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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
The Honorable R. Kirk Griffin, Circuit Court Judge

Case No. 2019-CP-22-00212
Appellate Case No. 2023-00646

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.

**RECORD ON APPEAL
(VOLUME I)**

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County; Georgetown County Council;
and Steve Goggans, individually and in his
official capacity as Georgetown County
Councilmember

Counsel for Appellant The Gulfstream Café, Inc.



***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2019CP2200212

Official File Stamp: 05-23-2019 03:36:55 PM
Court: CIRCUIT COURT
Common Pleas
Georgetown
Case Caption: The Gulfstream Caf? Inc VS Georgetown County , defendant, et al
Document(s) Submitted: Order/Electronic Form 4/After Arguments of Counsel and a Rev Order/Electronic Form 4
Filed by or on behalf of: D. Craig Brown

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Sean Matthew Foerster for The Gulfstream Caf? Inc
Henrietta U. Golding for Louis Morant et al

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

The Gulfstream Caf Inc
PLAINTIFF(S)

Georgetown County et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

After arguments of counsel and a review of submissions by counsel, Defendant's Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC, from The Complaint Counts II, III, IV, V and VIII is hereby DENIED.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 05/23/2019 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Georgetown Common Pleas

Case Caption: The Gulfstream Caf? Inc VS Georgetown County , defendant, et al

Case Number: 2019CP2200212

Type: Order/Electronic Form 4

IT IS SO ORDERED

s/D. Craig Brown (2160)

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infringes on legislative privilege. The case law cited by Defendants prohibits Gulfstream from asking the Councilmembers questions regarding the Councilmembers' motivations or asking them "why" they made the decision that they did. See, e.g., Greenville County v. Kenwood Enterprises, Inc. 353 S.C. 157, 175 (2003) overruled on other grounds by Byrd v. City of Hartsville, 365 S.C. 650, (2005) (finding that County Council member's motivations for passing an ordinance was not a proper inquiry). But Gulfstream is not looking to uncover impermissible motive-related information. Instead, Gulfstream explains that it seeks to understand the Councilmembers' general process for reviewing major amendment applications, as well as the information received and evaluated by the Councilmembers during the process of reviewing the application subject to this lawsuit. Since Gulfstream is looking to uncover objective, factual information related to the application and the process, Gulfstream's topics of inquiry are not prohibited by the legislative privilege.

The Court further finds that Gulfstream is not entirely precluded from taking the depositions of the Councilmembers by the Bear Enterprises v. County of Greenville, 319 S.C. 137 (Ct. App. 1995) decision. In Bear, the Court of Appeals, in a footnote, offered its opinion related to the depositions of the council members, even though the County had not objected to the depositions. The issue of the propriety or the permissibility of the depositions of the council members was not before the Court of Appeals in Bear, and therefore, the footnote is dicta. See Nash v. Tindall Corp., 375 S.C. 36, 40 (Ct. App. 2007) (quoting Black's Law 465) (7th ed.1999) ("Judicial dicta is 'not essential to the decision.'"). Moreover, while the Court of Appeals in Bear noted it knew of no authority permitting the depositions of the council members, the Court of Appeals in Bear did not cite to any authority holding depositions of council members are not permitted in South Carolina. The Court finds that the footnote in Bear does not create a *per se* rule

against deposing the Councilmembers who are parties to this litigation and therefore subject to being deposed under Rule 30.

In order to provide further guidance regarding the scope of the legislative privilege, the Court finds the following areas of inquiry and exemplary questions are permissible:

1. Process for reviewing applications for a major change to a PD under Georgetown County's Zoning Ordinance, including but not limited to, questions such as:

- How often do major changes to a PD come before Council for decision each year?
- Is a major amendment treated the same as a rezoning in terms of the process that must be followed?
- Who is involved with an application for a major change from the County?
- What County departments or groups are involved with an application for a major change?
- What is the flow of the decision making process?
- Who receives the application first?
- Then who reviews it?
- When does the Planning Commission review?
- What does the Planning Commission do with an application?
- Are there any time limitations for the review process?
- When does an application go before County Council?
- How many readings does an ordinance receive before County Council?
- ~~○ When do you get involved in process for a major amendment?~~
- ~~○ What is your process for reviewing an application for a major change?~~

- ~~○ What materials do you review when deciding a major change application?
 - ~~▪ Do you review the application itself?~~
 - ~~▪ Do you review the staff report?~~
 - ~~▪ Do you review the Planning Commission's recommendation?~~
 - ~~▪ Do you review any outside materials or information?~~
 - ~~▪ Do you review anything that is not in the file for the application?~~
 - ~~▪ Do you read any ordinances?
 - ~~● If so, which ones?~~~~~~
- ~~○ What individuals do you meet with or talk to when deciding a major application?
 - ~~▪ The applicant?~~
 - ~~▪ Planning staff?~~
 - ~~▪ Members of the public?~~~~
- ~~○ Do you conduct a site visit?~~
- ~~○ Generally speaking, does the Zoning Ordinance require consideration of the public necessity, convenience, general welfare, and good zoning practice to justify a major change?~~
- ~~○ Generally speaking, are parking and traffic considerations in evaluating a major change?~~
- ~~○ Potential exhibits under this topic include, but are not limited to, Georgetown County's Zoning Ordinance.~~

2. Process followed here, general knowledge of the application, ~~and materials and information~~ presented to the Councilmembers with respect to the application, including but not limited to, questions such as:

- ~~○ Are you aware that Palmetto Industrial Development (“Palmetto”) owns property in the Marlin Quay PD?

 - ~~▪ Including a parking lot?~~
 - ~~▪ Including property where a marina store and restaurant used to be located?~~~~
- ~~○ Are you aware that Gulfstream owns a restaurant in the Marlin Quay PD?~~
- ~~○ Are you aware that Gulfstream owns an easement to the parking lot in the Marlin Quay PD?~~
- And you are aware that Palmetto submitted an application for a major change to the PD in August 2018 to allow it to build a new restaurant (“Version 3.0”) where the former marina store and restaurant was located?
- Did you follow your normal process to review this application?
 - ~~▪ Did you review the application?~~
 - ~~▪ Did you review the staff report?~~
 - ~~▪ Did you review the Planning Commission’s decision?~~
 - ~~▪ Did you review any outside materials?~~
 - ~~▪ Did you do a site visit?~~
- ~~○ Did you meet with anyone regarding the application?~~
- ~~○ Did you have discussions with anyone outside of County Council meetings, other than your attorneys, regarding the application?~~

- ~~Who?~~
 - ~~Planning staff?~~
 - ~~Applicant?~~
 - ~~Members of the public?~~
- ~~What did you talk about?~~
- What is your understanding of what the application was trying to do?
 - ~~Was it seeking a change in the building configuration that was located there before?~~
 - ~~Was it seeking a change in the site plan layout that was there before?~~
- ~~Did you review any amendments to the application or additional documents submitted in support of the application?~~
- ~~Do you recall that County Council had previously approved a major change to permit construction by Palmetto of a restaurant using a different set of plans (“Version 2.0”)?~~
- ~~Do you recall that the Court ordered that Version 2.0 could not be built?~~
- ~~Did you ever see any plans for Version 3.0?~~
- ~~Did you review any materials or documents related to Version 2.0 when reviewing the current application?~~
- ~~Did you review any materials or documents comparing Version 2.0 to Version 3.0 when reviewing the application?~~
- ~~Did you review any materials or documents related to the size of the original marina store and restaurant?~~

- ~~○ Did you have any understanding regarding the size of the marina store and restaurant?~~
- ~~○ Did you receive any information regarding the comparison of unheated square footage of Version 3.0 and the unheated square footage of the marina store and restaurant?~~
- ~~○ Did you receive any information regarding the comparison of total square footage of Version 3.0 and the total square footage of the marina store and restaurant?~~
- ~~○ What information did you receive regarding what attributes of Version 3.0 were comparable to the marina store and restaurant?~~
- ~~○ Did you review any pictures of the original marina store and restaurant?~~
- ~~○ Did you review the parking site plan for the major change?~~
- ~~○ Do you recall that Version 3.0 required 51 parking spaces?~~
- ~~○ Do you recall that the parking lot contains 62 parking spaces?~~
- ~~○ Do you recall that Gulfstream and the marina will share the parking lot with Version 3.0?~~
- ~~○ Were you ever presented at any time with any information regarding the parking requirements of adjacent uses?~~
- ~~○ Did you receive any information about how many parking spaces Gulfstream requires under Georgetown's Zoning Code?~~
- ~~○ Did you receive any information about how many parking spaces the marina requires under Georgetown's Zoning Code?~~

- ~~○ Did any of the materials or documents you reviewed contain any evaluation of how many parking spots adjacent uses required under Georgetown's Zoning Code?~~
 - ~~○ Did you speak to anyone, other than your attorneys, regarding how many parking spots adjacent uses required under Georgetown's Zoning Code?~~
 - ~~○ Did you see the December 11, 2018 letter from Adam Nugent on behalf of Gulfstream prior to deciding the application?~~
 - ~~○ Did Mr. Nugent present Gulfstream's concerns with the application at the December 11, 2018 County Council meeting?~~
 - ~~○ Did other members of the public raise concerns regarding traffic and safety of the parking lot?~~
 - ~~○ Was any information presented by anyone that addressed the concerns related to parking?~~
 - ~~○ Potential exhibits under this topic include, but are not limited to, the Marlin Quay PD Layout, the application, letter from Palmetto's counsel to the County dated October 12, 2018, staff report, Agenda Request Form, Adam Nugent's December 11, 2018 letter, December 11, 2018 Council Meeting Minutes, Georgetown County's Parking Regulations.~~
- ~~3. Any communications with Defendant Goggans, including questions such as:~~
- ~~○ Did you ever speak with Defendant Goggans regarding the application?~~
 - ~~○ Were you aware of his conflict of interest with respect to the application?~~
 - ~~○ What conversation did you have with Defendant Goggans regarding the application?~~

NOW, THEREFORE, it is hereby

ORDERED, that the defendants' Motion for Protective Order is **GRANTED** to the extent that the questions stricken hereinabove are not permitted and are protected by legislative privilege since they seek the motive, intent or reason for a council member's decision when reviewing applications for a major change to a PD under Georgetown County's Zoning Ordinance; it is further

ORDERED, that the defendants' Motion for Protective Order is **DENIED** to the extent that the questions not stricken hereinabove are permissible and not protected by legislative privilege.

IT IS SO ORDERED.

[Electronic signature of the Honorable Benjamin H. Culbertson to follow.]



Georgetown Common Pleas

Case Caption: The Gulfstream Caf? Inc VS Georgetown County , defendant, et al

Case Number: 2019CP2200212

Type: Order/Other

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2021-04-15 13:40:14 page 10 of 10

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN) CIVIL ACTION NO. 2019-CP-22-00212

The Gulfstream Café, Inc.,)
)
Plaintiff,)

vs.)

Georgetown County, Georgetown County)
Council, John Thomas, Ron Charlton, Lillie)
Johnson, Austin Beard, Steve Goggans, and)
Louis Morant, individually and in their)
official capacity as Georgetown County)
Councilmembers,)

Defendants.)
_____)

**CONSENT ORDER OF DISMISSAL
OF DEFENDANTS JOHN THOMAS,
RON CHARLTON, LILLIE
JOHNSON, AUSTIN BEARD, AND
LOUIS MORANT, INDIVIDUALLY
AND IN THEIR OFFICIAL
CAPACITY AS GEORGETOWN
COUNTY COUNCILMEMBERS
(With Prejudice)**

The Parties through consent of their attorneys as shown in the Consent Motion, request dismissal, with prejudice, of Defendants John Thomas (“Thomas”), Ron Charlton (“Charlton”), Lillie Johnson (“Johnson”), Austin Beard (“Beard”), and Louis Morant (“Morant”) from the above entitled action.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Defendants Thomas, Charlton, Johnson, Beard, and Morant are dismissed, with prejudice, from the above entitled action.

IT IS SO ORDERED.



Georgetown Common Pleas

Case Caption: The Gulfstream Caf? Inc VS Georgetown County , defendant, et al

Case Number: 2019CP2200212

Type: Order/Dismissal

Resident Circuit Court Judge, 15th Judicial Circuit

s/Benjamin H. Culbertson, Judge Code 2148

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The Gulfstream Caf Inc
PLAINTIFF(S)

Georgetown County et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (*CHECK REASON*):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (*CHECK REASON*):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Defendant Georgetown County's Motion for Summary Judgment was filed on October 22, 2021 and was heard by this Court on January 13, 2022. Upon careful consideration of both the arguments and submissions from counsel, this Court respectfully DENIES Defendant Georgetown County's Motion for Summary Judgment. Plaintiff The Gulfstream Café Inc to submit a formal proposed order within 10 days of the date of this Order.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 01/28/2022 .

Andrea J Pearson for The Gulfstream Caf Inc
Simon H Bloom for The Gulfstream Caf Inc
Adam D Nugent for The Gulfstream Caf Inc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Georgetown Common Pleas

Case Caption: The Gulfstream Caf? Inc VS Georgetown County , defendant, et al

Case Number: 2019CP2200212

Type: Order/Electronic Form 4

So Ordered

s/Jennifer B. McCoy #2764

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in the PUD documents as a parking lot and a marina store. (Plaintiff's Response to the Motion, Exhibit 2, Marlin Quay PUD Documents). During its entire existence, Gulfstream has held an easement permitting it to use the parking lot adjacent to its restaurant. (Greenbaum Aff. at ¶ 5); (Plaintiff's Response to the Motion, Exhibits 4 and 5, Easement Documents). The property adjacent to Gulfstream is currently owned by Palmetto Industrial Development, LLC ("Palmetto"). After purchasing the property, Palmetto demolished the building that had included the marina store and restaurant. (Plaintiff's Response to the Motion, Exhibit 3, Excerpts from the 30(b)(6) Deposition of Georgetown County and Holly Richardson ("Georgetown Dep.") at 41:1-13).

Defendant Goggans was involved in efforts by Palmetto to obtain County approval for a new structure on the site of the marina store and restaurant ("Version 1.0"). (Plaintiff's Response to the Motion, Exhibit 6, Transcript of Hearing of Board of Zoning Appeals, *In re: Appeal – Marlin Quay Marina Store and Snack Bar*, 56:8-11, Feb. 2, 2017). Gulfstream submitted evidence indicating that Defendant Goggans used his influence and relationships with County planning staff to obtain favorable outcomes for Palmetto, including related to parking and how to calculate the permissible square footage for Version 1.0. (*Id.* at 56-64); (Plaintiff's Response to the Motion, Exhibit 7, Excerpts from the April 11, 2018 Deposition of Steve Goggans ("2018 Goggans Dep.") at 132-133, 139-140, 150); (Plaintiff's Response to the Motion, Exhibit 8, 2018 Goggans Dep. at Exhibit 7); (Plaintiff's Response to the Motion, Exhibit 9, 2018 Goggans Dep. at Exhibit 8); (Plaintiff's Response to the Motion, Exhibit 31, Excerpts from the September 29, 2021 Deposition of Steve Goggans and SGA Narmour Wright Design, PA ("2021 Goggans Dep.") at 50-52, 67-69, 71, 139). Palmetto ultimately abandoned its plans to build Version 1.0.

Then, in November 2017, Palmetto submitted an "Application to Amend a Planned Development" for Marlin Quay seeking a "Change of Building Location" to obtain approval of

Palmetto's plans for its new restaurant ("Version 2.0"). (Defendants' Motion, Exhibit D at 1). The application packet for Version 2.0 included architectural site plans, building elevations, and design plans showing seating layouts. (Id.). The County approved the major amendment on February 27, 2018. (Defendants' Motion, Exhibit E).

Palmetto's plan for Version 2.0 was challenged by Gulfstream in the action captioned The Gulfstream Café, Inc. v. J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC, C.A. No. 2016-CP-22-00961. Gulfstream prevailed in that action, as the jury found in favor of Gulfstream on its claim for interference with its easement. (Plaintiff's Response to the Motion, Exhibit 11, Jury Verdict). Accordingly, the Court issued a permanent injunction barring Palmetto from constructing a building on any portion of the property subject to the Gulfstream Easement (the "Injunction"). (Plaintiff's Response to the Motion, Exhibit 12, Permanent Injunction). Version 2.0 was prohibited by this Injunction.

On August 27, 2018, Palmetto submitted another "Application to Amend a Planned Development" (the "Application") also requesting a "Change of Building Configuration" and a "Site Plan Amendment." (Plaintiff's Response to the Motion, Exhibit 13, Application to Amend Planned Development for Version 3.0 at 1); (Plaintiff's Response to the Motion, Exhibit 14, October 12, 2018 Letter from Dan Stacy) (noting application date of August 27, 2018). Palmetto submitted the Application even though it had been less than twelve months from the hearing by the Planning Commission held in December 2017 on the application for Version 2.0. (Georgetown Dep. at 143:10-144:16).

The Application sought approval of a different building layout, "Version 3.0." (Plaintiff's Response to the Motion, Exhibit 13, Application to Amend Planned Development for Version 3.0 at 5). The County Staff Report on the Application stated that "[a] court has ordered that the site

plan approved in February 2018 by Council cannot be built.” (Plaintiff’s Response to the Motion, Exhibit 15, Staff Report dated October 18, 2018 at 1); (See also Georgetown Dep. at 87:8-11).

The Application for Version 3.0 did not provide building elevations or design plans showing the proposed seating layout at the time of initial application. Compare (Plaintiff’s Response to the Motion, Exhibit 13, Application to Amend Planned Development for Version 3.0) with (Defendants’ Motion, Exhibit D). Accordingly, the County did not have information before it to show the size of the proposed building at the time of the initial application. (Plaintiff’s Response to the Motion, Exhibit 13, Application to Amend Planned Development for Version 3.0).

Palmetto did not provide supplemental information until October 12, 2018, when counsel for Palmetto, Dan Stacy, provided building plans for the Application to the County. (Plaintiff’s Response to the Motion, Exhibit 14, October 12, 2018 Letter from Dan Stacy). Mr. Stacy provided this information less than a week before the Planning Commission Meeting on the Application, held on October 18, 2018. (Plaintiff’s Response to the Motion, Exhibit 17, Planning Commission Meeting Minutes dated October 18, 2018).

The Application required that “[a] list of all persons (and related Tax Map Numbers) to Whom Envelopes were addressed to Must Also Accompany the Application.” (Plaintiff’s Response to the Motion, Exhibit 13, Application to Amend Planned Development for Version 3.0 at 3). The Marlin Quay condominiums are within 400 feet of Palmetto’s property, and the County’s Zoning Code required that the owners of the condominiums receive mailed notice of the Application. (Georgetown Dep. at 136:13-137:5). The County only mailed notice to the Marlin Quay Homeowners Association, and did not mail notice to each individual owner of the Marlin Quay condominiums. (Exhibit 20, List of Owners Receiving Mailed Notice); (Georgetown Dep. at 140:17-23). Instead, the County sent notice via e-mail to the manager of the Marlin Quay

Homeowners Association, Nancy Gardner, asking her to provide notice. (Plaintiff's Response to the Motion, Exhibit 21, Excerpts from the Deposition of Tiffany Coleman ("Coleman Dep.") at 29). Homeowners who received notice by this method only received notice via email, not by mail. (Plaintiff's Response to the Motion, Exhibit 22, Coleman Dep. Ex. 45.)

At the time of the Application, the County was aware that multiple entities, including Gulfstream, utilized the parking lot. (Johnson Dep. at 117:3-118:4); (Plaintiff's Response to the Motion, Exhibit 15, Staff Report at 2). The Staff Report recognized that Palmetto's new restaurant would require 51 of the 62 parking spaces for the site, and that Gulfstream and the marina used the parking lot, but the County did not evaluate the parking needs of Gulfstream or the marina. (Georgetown Dep. at 91:9-20). The County did not do any evaluation under the parking regulations of the County's Zoning Code regarding how many parking spaces were required for Gulfstream or the marina when considering the Application. (Georgetown Dep. at 124:4-126:11); (Johnson Dep. at 114:5-19, 116:2-14, 117:25-118:9; 188:22-189:3).

Gulfstream and members of the public voiced concerns regarding the lack of parking, safety, and traffic. (Plaintiff's Response to the Motion, Exhibit 24, October 17, 2018 Letter from Adam Nugent); (Plaintiff's Response to the Motion, Exhibit 25, December 11, 2018 Letter from Adam Nugent); (Plaintiff's Response to the Motion, Exhibit 26, Meeting Minutes from December 11, 2018 County Council Meeting). Despite objections to the Application, the County approved the Application on January 8, 2019. (Plaintiff's Response to the Motion, Exhibit 27, Meeting Minutes from January 8 2019 Meeting); (Exhibit T to Defendants' Motion).

Plaintiff has presented affidavit evidence regarding the following. Gulfstream cannot operate its restaurant without adequate parking. (Plaintiff's Response to the Motion, Exhibit 28, Affidavit of Jef Kirk ("Kirk Aff.") ¶ 6); (Plaintiff's Response to the Motion, Exhibit 29, Affidavit

of Jim Moring (“Moring Aff.”) ¶ 10). Parking is essential to Gulfstream’s operations. (Kirk Aff. ¶ 6). Once Version 3.0 opens and operates at night, Gulfstream will not have enough parking spaces to support its business. (Id. ¶ 7). There is not another parking lot in the area, and there is not sufficient foot traffic to generate enough business to keep Gulfstream open. (Id. ¶ 5); (Moring Aff. ¶ 9). Gulfstream invests in excess of \$1 million per year to operate its restaurant. (Id.).

Moreover, Gulfstream presented an appraisal indicating that after the loss of the easement parking, the only use of Gulfstream’s property will be for vacant land. (Plaintiff’s Response to the Motion, Exhibit 30, Appraisal Report). (Id. at 53); (Moring Aff. ¶ 13). Gulfstream’s appraisal states that the grant of the Application will result in a loss in the value of Gulfstream’s property in the amount of \$1,760,100. (Id.).

ANALYSIS

I. Summary Judgment Standard

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Even when there is no dispute as to evidentiary facts, but only as to conclusions or inferences to be drawn from them, summary judgment should be denied. Id. For a motion for summary judgment, the South Carolina Supreme Court has stated that “the non-moving party is only required to submit *a mere scintilla of evidence* in order to withstand a motion for summary judgment.” Hancock v. Mid-S. Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (emphasis added).

II. Gulfstream Properly Filed Suit Challenging the Grant of the Application Within 60 Days.

S.C. Code § 6-29-760 provides that “[n]o challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether enacted before or after the effective date of this section, may be made sixty days after 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.” S.C. Code § 6-29-760(d). In accordance with this statute, Gulfstream filed this lawsuit on March 8, 2019, within 60 days of the County’s decision to grant the Application on January 8, 2019. (Plaintiff’s Response to the Motion, Exhibit 27, Meeting Minutes from January 8, 2019 Meeting).

Defendants make the argument that since Gulfstream did not challenge the approval of Version 2.0, Gulfstream is barred from timely challenging Version 3.0. During oral argument, Defendants posited that this issue—whether Plaintiff should have challenged Version 2.0—is dispositive. Defendants’ argument, however, is unavailing. Defendants do not point to any case law in support of their claim that Gulfstream waived its ability to appeal Version 3.0 by failing to appeal Version 2.0. The Application for Version 3.0 was a new application that went through the complete major amendment process, such that the County’s approval of Version 3.0 was a new decision with its own 60-day clock for challenge. Accordingly, the lawsuit is timely as a matter of law regardless of whether or not the applications addressed the same project. Moreover, in addition, the Court finds Defendants’ argument that Version 2.0 and Version 3.0 are the same unpersuasive. Finally, Ordinance 2018-40 approving Version 3.0 entirely superseded and replaced Ordinance 2018-03 approving Version 2.0. (Exhibit T to Defendants’ Motion). As a result, Ordinance 2018-03 was no longer valid, and the failure to challenge that Ordinance and cannot serve as basis to preclude Gulfstream’s challenge to the approval of Version 3.0. Therefore,

Gulfstream timely filed this action and is not statutorily barred from challenging the grant of the Application as a matter of law.

III. Claims Regarding Defects in The Application and Process for Approval and Gulfstream's Constitutional Claims.

As previously stated, Defendants' argument at the summary judgment hearing hinged entirely on the issue of whether or not Gulfstream filed suit within the time required under S.C. Code § 6-29-760. The Court has decided above that Gulfstream timely filed suit in this action. In Defendants' Motion, Defendants also argue that Defendants did not violate the County Zoning Ordinance because the Application was not a second request for a major change within a 12-month period, Palmetto submitted the Application in proper form in the time required by the Zoning Ordinance, Palmetto and/or the County met the notice requirements and failure to strictly comply with those requirements does not void approval of the Application, and the parking regulations in the Zoning Ordinance are a guide and not a requirement. Defendants similarly contend that Gulfstream's constitutional claims for substantive due process, procedural due process, and takings fail as a matter of law. The Court finds that Gulfstream has presented evidence in response to Defendants' Motion demonstrating genuine issues of material fact for trial on each of its claims regarding violations of the Zoning Ordinance and each of its constitutional claims. Accordingly, Defendants are not entitled to judgment as a matter of law on any of the claims in Gulfstream's Complaint.

IV. Consent to the Dismissal of Individual Defendant Except for Steve Goggans.

Plaintiff has consented to the dismissal of its claims against John Thomas, Ron Charlton, Lillie Johnson, Austin Beard, and Louis Morant. Further, and the parties have filed a consent motion to dismiss these named defendants.

Notably, Plaintiff does not agree to dismiss its claims against Defendant Goggans, and argues that because he did not act in his legislative capacity with respect to the Application that he is therefore not entitled to immunity. Because genuine issues of material fact exist as to whether the doctrine of legislative immunity applies to Defendant Goggans's actions, summary judgment is inappropriate on this issue and Defendant Goggans is not dismissed from this action.

CONCLUSION

For the reasons set forth above, the Court respectfully **DENIES** the Motion.

IT IS SO ORDERED.

[Court's signature page to follow.]

FORM 4

**STATE OF SOUTH CAROLINA
 COUNTY OF GEORGETOWN
 IN THE COURT OF COMMON PLEAS**

JUDGMENT IN A CIVIL CASE

CASE NO. 2019-CP-22-00212

The Gulfstream Café, Inc.
 PLAINTIFF(S)

Georgetown County et al
 DEFENDANT(S)

<p>Submitted by: Sean M. Foerster (SC Bar # 77466) Local Counsel Rogers Townsend LLC 1221 Main Street, 14th Floor Post Office Box 100200(29202) Columbia, SC 29201 (803) 744-1855 sean.foerster@rogerstownsend.com</p>	<p>Attorney for: <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant</p>
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (*CHECK REASON*):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (*CHECK REASON*):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):**
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

<p>INFORMATION FOR THE JUDGMENT INDEX Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.</p>
--

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Master in Equity

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Sean M. Foerster, Esquire
Rogers Townsend, LLC
P.O. Box 100200
Columbia, SC 29202-3400

ATTORNEY(S) FOR THE PLAINTIFF(S)
023499-00001

Henrietta U. Golding, Esquire
Burr & Forman, LLP
2411 N. Oak Street, Suite 206
Myrtle Beach, SC 29577

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Simon H. Bloom, Esquire
Andrea J. Pearson, Esquire
Bloom Parham, LLC
977 Ponce de Leon Avenue NE
Atlanta, Georgia 30306

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCP.



Georgetown Common Pleas

Case Caption: The Gulfstream Caf? Inc VS Georgetown County , defendant, et al

Case Number: 2019CP2200212

Type: Order/Summary Judgment

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2022-02-09 15:07:58 page 13 of 13

The Gulfstream Caf Inc
PLAINTIFF(S)

Georgetown County et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

This case is taken under advisement.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 01/17/2023 .

Andrea J Pearson for The Gulfstream Caf Inc
Simon H Bloom for The Gulfstream Caf Inc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Georgetown Common Pleas

Case Caption: The Gulfstream Caf? Inc VS Georgetown County , defendant, et al

Case Number: 2019CP2200212

Type: Order/Electronic Form 4

So Ordered

s/ R. Kirk Griffin 2768

Electronically signed on 2023-01-17 09:31:02 page 3 of 3

Store and Restaurant, the Marina boat slips, the Gulfstream Café, and the condominiums. The uses have not changed since the Plaintiff purchased the café.

Plaintiff was granted a non-exclusive easement in 1986 for ingress and egress of the parking lot. With this easement, the Plaintiff was guaranteed “joint and non-exclusive use of the area covered by the easement.” The 1990 easement specifically gave Gulfstream:

A non-exclusive perpetual easement appurtenant to the premises hereinafter described for the full and free right of ingress and egress on, over and across the following described property, together with the rights of vehicular parking on and vehicular and pedestrian access to, all in accordance with all governmental rules, regulations, ordinances or laws, the premises of the hereinafter described, and also for the purpose of maintenance, repair, alteration and/or improvements to hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use at all times of the area covered by this easement that the Marina will utilize the premises primarily during the daytime regular business hours and Gulfstream will utilize the premises primarily in the evening regular business hours.

Plaintiff was not guaranteed a specific number of parking spots, merely the right of ingress and egress.

In 2014, Palmetto Industrial Development, LLC became the owner of the parking lot and the easement remained with Gulfstream. Today, Plaintiff has a property interest that is a non-exclusive right of ingress and egress of the parking lot with 62 spaces. In addition, Plaintiff owns 17 of their own parking spaces exclusively for Gulfstream and 6 additional parking spaces underneath the restaurant. The parking lot is located in the Marlin Quay PD with Gulfstream and

Marlin Quay Marina Store and Restaurant. The Marlin Quay PD was one of the first PDs in Georgetown County. Holly Richardson and Boyd Johnson testified that in a PD, zoning regulations are guides, but not requirements.

In 2016, Palmetto hired SGA Architecture, LLC to rebuild the Marina Store and Restaurant; repairs consisted of complying with flood requirements with FEMA, the ADA, and other fire and building codes. Further, the old building encroached on the Marlin Quay Condominiums and the new building would remedy the encroachment. The old building was 1.5 stories tall, with 4,603 heated square feet, and a 2-story outdoor deck. The new building plans were for a 4-story building, with 4,596 heated square feet, and a 3-story outdoor deck with total combined unheated space of 5,326 square feet.

Steve Goggans founded SGA Architecture. Additionally, Goggans was elected to the Georgetown County Council in 2014, however he did not seek re-election in 2022. Goggans was the principal architect for the initial rebuild of the Marina Store and Restaurant. In 2016, Palmetto submitted the first zoning amendment (referred to as 1.0) request to the Georgetown County Planning and Zoning Department as a minor amendment. The minor amendment was accepted and in November 2016 Palmetto demolished the old Marina Store and Restaurant.

Plaintiff appealed the granting of the minor amendment and claimed it should have been a major amendment. Goggans appeared on behalf of Palmetto at the appeal hearing on February 2, 2017. At the time, Goggans was still a member of the Georgetown County Council. Later that year, Plaintiff filed a complaint with the South Carolina Ethics Commission about Goggans' involvement in the minor amendment and the appeals hearing; on September 16, 2019, Goggans received a written warning and paid a civil fine for his actions in the 1.0 amendment process. After

this, Goggans stepped back from his involvement with the projects for Palmetto and was no longer the lead architect on the project.

After the appeal hearing in February of 2017, Palmetto submitted an amended application for a major amendment instead of a minor amendment (referred to as 2.0). Goggans was not involved in the submission of the 2.0 application. Amendment 2.0 was filed on November 3, 2017. On December 21, 2017, the Georgetown County Planning Commission heard the reading of the 2.0 application; Plaintiff's representatives appeared and opposed the amendment. After the hearing, the Commission recommended approval of the 2.0 application.

The 2.0 amendment was presented for public reading on three separate occasions: January 9, 2018, February 13, 2018, and February 27, 2018. Goggans recused himself at all three readings. Representatives of the Plaintiff spoke in opposition to the 2.0 amendment at all three readings. After the third reading, the County Council voted to approve the amendment. Goggans was not part of the vote. The approved 2.0 amendment included: Heated square footage not to exceed 4,598; 62 parking spaces already in place in addition to three compact spaces underneath the new Marina Store and Restaurant; the building would not exceed 45 feet at the middle of the roof; and the total seating capacity would not exceed 110 seats. Plaintiff did not challenge the passing of this ordinance. As of February 27, 2018, the 2.0 application was approved without challenge.

In November 2016, Plaintiff filed a lawsuit against Palmetto over the use of the easement and alleged that their rights had been interfered with. In June 2018, the Plaintiff was awarded a \$1,000 jury verdict. Additionally, The Honorable Judge Steven John ordered that Palmetto was not to expand the boundaries of the old Marina Store and Restaurant as those set forth in the 1985 plat records. Subsequently, Palmetto filed another major amendment to comply with this order

(referred to as 3.0). Goggans was not involved in the filing of the amendment or in the voting and approval process of 3.0.

The 3.0 amendment was filed August 27, 2018. Palmetto submitted the application, filing fee, and stamped envelopes to be used for mailing the notices to property owners within a 400-foot radius of the Marina Store and Restaurant. A hearing before the Georgetown Planning Commission was set for October 18, 2018. The Planning and Zoning Department sent out public notice to The Coastal Observer and The Georgetown Times. Prior to the hearing in October 2018, a Staff Report was prepared that detailed the square footage of the proposed amendment and the old building.

After the hearing, the Commission voted to recommend approval to the County Council. The proposed 3.0 amendment was read to the public on three occasions: November 13, 2018, December 11, 2018, and January 8, 2019. Plaintiff's representatives opposed the 3.0 amendment at the hearing and all three public readings. At the end of the reading on January 8, 2019, the County Council voted to approve the 3.0 amendment. The only changes made between 2.0 and 3.0 were to keep the footprint of the building inside the old footprint and that the roof not exceed 47 feet. There was no change in heated square footage, the 62 parking spaces, or the 110 person seating capacity that were present in the 2.0 approval. Upon approval of the 3.0 amendment, Ordinance 2018-40 was passed to amend the PD to allow construction of 3.0.

PLAINTIFF'S CAUSES OF ACTION

The following causes of action are at issue:

1. Declaratory Judgment to invalidate approval of Palmetto's Application for Major Amendment;
2. Violation of Substantive Due Process Rights under 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 under the United States Constitution;
4. Violation of Right to Procedural Due Process under 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 under the United States Constitution;
6. Violation of South Carolina’s Taking Clause under Article I Section 13 of the South Carolina Constitution;
7. Inverse Condemnation; and
8. Attorneys’ Fees.

DECLARATORY JUDGMENT

The courts have the “power to invalidate an ordinance where it is so unreasonable as to impair or destroy constitutional rights.” *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965). This power should 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.” *Id.*

However, a municipal ordinance is presumed to be constitutional. *Town of Scranton v. Willoughby*, 603 S.C. 421, 422, 412 S.E.2d 424, 425 (1992). “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 so 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 v. Columbia Bd. Of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 663 (2011)) (internal quotation marks omitted).

The burden of proving a zoning ordinance to be invalid is on the party who brings the action; to attack it, they must show the arbitrary and capricious nature 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).

Here, Plaintiff's have not overcome the presumption that the legislative enactment was constitutional. There is no evidence that Ordinance 2018-40 was so unreasonable as to impair or destroy constitutional rights. The approval process of 3.0 followed the requirements of public readings and the voting process. The decision was not arbitrary or capricious; the county council voted on this amendment without Goggans partaking in any of the votes or the public readings.

Plaintiff contends that Goggans' actions in the 1.0 amendment "infected" the 2.0 and 3.0 amendments. While Goggans was involved in the creation of 1.0, there is no evidence that he was involved in 2.0 or 3.0. Goggans was reprimanded for his actions with 1.0. After that, Goggans recused himself from all three public readings and the voting process of both 2.0 and 3.0. There is no evidence that Goggans participated in or influenced in any way the new plans contained in the 2.0 or 3.0 amendments. Plaintiff further argues that Goggans convinced or influenced Holly Richardson and Boyd Johnson to overlook Zoning ordinances, but there is no evidence of this. Richardson and Johnson testified that they did not feel pressure or influence from Goggans in the 2.0 or 3.0 process.

Plaintiff also argues that proper notice of the 2.0 and 3.0 amendments were not given. However, Plaintiff's representatives were present at each reading of the amendments and the meetings for the proposed amendment. Plaintiff made their concerns with the amendments known. The Defendants provided notice through the procedures set by the county: stamped envelopes, posting signs, and listings in the local papers.

There is no evidence that Goggans influenced the process of 3.0 or that the decision was made without reason. Plaintiff's claim for declaratory judgment fails.

SUBSTANTIVE DUE PROCESS

Substantive Due Process claims require a claimant to prove (1) that the claimant had a property or property interest; (2) that the state deprived the claimant of the property or property interest; (3) and that the state's action falls so far beyond the outer limits of legitimate governmental authority that no process could cure the deficiency. *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3rd 322, 328 (4th Cir. 2005) (citation omitted) (internal quotation marks omitted). The conduct must be such that it intended to injure in some way unjustifiable by any government interest and is the sort of official action that most likely rises to the level of shocking the conscience. *Cnty. Of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998).

In order for the claimant to prove a denial of substantive due process, a claimant 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, 569 S.E.2d 917, 922 (2004) (citation omitted). "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." *Dunes*, 401 S.C. at 297, 737 S.E.2d at 610 (citation omitted).

When reviewing a challenge to a municipal ordinance in South Carolina, a court must consider whether the ordinance bears a "reasonable relationship to *any* legitimate interest of government." *McMaster*, 395 S.C. at 505, 719 S.E.2d at 663 (citation omitted) (emphasis in original). "In order to successfully assault a city's zoning decision, a citizen must establish that

the decision was arbitrary and unreasonable.” *Knowles v. City of Aiken*, 305 S.C. 219, 222, 407 S.E.2d 639, 642 (citation and internal quotation marks omitted).

Plaintiff does have a property interest here. The Plaintiff has a non-exclusive easement granting the right of ingress and egress over the parking lot shared with the Marina Store and Restaurant.

The State has not deprived Plaintiff of their property interest in the parking lot. Plaintiff still retains the right of ingress and egress over the parking lot that was originally granted in the non-exclusive easement. Planned developments, like the Marlin Quay Marina PD, create distinct areas of zoning with separate zoning ordinances. Plaintiff argued that the zoning code was a requirement that had to be followed in the PD, but Richardson and Johnson testified opposite; that a PD is a zoning variance, where the code is a guideline, and not a requirement. Plaintiff did not offer any experts on zoning or planning and did not offer any evidence that said otherwise.

Richardson and Johnson testified that they did not calculate the parking based off of the Zoning ordinance, but that they did require the Marina restaurant to maintain the same number of seats inside the restaurant in order to maintain the same level of patron traffic to the parking lot. The decisions made by the County in regards to the amendments were not completely baseless; they required the Marina Store and Restaurant to have the same seating capacity in the new building that they had in the old building and they limited the heated square footage. Additionally, the approval of the amendments was not without reason, it allowed the property to comply with FEMA and ADA regulations as well as other up to date building codes in addition to fixing the encroachment onto the neighboring property.

Plaintiff spent time conducting calculations of the parking space needs for the parking lot. Plaintiff calculated that Gulfstream would need 76 parking spaces based on the Zoning ordinance.

Prior to the passing of Ordinance 2018-40, the parking lot only contained 68 parking spaces. By Plaintiff's own calculations, the parking lot was non-conforming prior to any amendments to the Marina Store and Restaurant. There is no evidence that the PD was required to follow Zoning ordinances in regards to parking because the PD was created long before the Article 11 Zoning ordinance was written. According to the State of South Carolina, PDs are variations to Zoning ordinances that "constitute zoning ordinance amendments." S.C. Code Ann. § 6-29-740. Plaintiff was not deprived of his property interest in the parking lot. Plaintiff still maintains a non-exclusive right of ingress and egress over the parking lot.

The state's action does not fall so far beyond the outer limits of legitimate governmental authority that no process could cure the deficiency. The state's actions were rationally related to a legitimate government purpose. According to Richardson and Johnson, the old building could not be rebuilt in the new build due to the existing flood regulations, FEMA, the ADA, and building and fire codes. Those new regulations promote the health, safety, and welfare of the community. The county did impose some requirements on the new building: same seating capacity as the original building and a limitation on the amount of heated square footage. These requirements were not arbitrary or capricious, they do not shock the conscience. Plaintiff's claim for Substantive Due Process fails.

PROCEDURAL DUE PROCESS

Procedural Due Process claims require (1) notice, (2) the opportunity to be heard in a meaningful way, and (3) 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. 165, 171, 656 S.E.2d 346, 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)).

Plaintiff did not present evidence suggesting that they received no notice, no opportunity to be heard, or no judicial review. Plaintiff was present at every stage of the hearing and approval process for all three amendments. Plaintiff voiced their opposition to the passage of Ordinance 2018-40 at all the readings of the proposed amendment. Plaintiff alleges that the other owners within the area did not receive proper notice. Plaintiff has no standing to complain about the notice of other individuals not party to this lawsuit. However, Plaintiff did not allege they themselves never received proper notice. Further, their presence at all stages of the process would indicate otherwise.

Plaintiff alleges that there were deficiencies in the application thus they did not have the opportunity to be meaningfully heard without those missing items. However, there is no evidence of that. Richardson testified that the application and form for the amendment were complete when turned in. She testified that any of the sections which were not completed were the sections that were not required based on the type of change the applicant was seeking. She further testified that the envelopes were not still attached to the application because they were used to send out the notices. The application was submitted in a timely fashion, giving at least 45 days before the Planning Commission meeting. Richardson and Judy Blankenship testified that Palmetto delivered envelopes address to the required property owners and attached them to the application as to provide notice to those within 400 feet of the property. Blankenship testified that the applicant is not required to provide the letters, just the envelopes, and that the Planning and Zoning Department provide the letters and map of the zoning changes. The notice requirements were substantially complied with. Plaintiff's claim for Procedural Due Process fails.

TAKINGS CLAUSE VIOLATION

For a regulatory taking claim, there are two questions that must be answered: (1) has there been an affirmative government action and (2) does that action result in a taking; *See Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76 (2005). A per se taking occurs where either (1) an owner is required to suffer a permanent physical invasion of property or (2) 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)).

Here, the actions by the Planning and Zoning Commission do constitute affirmative government action. The actions of the commission were to correct property lines and bring the building into compliance with numerous codes. The approval of Ordinance 2018-40 was affirmative government action.

Turning to the issue of the taking, plaintiff has not alleged a physical invasion, but has alleged that the passing of Ordinance 2018-40 equates a taking. In this case, there has not been a per se taking because the plaintiff has not been deprived of all economically beneficial or productive use of the land. Plaintiff still retains the non-exclusive easement for ingress and egress over the parking lot. Customers and patrons of Plaintiff still have the ability to use the parking lot. Plaintiff presented no evidence that all economically beneficial use of the land has been deprived, merely that customers may experience difficulty when parking in the parking lot.

Where there is not a per se taking, the claims of a taking are analyzed under a test set forth in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed.2d 631 (1978). This test evaluates “the character of the government action, the economic impact of the regulation on the claimant, and the extent to which the regulation has interfered with distinct investment-backed expectations.” *Id.*

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. In *Dunes*, the Court noted how the Town provided a legitimate public purpose by enacting the ordinance, that the Town did not eliminate all development potential, that the claimant still had a right to sell, and that the Town did not exploit the property for its own use or economic advantage. *Id.*, at 316-17, 737 S.E.2d at 620-21. Here, the government action was the passing of Ordinance 2018-40. The county had a legitimate public purpose by enacting Ordinance 2018-40. It provided a safer facility for patrons in the county that was up to newest FEMA and ADA regulations, amongst other building and fire codes.

Not all damages that are suffered by a property owner are compensable. *Dunes*, 401 S.C. at 315, 737 S.E.2d at 620. Where a comparison of the property value before and after the regulatory action happens, that comparison is “by no means conclusive.” *Id.* at 317, S.E.2d at 621 (quoting *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 790 (1987)). A diminution in property value alone cannot establish a taking. *Dunes*, 401 S.C. at 317, 737 S.E.2d at 621 (quoting *Penn Central*, 438 U.S. at 131).

The Plaintiff presented James Mooring, a real estate expert, who testified that the customers and the restaurant may experience some difficulty in parking in the lot and some loss of traffic of customers in the restaurant. Additionally, he testified that the value of Gulfstream would decrease and that the effect of Ordinance 2018-40 would be devastating to Gulfstream’s marketability. Plaintiff also presented George Knight, a real estate appraiser, who testified that prior to the passage of Ordinance 2018-40, Gulfstream was appraised at 1.85 Million dollars, but that after the passage of the ordinance, Gulfstream would only be worth \$89,500.

Ordinance 2018-40 does not restrict Plaintiff's use of the property. Plaintiff was never entitled to a certain number of parking spaces, but a non-exclusive right of ingress and egress over the parking lot. Plaintiff's appraiser Knight even agreed that his opinion was based on the assumption that there would be no parking available to the Plaintiff. Plaintiff's property is located on an inlet, surrounded by hundreds of condominiums with the opportunity for walk-in traffic that would not utilize the parking lot. Plaintiff's expert Knight even testified that if the property were rezoned for commercial use, it could be extremely valuable. Plaintiff's expert did not visit the property nor was the property ever listed online; Plaintiff never received any offer on the property from a buyer. Defendant presented evidence and testimony on cross-examination of Knight that the property would be highly sought after as it is a marsh-front inlet property across from the beach.

"For government regulation to constitute a taking, the property owner must objectively demonstrate the existence [of] investment-backed expectations." *Dunes*, at 401 S.C. at 320, 737 S.E.2d at 622. When considering what the owner's investment-backed expectations are for the property, the continuation of use is the primary expectation. *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).

Plaintiff does have an investment backed expectation in the use of the non-exclusive easement. Ordinance 2018-40 does not interfere with that easement as Plaintiff still retains a non-exclusive right of ingress and egress. Plaintiff's own witnesses testified that parking has always been a problem. Plaintiff cannot have an investment-backed expectation of full use of the parking lot where the easement does not grant that. The Plaintiff's claim for takings fails.

INVERSE CONDEMNATION

Inverse Condemnation occurs when a governmental agency “commits a taking of private property without exercising its formal powers of eminent domain.” *Ray v. City of Rock Hill*, 434 S.C. 39, 45, 862 S.E.2d 259, 262 (2021) (quoting *Hawkins v. City of Greenville*, 358 S.C. 280, 290, 594 S.E.2d 577, 562 (Ct. App. 2004)) (internal quotation marks omitted). A cause of action for inverse condemnation requires the Plaintiff to prove: (1) an affirmative, positive, aggressive act by the governmental agency; (2) a taking; (3) that the taking be for public use; and (4) that the taking have a degree of permanence. *Id.*

As referenced above, there is affirmative action on behalf of the governmental agency. However, also noted above, the passing of Ordinance 2018-40 is not a taking. The Plaintiff’s claim of inverse condemnation fails there. Further, there is no evidence of a public use. The parking lot is utilized by private entities for their customers. Additionally, because there is no taking, there is no degree of permanence. Plaintiff’s claim for Inverse Condemnation fails.

ATTORNEY’S FEES

In general, attorney’s fees are not recoverable unless authorized by a contract or statute. *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989); *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978); *Collins v. Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961). *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). In the Summons and Complaint, the Plaintiff claims entitlement to attorney’s fees under 28 U.S.C § 1988.

In South Carolina, the standard for determining the amount of reasonable attorney's fees is as follows: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services. *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313, (1991).

Here, the Plaintiff has not obtained beneficial results. As such, the Plaintiff is not entitled to attorney's fees.

CONCLUSION

Based upon the foregoing, the Court finds in favor of the Defendant on all causes of action.

IT IS SO ORDERED.

September 3, 2023
Sumter, SC

R. Kirk Griffin, Circuit Court Judge



Georgetown Common Pleas

Case Caption: The Gulfstream Caf? Inc VS Georgetown County , defendant, et al

Case Number: 2019CP2200212

Type: Order/Other

So Ordered

s/ R. Kirk Griffin 2768

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN) FIFTEENTH JUDICIAL CIRCUIT

The Gulfstream Café, Inc,)
)
)
Plaintiff,)
)
v.)
)
)
Georgetown County, Georgetown County)
Council, and Steve Goggans, individually)
and in his official capacity as Georgetown)
County Councilmember,)
)
Defendants)

ORDER
C/A NO. 2019-CP-22-00212

This matter is before the Court pursuant to Rule 59 (e) SCRCPP. The Defendants seek an Order of this Court amending or altering its Order of February 3, 2023.

Pursuant to Rule 59 (f) SCRCPP, this Court determines that the motion to alter or amend may be decided on briefs filed by the parties.

Having duly considered the motion to alter or amend of the Plaintiffs, this Court has determined that its original Order dated February 3, 2023, is fully supported by the law and the evidence and is hereby ratified and reconfirmed. The motion to alter or amend the earlier Order is therefore DENIED.

AND IT IS SO ORDERED.

Sumter, South Carolina

April 3, 2023

R. Kirk Griffin
Judge, Third Judicial Circuit



Georgetown Common Pleas

Case Caption: The Gulfstream Caf? Inc VS Georgetown County , defendant, et al

Case Number: 2019CP2200212

Type: Order/Other

So Ordered

s/ R. Kirk Griffin 2768

Electronically signed on 2023-04-03 14:22:57 page 2 of 2

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN)	FIFTEENTH JUDICIAL CIRCUIT
The Gulfstream Café, Inc,)	
)	
)	
Plaintiff,)	
)	
v.)	ORDER
)	C/A NO. 2019-CP-22-00212
)	
Georgetown County, Georgetown County)	
Council, and Steve Goggans, individually)	
and in his official capacity as Georgetown)	
County Councilmember,)	
)	
Defendant)	

This matter is before the Court pursuant to Rule 54, SCRCF, South Carolina Code Sections 15-37-10, et seq., and South Carolina Code Section 15-53-100. The Defendants’ seek an Order of this Court awarding costs. A bench trial was conducted in the above-referenced case during the August 29th, 2022 Term of Court. The court returned a verdict in favor of the above-referenced defendants (“the Defendants”).

LEGAL STANDARD

Pursuant to Rule 54 (d) SCRCF, “costs shall be allowed as of course to the prevailing party unless the court otherwise directs.” South Carolina Code Section 15-37-20 states, “No costs shall be allowed to any party unless he succeed, in whole or in part, in his claim or defense, unless otherwise directed by the judge hearing the cause.” Section 15-37-40 provides:

The clerk shall insert in the entry of judgment, on the application of the prevailing party . . . the sum of the allowances for costs and disbursements as provided by law . . . including the fees of officers allowed by law, the

fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees and the expense of printing the papers for any hearing when required by a rule of the court

Furthermore, South Carolina Code Section 15-53-100 permits the court to “make such award of costs as may seem equitable and just” for any proceeding under the Uniform Declaratory Judgments Act. S.C. Code Ann. § 15-53-10.

ANALYSIS

The Court entered judgment in favor of the Defendants on February 3rd, 2023. The Defendants are the prevailing party in this cause of action. Defendants submitted with their motion an itemized statement of costs and an affidavit for filing fees and transcript costs. From April 11, 2019 to August 24, 2022, Defendants have incurred costs of \$9,065.54. *Def. Itemized Statement of Costs 3*. Having duly considered the motion for costs by the Defendants, this Court has determined that the statement of costs is fully supported by the law and the evidence and is hereby GRANTED. Defendants are awarded \$9,065.54 in costs.

AND IT IS SO ORDERED.

Sumter, South Carolina

May 26, 2023

R. Kirk Griffin
Judge, Third Judicial Circuit



Georgetown Common Pleas

Case Caption: The Gulfstream Caf? Inc VS Georgetown County , defendant, et al

Case Number: 2019CP2200212

Type: Order/Costs

So Ordered

s/ R. Kirk Griffin 2768

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