goggans to remain on County Council while 3.0 was pending because Goggans had “power over Johnson and Richardson’s budget, raises, and promotions” and one individual, appointed by Goggans, voted to approve the proposal at the Planning Commission meeting. (Appellant’s Initial Br., p. 29.) Appellant also argues Richardson, Johnson, and Goggans agreed Article XI was mandatory. (*Id.*) Appellant would have this Court overlook and reject the processes by which 3.0 was approved.²²

First, there is no legal prohibition on other SGA employees’ involvement as architects. South Carolina Code Section 8-13-740(A)(4) states, “A public official, public members, or public employee of a county may not knowingly represent a person before an agency, unit, or subunit of that county for which the public official, public member, or public employee has official responsibility” However, Section 8-13-740(A)(7)(a) provides an exception to this rule: “The restrictions set forth in items (1) through (6) of this subsection do not apply to: (a) purely ministerial matters which do not require discretion on the part of the governmental entity before which the public official, public member, or public employee is appearing[.]”

Of note, the South Carolina Ethics Commission issued an opinion on January 17, 2007 in which the Commission determined a business associate of a sitting county councilmember would not be prohibited from submitting land development plans to the county’s planning department because decisions at the planning department level were *per se* ministerial and non-discretionary, and therefore, subject to the exception identified in Subsection 8-13-740(A)(7)(a). Op., S.C. State

²² To the extent Appellant repeats its arguments that Richardson and Johnson agreed Article XI was a mandatory requirement applicable to these amendment applications, see Respondents’ discussion set forth in Section I.

Ethics Comm'n, SEC AOO2007-006 (Jan. 17, 2007).²³ The Commission recognized that county planners and reviewers were tasked with reviewing and approving sketch plans and minor plats, communicating with developers and their engineering firms, and making recommendations to the planning commission regarding major developments. *Id.* The Commission also noted that Planning Department staff and the Planning Commission “administer and interpret” the zoning ordinance “on a daily basis,” and when reviewing a major development plan, staff “regularly seeks additional information and clarification from the engineering firms as they shepherd the plan from submission to final approval.” *Id.* Ultimately, the Commission concluded, “This information gathering and requests for information is ministerial . . . and non-discretionary.” *Id.* Instead, the Planning Commission is the entity that may “exercise its discretion in reviewing major developments and projects of regional significance.” *Id.*

The opinion of the Ethics Commission exposes two fallacies in Appellant’s position: (1) a business associate of a councilmember is not prevented from representing an applicant or from assisting with the submission of an application; and (2) the very job of a Planning and Zoning Department encompasses all of the tasks for which Appellant seeks to fault the Georgetown County Planning and Zoning Department’s staff. In sum, the Ethics Commission’s opinion on the role of a Planning and Zoning Department in preparing staff reports, reviewing information, and remaining in communication with applicants and their representatives rejects Appellant’s assertions that there was impropriety, favoritism, arbitrariness, or capriciousness by the County

²³ The heading of this opinion contains seemingly boiler plate language stating the opinion was “overturned in part by amendment to Section 8-13-740(4) and (5).” However, that amendment simply deleted language that referenced individuals who may be associated with a public official, public member, or public employee of a county, and therefore, reaffirms the opinion’s holding on different grounds.

when it cooperated and communicated with Palmetto and its representatives throughout the application process.²⁴

Moreover, Appellant's argument would require the Court to ignore entirely the procedure that ensued by virtue of the subsequent applications being for major amendments. As previously explained, an application for a major zoning amendment requires the preparation of a report by staff and its submittal to the Planning Commission. The Planning Commission, made up of seven members, receives public comment and subsequently makes a recommendation to County Council. The seven-member County Council, after not one, not two, but three public readings wherein the public is permitted to express their opinions regarding a zoning application to County Councilmembers, then votes whether to approve the proposed ordinance. In this case, the entire process occurred not once, but twice. Furthermore, as presented at trial, Goggans recused himself from participating in both of the major zoning applications, and in all proceedings, Appellant's legal counsel or representative were present and heard by Council.

To further illustrate, in *Kurschner v. City of Camden Planning Commission*, the Supreme Court of South Carolina noted, in dicta, that even if a sitting planning commission member had a conflict of interest, the decision by the commission would not automatically be void. 376 S.C. 165, 170-71, 656 S.E.2d 346, 349 (2008). In that case, a planning commission member was elected as a state representative after a special election, but had not yet taken the oath of office. *Id.* at 170, 656 S.E.2d at 349. The applicants wanted the commission member to recuse herself because, the applicant argued, South Carolina Code Section 6-29-350(B) and Article III, Section 24 and Article VI, Section 3 of the South Carolina Constitution prohibited a planning commission member from

²⁴ Appellant's own expert, Robert Castles, testified that after submission of a zoning applications with local governments, it was customary for applicants' representatives to engage in communications with staff members in the planning and zoning departments. (Tr. 522:4—523:8.)

holding an elected public office in the county from which she was appointed. *Id.* However, pursuant to a letter issued by the House Legislative Ethics Committee, the commission member did not recuse herself since she had not taken yet taken the oath, and in turn, had not begun “holding office.” *Id.* The Court affirmed this reasoning, and in dicta, noted:

However, even assuming [the planning commission member] was holding office, the [applicants] point to no authority indicating that the decision is automatically void and cannot show that [planning commission member’s] participation violated their due process rights. Specifically, the [applicants] cannot demonstrate that they were prejudiced by [the planning commission member’s] participation because even without [the member’s] vote, there remained six votes opposing the application, as the Commission unanimously voted against approval.

Id. at 170-71, 656 S.E.2d at 349.

As the applicants in *Kurschner*, Appellant did not and cannot demonstrate that it was prejudiced by Goggans’ 2016 involvement with Palmetto’s minor application. Note, too, that the 2016 minor amendment application did not result in any ordinance amending the Marlin Quay PD. The PD was not amended until February 2018 and subsequently, due to the circuit court’s order in civil action number 2016-CP-22-00961, was amended in January 2019. Goggans was not involved in the processes that led to these two PD amendments. Appellant presented no such evidence that the two PD amendments came about due to any pressure or influence from Goggans.

In order for Appellant’s theory to be correct, Appellant had to prove that Goggans’ involvement with 1.0 in 2016 tainted the decisions of the Planning Commission and County Council *twice*.²⁵ In a much closer question wherein the commission member actually participated

²⁵ Even more, to be viable, Appellant’s legal theory would require the Court to find that the Planning Commission and County Council members would not change their opinions from a staff report recommendation even in the face of public comments to the contrary—of which there was no evidence. Indeed, Johnson testified to the contrary that the Planning Commission often disagreed with the staff report’s recommendation and voted to recommend the opposite suggestion to County Council. (Tr. 393:2-19.)

in the vote of the very action at issue, this Court gave great weight to the remaining votes as a cure of any alleged prejudice had there been a conflict of interest. *Id.* Similarly, this Court should give great weight to the facts that two subsequent applications for major amendments were approved; Goggans was not involved; public comments were allowed—including comments by Appellant and its *attorneys* and other representatives expressing Appellant’s position; meetings and votes were public; and, significantly, two multi-member county decision-making bodies approved the passage of each ordinance. Indeed, Appellant did not present one iota of evidence that the Council vote of approval of Ordinance 2018-40 was influenced by Goggans. Appellant’s contention that Goggans’ initial involvement “infected” the processes up to and including the passage of Ordinance 2018-40 is without merit, and the circuit court’s findings were reasonably supported by the evidence. *See, e.g., Bear*, 319 S.C. at 139 n.1, 459 S.E.2d at 885 n.1 (“The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise. *If individuals are not satisfied with decisions made by members of a municipal government within the limits of the law, their remedy is at the polls, not the courts.*”) (emphasis added).

III. The circuit court did not err in denying Appellant’s takings and inverse condemnation claims.

A. The circuit court did not apply the wrong standard for inverse condemnation, and notwithstanding, any such error was harmless.

Appellant’s argument concerning the circuit court’s inverse condemnation analysis is an incorrect reading of the plain language of the court’s order. Appellant alleges the “trial court mistakenly applied the non-regulatory taking elements to the inverse condemnation section of its order, whereas it should have applied the two-element test as previously stated, and then applied the *Penn Central* test to determine whether the second element—whether the conduct effects a taking—was satisfied.” (Appellant’s Initial Br., p. 31.) Appellant in essence asserts that the circuit

court should have performed an identical analysis to its inverse condemnation claim as the court did when analyzing Appellant’s takings cause of action.

Appellant cites *Byrd v. City of Hartsville* for support that the circuit court should have determined only whether there was affirmative conduct of the County and whether that conduct effects a taking under a *Penn Central* analysis because Appellant has alleged a regulatory taking. 365 S.C. 650, 620 S.E.2d 76 (2005). Appellant contends the circuit court’s consideration of two elements cited for inverse condemnation—whether the taking is for public use and whether the taking has some degree of permanence—was erroneous pursuant to *Byrd*. Assuming, *arguendo*, that Appellant is correct, Appellant’s claim that a taking occurred is no different than Appellant’s claim for inverse condemnation, and the circuit court thoroughly analyzed Appellant’s takings claim as well as Appellant’s requested analysis of its inverse condemnation claim.²⁶

The analysis Appellant requests for its inverse condemnation claim—which it alleges is not a physical appropriation but a regulatory one—was performed by the circuit court within its analysis of the takings claim, and therefore, the result is the same. Specifically, the circuit court restated in its inverse condemnation analysis that the passing of Ordinance 2018-40 did not

²⁶ The distinction this Court made as to when a taking versus inverse condemnation is the appropriate claim is as follows: “While the government typically takes property through an eminent-domain proceeding, a taking may occur without such a proceeding. That is called ‘inverse condemnation.’” *Byrd*, 365 S.C. at 656, 620 S.E.2d at 79 (citation omitted). The *Byrd* Court went on to state, “Whether physical or regulatory, this Court has held that there are four elements to inverse condemnation: (1) affirmative conduct of a government entity; (2) the conduct effects a taking; (3) the taking is for public use; and (4) the taking has some degree of permanence.” *Id.* at 657, 620 S.E.2d at 79. The Court proceeded to “remove the element ‘some degree of permanence’” because it conflicted with the principle that the government must compensate for even a temporary taking,” and the Court held that the element that the taking must be for public use does not apply in regulatory-taking cases. *Id.* at 657, 620 S.E.2d at 79-80 (citations omitted). However, as evidenced by later cases involving inverse condemnation claims, the Court may not have abandoned the permanence requirement. *See, e.g., Ray v. City of Rock Hill*, 434 S.C. 39, 45, 862 S.E.2d 259, 262 (2021) (citations omitted).

constitute a taking. (Order, Feb. 3, 2023, p. 15.) *Cf. McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (“[W]hatever doesn’t make any difference, doesn’t matter.”); *State v. Reyes*, 423 S.C. 394, 406, 853 S.E.2d 334, 340 (2020) (same) (quoting *State v. Jolly*, 304 S.C. 34, 39, 402 S.E.2d 895, 898 (Ct. App. 1991)).

B. A *per se* taking did not occur, and Appellant did not meet the *Penn Central* test.

Appellant contends the circuit court ignored its “undisputed” evidence that Ordinance 2018-40 deprived it of its “rights to the easement and to the value of the restaurant.” (Appellant’s Initial Br., p. 31.) Specifically, Appellant contends the circuit court erred by not finding that it had been “deprived of all economically beneficial use of its land because the property will be worth a nominal amount of \$89,900 as a result of the approval of 3.0” (*Id.* at 32.) In fact, the circuit court did not overlook this evidence but specifically referenced it. (Order, Feb. 3, 2023, p. 13.) However, the court was not required to give absolute credit to all evidence before it, particularly given the concessions made by Appellant’s expert on cross-examination. *Cf. Twitty v. Harrison*, 230 S.C. 174, 94 S.E.2d 879 (1956) (“Our duty in equity cases to review challenged findings of fact as well as matters of law does not require that we disregard the findings below or that we ignore the fact that the trial judge, who saw and heard the witnesses, was in better position than we are to evaluate their credibility; nor does it relieve appellant of the burden of convincing this court that the trial judge erred in his findings of fact.”).

“Government regulation effectuates a *per se* taking in two scenarios: (1) where an owner is required to suffer a permanent physical invasion of property, however minor. . . ; or (2) ‘where [a] regulation denies all economically beneficial or productive use of land.’” *Dunes*, 401 S.C. at 313, 737 S.E.2d at 619 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-16 (1992)).

Appellant has not alleged that there has been any physical invasion of its property, but rather, Appellant claims that the passage of Ordinance 2018-40 equates a taking. However, Appellant presented no evidence that *all* economically beneficial uses of the land have been deprived, but rather, only that some of its customers may potentially have difficulty parking. Although Appellant has known about the rebuilding of the neighboring restaurant for approximately six years, Appellant did not conduct any study, test, or evaluation of the method or manner of travel its customers use when dining at its restaurant nor were any customer surveys conducted. Testimony of Kirk, a manager of the Gulfstream Café, and Appellant’s civil engineer, Castles, verified that many of the Gulfstream Café’s customers travel by foot, charter bus, and ride-sharing services. (Tr. 192:1—195:7; 527:14—528:25.) Both Kirk and Appellant’s real estate broker, Moring, agreed there were at least 400 to 500 condominium units, and numerous vacation homes, within walking distance of Gulfstream Café.²⁷ (Tr. 193:4-7; 456:3-8.) Not only does Appellant ask the Court to assume there will be diminished or no parking for Gulfstream Café customers, despite the twenty-three spaces that are exclusive to Gulfstream Café, but Appellant also ignores the fact that its customers traverse in numerous ways aside from parking. Thus, the restaurant would still have business even if Appellant’s “extraordinary assumptions” are true.²⁸

²⁷ Appellant’s expert real estate broker, Moring, also conceded the Gulfstream Café had significant income from walk-in traffic, and Appellant’s appraiser, Knight, agreed there was a significant number of condominium units within walking distance of Gulfstream Café. (Tr. 456:3—457:6; 563:14—564:5.)

²⁸ On cross-examination, Appellant’s expert, Knight, admitted—in his own words per his report—that he made an “extraordinary assumption” that *all* parking would be lost. (Tr. 561:23—562:1.) There was no evidence that Appellant would lose use of the entirety of the Parking Lot as a result of the passage of Ordinance 2018-40. Knight also conceded he was not made aware of the foot traffic of Gulfstream Café’s patrons, nor did he receive any financial information for Appellant. (Tr. 562:20—564:5; 567:23—568:6.) Thus, Appellant’s own expert did not have a full picture to conduct a credible valuation.

Moreover, Appellant’s appraiser agreed that if a zoning amendment were approved, the Gulfstream Café could be rezoned and used as housing. Accordingly, Appellant provided no evidence that the passage of Ordinance 2018-40 would result in a categorical taking. *Cf. Dunes*, 401 S.C. at 314, 737 S.E.2d at 619 (holding summary judgment was appropriate where challenger presented no evidence that the situation was the “extraordinary circumstance when *no* productive or economically beneficial use of land is permitted”) (citation and internal quotation marks omitted) (emphasis in original).²⁹

Appellant next contends that the circuit court erred in finding it did not meet the *Penn Central* test for a regulatory taking. Even where there is no categorical taking based on a total elimination of all economically beneficial use, the court must still weigh whether a taking has occurred depending on a set of factors set forth in *Penn Central Transportation Co. v. City of New York*. 438 U.S. 104 (1978). The factors for the court’s consideration are: (1) the character of the government action; (2) the economic impact of the regulation on the claimant; and (3) the extent to which the regulation has interfered with distinct investment-backed expectations. *Dunes*, 401 S.C. 315, 737 S.E.2d at 619. “The ‘common touchstone’ of each regulatory taking theory is ‘to identify *regulatory actions that are functionally equivalent to the classic taking* in which government directly appropriates private property or ousts the owner from his domain.’” *Dunes*, 401 S.C. at 314, 737 S.E.2d at 619 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005)) (emphasis in original).

²⁹ Appellant also asserts the circuit court did not acknowledge the evidence that Appellant will be deprived of its right to the easement. This assertion is also a misrepresentation of the circuit court’s order. (Order, Feb. 3, 2023, p. 13.) Nonetheless, as the circuit court noted, Appellant has not lost its right to use its non-exclusive easement to the parking lot, and Appellant was never entitled to exclusive use of a certain number of parking spaces within the parking lot. (*Id.* at 14.)

1. Character of the Government Action

Appellant asserts the circuit court erred in finding the passage of Ordinance 2018-40 furthered a legitimate government interest when the proposed new building could have been smaller while still complying with federal law and various codes—despite there being absolutely no evidence in the record to support that assertion.³⁰ (Appellant’s Initial Br., p. 32.) When reviewing the character of the government action, the South Carolina Supreme Court has acknowledged government regulation by its very nature involves some effect on rights for the benefit of the public good. *Dunes*, 401 S.C. at 315, 737 S.E.2d at 620. Further, not all damages suffered by a private property owner are compensable. *Id.* at 316, 737 S.E.2d at 620 (quoting *Carolina Chloride, Inc. v. Richland Cnty.*, 394 S.C. 154, 170, 714 S.E.2d 869, 877 (2011)).

In the *Dunes* case, this Court found the character of the government action factor weighed in favor of the Town of Mount Pleasant. 401 S.C. at 317, 737 S.E.2d at 621. There, the developer-claimant alleged the Town had committed a taking when it amended its zoning ordinance to create a “Conservation Recreation Open Space zoning district,” which put land-use restrictions on golf course properties. *Id.* at 287, 737 S.E.2d at 604-05. The claimant sought to rezone its golf-course property in order to construct new homes. *Id.* The Town denied the rezoning request and the claimant initiated suit, alleging the Town had committed a taking. *Id.* In finding the character of the government action weighed in favor of the Town, the Court noted the Town had provided a legitimate public purposes to be achieved by enacting the ordinance, the Town did not eliminate

³⁰ Appellant also complains that Respondents gave no explanation as to why FEMA, ADA, and fire and building codes applied to the construction of the Marina Store and Restaurant when Article XI of the Zoning Ordinance did not. As previously explained, Section 6-29-740 provides PDs flexibility when determining the applicability of other various *zoning* ordinances, and the requirements of federal regulations and other departments are outside the purview of the Planning and Zoning Department.

all development potential, claimant still had a right to sell the property if it wished, and the Town had not “in any way exploited the [property] for its own use or to gain any economic advantage.” *Id.* at 316-17, 737 S.E.2d at 620-21. The Court held that “[i]n sum, it cannot be said that, by designating the [property] as a CRO district, the Town has taken or acquired [claimant’s] property.” *Id.* at 317, 737 S.E.2d at 621.

Here, like the Town in *Dunes*, Georgetown County achieved legitimate public purposes by adopting Ordinance 2018-40, such as correcting property lines, complying with a court order, as well as permitting the construction of a structure that complied with flood requirements of FEMA, ADA, and other building and fire code regulations which have come into existence since the old building was erected.³¹ The County did not eliminate the development potential of Appellant’s property interest—which is a non-exclusive easement right to use an unspecified amount of parking spaces. Moreover, Appellant undeniably still has a right to sell its restaurant if it wishes, and Georgetown County has not in any way exploited the Parking Lot for its own use or to gain an economic advantage. Therefore, the character of the government action in passing Ordinance 2018-40 weighs heavily in favor of Respondents, and the circuit court did not err by finding the County had a legitimate public purpose by enacting Ordinance 2018-40.

2. Economic Impact of the Ordinance on Appellant

Appellant, per its experts’ testimony, contends the economic impact on it will be devastating. (Appellant’s Initial Br., pp. 32-34.) Once again, Appellant ignores the law and the evidence on cross-examination. In determining the economic impact of government regulations on landowners, courts have rejected the notion that diminution in property value alone can establish

³¹ Further, the replacement building provides services to the public, such as fuel sales and a second restaurant within the area. (Tr. 429:5-21; 431:17-23.)

a taking. *Braden's Folly, LLC v. City of Folly Beach*, 439 S.C. 171, 199, 886 S.E.2d 674, 689 (2023) (citing *Penn Central*, 438 U.S. at 131)). Instead, our Courts have held that the proper analysis is a focus on the permitted use under a regulation. *Dunes*, 401 S.C. at 317, 737 S.E.2d at 621 (quoting *Penn Central*, 438 U.S. at 131). While the consideration of a property's value before and after the regulatory action may be relevant, that comparison is "by no means conclusive." *Dunes*, 401 S.C. at 317, 737 S.E.2d at 621 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 490 (1987)).

Although Appellant's appraiser testified that the loss in value to the restaurant would be \$1,760,100.00, he admitted under cross-examination that his opinion was based on the "extraordinary assumption" that there would be absolutely no parking available for the restaurant. (Pl.'s Ex. 47, p. 3.)³² There was no evidence that Appellant would lose the ability to utilize sixty-two parking spaces due to the passage of Ordinance 2018-40. Appellant has never been entitled to the exclusive use of a certain number of parking spaces in the Parking Lot—even at night³³—and Ordinance 2018-40 does not restrict the use of the Parking Lot by Appellant's customers and employees. Appellant's property sits on the Inlet, across from the beach in Garden City, South Carolina, and as further conceded by Appellant's expert, the property would be extremely valuable

³² As previously noted, Knight did not take into consideration any walk-ins, charter buses, ride-sharing arrangements, nor that some of the use of the Parking Lot would continue. He testified that the "extraordinary assumption" of absolutely no parking was only an assumption without any independent verification.

³³ Appellant makes the repeated assertion that it is entitled to all sixty-two parking spaces at night per the easement. First, such an interpretation would rewrite the easement so that the non-exclusive easement in essence transforms into an exclusive easement at night. Second, evidence exists in the record to support that Appellant had not operated that way for a number of years and in fact, the Marina Store and Restaurant had been serving dinner and drinks in the evening for some time. (Tr. 188:1—189:21; 567:2-4.) Third, if Appellant is concerned about violation of an easement, its remedy is not against Respondents—who are not party to the easement between the private parties.

if Appellant were to receive approval to rezone to residential. Consequently, Appellant has not proven, and cannot show, that there is any legitimate basis for the hypothetical diminution in value it alleges. Notably, despite its allegations of loss of business and economic harm, Appellant has not placed the restaurant on the market for sale and has failed to even track or otherwise attempt to calculate what percentage of its customers actually utilize the Parking Lot.

Appellant's allegations notwithstanding, a diminution in market value alone cannot establish a taking. *See Dunes*, 401 S.C. at 318, 737 S.E.2d at 621; *Penn Cent.*, 438 U.S. at 131 (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value cause by zoning law) and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87.5% diminution in value)). *Cf. Rush*, 246 S.C. at 280-81, 143 S.E.2d at 533 (“[M]ere disadvantage in property value or income, or both, to a single owner of property, resulting from application of zoning restrictions ordinarily does not warrant relaxation in his favor on the ground of practical difficulty or unnecessary hardship.”) (quoting *Simmons v. Bd. of Adjustment of City of Charleston*, 226 S.C. 459, 85 S.E.2d 708 (1955) (internal quotation marks omitted); *Braden's Folly, LLC*, 439 S.C. at 201, 886 S.E.2d at 690-91 (“[T]he denial of one traditional property right does not always amount to a taking. *At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety At any rate, loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.*”) (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)) (internal quotation marks omitted) (emphasis in original). Therefore, the circuit court did not err in finding this factor weighed in favor of Respondents.

3. Interference with Investment-Backed Expectations

Without explanation as to how the circuit court allegedly erred, Appellant contends it has an investment-backed expectation to continue using sixty-two spaces at night for its restaurant.

(Appellant’s Initial Br., p. 34.) As the circuit court recognized, Appellant does have an investment-backed expectation to use the non-exclusive easement, and Ordinance 2018-40 does not interfere with that easement. (Order, Feb. 3, 2023, p. 14.)

“For government regulation to constitute a taking, the property owner must objectively demonstrate the existence [of] investment-backed expectations.” *Dunes*, 401 S.C. at 320, 737 S.E.2d at 622. “[C]ontinuation of the existing use of the property is the property owner’s ‘primary expectation’ when considering an owner’s investment-backed expectations for the property.” *Id.* at 319, 737 S.E.2d at 622 (quoting *Carolina Chloride*, 394 S.C. at 173, 714 S.E.2d at 878) (internal quotation marks omitted).

As the circuit court found and ordered, Appellant’s non-exclusive right to use the Parking Lot has not been changed by Ordinance 2018-40 because Appellant is not prohibited from using the Parking Lot, and, moreover, Appellant is not prohibited from using its property as a restaurant. *See, e.g., Braden’s Folly, LLC*, 439 S.C. at 206, 886 S.E.2d at 692 (noting property owner’s “primary expectation” of using property for vacations and rentals was not interfered with by the merger ordinance at issue). To the extent Appellant suggests the Parking Lot will be overburdened due to the passage of Ordinance 2018-40, which allows a new building with the same seating capacity as the former restaurant, Appellant’s witnesses testified that parking has long been a problem. Specifically, Kirk testified that during his time as the manager at Gulfstream Café, he directed traffic on shifts or saw customers turned away because of parking. (Tr. 152:6-16; 153:22—154:5.) In other words, according to Appellant’s own witnesses’ testimony, inadequate parking has been a problem and so contradicts the alleged investment-backed expectations Appellant claimed regarding adequate parking. Accordingly, the circuit court correctly held that this factor weighed in favor of Respondents, and Appellant did not establish a taking occurred.

IV. Appellant was not deprived of any procedural due process.

Appellant claims Palmetto's 3.0 application failed to comply with County's own rules and violated Appellant's procedural due process. "Procedural due process requires notice, the opportunity to be heard in a meaningful way, and judicial review." *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 570 (Ct. App. 2002) (citing *Grannis v. Ordean*, 234 U.S. 385 (1914)); *Kurschner*, 376 S.C. at 171, 656 S.E.2d at 350 (2008) (citing S.C. Const. art. 1, § 22; *Stono River Env't Prot. Ass'n v. S.C. Dep't of Health & Env't Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991)). The circuit court did not err in finding Appellant failed to meet its burden of proof.

Here, Appellant presented no evidence that it did not receive notice, an opportunity to be heard, or judicial review. In fact, Appellant's representatives, including employees and its attorneys, not only submitted multiple letters to various County agencies as well as Council members, but also participated at public hearings and expressed their opposition to the passage of Ordinance 2018-40 at every stage. *See Harbit*, 382 S.C. at 393-94, 675 S.E.2d at 781 (holding claimant had a meaningful opportunity to be heard because he was allowed to present arguments before the Planning Commission and City Council, and even when claimant was not personally present, his attorney appeared on his behalf). Given that Appellant actively engaged with the County Departments at every level, participated in public hearings, and received its opportunity for judicial review, Appellant's claims of lack of procedural due process are baseless. Appellant was not deprived of procedural due process.

Nonetheless, Appellant alleged several “deficiencies” with regard to procedural due process. Without conceding that any of the deficiencies alleged by Appellant are required by the state and federal constitutions, Respondents address each allegation³⁴ below:

A. The application was submitted in proper form (Section 1702.201).

The application was complete and the proper form was used. Richardson testified that the form used for the amendment was one created prepared by the Planning and Zoning Department specifically for amendments to PDs. She also identified each section in the form and testified that the sections that were not completed were not required because the applicant was not seeking a change to setback or signage. (Pl.’s Ex. 20.) Palmetto sought a site plan amendment with a change of building configuration. The section of the application dealing with site plan amendment, Section D, was completed. Submittals identified in this section were also provided with the application. While not required, Palmetto did state that revised calculations were to follow separately, and they subsequently were submitted. Thus, 3.0 was in proper form.³⁵

B. The application was submitted at least forty-five days prior to the Planning Commission meeting (Section 1702.201).

The application, in proper form, was provided at least forty-five days prior to the Planning Commission meeting as required by Section 1702.201. The Planning Commission meeting was

³⁴ Appellant appears to have abandoned its contention that the 3.0 application violated Section 1702.1, which prohibits a property owner from submitting the same application for the same parcel of property during a twelve-month period.

³⁵ Notwithstanding, Appellant maintains that failure to provide those revised plans forty-five days in advance of the Planning Commission hearing “necessarily hampered the ability of the County and the public to properly evaluate the proposal.” (Appellant’s Initial Br., p. 35.) However, setting aside any lack of standing Appellant has to make such an argument, Appellant presented no testimony or other evidence that a different determination would have resulted had the building plans been received earlier than approximately a week before the Planning Commission hearing, and therefore, such point is inapposite.

scheduled for October 18, 2018. (Pl.’s Ex. 34.) Palmetto submitted the 3.0 application to the Planning and Zoning Department on August 27, 2018. (Defs.’ Ex. 10; Pl.’s Ex. 29). Therefore, the application was submitted in excess of fifty days before the Planning Commission meeting.

C. There was substantial compliance with Section 1702.206 and 1702.207 of the 2018 Zoning Ordinance.³⁶

When Palmetto submitted the 3.0 application, it delivered envelopes addressed to each property owners within 400 feet of the subject property. Section 1702.206 provides that an applicant submit letters to the Planning Commission that are addressed to each property owner within 400 feet of the subject property. On the back of this notice, there must also be a location map showing the areas to be rezoned. Letters will be placed in unsealed, stamped, and addressed envelopes ready for mailing by the Planning Commission. Section 1702.206 further provides that “a list of all property owners, as reflected by the tax records, to whom letters are addressed must accompany the application.”

According to the testimony of Richardson and Planning and Zoning Department staff member, Judy Blankenship, the Planning and Zoning Department staff does not require letters from the applicant, but rather, only envelopes because the Planning and Zoning Department prefers to provide the letter containing the Notice of Meeting as well as the map. Although an applicant does provide a list of property owners, the staff also obtains its own list from County tax records in order to ensure the correct owners are included. The tax list of the property owners affected by the 3.0 application was introduced as Plaintiff’s Exhibit 22. Richardson testified that this list was obtained from the County’s tax records by using the County’s Geographic Information System

³⁶ Respondents address this allegation without conceding Appellant has standing to challenge it, as set forth more fully in Subsection D.

(“GIS”).³⁷ Thus, this portion of the notice requirements was substantially complied with. *See* S.C. Code Ann. § 6-29-760(D) (providing there can be no challenge to the adequacy of notice if there has been substantial compliance with the notice requirements of established procedures); GEORGETOWN COUNTY, S.C., ZONING ORDINANCES art. XVII, § 1702.207 (“Failure to strictly comply with the notification requirements contained in Sections 1702.206 and 1702.207 shall not render the rezoning of the property invalid.”).

D. Affected property owners received notice (Section 1702.207).

The tax map property owners’ list identifies The Gulfstream Café, Inc., Palmetto Industrial Development, LLC, and Marlin Quay Homeowners Association as property owners within 400 feet of the subject property. Appellant maintains that because the unit owners at the Marlin Quay Condominiums were not mailed a physical letter, Appellant’s procedural due process rights were violated.

Appellant did in fact receive notice from the County, yet it complains that other property owners did not receive notice in a proper form. Appellant lacks standing to complain about lack of notice to third parties who are not party to this action. *See State v. Chavis*, 261 S.C. 408, 411, 200 S.E.2d 390, 391 (1973) (“It is elementary that one has no standing to challenge the constitutionality of a statute unless *his* rights have been invaded and injuriously affected.”) (emphasis added); *Sea Pines Ass’n for Prot. of Wildlife, Inc. v. S.C. Dep’t of Nat. Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (citing the elements of standing, including that a plaintiff must have suffered an injury in fact and that there must be a causal connection between the injury and the conduct complained of) (citation omitted); *Oasis*

³⁷ Richardson also testified her department staff informed her a list had been provided, and Blankenship confirmed a list was likely provided. (Tr. 322:15-17; 597:20-22.)

Goodtime Emporium I, Inc. v. City of Doraville, 773 S.E.2d 728, 734 (Ga. 2015) (rejecting claimant’s argument that because it was affected by the passage of a bill, it had an interest in ensuring compliance with notice procedures and holding claimant received notice and lacked standing to attack the lack of notice to another party); *In re Single Cnty. Ditch*, 361 N.E.2d 1353, 1356 (Ohio Ct. App. 1976) (“An appellant landowner has no standing . . . to complain of lack of notice (to other landowners) . . . when the record does not support a conclusion that the appellant did not receive notice . . .”).

Notwithstanding the foregoing, Appellant presented no evidence that any Marlin Quay unit owner failed to receive actual notice of the Planning Commission meeting. Because the tax map list does not identify each individual owner in the condominium project, the Notice and the Map were sent to the property management company, Surfside Realty Company, which then emailed the Notice to each unit owner at Marlin Quay. Marlin Quay unit owners, who fall within the 400 feet, were not mailed a physical letter, but rather, were emailed by the property management company. Section 1702.207 specifically states the following: “Failure to strictly comply with the notification requirements contained in Sections 1702.206 and 1702.207 shall not render the rezoning of the property invalid.”³⁸ Accordingly, proper notice was given pursuant to Section 1702.207.³⁹

³⁸ Moreover, on the issue of notice, Richardson and Blankenship testified that the Planning and Zoning Department complied with Section 1702.3 by submitting an ad containing notice of the Planning Commission hearing in not one, but two, local newspapers of general circulation fifteen days in advance of the scheduled public hearing date. (Defs.’ Exs. 13 & 14.) Richardson also testified that the Planning and Zoning Department placed a “conspicuous notice” on the affected property, which was visible from the public street that bordered the property, all in compliance with Section 1702.209. (Defs.’ Ex. 11.)

³⁹ It should also be noted that Appellant did not call one condominium unit owner to appear at trial as a witness.

V. Appellant’s challenge to Ordinance 2018-40 is barred due to its failure to challenge Ordinance 2018-03.

A. Failure to Timely Challenge

Summarily within a footnote,⁴⁰ Appellant provides it did challenge the passage of Ordinance 2018-03, contrary to the circuit court’s finding that Appellant failed to do so. (Appellant’s Initial Br., p. 7.) According to Appellant, this “challenge” was completed when it initiated litigation against Palmetto in 2016. (*Id.*) However, the 2016 case, civil action number 2016-CP-22-00961, failed to challenge the validity of Ordinance 2018-03 as required by South Carolina Code Section 6-29-760(D), but rather, challenged only Palmetto’s exclusive use of the Parking Lot during construction. Given the similarity in the passage of 2.0 and 3.0, Appellant’s failure to challenge the passage of 2.0—as well as the circuit court’s prior order—estops it from now challenging the passage of 3.0.

The linchpin of Appellant’s claims regarding the passage of Ordinance 2018-40 (3.0) is an alleged lack of parking for its patrons, resulting in loss in value to its restaurant. However, due to the passage of 2.0 in February 2018, the existing PD already permitted the replacement building to use the Parking Lot. Ordinance 2018-03, enacted in February 2018, was not challenged by Plaintiff even though that Ordinance established the PD requirements for the new building—as Appellant emphasizes throughout its brief. These same requirements continued in the 3.0 amendment enacted in January 2019. Appellant was required by state statute to challenge the February 2018 ordinance, Ordinance 2018-03, per Section 6-29-760(D), which provides:

No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it . . . may be made after sixty days after

⁴⁰ *Cf. Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) (“[C]onclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for [appellate] review.”) (citing *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001)).

the decision of the governing body if there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission.

Although the dimensions of the building changed somewhat from 2.0 to 3.0 in order to comply with a court order, the requirements affecting the alleged parking issue were not amended in 3.0. Therefore, Appellant's challenge to Ordinance 2018-40 because of its alleged effect on the Parking Lot is untimely.

B. Collateral Estoppel

In addition to failing to follow the procedure set forth in Section 6-29-760(D), Appellant's alleged damages are the same as those asserted in its lawsuit against Palmetto and J. Mark Lawhon, owner of Palmetto, civil action number 2016-CP-22-00961, and therefore, are barred by the doctrine of collateral estoppel.

"Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (citation omitted). To successfully assert collateral estoppel, a party must demonstrate that the issue in the current lawsuit was (1) actually litigated in the prior action, (2) directly determined in the prior action, and (3) necessary to support the judgment. *Id.* The mutuality of parties requirement is not necessary where "the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues." *Id.* at 554-55, 684 S.E.2d at 782 (citation omitted) (internal quotation marks omitted). A court may refrain from applying the doctrine where justice or fairness so requires. *Id.* at 555, 684 S.E.2d at 782 (citations omitted).

In its action against Palmetto and Mr. Lawhon, Appellant alleged that those defendants had interfered with its non-exclusive easement given the construction that was commencing for the

new Marina Store and Restaurant. (Pl.’s Ex. 18; Defs.’ Ex. 24.) After a jury trial, the jury found for Appellant, awarding just \$1,000.00 in damages.⁴¹ The court issued an injunction.⁴² At issue in the 2016 action was Appellant’s challenge of Palmetto’s construction of a building currently at issue here. As evidenced by the court’s issuance of an injunction concerning the construction of the building and its effect on the Parking Lot, the issue of whether the building would infringe on Appellant’s property rights was actually adjudicated and directly determined by the trial court. Because Appellant sought injunctive relief and asserted the construction of that building would “permanently interfere with [Appellant’s] right to use of the Parking Lot,” the court’s holding regarding the building’s permitted construction was necessary to support that judgment.

Stated differently, Appellant alleges here that the building, as approved by the County, will result in damages due to shared use of the Parking Lot. However, this issue was already determined and ruled upon by the circuit court in its injunction, and the court held that a building may be constructed, so long as it does not exceed the footprint of the former building, and that version is the version approved by the County—Ordinance 2018-40—and at issue in this case. As such, Appellant is estopped from complaining of any alleged damage resulting from the passage of Ordinance 2018-40, which merely approved an amendment that actually conformed with the trial

⁴¹ The jury first awarded Appellant \$0.00. (Pl.’s Ex. 18.) The trial court instructed the jury to award some dollar amount, and the jury returned with a \$1,000.00 verdict. (*Id.*)

⁴² Appellant thereafter filed a Motion to Alter or Amend the Judgment. (Defs.’ Ex. 24.) In that Motion, Appellant requested the court to prohibit Palmetto and Mr. Lawhon from “operating a restaurant that serves dinner in the evening.” (*Id.*) Appellant also asked the court clarify that the “outside boundaries” were those that were reflected in a plat book recorded with Georgetown County real estate records. On July 27, 2018, the court granted the Motion in part, only to clarify that the “outside boundaries” referred to those defined by the plat book. The court did not require the Marina Store and Restaurant to operate only during the day, and thus, any argument by Appellant to that effect is estopped by the doctrine of issue preclusion.

court's prior order. *See* Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”).

VI. Award of Costs to Respondents

Appellant contests the award of costs and denial of attorneys' fees on the grounds that Appellant should have won on some cause of action entitling it to attorneys' fees.⁴³ However, given that the circuit court's order is proper in all respects and should be affirmed, Appellant's circular argument on fees and costs fails. The award of costs to Respondents was proper, and the Court should affirm that order.

CONCLUSION

Factually, Appellant's claims are premised on something it never had—an exclusive parking easement. Legally, Appellant's legal claims are wholly unsupported and contrary to existing law. For the foregoing reasons, this Court should affirm the circuit court's order.

Henrietta U. Golding, SC Bar No. 2173
Taylor K. Voegel, SC Bar No. 104770
BURR & FORMAN LLP
2411 N. Oak Street, Suite 206 (29577)
Post Office Box 336
Myrtle Beach, SC 29578-0336
Phone: 843.444.1107

Counsel for Respondents

⁴³ Although Appellant provided additional arguments concerning what costs may be awarded to Respondents in its Response to Respondents' Motion for Costs, Appellant did not set forth those grounds in its brief. Thus, such issues are abandoned. *See Dreher v. S.C. Dep't of Health & Env't Control*, 412 S.C. 244, 249-50, 772 S.E.2d 505, 508 (2015) (“[S]hould the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case.”).