

Nov 14 2023

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 VII)**

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Councilmember

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.	)	DEFENDANTS' PRE-TRIAL BRIEF
	)	Rule 16(c), SCRPC
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.	)	
_____	)	

The Defendants Georgetown County (the “County”), Georgetown County Council (the “County Council”), Steve Goggans, individually, and in his official capacity as a Georgetown County Councilmember (“Goggans”) (collectively, the “Defendants”),¹ submit this Pre-Trial Brief pursuant to Rule 16(c) of the South Carolina Rules of Civil Procedure.

I. STATEMENT OF THE FACTS

This dispute revolves around a parking lot (the “Parking Lot”), owned by Palmetto Industrial Development, LLC (“Palmetto”). The Parking Lot is located between Plaintiff Gulfstream Café, Inc.’s (“Plaintiff”) restaurant and Palmetto’s other property, the Marlin Quay Marina Store and Restaurant (collectively, the “Marina Store and Restaurant”) located in Garden

¹ Defendants John Thomas, Ron Charlton, Lillie Johnson, Austin Beard, and Louis Morant were dismissed with prejudice in their individual capacities and in their official capacities as Georgetown County Councilmembers pursuant to a Consent Order of Dismissal issued by Judge Benjamin H. Culbertson on December 14, 2021.

City, South Carolina. Plaintiff, the Marina Store and Restaurant, and the Parking Lot are part of the Marlin Quay Planned Development (“PD”), a Zoning District in Georgetown County.

On February 25, 1986, the Marlin Quay Marina Corporation, which, at the time, owned the Parking Lot and Marina Store and Restaurant, granted three (3) non-exclusive appurtenant easements (“Joint Nonexclusive Easements”) to Plaintiff for the right of ingress and egress into the Parking Lot, together with the right for maintenance, repair, alteration, and/or improvements to Plaintiff’s property. In 1990, the Marlin Quay Marina Corporation again granted a similarly stated Joint Nonexclusive Easement to Plaintiff.

In 2014, Palmetto, an entity owned by J. Mark Lawhon (“Lawhon”), purchased the Parking Lot and Marina Store and Restaurant. In 2016, Palmetto demolished the Marina Store and Restaurant and hired Goggans, an architect, to prepare architectural drawings for the new Marina Store and Restaurant.

In November 2016, Plaintiff filed a lawsuit against Palmetto and Lawhon alleging interference with its easement rights. This captioned action is *The Gulfstream Café, Inc. v. J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC*, C.A. No. 2016-CP-22-00961.² Initially, for construction of the new building, Palmetto submitted to the Georgetown County Planning Department (the “Planning Department”) an application for a minor amendment to the Marlin Quay PD (“Version 1”). Due to Plaintiff’s opposition to Version 1 being classified as a minor amendment, in November 2017, Palmetto submitted an application for a major amendment to the Marlin Quay PD. This application is known as Version 2. The Georgetown County Planning Commission (“Planning Commission”) recommended approval of the amendment to the PD. The

² Neither Georgetown County nor any Councilmembers were parties to this civil action.

Defendant County Council³ approved the proposed amendment (“Ordinance Number 2018-03”) on February 27, 2018. As a result of the amendment, the Marlin Quay PD permitted the Marlin Quay building to contain a seating capacity not to exceed 110 persons along with 4,598 heated square feet and sixty-two (62) parking spaces, including three (3) compact spaces underneath the new structure. Also, the building had a forty-five (45)-foot height limit measured from the midpoint of the roof. Plaintiff did not appeal the passage of this amendment to the Marlin Quay PD.

In June 2018, the trial against Lawhon and Palmetto concluded, and circuit court issued a permanent injunction which permitted the construction of a new Marina Store and Restaurant building, but specified the structure must be within the footprint of the former building as shown on a 1985 plat. The Order noted that “[t]he Court is specifically not talking about height, only the outside boundaries.”

Because the Marlin Quay PD permitted the proposed structure to be outside the footprint of the former building in certain limited areas, Palmetto submitted an application (“Version 3”) to amend the existing PD on August 27, 2018.⁴ Keeping with common practices, the Planning Department generated a list of property owners from the Georgetown County Geographic Information System (“GIS”) within 400 feet of Version 3. In accordance with the generated list, the Planning Department mailed notice to property owners listed in the GIS within 400 feet of the property. With the knowledge that the GIS list of property owners included the Marlin Quay Homeowners’ Association, but not the individual unit owners of the Marlin Quay Condominiums,

³ Goggans had no involvement or participation with the County Council in relation to the application of Version 2.

⁴ Goggans had no involvement or participation with the County Council in relation to the application of Version 3.

the Planning Department contacted Nancy Gardner with Surfside Realty, the property manager for the Marlin Quay Homeowners' Association, so that she could distribute the notice to the unit owners at the Marlin Quay Condominiums. Ms. Gardner received the notice and forwarded it to each unit owner at Marlin Quay.

In addition to the extra efforts to provide written notice, the Planning Department, on October 2, 2018, posted a sign at the entrance of the Parking Lot, which was more than fifteen (15) days prior to the public hearing date, being October 18, 2018, in accordance with the Georgetown County Land Development and Zoning Ordinance (the "Zoning Ordinance"). The Planning Department also advertised the Planning Commission hearing twice—once on October 3, 2018 in the *Georgetown Times*, which was fifteen (15) days prior to the hearing date, and once on October 4, 2018 in the *Coastal Observer*.

On October 18, 2018, the Planning Commission held a hearing on Palmetto's application for a major amendment to the PD. At the hearing, legal counsel for Plaintiff, as well as others associated with Plaintiff, attended and spoke. The Planning Commission voted to recommend submitting the Version 3 amendment to County Council.

County Council held three separate readings on the proposed amendment to the PD. Plaintiff's attorney appeared before County Council and offered public comments in opposition to the amendment, along with several Marlin Quay unit owners. Other community members and property owners spoke in support of the amendment. In addition, Plaintiff's attorney also submitted a letter to each Councilmember. This letter vigorously argued against the passage of the proposed amendment to the PD and threatened a lawsuit if it passed.

On January 8, 2019, the amendment to the existing PD was approved ("Ordinance Number 2018-40"). This amendment required that the new structure be built within the footprint of the

former building. This amendment also continued the requirements of the PD regarding the heated square footage⁵ for the new structure; sixty-two (62) parking spaces, including three (3) compact spaces underneath the new structure; and a total seating capacity not to exceed 110 persons.

II. FACTS IN CONTROVERSY

Plaintiff is challenging the last amendment to the Marlin Quay PD (2018-40) even though it only amended the location of the building and the height. It did not change the permitted heated square footage, the seating capacity, or the parking for these items were in the existing PD due to the passage of 2018-03, which Plaintiff did not legally challenge. The legal significance of Plaintiff's failure to make such a challenge is that under South Carolina Code Subsection 6-29-760(D), a challenge to an amendment of a zoning ordinance must be made within sixty (60) days "after the decision of the governing body if there has been substantial compliance with the notice requirement of this section or with the established procedures of the governing authority or the planning commission."

III. LEGAL ISSUES INVOLVED

Local boards are afforded great deference in their zoning decisions. As the Supreme Court of South Carolina has explained:

It is a well settled proposition of zoning law that a court will not substitute its judgment for the judgment of the [zoning board of appeals]. The court may not feel that the decision of the board was the best that could have been rendered under the circumstances. It may thoroughly disagree with the reasoning by which the board reached its decision. It may feel that the decision of the board was a substandard piece of logic and thinking. None the less, the court will not set aside the board's view of the matter just to inject its own ideas into the picture of things.

⁵ In fact, the heated square footage of Version 3 was two feet less than the heated square footage in Version 2.

Rest. Row Assocs. v. Horry Cnty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (quoting *Talbot v. Myrtle Beach Bd. Of Adjustment*, 222 S.C. 165, 173, 72 S.E.2d 66, 70 (1952)). See also *Rush*, 246 S.C. at 276, 143 S.E.2d at 531 (“There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application, and where the Planning and Zoning Commission and the city council of a municipality have acted after considering all of the facts, the Court should not disturb the finding unless such action is arbitrary, unreasonable, or in obvious abuse of its discretion, or unless it has acted illegally and in excess of its lawfully delegated authority.”); *Furr v. Horry Cnty. Zoning Bd. of Appeals*, 411 S.C. 178, 183–84, 767 S.E.2d 221, 224 (Ct. App. 2014) (internal citations omitted) (“By statute, the trial court must uphold a decision by the Planning Commission unless there is no evidence to support it. . . . The local zoning boards, and not the courts, are the primary entities responsible for the planning and development of our communities.”).

A zoning ordinance is presumed valid, and the party challenging the amendment has the burden of proof to establish the council acted arbitrarily and unreasonably. *Bob Jones Univ., Inc. v. City of Greenville*, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963) (citation omitted). “There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application, and where the Planning and Zoning Commission and the [county] council of a municipality has [sic] acted after considering all of the facts, the Court should not disturb the finding unless such action is arbitrary, unreasonable, or in obvious abuse of its discretion, or unless it has acted illegally and in excess of its lawfully delegated authority. Likewise, 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.” *Id.*

A. Plaintiff’s Causes of Action

1. Declaratory Judgment

As its first cause of action, Plaintiff seeks a declaratory judgment that the County’s amendment, dated January 8, 2019, Ordinance Number 2018-40, is invalid because this Ordinance allegedly constitutes a taking and violates Plaintiff’s substantive and procedural due process rights. The Declaratory Judgments Act permits courts of competent jurisdiction to “declare rights, status, and other legal relations whether or not further relief is or could be claimed.” S.C. Code Ann. § 15-53-20. Plaintiff is not entitled to a declaratory judgment that Ordinance 2018-40 is invalid because its substantive and procedural due process rights were not violated, and the passage of the amendment did not constitute a taking.

Plaintiff attacks Ordinance 2018-40 on the following grounds:

- (1) The August 2018 application was the second application for the same parcel of property during a twelve-month period;
- (2) The application was incomplete because, among other things, no sketches or drawings or list of property owners accompanied the application, although addressed envelopes did;
- (3) Notice was not timely or sufficient;
- (4) The application was not submitted in proper form forty-five (45) days prior to being considered by the Planning Commission;
- (5) The County did not follow parking requirements; and
- (6) The building proposed in the application is larger than the former building.

Each of these alleged deficiencies is addressed below.

2. Violation of Substantive Due Process—Article I, Section 3 of the South Carolina Constitution and the United States Constitution Pursuant to 42 U.S.C. § 1983

Plaintiff asserts it has “property rights to operate a restaurant” and rights in an easement, and by passing Ordinance 2018-40, Defendants “deprived” Plaintiff of its property rights and

“prevented” Plaintiff from fully enjoying those rights. Plaintiff further alleges Defendants’ actions were arbitrary and capricious and without any rational basis or relation to the public’s health, safety, welfare, or morals. The evidence Plaintiff suggests supports its assertions is Defendants’ alleged “failure” to consider the “impact” to the Parking Lot despite its complaints.

Article I, Section 3 of the South Carolina Constitution provides that no “person [shall] be deprived of life, liberty, or property without due process of law.” S.C. Const. art. I, § 3. A substantive due process violation occurs when a party is “arbitrarily and capriciously deprived of a cognizable property interest rooted in state law.” *Anonymous Taxpayer v. S.C. Dep’t of Revenue*, 377 S.C. 425, 437–38, 661 S.E.2d 73, 79 (2008) (quoting *Worsley Co. v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000)); *see also Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 296, 737 S.E.2d 601, 610 (2013) (“In order to successfully assault a city’s zoning decision, a citizen must establish that the decision was arbitrary and unreasonable.”); *Anonymous Taxpayer*, 377 S.C. at 437, 661 S.E.2d at 80 (“Substantive due process provides that one may not be deprived of property for arbitrary reasons.”).

The South Carolina Supreme Court has stated: “[I]n 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 (quoting *Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 827 (4th Cir. 1995)). “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. . . . 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.” *Id.* at 296, 737 S.E.2d at 609 (quoting *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 663 (2011)).

Like state law substantive due process claims, federal substantive due process claims of alleged violations of the United States Constitution require “facts demonstrating that the [county’s] conduct was arbitrary, irrational, or motivated by constitutionally impermissible factors.” *Singletary v. City of N. Charleston*, No. CV 2:09-1612-RMG-BM, 2012 WL 13018625, at *4 (D.S.C. Jan. 18, 2012), *report and recommendation adopted*, No. 2:09-CV-1612-RMG, 2012 WL 1309183 (D.S.C. Apr. 16, 2012), *and aff’d*, 479 F. App’x 456 (4th Cir. 2012), *and aff’d*, 479 F. App’x 456 (4th Cir. 2012). A federal due process claim is based on the Fourteenth Amendment to the United States Constitution, which states that “no State [shall] deprive any person of life, liberty, or property without the due process of law. . . .” *Id.* (quoting U.S. Const. Amend. XIV, Section 1 (alteration in original)). A federal substantive due process claim is considered under 42 U.S.C. § 1983, which “is the procedural mechanism through which Congress provided a private civil cause of action based on allegations of federal constitutional violations by persons acting under color of state law.” *Id.* at n.5 (citing *Jennings v. Davis*, 476 F.2d 1271 (8th Cir. 1973)).

In considering a substantive due process claim under the United States Constitution and 42 U.S.C. § 1983, the United States District Court for the District of South Carolina has further clarified that when a plaintiff contends “that a municipal land decision violate[s] substantive due process [under 42 U.S.C. § 1983], [it] must show that the defendants’ conduct shocks the conscience.” *Id.* (internal quotations omitted). “[O]nly the ‘most egregious official conduct’ will rise to the level of a constitutional violation.” *Id.*

In approving Ordinance 2018-40, the County’s actions were not arbitrary or capricious, nor did they shock the conscience. In determining whether an action is arbitrary and capricious, South Carolina courts look to the requirements set forth by the County’s code. *See, e.g., Bevivino v. Town of Mount Pleasant Bd. of Zoning Appeals*, 402 S.C. 57, 64, 737 S.E.2d 863, 867–68 (Ct. App. 2013) (reviewing the requirements of an ordinance); *Wyndham Enters., LLC v. City of N. Augusta*, 401 S.C. 144, 148, 735 S.E.2d 659, 661 (Ct. App. 2012) (considering the North Augusta Development Code).

In 2018, the County Zoning Ordinance required that: (1) the application not be a second request for “the same change *in district classification* by a property owner” to the Marlin Quay PUD within a twelve (12)-month period (Section 1702.1 (emphasis added)); and (2) the application be submitted at least forty-five (45)-days prior to the Planning Commission meeting on the form provided by the Planning Department, including administrative costs and any other document pertinent to the Planning Department’s review of the application (Section 1702.2 and 1702.201).⁶ Palmetto’s application did not ask for a change in district classification *at all* because both Version 2 and Version 3 applications were for the same district, and Palmetto complied with the time and application requirements for submission. Palmetto’s application did not violate any of these requirements of the Zoning Ordinance, and moreover, the approval of Ordinance 2018-40 was not a change in use from what had originally been authorized in the 1986. Further, the Planning Department followed the Zoning Ordinance and conducted a review of the information provided

⁶ Significantly, strict compliance with Section 1702.206 is not required. Section 1702.207 provides: “Failure to strictly comply with the notification requirements contained in Section[] 1702.206 . . . *shall not render the rezoning of the property invalid.*” (emphasis added). *See also* S.C. Code Ann. § 6-29-760(D) (stating a challenge against an amendment may not be brought within sixty days of the decision “if there has been *substantial compliance* with the notice requirements...or with established procedures of the governing authority....”) (emphasis added).

by Palmetto, and then set forth its finding in a Staff Report that was later presented to the Planning Commission. The Staff Report itself confirms that the Defendants' actions were not arbitrary and capricious, as it contemplated the heated square feet and height of the new structure, parking, seating capacity, the amount of pervious/impervious space, and the flood zone height requirements.

In addition to the Staff Report, the Planning Commission received the application, site building and plans, GIS location map, zoning map, and aerial map, and the adjacent property notice. The Planning Department presented the Staff Report to the Commissioners and provided a comparison of the existing PD requirements with the Version 3 proposal. The Planning Commission heard from agents of both Palmetto and Plaintiff, including their attorneys, a condominium owner, and an engineer. Following full discussion, *all* Commissioners voted to recommend the proposed PD amendment. County Council held three (3) readings of the proposed amendment, as required, and heard from Plaintiff and its agents, including its attorney, Plaintiff's employees, Palmetto's attorney, and a number of Marlin Quay condo owners. At every level, the County reviewed Palmetto's application and the information therein. Accordingly, the County's approval does not shock the conscience, and the decision was not "unconstitutional as arbitrary and capricious" simply because Plaintiff is dissatisfied with the County's decision. *Singletary*, No. CV 2:09-1612-RMG-BM, 2012 WL 13018625, at *5. *See also, Rush v. City of Greenville*, 246 S.C. 268, 282, 143 S.E.2d 527, 534 (1965) (holding where "[t]here is no evidence . . . that the action of the [County] Council . . . in any way violated any rule, regulation or ordinance in reaching their decision in this case," the zoning decision is not arbitrary and capricious.). Rather, the County's public servants undertook their duty to amply review Palmetto's application.

3. Violation of Procedural Due Process—Article I, Section 3 of the South Carolina Constitution and the United States Constitution Pursuant to 42 U.S.C. § 1983

Plaintiff alleges a violation of its procedural due process rights under the South Carolina and United States Constitutions on the same grounds as its alleged substantive due process violations. “The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.” *Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (“[W]e have determined that individuals whose property interests are at stake are entitled to ‘notice and an opportunity to be heard.’”); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993); *Kurschner v. City of Camden Plan. Comm’n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (citations omitted). “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Kurschner*, 376 S.C. at 172, 656 S.E.2d at 350 (citing *S.C. Dep’t of Soc. Servs. v. Wilson*, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002)). Procedural due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Taylor v. City of Columbia*, No. C/A 3:07-983-JFA-JRM, 2010 WL 296901, at *8 (D.S.C. Jan. 20, 2010), *aff’d sub nom. Taylor v., City of Columbia*, 389 F. App’x 325 (4th Cir. 2010) (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (1978)) (finding procedural due process rights were not violated because the plaintiff received adequate notice of the claims against her); *see also Jones v. S.C. Dep’t of Health & Env’t. Control*, 384 S.C. 295, 317, 682 S.E.2d 282, 294 (Ct. App. 2009) (finding no procedural due process violation because no prejudice resulted since the plaintiffs received sufficient notice and a hearing).

Like substantive due process, the South Carolina Constitution provides protection from procedural due process violations, and an alleged procedural due process violation under the

United States Constitution is considered under 42 U.S.C. § 1983. *See Taylor*, No. C/A 3:07-983-JFA-JRM, 2010 WL 296901, at *5–6 (“In procedural due process claims, the deprivation by state action of a constitutionally protected interest in ‘life, liberty, or property’ is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.” (citing *Parratt v. Taylor*, 451 U.S. 527, 537 (1981))).

a. The Version 3 Application was not a second request for a major change to the Marlin Quay PD made in a twelve (12)-month period.

Section 1702.1 of the Zoning Ordinance provides:

[Q]ualified applicants are eligible to initiate an application for change and/or relief from requirements of this Ordinance . . . [except] that action shall not be initiated for a zoning amendment affecting the same parcel or parcels of property or any part thereof, *and requesting the same change in district classification* by a property owner or owners of more often than once every twelve (12) months measured from the date of the original recommendation by the Planning Commission.

(Emphasis added.) The County properly considered the application for Version 3 without violating Section 1702.1 of the Zoning Ordinance’s rule because Palmetto was not asking for a change in district classification. The Marlin Quay PD remained a PD in both applications. Accordingly, the County did not violate Section 1702.1.

b. The Version 3 Application was not untimely or incomplete.

Section 1702.201 of the Zoning Ordinance provides that “an application must be submitted, in proper form, at least forty-five (45) days prior to a Planning Commission meeting in order to be heard at that meeting.” First, the application was not untimely. Palmetto submitted its application on August 27, 2018. The Planning Commission met on October 18, 2018, which was fifty-two (52) days after Palmetto submitted the application. Since the Planning Commission met more than forty-five (45) days after the application was submitted, the application was timely.

Second, the application was not incomplete. Section 1702.2 of the Zoning Ordinance sets forth the application procedure and identifies that “proper form” requires a complete application

form for amendment requests obtained from the Planning Commission, “together with an application fee to cover administrative costs plus additional information the applicant feels to be pertinent shall be filed with the Planning Commission.” The application included (i) the application in the form provided by the Planning Department, (ii) twelve copies of the existing sit plan and twelve copies of the proposed site plan, and (iii) the administrative costs. Additionally, the Planning Department began its review of the Version 3 application because it was substantially similar to the Version 2 application. The application was submitted in proper form, and the County had additional background information due to the prior application, and thus the application was complete.⁷

Further, the notice requirements set forth by Section 1702.206 did not render the application incomplete. Section 1702.206 requires that an entity applying to amend an ordinance amending a planned development

must submit to the Planning Commission, as part of the application, letters addressed to each property owner within four hundred (400) feet of the subject property containing information adequate to notify such owners of the intention to rezone, and when and where a public hearing will be held by the Planning Commission. A location map showing the areas to be rezoned must be included. Such letters must be placed in unsealed, stamped and addressed envelopes ready for mailing by the Planning Commission. The Planning Commission’s address must appear as the return address on the envelopes. A list of all property owners, as reflected by the tax records, to whom letters are addressed must accompany the application.

Here, Palmetto submitted, with its application, addressed envelopes with the names of the property owners. Notices went out to people within 400 feet of the property, as is required by the ordinance, and as provided by the GIS list, which the Planning Department generated in addition to any list

⁷ Plaintiff takes issue with the fact that Palmetto sent more drawings subsequent to its application, showing the building elevations and site layout in greater detail. However, it is a common practice for the Planning Department to request supplemental documentation. Palmetto’s submission of additional documents did not affect the timeliness and completeness of the application.

provided by Palmetto. The Planning Department compared that list against the envelopes provided to ensure the identified property owners received notice.

Moreover, as previously noted, the Zoning Ordinance instructs that Section 1702.206 does not require strict compliance. Section 1702.207 states: “Failure to strictly comply with the notification requirements contained in Section[] 1702.206 . . . shall not render the rezoning of the property invalid.” *See also* S.C. Code Ann. § 6-29-760(D) (stating a challenge against an amendment may not be brought within sixty days of the decision “if there has been *substantial compliance* with the notice requirements...or with established procedures of the governing authority....”) (emphasis added).

Palmetto submitted a complete application more than forty-five (45) days prior to the Planning Commission meeting. As a result, its application complied with the Zoning Ordinance and was neither untimely nor incomplete.

c. There was notice of the proposed amendment to property owners within 400 feet of the affected property, and such notice was proper.

Plaintiff also relies on Section 1702.206 of the Georgetown County Zoning Ordinance to assert that property owners received insufficient or no notice. However, as detailed above, Palmetto submitted addressed envelopes as required in Section 1702.206, and even if Palmetto did not provide a separate list, substantial compliance does not render the zoning void. *See* Georgetown County Land Development and Zoning Ordinances § 1702.207 (“Failure to strictly comply with the notification requirements contained in Section[] 1702.206 . . . shall not render the rezoning of the property invalid.”).

As standard procedure for all applicants, the Planning Department staff receive an applicant’s addressed envelopes, and staff prints the list of owners within 400 feet as reflected in the GIS. Based on this list of property owners generated by the GIS, the Planning Department

mailed letters to those addresses. Plaintiff specifically takes issue with how notice was provided to the Marlin Quay Condominium Owners. The Planning Department contacted Nancy Gardner with Surfside Realty, the property manager for the Marlin Quay Homeowners' Association. The Planning Department provided a separate email with the notice that could be forwarded to each individual owner in the condominium complex, and the Planning Department asked Ms. Gardner to forward the notice to each property owner. Ms. Gardner received the notice and forwarded it to each condominium owner at Marlin Quay.

In addition, the Planning Department also published the notice of the Planning Commission meeting in the newspaper and placed a sign at the Property. Section 1702.209 states, "In rezoning cases, conspicuous notices shall be posted on the affected property that shall be visible from each public street that borders the property. The notice shall be posted at least fifteen (15) days prior to the public hearing date." Here, the property posting occurred on October 2, 2018. The hearing occurred on October 18, 2018, meaning the Planning Department placed the notice more than fifteen (15) days prior to the public hearing date as required by Section 1702.209 of the Zoning Ordinance.

Additionally, the Ordinance states, "Before enacting an amendment to this Ordinance, the Planning Commission shall hold a public hearing thereon, notice of the time and place of which shall be published in a newspaper of general circulation in the County at least fifteen (15) days in advance of the scheduled public hearing date." The Planning Department advertised the Planning Commission meeting twice—on October 3, 2018 in the *Georgetown Times*, which is fifteen (15) days prior to the hearing date, and on October 4, 2018 in the *Coastal Observer*. Again, the Planning Department went above and beyond what was required of it to provide notice by publishing notice in two newspapers of general circulation.

d. The Version 3 Application did not violate Georgetown County's parking regulations.

Contrary to Plaintiff's contentions, the parking regulations do not apply to the Marlin Quay

PUD. Section 619.2 of the Georgetown County Zoning Ordinance provides:

Any request pertaining to the establishment of a Planned Development District shall be considered an amendment to the Zoning Ordinance and shall be administered and processed in accordance with the regulations set forth in Article XIV [sic], entitled Amendments. All data set forth in Section 619.6 pertaining to conceptual approval shall be submitted to Staff of the Planning Commission and subsequently forwarded to County Council, with recommendations from the Planning Commission. If approved by County Council, *all information pertaining to the proposal shall be adopted as an amendment to the Zoning Ordinance, as the standards of development for that particular Planned Development District.*

(Emphasis added.) Section 619.2 provides flexibility for zoning because a planned development creates a separate zoning district with its own conceptual plan. Since a planned development is a separate zoning district, Article XI, Parking Regulations are used as a guide in making determinations about parking, but the planned development zoning stands on its own and contains its own restrictions—if any. Here, the only change to the parking in Ordinance 2018-40 was the addition of parking spaces. Defendants fail to see how the addition of spaces could violate the historical requirements of the Marlin Quay PD.

Moreover, during the review process, the Planning Department did not overlook parking spaces, but rather, in the Staff Report made specific reference to the number of spaces proposed and the minimum number of spaces required. The Planning Department further explicitly noted the parking lot would be shared with Plaintiff.

All in all, Plaintiff received notice and an opportunity to be heard, as its agents, including its attorney, attended the Planning Commission hearing and County Council meetings and stated its position at those meetings. There is no better evidence that Plaintiff had notice and an opportunity to be heard.

4. Violation of South Carolina’s Taking Clause—Article I, Section 13 of the South Carolina Constitution

Plaintiff next asserts that the “Defendants’ action in advocating for and/or approving Palmetto’s application will result in the construction of Version 3.0, which will grossly overburden the parking lot...” and prevent Plaintiff from operating its restaurant, which Plaintiff alleges constitutes a taking. First, Plaintiff has no property interest in the amended ordinance and lacks a right to pursue any claims against Defendants, and further, Defendants did not take or otherwise interfere with Plaintiff’s right to run its restaurant or access its easement. The County is not involved in easements between private parties, and private easements are not taken into consideration when deciding zoning amendments.

“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 W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 313, 737 S.E.2d 601, 619 (2013) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992)).

In this case, Plaintiff does not allege a permanent physical invasion of its property, but it contends that Ordinance 2018-40 deprives Plaintiff of all “economically viable use of the property.” Plaintiff is incorrect. In *Dunes*, the South Carolina Supreme Court considered whether the passage of a Conservation Recreation Open Space zoning district, imposing land-use restrictions on all golf courses for recreation and conservation uses, deprived the Dunes West Golf Club of all economically viable uses of its property. *Id.* at 314, 737 S.E.2d at 619. The South Carolina Supreme Court determined that the “designation permit[ted] numerous recreation and conservation uses,” and Dunes did not “produce any evidence that those permitted uses are not economically beneficial.” *Id.* The Court, looking to the United States Supreme Court’s discussion

of a taking in *Lucas*, noted that there was no evidence of “the ‘extraordinary circumstance when no productive or economically beneficial use of land is permitted.’” *Id.* (emphasis in original) (quoting *Lucas*, 505 U.S. at 1017).

The Ordinance’s possible effect on Plaintiff’s property is similar to the ordinance’s effect on Dunes’ property. Here, Plaintiff cannot show that there is no productive or economically beneficial use of its land, and it “has presented no evidence that this is the ‘extraordinary circumstance when no productive or economically beneficial use of land is permitted.’” *Id.* (quoting *Lucas*, 505 U.S. at 1017). Instead, Plaintiff merely asserts that the construction of the Version 3 building will overburden the Parking Lot and that it cannot operate its property as a restaurant if it does not have parking,⁸ and therefore, the approval of the amendment deprives it of all economically viable use of its property. However, Plaintiff has the ability to operate its restaurant as a restaurant—nothing in Ordinance 2018-40 prevents Plaintiff from operating its restaurant, and nothing limits Plaintiff’s “free ingress, egress, and vehicular parking at the parking lot.” Furthermore, Plaintiff does not possess an exclusive easement to use the Parking Lot, and as such, there is no merit to its assertion that because it may have to share the Parking Lot with non-customers, it has suffered a taking. Accordingly, there is still an economically viable use of Plaintiff’s property, and as such, there has been no taking of Plaintiff’s property rights.

5. Inverse Condemnation

Plaintiff asserts Defendants passed an amendment that will result in the construction of a building that will allegedly “undermine” Plaintiff’s property right, which is a taking requiring just compensation. “An inverse condemnation may result from the government’s physical appropriation of private property, or it may result from government-imposed limitations on the use

⁸ Plaintiff has at least fourteen parking spaces that cannot be used by Palmetto.

of private property.” *Byrd v. City of Hartsville*, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005). “The governmental conduct at issue generally takes one of two forms: (1) the entity has physically appropriated private property or (2) the entity has imposed restrictions on the use of the property that deprive the owner of the proper’s ‘economically viable use.’” *Hilton Head Auto., LLC v. S.C. Dep’t of Transp.*, 394 S.C. 27, 30, 714 S.E.2d 308, 310 (2011). The elements of a regulatory inverse condemnation include: (1) affirmative conduct; and (2) a taking.⁹ *Byrd*, 365 S.C. at 657, 620 S.E.2d at 80. The court should consider two important circumstances when determining whether there has been a regulatory taking: (1) the economic impact on the Plaintiff, particularly the extent to which the government interference with investment-back expectations; and (2) the character of the governmental action. *Byrd*, 365 S.C. at 659, 620 S.E.2d at 80 (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978)).

In considering the economic impact of the Ordinance, a diminution in property value does not alone establish inverse condemnation. *Dunes*, 401 S.C. at 317, 737 S.E.2d at 621 (quoting *Penn Central*, 438 U.S. at 131 (“United States Supreme Court decisions sustaining land-use regulations ‘uniformly reject the proposition that diminution in property value, standing alone, can establish a “taking,” and that the “taking” issue in these contexts is resolved by focusing on the uses the regulations permit.”)). First, Plaintiff’s inverse condemnation claim makes no assertions regarding the alleged economic impact of 2018-40. Even considering its inverse condemnation claim related to Plaintiff’s takings claim, which alleges that 2018-40 “deprives [Plaintiff] of all economically viable use of its property,” Plaintiff does not assert a diminution in property value,

⁹ If the inverse condemnation results from a physical appropriation of property, a third element arises: the taking must be for public use. *Byrd*, 365 S.C. at 657, 620 S.E.2d at 79-80. In this case, Plaintiff has not alleged any physical appropriation by the County, but rather, has only alleged the passage of the Ordinance 2018-40 was wrongful. Accordingly, Plaintiff’s inverse condemnation claim is a regulatory one.

but rather a deprivation of economic use of its property. Even assuming *arguendo* that Plaintiff does assert there has been a diminution of the property value, the valuation would be calculated on the basis that the Plaintiff can no longer operate its restaurant. There is no diminution in property value—the property may still be used to operate a restaurant, and Plaintiff continues to have access to the Parking Lot for its guests as it continues to operate its restaurant.

Next, “continuation 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.” *Dunes*, 401 S.C. at 319, 737 S.E.2d at 622 (quoting *Carolina Chloride*, 394 S.C. at 173, 714 S.E.2d at 878). In this case, Plaintiff’s primary investment-backed expectation is the ability to operate a restaurant with access to the Parking Lot. Even with the passage of 2018-40, Plaintiff can continue to operate its restaurant in the same way as the PD permitted for years; it continues to have access to the Parking Lot, and it will be able to continue to operate its restaurant. The passage of the ordinance does nothing to change whether Plaintiff can or cannot operate a restaurant and provide parking to its guests. *See id.* at 319, 737 S.E.2d at 622.

When considering the character of the public action, South Carolina courts have noted that “government regulation—by definition—involves the adjustment of rights for the public good.” *Id.* at 315, 737 S.E.2d at 620 (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005)). “Not all damages suffered by a private property owner at the hands of [a] governmental agency are compensable.” *Id.* at 316, 737 S.E.2d at 620 (citing *Carolina Chloride*, 394 S.C. at 170, 714 S.E.2d at 877) (alteration in original). Here, numerous citizens spoke in favor of the rebuilding of the Marlin Quay Marina and Restaurant, noting the marina needed revitalization, and much of the mode of transportation in the Marlin Quay PD involved foot traffic. As recognized by the citizens of Georgetown County, the approval of the Marlin Quay Marina and Restaurant would benefit the

area as a whole. Consequently, these facts weigh in favor of Defendants, and there has been no inverse condemnation of Plaintiff's property by Defendants.

6. Attorneys' Fees Pursuant to 28 U.S.C. § 1988

The statute Plaintiff states entitles it to attorneys' fees, 28. U.S.C. § 1988, is nonexistent. The statute permitting attorneys' fees pursuant to a § 1983 claim is 42 U.S.C. § 1988: "In any action or proceeding to enforce a provision of section[...]1983..., the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee as part of the costs...." 42 U.S.C. § 1988(b). Even excusing Plaintiff's mistake, Defendants are not liable pursuant to 42 U.S.C. § 1983, as discussed extensively above, and Plaintiff is therefore not entitled to attorneys' fees. Instead, Defendants will be entitled to attorneys' fees pursuant to 42. U.S.C. § 1988.

B. Defendants' Defenses

1. Plaintiff's Challenges are Barred by South Carolina Code Section 6-29-760(D).

Plaintiff is statutorily barred from challenging the validity of Ordinance 2018-40 because a previous Ordinance, Ordinance No. 2018-03, enacted February 27, 2018, was not challenged by Plaintiff even though it is virtually identical to Ordinance 2018-40. South Carolina Code Section 6-29-760(D) states:

No 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 requirement of this section or with established procedures of the governing authority or the planning commission.

Initially, in 2016, Palmetto sought a minor amendment to the PD to construct the Marina Store and Restaurant. As a result of Plaintiff challenging the legality of obtaining a minor amendment, Palmetto submitted an application for a major amendment, which is Version 2. On December 21, 2017, the Planning Commission held a hearing on the application for Version 2, and it later

recommended the amendment be presented to County Council. Then on January 9, 2018, at a county Council Meeting, Ordinance 2018-03 was presented for the first reading. The second reading was held February 13, 2018, and the third reading February 27, 2018.

As previously noted, throughout the entire process to amending the PD, Plaintiff expressed its opposition at each step. It presented not only written statements/letters opposing the approval of Version 2, but also its representatives attended the Planning Commission Hearing and the three (3) readings held by County Council. At the first reading, January 9, 2018, George Redman, counsel for Plaintiff, as well as a unit owner in the Marlin Quay Condominiums, appeared and spoke. At the second reading, February 13, 2018, Mr. Redman, Plaintiff's operating partner, Plaintiff's operations manager, and three additional Marlin Quay unit owners appeared and spoke in opposition to the proposed amendment. Plaintiff's representatives also attended the third reading on February 27, 2018. It was at that meeting that 2018-03 was approved.

If Plaintiff wanted to challenge the square footage, the number of parking spaces, and the seating capacity, South Carolina Code section 6-29-760(D) required Plaintiff to challenge Version 2 within sixty (60) days following the County Council's passage of the ordinance. However, Plaintiff made no challenge and now asks this Court to overlook its failure to timely challenge that amendment by focusing solely on the passage of 2018-40.

In August 2018, Palmetto submitted an application to amend the site plan. Palmetto filed this application in order to comply with the circuit court's June 12, 2018 order wherein the court issued an injunction which directed that Palmetto "may not expand the outside boundaries of any new building beyond those previously used. The Court is specifically not talking about height, only the outside boundaries." The former building footprint is reflected within a 1985 recorded plat, Plat Book 6, Page 24. Prior to the circuit court's order, the existing zoning PD permitted the

new structure to be located outside the footprint as a result of the passage of 2018-03. Therefore, in order to comply with the circuit court's order, an amendment was required for the building to be constructed within the footprint. The application for an amendment was presented to the Planning Commission, which permitted it to proceed to County Council. County Council then held three (3) readings, and approved and adopted the amendment on January 8, 2019. The differences between the ordinances are the following:

Ordinance No. 2018-03 (Adopted 2/27/2018)	Ordinance No. 2018-40 (Adopted 1/8/2019)
Heated Square Feet for the new structure will not exceed 4,598	Heated Square Feet for the new structure will not exceed 4,596 SF
62 parking spaces will be provided including three compact spaces to be located underneath the new structure	62 parking spaces will be provided including three compact spaces to be located underneath the new structure
Structure will not exceed a 45 foot height limit measured at the midpoint of the roof	Structure will not exceed a 47 foot height limit. The building may utilize a flat roof.
Total seating capacity shall not exceed 110 persons	Total seating capacity shall not exceed 110 persons.

The comparison of the two (2) amendments shows that the actual square footage of the proposed building decreased. There was not a change in the number of parking spaces or the seating capacity. There was a minor change with respect to the height of the roof. As evidenced by the chart above, Plaintiff should have challenged 2018-03 because that ordinance established the size of the building, the number of parking spaces, and the seating capacity. In other words, Plaintiff cannot now challenge the seating capacity and the building square footage since both of these were part of the existing zoning ordinance. Thus, if Plaintiff wanted to comply with the statute, it should have appealed the passage of 2018-03. Because it failed to do so, Plaintiff cannot now challenge the Version 3 amendment.

2. Plaintiff's Claims are Barred by Collateral Estoppel/Issue Preclusion.

Plaintiff raised the complaints of the same alleged damage—lack of parking and loss in revenue/value therefrom—arising from the construction of the Marina Store and Restaurant in its 2016 lawsuit against *Palmetto Industrial Development, LLC and Mark Lawhon*, C.A. No. 2016-CP-22-00961.

“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). “The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior 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 quotations 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 Lawhon, Plaintiff alleged that “[o]n or around the second week of November 2016, [Palmetto and Lawhon] initiated a construction project involving the Marlin Quay Marina, and [] completely obstructed access to the Parking Lot by [Plaintiff].” C.A., No. 2016-CP-22-00961, Compl. ¶ 25. Plaintiff further alleged that the “construction project where the Plans call for improvements [] will permanently interfere with Plaintiff’s rights to use the Parking Lot.” C.A., No. 2016-CP-22-00961, Compl. ¶ 28. After a jury trial, the jury found for Plaintiff, awarding just \$1,000 in damages. The circuit court issued an injunction.

The court's order stated in full:

Based on the case law of this state, the facts as presented at this trial, and the jury's verdict, a permanent restraining order is issued with the following terms. The Defendants are enjoined from preventing the Plaintiff from enjoying the right granted to it in the recorded nonexclusive joint easement. The Defendants are restrained and *may not expand the outside boundaries of any new building beyond those previously used. The Court is specifically not talking about height, only the outside boundaries.*

(Emphasis added). Accordingly, at issue in the 2016 action was Plaintiff's challenge of Palmetto's construction of a building currently at issue in this suit. As evidenced by the circuit 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 Plaintiff's property rights was actually adjudicated and directly determined by the trial court. Because Plaintiff sought injunctive relief and asserted the construction of that building would "permanently interfere with Plaintiff's rights to use of the Parking Lot," the court's holding regarding the building's permitted construction was necessary to support that judgment. Plaintiff 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—2018-40—and at issue in this case. As such, Plaintiff 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 court's prior order.

3. Plaintiff Does Not Possess a Property Interest in Ordinance 2018-40 and Therefore, Lacks a Right to Pursue Any and All Claims Against Defendants.

Plaintiff contends its property and easement rights have been deprived of it by the passage of Ordinance 2018-40. However, Plaintiff does not possess a property interest in the Ordinance in order to pursue any claims against the Defendants. To establish a violation of substantive or procedural due process, the claimant must first establish it had a property interest of which it was deprived. *Sylvia Dev. Corp. v. Calvert Cnty., Md.*, 48 F.3d 810, 826-27 (4th Cir. 1995) (citations omitted). Ordinance 2018-40 pertains to the “MARLIN QUAY/MARINA STORE/RESTAURANT AS SHOWN ON THE ATTACHED SITE PLAN NUMBERED ‘AS101[.]’” Plaintiff does not have any property interest in the Marina Store and Restaurant or the proposed building permitted by Ordinance 2018-40 and the circuit’s order, C.A. No. 2016-CP-22-00961. Therefore, Plaintiff has no right to assert any claims against the Defendants.

4. Plaintiff has Suffered No Damages.

Plaintiff asserts the “value” of its “property has been reduced” because of the County’s passage of Ordinance 2018-40; however, even assuming *arguendo* that Plaintiff’s restaurant business would decrease in value, it has not alleged or provided any evidence that the property would be “worthless.” See, e.g., *Moore v. Sumter Cnty. Council*, 300 S.C. 270, 272 n.2, 387 S.E.2d 455, 457 (1990) (listing permissible uses “to illustrate that the ordinance in question does not render the [property owners’] property worthless” and further noting “a property owner is not entitled to have his property zoned for its most profitable use”) (citation omitted). Plaintiff relies heavily on its easement, which allows Plaintiff use of the Parking Lot, but Plaintiff is not—nor has it ever been—entitled to *exclusive* use of the Parking Lot, and Plaintiff does not have absolute or sole control or ownership over the Parking Lot. Simply because Plaintiff’s customers may have

to share the Parking Lot with non-customers does not render the value of the property worthless, and Plaintiff is not prevented from continuing its business as a restaurant.

5. Defendant Steve Goggans Cannot Have Personal Liability for the Constitutional Claims of Plaintiff.

Plaintiff's Constitutional claims fail against Goggans because he cannot be sued in his individual capacity; the Georgetown County Council acts as a unit and not as individual officials. "Suits against municipal officers in their official capacity are construed as suits against the entity. . . ." *Seabrook v. Knox*, No. 1999-CP-10-4323, 2004 WL 6003045 (S.C. Com. Pl. Sep. 10, 2004), *rev'd on other grounds*, 369 S.C. 191, 631 S.E.2d 907 (2006).

A county councilmember cannot act individually in his official capacity to violate due process rights granted by the South Carolina and United States Constitutions. To establish a violation of due process rights as set forth in the South Carolina and United States Constitutions, the Plaintiff must show that it "was arbitrarily and capriciously deprived of a cognizable property interest," *Anonymous Taxpayer*, 377 S.C. at 437–38, 661 S.E.2d at 79 (quoting *Worsley Co.*, 339 S.C. at 56, 528 S.E.2d at 660), and was not afforded notice and the opportunity to be heard. *See Taylor*, No. C/A 3:07-983-JFA-JRM, 2010 WL 296901, at *5–6; *see also Dunes W. Golf Club, LLC*, 401 S.C. at 296, 737 S.E.2d at 610 ("In order to successfully assault a *city's zoning decision*, a citizen must establish that the decision was arbitrary and unreasonable." (emphasis added)); *see also Singletary*, No. CV 2:09-1612-RMG-BM, 2012 WL 13018625, at *4; *N.C. Elec. Membership Corp. v. White*, 722 F. Supp. 1314, 1333 (D.S.C. 1989).

However, only government entities, acting as a whole, can act arbitrarily and capriciously and deprive an individual of notice and the opportunity to be heard. "Only where the *municipality's action* is 'so unreasonable as to impair or destroy constitutional rights,' will the courts declare *the municipality's action* unconstitutional. The burden of proving the invalidity of

a zoning ordinance is on the party attacking it; thus, it is incumbent upon [the plaintiff] to show by clear and convincing evidence the arbitrary and capricious nature of the ordinance.” *Bear Enters. v. Cnty. of Greenville*, 319 S.C. 137, 140–41, 459 S.E.2d 883, 886 (Ct. App. 1995) (citing *Rush*, 246 S.C. at 276, 143 S.E.2d at 531; and then citing *Town of Scranton v. Willoughby*, 306 S.C. 421, 412 S.E.2d 424 (1991)). Due process violations must be taken by the government as a whole, not by individual members of the County Council. As a result, an individual member of the County Council could not violate Plaintiff’s due process rights.

Additionally, Councilmembers cannot individually violate the takings and inverse condemnation clauses set forth in the South Carolina Constitution because these clauses also require action by the government as a unit. In order to constitute a taking or inverse condemnation, there must be government regulation of private property. *Dunes*, 401 S.C. at 313, 737 S.E.2d at 618 (“[A]bsent a direct physical invasion, ‘government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such “regulatory takings” may be compensable under the Fifth Amendment.’”) (emphasis added). As such, only a government entity as a whole can act in its official capacity to violate the takings and inverse condemnation clauses of the South Carolina Constitution.

Here, Goggans could not act in his individual or individual official capacity to engage in the constitutional violations alleged by Plaintiff, and moreover, Goggans had no participation in the passages of Ordinances 2018-03 or 2018-40 as a councilmember. Thus, to hold him liable for the passage of Ordinance 2018-40 would be to hold him liable for acts he did not commit or matters with which he had no relation.

6. Plaintiff is Barred from Recovery Here, but if Not, Plaintiff Must Elect its Remedy.

As previously noted, Plaintiff has already recovered relief—both monetary and injunctive—for the same alleged damage in C.A. No. 2016-CP-22-00961 and should not be permitted to collect any further relief from Defendants. *Cf. Riddle v. City of Greenville*, 251 S.C. 473, 477-78, 163 S.E.2d 462, 464 (1968) (holding plaintiff failed to prove he sustained damages not already recovered in prior litigation and stating, “[I]t is elementary law that one cannot actually recover twice for the same damage.”).

Nevertheless, even if Plaintiff may proceed to seek any damages against these Defendants, Plaintiff must elect which remedy it will pursue. “Election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action.” *Oaks at Rivers Edge Prop. Owners Ass’n, Inc. v. Daniel Island Riverside Devs., LLC*, 420 S.C. 424, 442, 803 S.E.2d 475, 485 (Ct. App. 2017) (citations and quotations omitted). “The basic purpose of election of remedies is to prevent double recovery for a single wrong. ‘When an identical set of facts entitle the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both.’” *Id.* at 442-43, 803 S.E.2d at 485 (citation and quotations omitted). Here, Plaintiff has alleged that the same facts—the passage of Ordinance 2018-40—has caused it damage for which it seeks injunctive relief and compensatory damages. Accordingly, Plaintiff must elect which remedy he is seeking.

IV. LIST OF EXHIBITS & WITNESSES

A. List of Exhibits (Defendants)

1. 2018 Georgetown County Zoning Ordinances
2. Georgetown Times Notice of Public Hearing for Version 2 Application

3. Georgetown Times Notice of Public Hearing for Version 3 Application
4. Coastal Observer Notice of Public Hearing for Version 2 Application
5. Coastal Observer Notice of Public Hearing for Version 3 Application
6. Emails between Planning Department staff and Georgetown Times/Coastal Observer re: Notice of Public Hearing
7. Picture of Sign Posted at Marlin Quay PD for Version 3 Application
8. Version 2 Application
9. Version 2 Staff Report
10. Version 2 Planning Commission Meeting Minutes
11. Version 2 County Council Meeting Minutes
12. Version 2 Approval by County Council
13. Notice of Public Hearing set for December 21, 2017 regarding Version 2
14. Version 3 Application
15. Version 3 Staff Report
16. Version 3 Planning Commission Staff Report
17. Version 3 Planning Commission Meeting Minutes
18. Version 3 County Council Meetings Agenda
19. Version 3 Approval by County Council
20. Final Plans submitted to the Planning Commission
21. Notice of Public Hearing set for October 18, 2018 regarding Version 3
22. October 2018 Sign-In Sheet for Public Comments at the Planning Commission Meeting regarding Version 3
23. December 11, 2018 Sign-In Sheet for Public Comments at County Council Meeting regarding Version 3
24. List of Property Owners adjacent to Marlin Quay PD and Map
25. Tiffany Coleman's email to Nancy Gardner at Surfside Realty dated December 14, 2017, attaching Notice of Amendment to PD (Version 2)

26. Email dated December 15, 2017 from Judy Blankenship regarding the posting of the Planning Commission Packet on the County's website
27. Email from Constance Lowery to Tiffany Coleman dated December 16, 2017, confirming receipt of Notice of Hearing regarding Proposed Amendment to PD (Version 2)
28. Tiffany Coleman's email to Nancy Gardner at Surfside Realty dated September 24, 2018, attaching Notice of Amendment to PD (Version 3)
29. Email from Nancy Gardner to Marlin Quay Condominium Unit Owners dated September 25, 2018, sending Notice of Proposed Amendment (Version 3)
30. Email from Nancy Gardner to Constance Lowery and Tiffany Coleman dated October 10, 2018, sending Notice to HOA to all owners whose email address the management office had on record (Version 3)
31. Emails dated October 12, 2018 from Judy Blankenship regarding the posting of the Planning Commission Packet on the County's website
32. Plaintiff's states and federal tax records and tax returns for the years 2010—2020
33. Plaintiff's 2018—2021 Property Tax Receipts and Invoices
34. George Knight's notes
35. George Knight's Appraisal Report dated April 24, 2020
36. George Knight's Restricted Appraisal Report dated March 11, 2020
37. Travis Avant's Appraisal Review Report dated February 16, 2022
38. Complaint, the Court's Amended Order Granting Temporary Injunction, Plaintiff's Motion to Alter or Amend the Judgment dated June 22, 2018, and the Court's Order Granting Plaintiff's Motion to Alter or Amend the Judgment dated July 27, 2018 from Case No. 2016-CP-22-00961

B. List of Witnesses (Defendants)

1. Holly Richardson
2. Boyd Johnson
3. Judy Blankenship
4. Tiffany Coleman

5. Nancy Gardner, Representative from Surfside Realty
6. Steve Goggans
7. Louis Morant
8. Travis Avant, ASA, ARM-RP, R/W-AC, Expert
9. J. Mark Lawhon

V. EVIDENTIARY ISSUES

A Motion in Limine and accompanying memorandum will be filed by the end of this week. It will set forth more fully anticipated evidentiary issues and the reasons each item should be excluded from evidence. Defendants request the following evidence be excluded:

1. Any evidence or mention of evidence related to Steve Goggans' involvement with the South Carolina Ethics Commission, including but not limited to, the September 16, 2019 Consent Order which Steve Goggans entered into, the transcript of the Board of Zoning Appeals hearing on February 2, 2017, and any evidence Mr. Goggans made an appearance at the Georgetown County Planning Commission meeting in 2017, or the emails or letters from Mr. Goggans to Mark Lawhon in 2016 and 2017;
2. Any pictures of renderings, other evidence, or mention of the former Marlin Quay Restaurant and Store building that previously occupied the property at issue;
3. Any evidence or mention that the marina store and restaurant should operate only during the daytime hours or that the former marina store and restaurant only operated during the daytime hours in the past;
4. Any evidence or mention of the differences between the construction of Version 2 and Version 3 buildings, including but not limited to, the type of material

used or the building code, as Plaintiff is only attacking the 2019 amendment to a zoning ordinance;

5. Any evidence of mention that the County allegedly “violated the easement” between Plaintiff and Mark Lawhon/Palmetto;

6. Any evidence or complaint regarding the height of the proposed structure;

7. Any evidence or mention of any alleged deaths near the parking lot at issue in this litigation; and

8. Any statements or evidence that Palmetto’s building plans or applications were declared “illegal” or “unlawful” by any court.

Defendants further request that the Court take judicial notice of Plaintiff’s Motion to Alter or Amend the Judgment dated June 22, 2018 and the Circuit Court’s Order entered July 27, 2018 in C.A. No. 2016-CP-22-00961.

VI. UNUSUAL QUESTIONS OR MATTERS WHICH SHOULD BE BROUGHT TO THE ATTENTION OF THE COURT

Should the case reach the jury, Defendants will ask the Court to order Plaintiff to elect which cause of action will go to the jury as Plaintiff alleges the same damage for each cause of action: its business will supposedly suffer because it will have to share the Parking Lot.

VII. STATUS OF SETTLEMENT NEGOTIATIONS

A mediation was conducted June 25, 2021 but ended without resolution. While settlement discussions continued, nothing was resolved.

[Signature on Following Page]

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Attorney for the Defendants

Myrtle Beach, South Carolina

March 16, 2022

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

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.

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) COUNTY OF GEORGETOWN
) Civil Action No. 2019-CP-22-00212

) **PLAINTIFF THE GULFSTREAM CAFÉ,**
) **INC.'S PRE-TRIAL BRIEF**

Plaintiff The Gulfstream Café, Inc. (“Gulfstream” or “Plaintiff”) submits the following
Pre-Trial Brief pursuant to Rule 16 (c) of the South Carolina Rules of Civil Procedure:

I. Statement of Facts of the Case.

This case is about Gulfstream’s challenge to the Defendant Georgetown County’s (the
“County”) approval of an application for a planned development, submitted by Palmetto Industrial
Development, LLC (“Palmetto”).

Gulfstream is a restaurant that has been in operation for over 30 years. The property where
Gulfstream is located is in the Marlin Quay PUD in Garden City. The property adjacent to
Gulfstream is designated in the PUD documents as a parking lot and a marina store. During its
entire existence, Gulfstream has held an easement permitting it to use the parking lot adjacent to
its restaurant. The property adjacent to Gulfstream is currently owned by Palmetto. After
purchasing the property, Palmetto demolished the building that had included the marina store and
restaurant.

Defendant Steve Goggans was involved in efforts by Palmetto to obtain the County's approval for a new structure on the site of the marina store and restaurant ("Version 1.0"). 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"). The application packet for Version 2.0 included architectural site plans, building elevations, and design plans showing seating layouts. The County approved the major amendment on February 27, 2018.

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. 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"). 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." 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. The Application sought approval of a different building layout, "Version 3.0." 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."

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. 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. Mr. Stacy provided this information less than a week before the Planning Commission Meeting on the Application, held on 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.” 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. 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. Instead, the County sent notice via e-mail to the manager of the Marlin Quay Homeowners Association, Nancy Gardner, asking her to provide notice. Homeowners who received notice by this method only received notice via email, not by mail.

At the time of the Application, the County was aware that multiple entities, including Gulfstream, utilized the parking lot. 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. 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.

Gulfstream and members of the public voiced concerns regarding the lack of parking, safety, and traffic. Despite objections to the Application, the County approved the Application on January 8, 2019.

II. Statement of Facts in Controversy.

Gulfstream will present evidence that Palmetto initiated the amendment for Version 3.0 affecting the same parcel or parcels requesting the same change in district classification of a major change and change in building configuration within 12 months of the Planning Commission Meeting on Version 2.0 in violation of the Ordinance. The County denies this constitutes a violation.

Gulfstream will present evidence that the application for Version 3.0 was not in proper form at least 45 days prior to the Planning Commission Meeting because it did not include building elevations, design plans, building type/size, proposed density, calculations, etc., in violation of the Ordinance. The County contends the application was in proper form.

Gulfstream will present evidence that notice was not mailed to the individual owners of the Marlin Quay Marina condominiums in violation of the Ordinance. The County denies this constitutes a violation.

Gulfstream will present evidence that the County entirely ignored the parking regulations regarding the shared uses of the parking lot and only considered the parking needs of Palmetto's new restaurant. The County denies that it was required to consider the parking requirements and that they only served as a "guide."

Gulfstream will present evidence of the above violations of the County's Ordinance and that the County ignored public concerns regarding approval of the application related to parking,

safety, and traffic. Gulfstream also contends that the capacity differences between the new restaurant and the old restaurant will overburden the parking lot.

Gulfstream will present evidence that the public did not have an adequate opportunity for notice regarding mailed notice of the hearing and did not have access to materials regarding the proposed plans for the building sufficiently in advance of the hearing.

Gulfstream will present 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. Gulfstream contends this influence has infected the entire process for the applications related to approval of Palmetto's building, including Version 3.0.

Gulfstream will present evidence that it cannot operate its restaurant without adequate parking. Parking is essential to Gulfstream's operations. Once Version 3.0 opens and operates at night, Gulfstream will not have enough parking spaces to support its business. There is not another parking lot in the area, and there is not sufficient foot traffic to generate enough business to keep Gulfstream open. Gulfstream invests in excess of \$1 million per year to operate its restaurant.

Gulfstream has presented an appraisal indicating that after the loss of the easement parking, the only use of Gulfstream's property will be for vacant land. 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.

III. The Legal Issues Involved.

Plaintiff has pled the following Causes of Action:

- A.** Declaratory Judgment regarding violations of the County's Ordinances and violations of Gulfstream's constitutional rights
- B.** Violation of Substantive Due Process Rights – Article I Section 3 of the South Carolina Constitution
- C.** Relief Under 42 U.S.C. § 1983 for Violation of Right to Substantive Due Process – United States Constitution
- D.** Violation of Right to Procedural Due Process – Article I Section 3 South Carolina Constitution
- E.** Relief Under 42 U.S.C. § 1983 for Violation of Right to Procedural Due Process – United States Constitution
- F.** Violation of South Carolina's Taking Clause – Article I, Section 13 of the South Carolina Constitution
- G.** Inverse Condemnation
- H.** Attorneys' Fees

Plaintiff's proposed requests to charge, submitted simultaneously with this Pre-Trial Brief, include the legal standards involved with Plaintiff's causes of action set forth above.

The defenses pled by Defendants are set forth below, along with Gulfstream's concise responses.¹

- A.** Doctrine of unclean hands. Gulfstream's response: This doctrine only applies in equitable cases so is not applicable to this action for damages. Straight v. Goss, 383 S.C. 180, 206–07 (Ct. App. 2009).

¹ These responses are intended to be a concise and non-exhaustive list of responses to the County's affirmative defenses, as it is currently unclear which, if any, the County intends to pursue at trial. Gulfstream reserves the right to supplement these responses as necessary at trial.

B. Gulfstream does not have a property interest in the Amended Ordinance. Gulfstream's response: Gulfstream has a property interest in its easement and its restaurant, as well as the right to be protected from arbitrary and capricious zoning decisions. S.C. Pipeline Corp. v. Lone Star Steel Co., 345 S.C. 151, 153 (2001)

C. Defendants are entitled to qualified immunity for Section 1983 claims, and individual council members are entitled to absolute immunity. Gulfstream's Response: The doctrine of qualified immunity does not apply to the County. Goggans is not protected by the doctrine of qualified immunity because his conduct violated clearly established constitutional rights of Gulfstream of which a reasonable person would have known. Iko v. Shreve, 535 F.3d 225 (2008). The individual council members are no longer Defendants in this action so their immunity is not at issue.

D. Failure to exhaust all administrative remedies. Gulfstream's Response: Defendants have not identified what administrative remedy it contends Gulfstream did not exhaust. Gulfstream contends there was no adequate remedy available other the filing suit.

E. Failure to prove damages as a result of the allegations asserted. Gulfstream's Response: Gulfstream has produced an appraisal demonstrating its monetary damages as a result of the approval of the amendment.

F. Doctrine of election of remedies, Plaintiffs seek duplicate remedies under multiple causes of action that would result in double recovery. Gulfstream's Response: Gulfstream has asserted multiple claims entitling it to damages, and it will not result in double recovery.

G. Res judicata, collateral estoppel, and issue preclusion. Gulfstream's Response: Gulfstream contends that these doctrines do not apply and Defendants have not articulated any basis for these defenses.

H. Failure to bring action within time allowed under § 6-29-760, Code of Laws of the State of South Carolina. Gulfstream's Response: The Court decided at the summary judgment stage that Gulfstream brought this action within the time required by law as a matter of law. This is no longer in dispute.

I. Defendants are entitled to legislative immunity. Gulfstream's Response: Gulfstream has dismissed the individual County Councilmembers, except for Defendant Goggans, from this suit. Defendant Goggans was not acting in his legislative capacity with respect to the approval of the application, so the doctrine does not apply to him.

J. Defendant Georgetown County is entitled to recovery of attorney's fees and costs from Plaintiff. Gulfstream's Response: Plaintiff's action is not frivolous, unreasonable, or without foundation, so Defendants are not entitled to attorneys' fees and costs under 42 U.S.C. 1988.

IV. Exhibits and Witness Lists.

Possible Witnesses:

1. Greg Greenbaum
2. Jef Kirk
3. Vince Van Brunt
4. Linda Barnaba
5. Jake Knight
6. Jim Moring
7. Robert Castles
8. Holly Richardson
9. Boyd Johnson
10. Steve Goggans
11. Dan Stacy
12. Tiffany Coleman

13. Teresa Floyd
14. John Thomas
15. Ron Charlton
16. Lillie Johnson
17. Austin Beard
18. Louis Morant
19. Luda Sobchuk
20. Beth Novak

Possible Exhibits:

See Plaintiff's Exhibit List, attached hereto as Attachment A and incorporated herein by reference. Plaintiff identifies the following, potential additional exhibits:

- (a) Any and all documents produced in discovery by any party or non-party;
- (b) All pleadings, discovery responses served in the case, and any motions, responses, or supporting exhibits;
- (c) Demonstrative evidence generated by or for Plaintiff or their counsel, including without limitation any charts, images, or other visual depictions;
- (d) Documentary or physical evidence that may be listed herein by Defendants;
- (e) Any and all documents that may be used for impeachment purposes;
- (f) Any and all documents produced by Defendants in response to FOIA requests related to this matter.

Plaintiff reserves the right to supplement, amend, or withdraw exhibits in Plaintiff's Exhibit List and set forth above.

Plaintiff and Defendants have not had the opportunity to exchange exhibit lists, so Plaintiff is unaware of whether there are disagreements regarding exhibits.

V. Unusual Problems Relating to Evidence.

Plaintiff will file its motions in limine in advance of trial.

Plaintiff has filed a motion for sanctions seeking to exclude the testimony of Defendants' Expert, Mr. Travis Avant, due to the late disclosure of his expert report. Plaintiff filed that motion on March 9, 2022, and the motion will impact whether Mr. Avant will be permitted to testify.

VI. Unusual Question or Matters to be Brought to the Attention of the Trial Court.

Plaintiff believes the Motion for Sanctions should be addressed by the Court before the trial begins.

VII. Settlement Negotiations.

Settlement negotiations have been attempted and proven unsuccessful.

Respectfully submitted,

/s/ Sean M. Foerster

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ATTACHMENT A

PLAINTIFF’S TRIAL EXHIBIT LIST

No.	Description
P-1	Marlin Quay PUD Documents (including surveys and ordinance)
P-2	1986 Easement Documents
P-3	1990 Easement Documents
P-4	Ordinance Excerpts, including Article I, Article XVII Sections 1700-1703, Article VI Sections 608, 619
P-5	Off-Street Parking Regulations
P-6	05.06.16 Email from Mark Lawhon to Steve Goggans re Message from KMBT_C454e(1) ¹
P-7	05.13.16 Email from Steve Goggans to Holly Richardson and Boyd Johnson re: MQ parking study
P-8	09.22.16 Letter from Steve Goggans to Mark Lawhon
P-9	02.02.17 Transcript of Board of Zoning Appeals Georgetown County
P-10	09.06.17 Email re meeting 8-24-17 summary
P-11	Photos of MQ 1.0 (TUNGSTEN 42)
P-12	11.03.17 Application to Amend a Planned Development (PD)
P-13	Notice of Public Hearing – December 21, 2017
P-14	12.21.17 Georgetown County Planning Commission Agenda
P-15	12.21.17 Georgetown County Planning Commission Minutes
P-16	04.11.18 Steve Goggans Deposition Transcript - FULL with Exhibits
P-17	06.04.18 Form 4 Judgment in <i>Gulfstream v. Lawhon, et al.</i> Civil Case 2016-CP-22-00961
P-18	Verdict Form, signed 06.11.18, <i>Gulfstream v. Lawhon, et al.</i> Civil Case 2016-CP-22-00961
P-19	07.27.18 Order Granting Plaintiff’s Motion to Alter or Amend Judgment, <i>Gulfstream v. Lawhon, et al.</i> 2016-CP-22-00961
P-20	August 2018 Application
P-21	09.24.18 Email from Tiffany Coleman to Surfside Realty

¹ Emails are notated/named herein using the email at the top of the chain.

No.	Description
P-22	Tax Map Property Owner List
P-23	10.02.18 Email from Luda Sobchuck to Christie Lawhon re MQ2 Property Line Wall
P-24	10.10.18 Email from Beth Novak to Holly Richardson re 18118_MQ-3_Review Additional Info
P-25	10.10.18Email from Luda Sobchuk to Holly Richardson re call me
P-26	10.10.18 Email from Tiffany Coleman to Judy Blankenship re Notice of Public hearing
P-27	10.11.18 (12:33 pm) Email from Luda Sobchuk to Dan Stacy re MQ
P-28	10.11.18 (12:53 pm) Email from Luda Sobchuk to Richardson re MQ
P-29	10.12.18 Stacy Letter to Holly Richardson
P-30	10.12.18 Email from Luda Sobchuk to Holly Richardson re Updated Plans, including attachments
P-31	10.12.18 Email from Holly Richardson to Stacy re Marlin Quay Staff Report
P-32	Square Footage Charts
P-33	10.17.18 Adam Nugent Letter to Wesley Bryant
P-34	October 2018 Notice of Public Hearing
P-35	10.18.18 Planning Commission Staff Report
P-36	10.18.18 Planning Commission Agenda Addendum
P-37	10.18.18 Planning Commission Meeting Minutes
P-38	10.19.18 Email from Boyd Johnson to Dany Stacy re PC Letter
P-39	10.22.18 Email from Boyd Johnson re questioning application for MQ3
P-40	10.25.18 Email from Steven Elliott to Boyd Johnson re Marlin Quay Marina Restaurant and Store – Code Review Questions
P-41	11.09.18 Email from Steve Goggans to Beth Novak re Marlin Quay 3 - Georgetown County Follow
P-42	11.13.18 County Council Meeting Minutes
P-43	12.11.18 Agenda Request Form
P-44	12.11.18 County Council Meeting Minutes
P-45	01.08.19 County Council Minutes
P-46	01.08.19 Ordinance 2018-40
P-47	1.23.19 George E. Knight, Jr. MAI Appraisal Report of 1536 South Waccamaw Dr.

No.	Description
P-48	01.23.19 Email from Beth Novak to Steve Goggans re Marlin Quay Plans
P-49	01.24.19 Email from Luda Sobchuk to Mark Lawhon re Marlin Quay Plans
P-50	01.24.19 Email from Steve Goggans to Mark Lawhon re Marlin Quay Plans
P-51	01.25.19 Email from Steve Goggans to Boyd Johnson re Marlin Quay Plans
P-52	01.25.19 Email from Boyd Johnson to S. Goggans re: Marlin Quay Plans
P-53	02.18.19 Email from Beth Novak to Luda Sobchuk & Steve Goggans re Marlin Quay Plans
P-54	03.27.19 Email from Steve Goggans to Mark Lawhon re Marlin Quay
P-55	06.09.19 Email from Steve Goggans to Mike Rolison re Urgent
P-56	06.11.19 Email from Boyd to Richardson re MQ
P-57	Consent Judgment signed 09.05.19, Entered by SC Ethics Commission
P-58	11.04.19 Defendant Steve Goggan's Answer to Plaintiff's First Interrogatories
P-59	11.04.19 Defendant Georgetown County's Answer to Plaintiff's First Interrogatories
P-60	12.11.19 Gulfstream Position Paper with comments
P-61	12.13.19 Email from Goggans to Brian Turner et al re Marlin Quay elevator front beam question
P-62	04.16.20 Email from Steve Goggans to Lindsey Pascoe re- Marlin Quay
P-63	11.06.20 Email from Mike Rolison to Beth Novak, Steve Goggans & Laura Helminski re- MQ3 elevator
P-64	11.11.20 Email from Mark Lawhon to Steve Goggans and group re- MQ3 elevator revision drawings
P-65	02.03.21 Email from Dan Stacy to Sonya Papanikolaou re Wall
P-66	02.03.21 Email from Dan Stacy to Sonya Papanikolaou re Marlin Quay
P-67	BP Invoices
P-68	Aerial Photo
P-69	Cost Receipts
P-70	Jake Knight Work File
P-71	MQ3 Plans
P-72	November 25, 2019 Appraisal of Jake Knight
P-73	Jim Moring Work File
P-74	Robert Castles Work File

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

**DEFENDANTS’
MOTION IN LIMINE**

Defendants Georgetown County (“the County”), Georgetown County Council (“County Council”), and Steve Goggans (collectively hereinafter “Defendants”) hereby move for an Order of the Court limiting or excluding, from the trial of this case, any evidence, reference to, and/or argument by Plaintiff The Gulfstream Café, Inc. (“Plaintiff”), its counsel, and/or any witnesses regarding the following matters:

- 1. Steve Goggans and South Carolina Ethics Commission.** Any reference of matters relating to Steve Goggans and the South Carolina Ethics Commission (“the Commission”), including Plaintiff’s Complaint to the Commission and the Consent Order with the Commission (Plaintiff’s Exhibit 57), the transcript of the Board of Zoning Appeals hearing (Plaintiff’s Exhibit 9), any evidence Mr. Goggans made an appearance at the Georgetown County Board of Zoning Appeals meeting in 2017, and any emails or letters from Mr. Goggans to Mark Lawhon or members of the Planning Department in 2016 and 2017 (Plaintiff’s Exhibits 6, 7, and 8);

2. **Legislative Immunity.** Any questions of Defendant Goggans soliciting information subject to legislative immunity as well as not permitting any references to County Council deliberations at any time before the jury, including opening statements and closing arguments;
3. **Old Building.** Any picture of renderings, other evidence, or mention of the initial Marlin Quay Restaurant and Store building that was demolished in November 2016 (Plaintiff's Exhibit 11);
4. **Business Operation Hours.** Any evidence or mention that the marina store and restaurant should operate only during the daytime hours or that the former marina store and restaurant only operated during the daytime hours in the past (Plaintiff's Exhibits 2 and 3);
5. **"Violation of Easements."** Any evidence or mention that the County allegedly "violated the easement" between Plaintiff and Palmetto Industrial Development, LLC ("Palmetto");
6. **Deaths, Wrecks, or Accidents.** Any evidence or mention of any alleged deaths, wrecks, accidents, or dangerous traffic near the parking lot at issue in this civil action, including, but not limited to, references contained in Plaintiff's Exhibit 44 (December 11, 2018 Georgetown County Council Meeting Minutes, including statements by Jef Kirk, Clete Skipper, Rob Boros, Chris Causey, and Micah Sawyer);
7. **Declarations of Illegality.** Any statements or evidence that Ordinance 2018-03 (relating to "MQ2" or "Version 2") was declared "illegal" or "unlawful" by any court;
8. **Aerial Photograph.** Plaintiff's Exhibit 68 produced by Plaintiff after discovery ended on September 23, 2021;

- 9. Palmetto's Current Status.** Any evidence, testimony, argument, or mention about any issue of whether Palmetto Industrial Development, LLC (property owner) is violating the current zoning ordinances or any part thereof;
- 10. Additional Expert Witness.** Additional expert witness, Jody Bishop, who was disclosed on Friday, August 12, 2022, two weeks prior to the start of trial and after the close of discovery;
- 11. The Exclusion of Undisclosed Witnesses.** In Plaintiff's Pre-Trial Brief, it identified Jef Kirk, Linda Barnaba, and Theresa Floyd as witnesses. They were not identified as witnesses in Plaintiff's Answers to Defendants' Interrogatories;
- 12. Experts' Written Material.** Written reports, findings, and "work files" of Plaintiff's named experts, including Jake Knight, Jim Moring, and Robert Castles, as well as Jody Bishop, including Plaintiff's Exhibits 47 (George "Jake" Knight's Appraisal Report), 70 (Jake Knight's Work File), 72 (Jake Knight's Appraisal), 73 (Jim Moring's "Work File"), and 74 (Robert Castles' "Work File");
- 13. Jury Verdict Form.** Plaintiff's Exhibit 18, a copy of the jury's completed Verdict Form in civil action number 2016-CP-22-00961, captioned *The Gulfstream Café, Inc. v. J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC*;
- 14. Incomplete Electronic Communication.** Plaintiff's Exhibit 38, an email from Boyd Johnson to Holly Richardson attaching a document that was provided to the Planning Commission, but that attachment is not included in Plaintiff's exhibit;
- 15. Letter Containing Notations and Impressions.** Plaintiff's Exhibit 60, a copy of letter from Plaintiff's counsel to County Council on which Holly Richardson made handwritten notes on the letter;

16. References to MQ1. Plaintiff's Exhibits 10 (email communication dated August 25 and September 6, 2017), 76 (email exchange ranging from April 27, 2016 to May 3, 2016), 77 (email dated June 15, 2016), 78 (letter from SGA Architecture to Georgetown County Department of Planning & Code Enforcement dated May 26, 2016), 79 (email dated August 4, 2015), 80 (email exchange ranging dated July 16, 2015 and July 20, 2015), 81 (email exchange dated December 5 and 6, 2016), 82 (email exchange from June 15, 2016 and December 7, 2016), 83 (letter from SGA Architecture to Dr. Mark Lawhon dated September 22, 2016), and a portion of 44 (December 11, 2018 County Council Meeting Minutes, including Chris Sanders' comments);

17. Communications Unrelated to Zoning Ordinances. Plaintiff's Exhibits 23 (email communication related to building code compliance dated October 1-2, 2018 and February 3, 2021), 40 (email regarding changes concerning building code compliance dated October 24-25, 2018), 41 (emails dated November 9, 2018 concerning building code compliance), 48 (email exchange dated January 23, 2019 regarding building code compliance), 49 (email exchange dated January 23-24, 2019 regarding building code compliance), 50 (email exchange dated January 23-24, 2019 regarding building code compliance), 51 (email attaching letter, both dated January 25, 2019, regarding building code compliance), 52 (email exchange dated January 25, 2019 regarding building code and flood regulation compliance), and 53 (email exchange dated January 25, 2019, and February 15 & 18, 2019 regarding building code compliance);

18. Communications and Other Documents Post-Passage of Ordinance 2018-40 on January 8, 2019. Plaintiff's Exhibits 54 (email dated March 27, 2019 attaching outstanding invoices from SGA Architecture to Mark Lawhon), 55 (email exchange

dated June 9, 2019), 56 (email exchange dated June 11, 2019), 61 (email exchange ranging from December 5, 2019 to December 13, 2019), 62 (email exchange dated April 15-16, 2020), 63 (email exchange dated November 6, 2020), 64 (email exchange dated November 9 & 11, 2020), 65 (email exchange dated February 3, 2021 forwarding email dated October 2, 2018 and contained in Plaintiff's Exhibit 23), and 66 (email forward dated February 3, 2021 forwarding August 20, 2018 email).

19. Steve Goggans' Deposition Transcript from the Lawsuit to Which Defendants

Were Not Parties. Plaintiff's Exhibit 16, Defendant Steve Goggans' Deposition Transcript taken April 11, 2018 in a civil action captioned *The Gulfstream Café, Inc. v. J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC*, case number 2016-CP-22-00961;

20. Answers to Interrogatories. Plaintiff's Exhibits 58 (Defendant Steve Goggans' Answers to Plaintiff's First Interrogatories) and 59 (Defendant Georgetown County's Answers to Plaintiff's First Interrogatories);

21. Letter from Adam Nugent to Wesley Bryant. Plaintiff's Exhibit 33, a letter dated October 17, 2018 from Plaintiff's counsel to Georgetown County's then-attorney, Wesley Bryant;

22. Email from Boyd Johnson to Wesley Bryant. Plaintiff's Exhibit 39, an email exchange dated October 22, 2018 regarding the letter in Plaintiff's Exhibit 33; and

23. Invoices for Plaintiff's Attorneys' Fees. Plaintiff's Exhibit 67, which contains invoices for Plaintiff's attorneys' fees.

24. Judicial Notice. Defendants further request that this Court take judicial notice of the Circuit Court's Form 4 Order entered June 11, 2018, Plaintiff's Motion to Alter or

Amend the Judgment dated June 22, 2018, and the Circuit Court's Order entered July 27, 2018 in Civil Action Number 2016-CP-22-00961.

The above Motion is based upon South Carolina law, the South Carolina Rules of Evidence and Rules of Civil Procedure, applicable authorities, and Defendants' Memorandum of Law in Support.

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Myrtle Beach, South Carolina

August 24, 2022

Attorney for Defendants

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.	)	DEFENDANTS' PRE-TRIAL BRIEF
	)	Rule 16(c), SCRPC
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.	)	
_____	)	

The Defendants Georgetown County (the “County”), Georgetown County Council (the “County Council”), Steve Goggans, individually, and in his official capacity as a Georgetown County Councilmember (“Mr. Goggans”) (collectively, the “Defendants”),¹ submit this Pre-Trial Brief pursuant to Rule 16(c) of the South Carolina Rules of Civil Procedure.

I. STATEMENT OF THE FACTS

This dispute revolves around a parking lot (the “Parking Lot”), owned by Palmetto Industrial Development, LLC (“Palmetto”). The Parking Lot is located between Plaintiff Gulfstream Café, Inc.’s (“Plaintiff”) restaurant and the Marlin Quay Marina Store and Restaurant (collectively, the “Marina Store and Restaurant”) located in Garden City, South Carolina.

¹ Defendants John Thomas, Ron Charlton, Lillie Johnson, Austin Beard, and Louis Morant were dismissed with prejudice in their individual capacities and in their official capacities as Georgetown County Councilmembers pursuant to a Consent Order of Dismissal issued by Judge Benjamin H. Culbertson on December 14, 2021.

Plaintiff's restaurant, the Marina Store and Restaurant, the boat slips, and the Parking Lot are part of the Marlin Quay Planned Development ("PD"), a Zoning District in Georgetown County.

On February 25, 1986, the Marlin Quay Marina Corporation, which, at the time, owned the Parking Lot and Marina Store and Restaurant, granted three (3) non-exclusive appurtenant easements ("Joint Nonexclusive Easements") to Plaintiff for ingress and egress into the Parking Lot, together with the right for maintenance, repair, alteration, and/or improvements to Plaintiff's property. In 1990, the Marlin Quay Marina Corporation again granted a similarly stated Joint Nonexclusive Easement to Plaintiff.

In 2014, Palmetto, a South Carolina limited liability company owned by J. Mark Lawhon ("Lawhon"), purchased the property on which the Parking Lot and the Marina Store and Restaurant are located. In 2016, Palmetto demolished the building in which was located the Marina Store and Restaurant. It also hired the Mr. Goggans, an architect, to prepare architectural drawings for a new Marina Store and Restaurant.

Initially, for construction of the new building, Palmetto submitted to the Georgetown County Planning Department (the "Planning Department") an application for a minor amendment to the Marlin Quay PD ("MQ1"). Due to Plaintiff's opposition to MQ1 being classified as a minor amendment, in November 2017, Palmetto submitted an application for a major amendment to the Marlin Quay PD. This application is known as MQ2. The Georgetown County Planning Commission ("Planning Commission") recommended approval of the amendment to the PD. The Defendant County Council² approved the proposed amendment ("Ordinance Number 2018-03") on February 27, 2018. As a result of the amendment, the Marlin Quay PD permitted the Marlin

² Mr. Goggans had no involvement or participation with the County Council in relation to the application of MQ2.

Quay building to have a seating capacity not to exceed 110 persons along with 4,598 heated square feet and sixty-two (62) parking spaces, including three (3) compact spaces underneath the new structure. Also, the building had a forty-five (45)-foot height limit measured from the midpoint of the roof. Plaintiff did not appeal the passage of this MQ2 amendment to the Marlin Quay PD.

In November 2016, Plaintiff filed a lawsuit against Palmetto and Lawhon alleging interference with its Parking Lot easement rights. This captioned action is *The Gulfstream Café, Inc. v. J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC*, C.A. No. 2016-CP-22-00961.³ In June 2018, the trial against Lawhon and Palmetto concluded, and circuit court issued a permanent injunction which permitted the construction of a new Marina Store and Restaurant building, but specified the new structure must be within the footprint of the former building as shown on a 1985 plat. The Order noted that “[t]he Court is specifically not talking about height, only the outside boundaries.”

Because the Marlin Quay PD permitted the proposed building to be outside the footprint of the former building in certain limited areas, Palmetto submitted an application (“MQ3”) to amend the existing PD on August 27, 2018.⁴ Keeping with common practices, the Planning Department generated a list of property owners from the Georgetown County Geographic Information System (“GIS”) within 400 feet of the property. In accordance with the generated list, the Planning Department mailed notice to property owners listed in the GIS within 400 feet of the property. With the knowledge that the GIS list of property owners included the Marlin Quay Homeowners’ Association, but not the individual unit owners of the Marlin Quay Condominiums,

³ Neither Georgetown County nor any Councilmembers were parties to this civil action.

⁴ Mr. Goggans had no involvement or participation with the County Council in relation to the application of MQ3.

the Planning Department contacted Nancy Gardner with Surfside Realty, the property manager for the Marlin Quay Homeowners' Association, so that she could distribute the notice to the unit owners at the Marlin Quay Condominiums. Ms. Gardner received the notice and forwarded it to each unit owner at Marlin Quay.

In addition to the extra efforts to provide written notice, the Planning Department, on October 2, 2018, posted a sign at the entrance of the Parking Lot, which was more than fifteen (15) days prior to the public hearing date, being October 18, 2018, in accordance with the Georgetown County Land Development and Zoning Ordinance (the "Zoning Ordinance"). The Planning Department also advertised the Planning Commission hearing twice—once on October 3, 2018 in the *Georgetown Times*, which was fifteen (15) days prior to the hearing date, and once on October 4, 2018 in the *Coastal Observer*.

On October 18, 2018, the Planning Commission held a hearing on Palmetto's application for a major amendment to the PD. At the hearing, legal counsel for Plaintiff, as well as others associated with Plaintiff, attended and spoke. The Planning Commission voted to recommend submitting the MQ3 amendment to County Council.

County Council held three separate readings on the proposed amendment to the PD. Plaintiff's attorney appeared before County Council and offered public comments in opposition to the amendment, along with several Marlin Quay unit owners. Other community members and property owners spoke in support of the amendment. In addition, Plaintiff's attorney also submitted a letter to each Councilmember. This letter vigorously argued against the passage of the proposed amendment to the PD and threatened a lawsuit if it passed.

On January 8, 2019, the amendment to the existing PD was approved ("Ordinance Number 2018-40"). This amendment required that the new structure be built within the footprint of the

former building. This amendment also continued the requirements of the PD regarding the heated square footage⁵ for the new structure; sixty-two (62) parking spaces, including three (3) compact spaces underneath the new structure; and a total seating capacity not to exceed 110 persons.

II. FACTS IN CONTROVERSY

Plaintiff is challenging the last amendment to the Marlin Quay PD (2018-40) even though it only amended the location of the building and the height. It did not change the permitted heated square footage, the seating capacity, or the parking for these items were in the existing PD due to the passage of 2018-03, which Plaintiff did not legally challenge. The legal significance of Plaintiff's failure to make such a challenge is that under South Carolina Code Subsection 6-29-760(D), a challenge to an amendment of a zoning ordinance must be made within sixty (60) days "after the decision of the governing body if there has been substantial compliance with the notice requirement of this section or with the established procedures of the governing authority or the planning commission."

III. LEGAL ISSUES INVOLVED

Local boards are afforded great deference in their zoning decisions. As the Supreme Court of South Carolina has explained:

It is a well settled proposition of zoning law that a court will not substitute its judgment for the judgment of the [zoning board of appeals]. The court may not feel that the decision of the board was the best that could have been rendered under the circumstances. It may thoroughly disagree with the reasoning by which the board reached its decision. It may feel that the decision of the board was a substandard piece of logic and thinking. None the less, the court will not set aside the board's view of the matter just to inject its own ideas into the picture of things.

⁵ In fact, the heated square footage of MQ3 was two feet less than the heated square footage in MQ2.

Rest. Row Assocs. v. Horry Cnty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (quoting *Talbot v. Myrtle Beach Bd. of Adjustment*, 222 S.C. 165, 173, 72 S.E.2d 66, 70 (1952)). *See also* *Rush*, 246 S.C. at 276, 143 S.E.2d at 531 (“There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application, and where the Planning and Zoning Commission and the city council of a municipality have acted after considering all of the facts, the Court should not disturb the finding unless such action is arbitrary, unreasonable, or in obvious abuse of its discretion, or unless it has acted illegally and in excess of its lawfully delegated authority.”); *Furr v. Horry Cnty. Zoning Bd. of Appeals*, 411 S.C. 178, 183–84, 767 S.E.2d 221, 224 (Ct. App. 2014) (internal citations omitted) (“By statute, the trial court must uphold a decision by the Planning Commission unless there is no evidence to support it. . . . The local zoning boards, and not the courts, are the primary entities responsible for the planning and development of our communities.”).

A zoning ordinance is presumed valid, and the party challenging the amendment has the burden of proof to establish the council acted arbitrarily and unreasonably. *Bob Jones Univ., Inc. v. City of Greenville*, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963) (citation omitted). “There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application, and where the Planning and Zoning Commission and the [county] council of a municipality has [sic] acted after considering all of the facts, the Court should not disturb the finding unless such action is arbitrary, unreasonable, or in obvious abuse of its discretion, or unless it has acted illegally and in excess of its lawfully delegated authority. Likewise, 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.” *Id.*

A. Plaintiff’s Causes of Action

1. Declaratory Judgment

As its first cause of action, Plaintiff seeks a declaratory judgment that the County’s amendment, dated January 8, 2019, Ordinance Number 2018-40, is invalid because this Ordinance allegedly constitutes a taking and violates Plaintiff’s substantive and procedural due process rights. The Declaratory Judgments Act permits courts of competent jurisdiction to “declare rights, status, and other legal relations whether or not further relief is or could be claimed.” S.C. Code Ann. § 15-53-20. Plaintiff is not entitled to a declaratory judgment that Ordinance 2018-40 is invalid because Plaintiff’s substantive and procedural due process rights were not violated, and the passage of the amendment did not constitute a taking.

Plaintiff attacks Ordinance 2018-40 on the following grounds:

- (1) The August 2018 application was the second application for the same parcel of property during a twelve-month period;
- (2) The application was incomplete because, among other things, no sketches or drawings or list of property owners accompanied the application, although addressed envelopes did;
- (3) Notice was not timely or sufficient;
- (4) The application was not submitted in proper form forty-five (45) days prior to being considered by the Planning Commission;
- (5) The County did not follow parking requirements; and
- (6) The building proposed in the application is larger than the former building.

Each of these alleged deficiencies is addressed below.

2. Violation of Substantive Due Process—Article I, Section 3 of the South Carolina Constitution and the United States Constitution Pursuant to 42 U.S.C. § 1983

Plaintiff asserts it has “property rights to operate a restaurant” and rights in an easement, and by passing Ordinance 2018-40, Defendants “deprived” Plaintiff of its property rights and

“prevented” Plaintiff from fully enjoying those rights. Plaintiff further alleges Defendants’ actions were arbitrary and capricious and without any rational basis or relation to the public’s health, safety, welfare, or morals. The evidence Plaintiff suggests supports its assertions is Defendants’ alleged “failure” to consider the “impact” to the Parking Lot despite its complaints.

Article I, Section 3 of the South Carolina Constitution provides that no “person [shall] be deprived of life, liberty, or property without due process of law.” S.C. Const. art. I, § 3. A substantive due process violation occurs when a party is “arbitrarily and capriciously deprived of a cognizable property interest rooted in state law.” *Anonymous Taxpayer v. S.C. Dep’t of Revenue*, 377 S.C. 425, 437–38, 661 S.E.2d 73, 79 (2008) (quoting *Worsley Co. v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000)); *see also Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 296, 737 S.E.2d 601, 610 (2013) (“In order to successfully assault a city’s zoning decision, a citizen must establish that the decision was arbitrary and unreasonable.”); *Anonymous Taxpayer*, 377 S.C. at 437, 661 S.E.2d at 80 (“Substantive due process provides that one may not be deprived of property for arbitrary reasons.”).

The South Carolina Supreme Court has stated: “[I]n 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 (quoting *Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 827 (4th Cir. 1995)). “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. . . . 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.” *Id.* at 296, 737 S.E.2d at 609 (quoting *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 663 (2011)).

Like state law substantive due process claims, federal substantive due process claims of alleged violations of the United States Constitution require “facts demonstrating that the [county’s] conduct was arbitrary, irrational, or motivated by constitutionally impermissible factors.” *Singletary v. City of N. Charleston*, No. CV 2:09-1612-RMG-BM, 2012 WL 13018625, at *4 (D.S.C. Jan. 18, 2012), *report and recommendation adopted*, No. 2:09-CV-1612-RMG, 2012 WL 1309183 (D.S.C. Apr. 16, 2012), *and aff’d*, 479 F. App’x 456 (4th Cir. 2012), *and aff’d*, 479 F. App’x 456 (4th Cir. 2012). A federal due process claim is based on the Fourteenth Amendment to the United States Constitution, which states that “no State [shall] deprive any person of life, liberty, or property without the due process of law. . . .” *Id.* (quoting U.S. Const. Amend. XIV, Section 1 (alteration in original)). A federal substantive due process claim is considered under 42 U.S.C. § 1983, which “is the procedural mechanism through which Congress provided a private civil cause of action based on allegations of federal constitutional violations by persons acting under color of state law.” *Id.* at n.5 (citing *Jennings v. Davis*, 476 F.2d 1271 (8th Cir. 1973)).

In considering a substantive due process claim under the United States Constitution and 42 U.S.C. § 1983, the United States District Court for the District of South Carolina has further clarified that when a plaintiff contends “that a municipal land decision violate[s] substantive due process [under 42 U.S.C. § 1983], [it] must show that the defendants’ conduct shocks the conscience.” *Id.* (internal quotations omitted). “[O]nly the ‘most egregious official conduct’ will rise to the level of a constitutional violation.” *Id.*

In approving Ordinance 2018-40, the County’s actions were not arbitrary or capricious, nor did they shock the conscience. In determining whether an action is arbitrary and capricious, South Carolina courts look to the requirements set forth by the County’s code. *See, e.g., Bevivino v. Town of Mount Pleasant Bd. of Zoning Appeals*, 402 S.C. 57, 64, 737 S.E.2d 863, 867–68 (Ct. App. 2013) (reviewing the requirements of an ordinance); *Wyndham Enters., LLC v. City of N. Augusta*, 401 S.C. 144, 148, 735 S.E.2d 659, 661 (Ct. App. 2012) (considering the North Augusta Development Code).

In 2018, the County Zoning Ordinance required that: (1) the application not be a second request for “the same change *in district classification* by a property owner” to the Marlin Quay PD within a twelve (12)-month period (Section 1702.1 (emphasis added)); and (2) the application be submitted at least forty-five (45)-days prior to the Planning Commission meeting on the form provided by the Planning Department, including administrative costs and any other document pertinent to the Planning Department’s review of the application (Section 1702.2 and 1702.201).⁶ Palmetto’s application did not ask for a change in district classification *at all* because both MQ2 and MQ3 applications were for the same district, and Palmetto complied with the time and application requirements for submission. Palmetto’s application did not violate any of these requirements of the Zoning Ordinance, and moreover, the approval of Ordinance 2018-40 was not a change in use from what had originally been authorized in the 1986. Further, the Planning Department followed the Zoning Ordinance and conducted a review of the information provided

⁶ Significantly, strict compliance with Section 1702.206 is not required. Section 1702.207 provides: “Failure to strictly comply with the notification requirements contained in Section[] 1702.206 . . . *shall not render the rezoning of the property invalid.*” (emphasis added). *See also* S.C. Code Ann. § 6-29-760(D) (stating a challenge against an amendment may not be brought within sixty days of the decision “if there has been *substantial compliance* with the notice requirements...or with established procedures of the governing authority....”) (emphasis added).

by Palmetto, and then set forth its finding in a Staff Report that was later presented to the Planning Commission. The Staff Report itself confirms that the Defendants' actions were not arbitrary and capricious, as it contemplated the heated square feet and height of the new structure, parking, seating capacity, the amount of pervious/impervious space, and the flood zone height requirements.

In addition to the Staff Report, the Planning Commission received the application, site building and plans, GIS location map, zoning map, and aerial map, and the adjacent property notice. The Planning Department presented the Staff Report to the Commissioners and provided a comparison of the existing PD requirements with the MQ3 proposal. The Planning Commission heard from agents of both Palmetto and Plaintiff, including their attorneys, a condominium owner, and an engineer. Following full discussion, *all* Commissioners voted to recommend the proposed PD amendment. Then the amendment application was sent to County Council. County Council held three (3) readings of the proposed amendment, as required, and heard from Plaintiff and its agents, including its attorney, Plaintiff's employees, Palmetto's attorney, and a number of Marlin Quay condo owners.

At every level, the County reviewed Palmetto's application and the information. Accordingly, the County's approval does not shock the conscience, and the decision was not "unconstitutional as arbitrary and capricious" simply because Plaintiff is dissatisfied with the County's decision. *Singletary*, No. CV 2:09-1612-RMG-BM, 2012 WL 13018625, at *5. *See also, Rush v. City of Greenville*, 246 S.C. 268, 282, 143 S.E.2d 527, 534 (1965) (holding where "[t]here is no evidence . . . that the action of the [County] Council . . . in any way violated any rule, regulation or ordinance in reaching their decision in this case," the zoning decision is not arbitrary

and capricious.). Rather, the County’s public servants undertook their duty to amply review Palmetto’s application.

3. Violation of Procedural Due Process—Article I, Section 3 of the South Carolina Constitution and the United States Constitution Pursuant to 42 U.S.C. § 1983

Plaintiff alleges a violation of its procedural due process rights under the South Carolina and United States Constitutions on the same grounds as its alleged substantive due process violations. “The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.” *Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (“[W]e have determined that individuals whose property interests are at stake are entitled to ‘notice and an opportunity to be heard.’”); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993); *Kurschner v. City of Camden Plan. Comm’n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (citations omitted). “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Kurschner*, 376 S.C. at 172, 656 S.E.2d at 350 (citing *S.C. Dep’t of Soc. Servs. v. Wilson*, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002)). Procedural due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Taylor v. City of Columbia*, No. C/A 3:07-983-JFA-JRM, 2010 WL 296901, at *8 (D.S.C. Jan. 20, 2010), *aff’d sub nom. Taylor v., City of Columbia*, 389 F. App’x 325 (4th Cir. 2010) (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (1978)) (finding procedural due process rights were not violated because the plaintiff received adequate notice of the claims against her); *see also Jones v. S.C. Dep’t of Health & Env’t. Control*, 384 S.C. 295, 317, 682 S.E.2d 282, 294 (Ct. App. 2009) (finding no procedural due process violation because no prejudice resulted since the plaintiffs received sufficient notice and a hearing).

Like substantive due process, the South Carolina Constitution provides protection from procedural due process violations, and an alleged procedural due process violation under the United States Constitution is considered under 42 U.S.C. § 1983. *See Taylor*, No. C/A 3:07-983-JFA-JRM, 2010 WL 296901, at *5–6 (“In procedural due process claims, the deprivation by state action of a constitutionally protected interest in ‘life, liberty, or property’ is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.” (citing *Parratt v. Taylor*, 451 U.S. 527, 537 (1981))).

a. The MQ3 Application was not a second request for a major change to the Marlin Quay PD made in a twelve (12)-month period.

Section 1702.1 of the Zoning Ordinance provides:

[Q]ualified applicants are eligible to initiate an application for change and/or relief from requirements of this Ordinance . . . [except] that action shall not be initiated for a zoning amendment affecting the same parcel or parcels of property or any part thereof, *and requesting the same change in district classification* by a property owner or owners of more often than once every twelve (12) months measured from the date of the original recommendation by the Planning Commission.

(Emphasis added.) The County properly considered the application for MQ3 without violating Section 1702.1 of the Zoning Ordinance’s rule because Palmetto was not asking for a change in district classification. The Marlin Quay PD remained a PD in both applications. Accordingly, the County did not violate Section 1702.1.

b. The MQ3 Application was not untimely or incomplete.

Section 1702.201 of the Zoning Ordinance provides that “an application must be submitted, in proper form, at least forty-five (45) days prior to a Planning Commission meeting in order to be heard at that meeting.” First, the application was not untimely. Palmetto submitted its application on August 27, 2018. The Planning Commission met on October 18, 2018, which was fifty-two (52) days after Palmetto submitted the application. Since the Planning Commission met more than forty-five (45) days after the application was submitted, the application was timely.

Second, the application was not incomplete. Section 1702.2 of the Zoning Ordinance sets forth the application procedure and identifies that “proper form” requires a complete application form for amendment requests obtained from the Planning Commission, “together with an application fee to cover administrative costs plus additional information the applicant feels to be pertinent shall be filed with the Planning Commission.” The application included (i) the application in the form provided by the Planning Department, (ii) twelve copies of the existing site plan and twelve copies of the proposed site plan, and (iii) the administrative costs. Additionally, the Planning Department began its review of the MQ3 application because it was substantially similar to the MQ2 application. The application was submitted in proper form, and the County had additional background information due to the prior application, and thus the application was complete.⁷

Further, the notice requirements set forth by Section 1702.206 did not render the application incomplete. Section 1702.206 requires that an entity applying to amend an ordinance amending a planned development

must submit to the Planning Commission, as part of the application, letters addressed to each property owner within four hundred (400) feet of the subject property containing information adequate to notify such owners of the intention to rezone, and when and where a public hearing will be held by the Planning Commission. A location map showing the areas to be rezoned must be included. Such letters must be placed in unsealed, stamped and addressed envelopes ready for mailing by the Planning Commission. The Planning Commission’s address must appear as the return address on the envelopes. A list of all property owners, as reflected by the tax records, to whom letters are addressed must accompany the application.

⁷ Plaintiff takes issue with the fact that Palmetto sent more drawings subsequent to its application, showing the building elevations and site layout in greater detail. However, it is a common practice for the Planning Department to request supplemental documentation. Palmetto’s submission of additional documents did not affect the timeliness and completeness of the application.

Here, Palmetto submitted, with its application, addressed envelopes with the names of the property owners. Notices went out to people within 400 feet of the property, as is required by the ordinance, and as provided by the GIS list, which the Planning Department generated in addition to any list provided by Palmetto. The Planning Department compared that list against the envelopes provided to ensure the identified property owners received notice.

Moreover, as previously noted, the Zoning Ordinance instructs that Section 1702.206 does not require strict compliance. Section 1702.207 states: “Failure to strictly comply with the notification requirements contained in Section[] 1702.206 . . . shall not render the rezoning of the property invalid.” *See also* S.C. Code Ann. § 6-29-760(D) (stating a challenge against an amendment may not be brought within sixty days of the decision “if there has been *substantial compliance* with the notice requirements...or with established procedures of the governing authority....”) (emphasis added).

Palmetto submitted a complete application more than forty-five (45) days prior to the Planning Commission meeting. As a result, its application complied with the Zoning Ordinance and was neither untimely nor incomplete.

c. There was notice of the proposed amendment to property owners within 400 feet of the affected property, and such notice was proper.

Plaintiff also relies on Section 1702.206 of the Georgetown County Zoning Ordinance to assert that property owners received insufficient or no notice. However, as detailed above, Palmetto submitted addressed envelopes as required in Section 1702.206, and even if Palmetto did not provide a separate list, substantial compliance does not render the zoning void. *See* Georgetown County Land Development and Zoning Ordinances § 1702.207 (“Failure to strictly comply with the notification requirements contained in Section[] 1702.206 . . . shall not render the rezoning of the property invalid.”).

As standard procedure for all applicants, the Planning Department staff receive an applicant's addressed envelopes, and staff prints the list of owners within 400 feet as reflected in the GIS. Based on this list of property owners generated by the GIS, the Planning Department mailed letters to those addresses. Plaintiff specifically takes issue with how notice was provided to the Marlin Quay Condominium Owners. The Planning Department contacted Nancy Gardner with Surfside Realty, the property manager for the Marlin Quay Homeowners' Association. The Planning Department provided a separate email with the notice that could be forwarded to each individual owner in the condominium complex, and the Planning Department asked Ms. Gardner to forward the notice to each property owner. Ms. Gardner received the notice and forwarded it to each condominium owner at Marlin Quay.

In addition, the Planning Department also published the notice of the Planning Commission meeting in the newspaper and placed a sign at the Property. Section 1702.209 states, "In rezoning cases, conspicuous notices shall be posted on the affected property that shall be visible from each public street that borders the property. The notice shall be posted at least fifteen (15) days prior to the public hearing date." Here, the property posting occurred on October 2, 2018. The hearing occurred on October 18, 2018, meaning the Planning Department placed the notice more than fifteen (15) days prior to the public hearing date as required by Section 1702.209 of the Zoning Ordinance.

Additionally, the Ordinance states, "Before enacting an amendment to this Ordinance, the Planning Commission shall hold a public hearing thereon, notice of the time and place of which shall be published in a newspaper of general circulation in the County at least fifteen (15) days in advance of the scheduled public hearing date." Two different times, the Planning Department advertised the Planning Commission meeting—on October 3, 2018 in the *Georgetown Times*, both

of which occurred fifteen (15) days prior to the hearing date, and on October 4, 2018 in the *Coastal Observer*. Again, the Planning Department went above and beyond what was required of it to provide notice by publishing notice in two newspapers of general circulation.

d. The MQ3 Application did not violate Georgetown County's parking regulations.

Contrary to Plaintiff's contentions, the parking regulations do not apply to the Marlin Quay PD. Section 619.2 of the Georgetown County Zoning Ordinance provides:

Any request pertaining to the establishment of a Planned Development District shall be considered an amendment to the Zoning Ordinance and shall be administered and processed in accordance with the regulations set forth in Article XIV [sic], entitled Amendments. All data set forth in Section 619.6 pertaining to conceptual approval shall be submitted to Staff of the Planning Commission and subsequently forwarded to County Council, with recommendations from the Planning Commission. If approved by County Council, *all information pertaining to the proposal shall be adopted as an amendment to the Zoning Ordinance, as the standards of development for that particular Planned Development District.*

(Emphasis added.) Section 619.2 provides flexibility for zoning because a planned development creates a separate zoning district with its own conceptual plan. Since a planned development is a separate zoning district, Article XI, Parking Regulations are used as a guide in making determinations about parking, but the planned development zoning stands on its own and contains its own restrictions—if any. Here, the only change to the parking in Ordinance 2018-40 was the addition of parking spaces. Defendants fail to see how the addition of spaces could violate the historical requirements of the Marlin Quay PD.

Moreover, during the review process, the Planning Department did not overlook parking spaces, but rather, in the Staff Report made specific reference to the number of spaces proposed and the minimum number of spaces required. The Planning Department further explicitly noted the parking lot would be shared with Plaintiff.

All in all, Plaintiff received notice and an opportunity to be heard, as its agents, including its attorney, attended the Planning Commission hearing and County Council meetings and stated its position at those meetings. There is no better evidence that Plaintiff had notice and an opportunity to be heard.

4. Violation of South Carolina’s Taking Clause—Article I, Section 13 of the South Carolina Constitution

Plaintiff next asserts that the “Defendants’ action in advocating for and/or approving Palmetto’s application will result in the construction of Version 3.0, which will grossly overburden the parking lot...” and prevent Plaintiff from operating its restaurant, which Plaintiff alleges constitutes a taking. First, Plaintiff has no property interest in the amended ordinance and lacks a right to pursue any claims against Defendants, and further, Defendants did not take or otherwise interfere with Plaintiff’s right to run its restaurant or access its easement. The County is not involved in easements between private parties, and private easements are not taken into consideration when deciding zoning amendments.

“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 W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 313, 737 S.E.2d 601, 619 (2013) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992)).

In this case, Plaintiff does not allege a permanent physical invasion of its property, but it contends that Ordinance 2018-40 deprives Plaintiff of all “economically viable use of the property.” Plaintiff is incorrect. In *Dunes*, the South Carolina Supreme Court considered whether the passage of a Conservation Recreation Open Space zoning district, imposing land-use restrictions on all golf courses for recreation and conservation uses, deprived the Dunes West Golf

Club of all economically viable uses of its property. *Id.* at 314, 737 S.E.2d at 619. The South Carolina Supreme Court determined that the “designation permit[ted] numerous recreation and conservation uses,” and Dunes did not “produce any evidence that those permitted uses are not economically beneficial.” *Id.* The Court, looking to the United States Supreme Court’s discussion of a taking in *Lucas*, noted that there was no evidence of “the ‘extraordinary circumstance when no productive or economically beneficial use of land is permitted.’” *Id.* (emphasis in original) (quoting *Lucas*, 505 U.S. at 1017).

The Ordinance’s possible effect on Plaintiff’s property is similar to the ordinance’s effect on Dunes’ property. Here, Plaintiff cannot show that there is no productive or economically beneficial use of its land, and it “has presented no evidence that this is the ‘extraordinary circumstance when no productive or economically beneficial use of land is permitted.’” *Id.* (quoting *Lucas*, 505 U.S. at 1017). Instead, Plaintiff merely asserts that the construction of the MQ3 building will overburden the Parking Lot and that it cannot operate its property as a restaurant if it does not have parking,⁸ and therefore, the approval of the amendment deprives it of all economically viable use of its property. However, Plaintiff has the ability to operate its restaurant as a restaurant—nothing in Ordinance 2018-40 prevents Plaintiff from operating its restaurant, and nothing limits Plaintiff’s “free ingress, egress, and vehicular parking at the parking lot.” Furthermore, Plaintiff does not possess an exclusive easement to use the Parking Lot, and as such, there is no merit to its assertion that because it may have to share the Parking Lot with non-customers, it has suffered a taking. Accordingly, there is still an economically viable use of Plaintiff’s property, and as such, there has been no taking of Plaintiff’s property rights.

5. Inverse Condemnation

⁸ Plaintiff has at least fourteen parking spaces that cannot be used by Palmetto.

Plaintiff asserts Defendants passed an amendment that will result in the construction of a building that will allegedly “undermine” Plaintiff’s property right, which is a taking requiring just compensation. “An inverse condemnation may result from the government’s physical appropriation of private property, or it may result from government-imposed limitations on the use of private property.” *Byrd v. City of Hartsville*, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005). “The governmental conduct at issue generally takes one of two forms: (1) the entity has physically appropriated private property or (2) the entity has imposed restrictions on the use of the property that deprive the owner of the property’s ‘economically viable use.’” *Hilton Head Auto., LLC v. S.C. Dep’t of Transp.*, 394 S.C. 27, 30, 714 S.E.2d 308, 310 (2011). The elements of a regulatory inverse condemnation include: (1) affirmative conduct; and (2) a taking.⁹ *Byrd*, 365 S.C. at 657, 620 S.E.2d at 80. The court should consider two important circumstances when determining whether there has been a regulatory taking: (1) the economic impact on the Plaintiff, particularly the extent to which the government interference with investment-back expectations; and (2) the character of the governmental action. *Byrd*, 365 S.C. at 659, 620 S.E.2d at 80 (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978)).

In considering the economic impact of the Ordinance, a diminution in property value does not alone establish inverse condemnation. *Dunes*, 401 S.C. at 317, 737 S.E.2d at 621 (quoting *Penn Central*, 438 U.S. at 131 (“United States Supreme Court decisions sustaining land-use regulations ‘uniformly reject the proposition that diminution in property value, standing alone, can establish a “taking,” and that the “taking” issue in these contexts is resolved by focusing on the

⁹ If the inverse condemnation results from a physical appropriation of property, a third element arises: the taking must be for public use. *Byrd*, 365 S.C. at 657, 620 S.E.2d at 79-80. In this case, Plaintiff has not alleged any physical appropriation by the County, but rather, has only alleged the passage of the Ordinance 2018-40 was wrongful. Accordingly, Plaintiff’s inverse condemnation claim is a regulatory one.

uses the regulations permit.’’). First, Plaintiff’s inverse condemnation claim makes no assertions regarding the alleged economic impact of 2018-40. Even considering its inverse condemnation claim related to Plaintiff’s takings claim, which alleges that 2018-40 “deprives [Plaintiff] of all economically viable use of its property,” Plaintiff does not assert a diminution in property value, but rather a deprivation of economic use of its property. Even assuming *arguendo* that Plaintiff does assert there has been a diminution of the property value, the valuation would be calculated on the basis that the Plaintiff can no longer operate its restaurant. There is no diminution in property value—the property may still be used to operate a restaurant, and Plaintiff continues to have access to the Parking Lot for its guests as it continues to operate its restaurant.

Next, “continuation 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.” *Dunes*, 401 S.C. at 319, 737 S.E.2d at 622 (quoting *Carolina Chloride*, 394 S.C. at 173, 714 S.E.2d at 878). In this case, Plaintiff’s primary investment-backed expectation is the ability to operate a restaurant with access to the Parking Lot. Even with the passage of 2018-40, Plaintiff can continue to operate its restaurant in the same way as the PD permitted for years; it continues to have access to the Parking Lot, and it will be able to continue to operate its restaurant. The passage of the ordinance does nothing to change whether Plaintiff can or cannot operate a restaurant and provide parking to its guests. *See id.* at 319, 737 S.E.2d at 622.

When considering the character of the public action, South Carolina courts have noted that “government regulation—by definition—involves the adjustment of rights for the public good.” *Id.* at 315, 737 S.E.2d at 620 (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005)). “Not all damages suffered by a private property owner at the hands of [a] governmental agency are compensable.” *Id.* at 316, 737 S.E.2d at 620 (citing *Carolina Chloride*, 394 S.C. at 170, 714

S.E.2d at 877) (alteration in original). Here, numerous citizens spoke in favor of the rebuilding of the Marlin Quay Marina and Restaurant, noting the marina needed revitalization, and much of the mode of transportation in the Marlin Quay PD involved foot traffic. As recognized by the citizens of Georgetown County, the approval of the Marlin Quay Marina and Restaurant would benefit the area as a whole. Consequently, these facts weigh in favor of Defendants, and there has been no inverse condemnation of Plaintiff's property by Defendants.

6. Attorneys' Fees Pursuant to 28 U.S.C. § 1988

The statute Plaintiff states entitles it to attorneys' fees, 28. U.S.C. § 1988, is nonexistent. The statute permitting attorneys' fees pursuant to a § 1983 claim is 42 U.S.C. § 1988: "In any action or proceeding to enforce a provision of section[]...1983..., the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee as part of the costs...." 42 U.S.C. § 1988(b). Even excusing Plaintiff's mistake, Defendants are not liable pursuant to 42 U.S.C. § 1983, as discussed extensively above, and Plaintiff is therefore not entitled to attorneys' fees. Instead, Defendants will be entitled to attorneys' fees pursuant to 42. U.S.C. § 1988.

B. Defendants' Defenses

1. Plaintiff's Challenges are Barred by South Carolina Code Section 6-29-760(D).

Plaintiff is statutorily barred from challenging the validity of Ordinance 2018-40 because a previous Ordinance, Ordinance No. 2018-03, enacted February 27, 2018, was not challenged by Plaintiff even though it is virtually identical to Ordinance 2018-40. South Carolina Code Section 6-29-760(D) states:

No 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 requirement of this section or with established procedures of the governing authority or the planning commission.

Initially, in 2016, Palmetto sought a minor amendment to the PD to construct the Marina Store and Restaurant. As a result of Plaintiff challenging the legality of obtaining a minor amendment, Palmetto submitted an application for a major amendment, which is MQ2. On December 21, 2017, the Planning Commission held a hearing on the application for MQ2, and it later recommended the amendment be presented to County Council. Then on January 9, 2018, at a county Council Meeting, Ordinance 2018-03 was presented for the first reading. The second reading was held February 13, 2018, and the third reading February 27, 2018.

As previously noted, throughout the entire process to amend the PD, Plaintiff expressed its opposition at each step. It presented not only written statements/letters opposing the approval of MQ2, but also its representatives attended the Planning Commission Hearing and the three (3) readings held by County Council. At the first reading, January 9, 2018, George Redman, counsel for Plaintiff, as well as a unit owner in the Marlin Quay Condominiums, appeared and spoke. At the second reading, February 13, 2018, Mr. Redman, Plaintiff's operating partner, Plaintiff's operations manager, and three additional Marlin Quay unit owners appeared and spoke in opposition to the proposed amendment. Plaintiff's representatives also attended the third reading on February 27, 2018. It was at that meeting that 2018-03 was approved.

If Plaintiff wanted to challenge the square footage, the number of parking spaces, and the seating capacity, South Carolina Code section 6-29-760(D) required Plaintiff to challenge MQ2 within sixty (60) days following the County Council's passage of the ordinance. However, Plaintiff made no challenge and now asks this Court to overlook its failure to timely challenge that amendment by focusing solely on the passage of 2018-40.

In August 2018, Palmetto submitted an application to amend the site plan. Palmetto filed this application in order to comply with the circuit court's July 27, 2018 order wherein the court

issued an injunction which directed that Palmetto “may not expand the outside boundaries of any new building beyond those previously used The Court is specifically not talking about height, only the outside boundaries.” The former building footprint is reflected within a 1985 recorded plat, Plat Book 6, Page 214. Prior to the circuit court’s order, the existing zoning PD permitted the new structure to be located outside the footprint as a result of the passage of 2018-03. Therefore, in order to comply with the circuit court’s order, an amendment was required for the building to be constructed within the footprint. The application for an amendment was presented to the Planning Commission, which recommended it to proceed to County Council. County Council then held three (3) readings, and approved and adopted the amendment on January 8, 2019. The differences between the two ordinances are the following:

Ordinance No. 2018-03 (Adopted 2/27/2018)	Ordinance No. 2018-40 (Adopted 1/8/2019)
Heated Square Feet for the new structure will not exceed 4,598	Heated Square Feet for the new structure will not exceed 4,596 SF
62 parking spaces will be provided including three compact spaces to be located underneath the new structure	62 parking spaces will be provided including three compact spaces to be located underneath the new structure
Structure will not exceed a 45 foot height limit measured at the midpoint of the roof	Structure will not exceed a 47 foot height limit. The building may utilize a flat roof.
Total seating capacity shall not exceed 110 persons	Total seating capacity shall not exceed 110 persons.

The comparison of the two (2) amendments shows that the actual square footage of the proposed building decreased. There was not a change in the number of parking spaces or the seating capacity. There was a minor change with respect to the height of the roof. As evidenced by the chart above, Plaintiff should have challenged 2018-03 because that ordinance established the allowable size of the building, the number of parking spaces, and the seating capacity. In other words, Plaintiff cannot now challenge the seating capacity and the building square footage since both of these were part of the existing PD. Thus, if Plaintiff wanted to comply with the statute, it should have appealed

the passage of 2018-03. Because it failed to do so, Plaintiff cannot now challenge the Ordinance 2018-40.

2. Plaintiff's Claims are Barred by Collateral Estoppel/Issue Preclusion.

Plaintiff raised the complaints of the same alleged damage—lack of parking and loss in revenue/value therefrom—arising from the construction of the Marina Store and Restaurant in its 2016 lawsuit against Palmetto Industrial Development, LLC and J. Mark Lawhon, C.A. No. 2016-CP-22-00961.

“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). “The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior 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 quotations 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 Lawhon, Plaintiff alleged that “[o]n or around the second week of November 2016, [Palmetto and Lawhon] initiated a construction project involving the Marlin Quay Marina, and [] completely obstructed access to the Parking Lot by [Plaintiff].” C.A., No. 2016-CP-22-00961, Compl. ¶ 25. Plaintiff further alleged that the “construction project where the Plans call for improvements [] will permanently interfere with Plaintiff’s rights to use the

Parking Lot.” C.A., No. 2016-CP-22-00961, Compl. ¶ 28. After a jury trial, the jury found for Plaintiff, awarding just \$1,000 in damages. The circuit court issued an injunction.

The court’s order stated in relevant part:

Based on the case law of this state, the facts as presented at this trial, and the jury’s verdict, a permanent restraining order is issued with the following terms. The Defendants are enjoined from preventing the Plaintiff from enjoying the right granted to it in the recorded nonexclusive joint easement. The Defendants are restrained and *may not expand the outside boundaries of any new building beyond those previously used*. The outside boundaries specifically are the outside boundaries of the old building, which was depicted on the 1985 Plat recorded at Plat Book 6, Page 214 of the Georgetown County real property records and was demolished by Defendants in November 2016. The outside boundaries do not include any outbuildings, fixtures, concrete pads, dumpsters, or other accessories. *The Court is specifically not talking about height, only the outside boundaries.*

(Emphasis added). Accordingly, at issue in the 2016 action was Plaintiff’s challenge of Palmetto’s construction of a building currently at issue in this suit. As evidenced by the circuit 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 Plaintiff’s property rights was actually adjudicated and directly determined by the trial court. Because Plaintiff sought injunctive relief and asserted the construction of that building would “permanently interfere with Plaintiff’s rights to use of the Parking Lot,” the court’s holding regarding the building’s permitted construction was necessary to support that judgment. Plaintiff 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 the conforming application (MQ3), was approved by the County in its adoption of Ordinance 2018-40. As such, Plaintiff 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 court's prior order.

3. Plaintiff Does Not Possess a Property Interest in Ordinance 2018-40 and Therefore, Lacks a Right to Pursue Any and All Claims Against Defendants.

Plaintiff contends it is now deprived of its property and easement rights by the passage of Ordinance 2018-40. However, Plaintiff does not possess a property interest in the property that is the subject of the Ordinance in order to pursue any claims against the Defendants. To establish a violation of substantive or procedural due process, the claimant must first establish it had a property interest of which it was deprived. *Sylvia Dev. Corp. v. Calvert Cnty., Md.*, 48 F.3d 810, 826-27 (4th Cir. 1995) (citations omitted). Ordinance 2018-40 pertains to the "MARLIN QUAY/MARINA STORE/RESTAURANT AS SHOWN ON THE ATTACHED SITE PLAN NUMBERED 'AS101[.]'" Plaintiff does not have any property interest in the Marina Store and Restaurant or the proposed building permitted by Ordinance 2018-40 and the circuit's order, C.A. No. 2016-CP-22-00961. Therefore, Plaintiff has no right to assert any claims against the Defendants.

4. Plaintiff has Suffered No Damages.

Plaintiff asserts the "value" of its "property has been reduced" because of the County's passage of Ordinance 2018-40; however, even assuming *arguendo* that Plaintiff's restaurant business would decrease in value, it has not alleged or provided any evidence that the property would be "worthless." See, e.g., *Moore v. Sumter Cnty. Council*, 300 S.C. 270, 272 n.2, 387 S.E.2d 455, 457 (1990) (listing permissible uses "to illustrate that the ordinance in question does not render the [property owners'] property worthless" and further noting "a property owner is not entitled to have his property zoned for its most profitable use") (citation omitted). Plaintiff relies

heavily on its easement, which allows Plaintiff use of the Parking Lot, but Plaintiff is not—nor has it ever been—entitled to *exclusive* use of the Parking Lot, and Plaintiff does not have absolute or sole control or ownership over the Parking Lot. Simply because Plaintiff’s customers may have to share the Parking Lot with non-customers does not render the value of the property worthless, and Plaintiff is not prevented from continuing its business as a restaurant.

5. Mr. Goggans Cannot Have Personal Liability for the Constitutional Claims of Plaintiff.

Plaintiff’s Constitutional claims fail against Mr. Goggans because he cannot be sued in his individual capacity; the Georgetown County Council acts as a unit and not as individual officials. “Suits against municipal officers in their official capacity are construed as suits against the entity. . . .” *Seabrook v. Knox*, No. 1999-CP-10-4323, 2004 WL 6003045 (S.C. Com. Pl. Sep. 10, 2004), *rev’d on other grounds*, 369 S.C. 191, 631 S.E.2d 907 (2006).

A county councilmember cannot act individually in his official capacity to violate due process rights granted by the South Carolina and United States Constitutions. To establish a violation of due process rights as set forth in the South Carolina and United States Constitutions, the Plaintiff must show that it “was arbitrarily and capriciously deprived of a cognizable property interest,” *Anonymous Taxpayer*, 377 S.C. at 437–38, 661 S.E.2d at 79 (quoting *Worsley Co.*, 339 S.C. at 56, 528 S.E.2d at 660), and was not afforded notice and the opportunity to be heard. *See Taylor*, No. C/A 3:07-983-JFA-JRM, 2010 WL 296901, at *5–6; *see also Dunes W. Golf Club, LLC*, 401 S.C. at 296, 737 S.E.2d at 610 (“In order to successfully assault a *city’s zoning decision*, a citizen must establish that the decision was arbitrary and unreasonable.” (emphasis added)); *see also Singletary*, No. CV 2:09-1612-RMG-BM, 2012 WL 13018625, at *4; *N.C. Elec. Membership Corp. v. White*, 722 F. Supp. 1314, 1333 (D.S.C. 1989).

However, only government entities, acting as a whole, can act arbitrarily and capriciously and deprive an individual of notice and the opportunity to be heard. “Only where the *municipality’s action* is ‘so unreasonable as to impair or destroy constitutional rights,’ will the courts declare *the municipality’s action* unconstitutional. The burden of proving the invalidity of a zoning ordinance is on the party attacking it; thus, it is incumbent upon [the plaintiff] to show by clear and convincing evidence the arbitrary and capricious nature of the ordinance.” *Bear Enters. v. Cnty. of Greenville*, 319 S.C. 137, 140–41, 459 S.E.2d 883, 886 (Ct. App. 1995) (citing *Rush*, 246 S.C. at 276, 143 S.E.2d at 531; and then citing *Town of Scranton v. Willoughby*, 306 S.C. 421, 412 S.E.2d 424 (1991)). Due process violations must be taken by the government as a whole, not by individual members of the County Council. As a result, an individual member of the County Council could not violate Plaintiff’s due process rights.

Additionally, Councilmembers cannot individually violate the takings and inverse condemnation clauses set forth in the South Carolina Constitution because these clauses also require action by the government as a unit. In order to constitute a taking or inverse condemnation, there must be government regulation of private property. *Dunes*, 401 S.C. at 313, 737 S.E.2d at 618 (“[A]bsent a direct physical invasion, ‘*government regulation* of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such “regulatory takings” may be compensable under the Fifth Amendment.”) (emphasis added). As such, only a government entity as a whole can act in its official capacity to violate the takings and inverse condemnation clauses of the South Carolina Constitution.

Here, Mr. Goggans could not act in his individual or individual official capacity to engage in the constitutional violations alleged by Plaintiff, and moreover, Mr. Goggans had no participation in the passages of Ordinances 2018-03 or 2018-40 as a councilmember. Thus, to hold

him liable for the passage of Ordinance 2018-40 would be to hold him liable for acts he did not commit or matters with which he had no relation.

6. Plaintiff is Barred from Recovery Here, but if Not, Plaintiff Must Elect its Remedy.

As previously noted, Plaintiff has already recovered relief—both monetary and injunctive—for the same alleged damage in C.A. No. 2016-CP-22-00961 and should not be permitted to collect any further relief from Defendants. *Cf. Riddle v. City of Greenville*, 251 S.C. 473, 477-78, 163 S.E.2d 462, 464 (1968) (holding plaintiff failed to prove he sustained damages not already recovered in prior litigation and stating, “[I]t is elementary law that one cannot actually recover twice for the same damage.”).

Nevertheless, even if Plaintiff may proceed to seek any damages against these Defendants, Plaintiff must elect which remedy it will pursue. “Election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action.” *Oaks at Rivers Edge Prop. Owners Ass’n, Inc. v. Daniel Island Riverside Devs., LLC*, 420 S.C. 424, 442, 803 S.E.2d 475, 485 (Ct. App. 2017) (citations and quotations omitted). “The basic purpose of election of remedies is to prevent double recovery for a single wrong. ‘When an identical set of facts entitle the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both.’” *Id.* at 442-43, 803 S.E.2d at 485 (citation and quotations omitted). Here, Plaintiff has alleged that the same facts—the passage of Ordinance 2018-40—has caused it damage for which it seeks injunctive relief and compensatory damages. Accordingly, Plaintiff must elect which remedy he is seeking.

IV. LIST OF EXHIBITS & WITNESSES

A. List of Exhibits (Defendants)

1. 2018 Georgetown County Zoning Ordinance
2. Application to Amend a Planned Development, submitted 11/3/17
3. Notice of Public Hearing for Planning Commission Meeting on 12/21/17
4. The Georgetown Times Ad for 12/21/17 Notice of Planning Commission Public Hearing
5. The Coastal Observer Ad for 12/21/17 Notice of Planning Commission Public Hearing
6. Emails from Judy Blankenship to The Georgetown Times and The Coastal Observer re: Notice of Public Hearings on 12/21/17
7. Planning Commission Staff Report for 12/21/17
8. Planning Commission Minutes for 12/21/17 Public Hearing
9. Minutes of Georgetown County Council 1/9/18 Meeting (*First Reading*)
10. Minutes of Georgetown County Council 2/13/18 Meeting (*Second Reading*)
11. Minutes of Georgetown County Council 2/27/18 Meeting (*Third Reading*)
12. Ordinance No. 2018-03, adopted 2/27/18
13. Hand delivered letter dated August 27, 2018 from Oxner & Stacy, P.A. to Georgetown County Planning Commission
14. Application to Amend a Planned Development, submitted 8/27/18
15. Tax Map Property Owners List
16. Notice of Public Hearing for Planning Commission Meeting on 10/18/18
17. Picture of Sign Posted for Public Notice of Planning Commission Meeting in October 2018
18. Emails from Judy Blankenship to The Georgetown Times and The Coastal Observer re: Notice of Public Hearings on 10/18/18
19. The Georgetown Times Ad for Notice of 10/18/18 Planning Commission Public Hearing
20. The Coastal Observer Ad Notice of 10/18/18 Planning Commission Public Hearing

21. 9/24/18 Email from Tiffany Coleman to Nancy Gardner attaching Notice of Public Hearing for Planning Commission Meeting on 10/18/18
22. 9/24/18 Email from Tiffany Coleman to Mark Nappier and Marlin Quay Board Members attaching Notice of Public Hearing for Planning Commission Meeting on 10/18/18
23. 9/25/18 Email from Nancy Gardner to Marlin Quay Unit Owners attaching Notice of Public Hearing for Planning Commission Meeting on 10/18/18
24. 10/12/18 Email from Nancy Gardner to Marlin Quay Unit Owners attaching design documents and Application
25. Planning Commission Staff Report for 10/18/18
26. 10/12/18 Ticket from Judy Blankenship for posting of 10/18/18 Planning Commission Meeting Packet on County's Website
27. Public Sign-In Sheet for Planning Commission Hearing on 10/18/18
28. County Planning Commission Minutes for 10/18/18 Public Hearing
29. Agenda and Minutes of County Council 11/13/18 Meeting (*First Reading*)
30. Agenda and Minutes of County Council 12/11/18 Meeting (*Second Reading*)
31. Agenda and Minutes of County Council 1/8/19 Meeting (*Third Reading*)
32. Ordinance No. 2018-40, adopted 1/8/19
33. Sign-In Sheet for County Council Meeting on 12/11/18
34. The Gulfstream Café, Inc.'s Tax Returns for Years 2010-2020
35. The Gulfstream Café, Inc.'s 2018-2021 Property Tax Receipts and Invoices
36. Travis Avant's Appraisal Review Report dated February 16, 2022
37. Plaintiff's Motion to Alter or Amend the Judgment filed June 22, 2018, *The Gulfstream Café, Inc. v. J. Mark Lawhon, et al.*, Civil Action No. 2016-CP-22-00961
38. Order Granting Plaintiff's Motion to Alter or Amend the Judgment dated July 27, 2018, *The Gulfstream Café, Inc. v. J. Mark Lawhon, et al.*, Civil Action No. 2016-CP-22-00961

B. List of Witnesses (Defendants)

1. Holly Richardson
2. Boyd Johnson
3. Judy Blankenship
4. Tiffany Coleman
5. Nancy Gardner, Representative from Surfside Realty
6. Steve Goggans
7. Louis Morant
8. Travis Avant, ASA, ARM-RP, R/W-AC, Expert
9. J. Mark Lawhon

V. EVIDENTIARY ISSUES

A Motion in Limine has been filed as of the date of this submission. It will set forth more fully anticipated evidentiary issues.

VI. UNUSUAL QUESTIONS OR MATTERS WHICH SHOULD BE BROUGHT TO THE ATTENTION OF THE COURT

Should the case reach the jury, Defendants will ask the Court to order Plaintiff to elect which cause of action will go to the jury as Plaintiff alleges the same damage for each cause of action: its business will supposedly suffer because it will have to share the Parking Lot.

VII. STATUS OF SETTLEMENT NEGOTIATIONS

A mediation was conducted June 25, 2021 but ended without resolution. While settlement discussions continued, nothing was resolved.

[Signature on Following Page]

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Attorney for the Defendants

Myrtle Beach, South Carolina

August 24 2022

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

The Gulfstream Café, Inc.,

Plaintiff,

vs.

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

Defendants.

) **IN THE COURT OF COMMON PLEAS**
) **FIFTEENTH JUDICIAL CIRCUIT**
) **COUNTY OF GEORGETOWN**
) Civil Action No. 2019-CP-22-00212

) **PLAINTIFF THE GULFSTREAM CAFÉ,**
) **INC.'S AMENDED PRE-TRIAL BRIEF**

Plaintiff The Gulfstream Café, Inc. (“Gulfstream” or “Plaintiff”) submits the following
Pre-Trial Brief pursuant to Rule 16 (c) of the South Carolina Rules of Civil Procedure:

I. Statement of Facts of the Case.

This case is a neighbor challenge to an illegal and invalid rezoning. The Marlin Quay Marina development is a four-tract planned development, zoned back in 1982, based on a site plan, also known as a PD. Gulfstream owns one tract and has run a restaurant on it for over 30 years. Palmetto Industrial Development, LLC (“Palmetto”) and its predecessor own the parking lot, the marina and a ship store/snack bar. Gulfstream and Palmetto share the parking lot pursuant to a 1986 easement. The parking lot in question contains roughly 62 parking spaces. Pursuant to the easement, Gulfstream had primary rights to use the parking lot at night, when it served dinner. Palmetto and its predecessor had primary rights to use the parking lot during the day to service its marina customers. Palmetto purchased the property in 2016. It sought to redevelop the ship store/snack bar property into a four story, 10,000 plus square foot full-service restaurant, bar, night club, retail store and marina office; without adding any more parking spaces. Adding that much

square footage, that much more traffic, intensity of use, and people, exponentially overburdens the parking lot.

The County confirms that adding this much square footage violates its own Zoning Ordinance. The math is simple. According to the County, the new building Palmetto sought to develop would require 51 parking spaces of its own. The Marina requires 22 spaces. Gulfstream's restaurant requires at least 60 parking spaces. That totals 133 spaces. The property only contains 62 spaces. The Zoning Ordinance strictly prohibits double counting or shared spaces without special analysis and approval. The County did neither. Further, there are no off-site parking spaces available.

Palmetto knew this. Palmetto hired one of the County Councilmen, Steve Goggans ("Goggans"), to serve as the redevelopment project's architect and get the project approved. Goggans influenced the County to ignore the parking code's black-letter requirements and approve the rezoning not once, but three times.

Goggans' first run at the County approval sought a minor amendment to the planned development zoning of the property. That meant the change could be done discreetly, without public notice, comment, input or even a hearing. Goggans "negotiated" with members of the County's planning staff, including Holly Richardson ("Richardson") and Boyd Johnson ("Johnson"), who were more than willing to reach terms and conditions for the building that were favorable to Goggans and Palmetto. Once Gulfstream and other neighbors caught wind of this campaign, they challenged the approval through administrative appeal and litigation.

Goggans' active involvement in representing Palmetto, while at the same time acting as a County Councilmember, resulted in Goggans entering into a consent order finding Goggans in

violation of Section 8-13-740(A), which ordered Goggans to pay fees and a civil penalty totaling \$1,000.

Palmetto then sought approval of “Version 2.0,” which Gulfstream challenged in court as a violation of the aforementioned easement. A judge and jury found Version 2.0 to be unlawful as a violation of Gulfstream’s easement rights.

Not to be deterred, Palmetto then filed the current rezoning application, seeking approval of “Version 3.0” of its restaurant, bar, and marina store.

And while Goggans allegedly stepped back from the front lines for negotiations with the County in seeking the County’s approvals for these later versions of Palmetto’s building, Goggans continued to “grease the wheels” and worked on the project behind the scenes. Moreover, the County doubled down on the favorable terms Goggans negotiated with Holly and Boyd, while ignoring the fact that Version 3.0 plainly violates the County’s parking code. The County rubber-stamped the rezoning while failing to evaluate the most recent version of the project and admittedly failing to evaluate the obvious parking disaster.

In addition to the approval’s illegality on the merits, the County also violated a host of its own procedural requirements for the consideration and approval of a rezoning like the one at bar.

- Palmetto violated the 12-month penalty box. An owner may not apply for another rezoning on the same parcel, seeking the same change within 12 months of the Planning Commission Meeting on Version 2.0. The County held the planning commission meeting on Version 2.0 on December 21, 2017. Palmetto applied for rezoning for Version 3.0 on August 27, 2018. Zoning Ordinance § 1702.1.
- The application for Version 3.0 was not in proper form at least 45 days prior to the Planning Commission Meeting because it did not include building elevations,

design plans, building type/size, proposed density, calculations (including parking), etc. Zoning Ordinance § 1702.201.

- Notice was not mailed to the individual owners of the Marlin Quay Marina condominiums in violation of Section 1702.206 of the Ordinance.
- The County entirely ignored the parking regulations regarding the shared uses of the parking lot and only considered the parking needs of Palmetto's new restaurant.

Beyond the above express Ordinance violations, Gulfstream will present evidence that the County did not consider the public health, safety, or welfare or give adequate notice and opportunity to be heard in approving the Application, including:

- The County ignored public concerns regarding approval of the application related to parking, safety, and traffic. Gulfstream also contends that the capacity use differences between the new restaurant and the old snack bar will overburden the parking lot.
- The public did not have an adequate opportunity for notice regarding mailed notice of the hearing and did not have access to materials regarding the proposed plans for the building sufficiently in advance of the hearing.
- Goggans used his influence and relationships with County planning staff and fellow council members to obtain favorable outcomes for Palmetto, including favorable outcomes related to parking and how to calculate permissible square footage.

If this rezoning is allowed to stand, Gulfstream will cease to exist and the property on which it stands will be rendered worthless. Gulfstream cannot operate its restaurant without adequate parking. It is the first rule of owning or running a restaurant. If Version 3.0 of the building is allowed to be built and opened, Gulfstream will not have enough parking spaces to

support its business. Off-site parking is not an option. There are no other parking lots in the area. And no new lots can be purchased or developed due to the County's own zoning restrictions.

The evidence will demonstrate that if the rezoning is allowed to stand, the only feasible use for the Gulfstream property will be for vacant land. Gulfstream's appraiser will testify that the resulting loss in the value of Gulfstream's property is \$1,760,100.

Approving the rezoning to allow this redevelopment violated the County's own Zoning Ordinance, South Carolina and United States Constitutions, as well as common sense. If allowed to stand, the approved rezoning will result in a total taking of Gulfstream's property.

II. The Legal Issues Involved.

Plaintiff has pled the following Causes of Action:

- A.** Declaratory Judgment seeking declaration that rezoning approval is invalid nunc pro tunc. Rezoning approval of Version 3.0 violates the County's Ordinances, South Carolina and United States Constitutions.
- B.** Violation of Substantive Due Process Rights – Article I Section 3 of the South Carolina Constitution
- C.** Relief Under 42 U.S.C. § 1983 for Violation of Right to Substantive Due Process – United States Constitution
- D.** Violation of Right to Procedural Due Process – Article I Section 3 South Carolina Constitution
- E.** Relief Under 42 U.S.C. § 1983 for Violation of Right to Procedural Due Process – United States Constitution
- F.** Violation of South Carolina's Taking Clause – Article I, Section 13 of the South Carolina Constitution

G. Inverse Condemnation

H. Attorneys' Fees based on 42 U.S.C. § 1988

Georgetown County's parking regulations state that Article XI of the Zoning Ordinance "establish[es] standards for the provisions of off-street parking facilities throughout the unincorporated area of Georgetown County." Zoning Ordinance § 1100. The purpose of the parking regulations is to "assist in improving the appearance and safety of required parking facilities while promoting desirable development, thereby improving the public health, safety and general welfare of the community." Id.

In Section 1102.1, the parking regulations set "[m]inimum parking space requirements" for each type of property use. In Section 1102.3, the parking regulations provided for shared and mixed uses, and state that:

If there is more than one principal use in the same building or premises, off-street parking may be provided collectively in the same facility, such that the total number of spaces shall equal the sum of the required spaces for each use calculated separately. The parking spaces provided for one use shall not be used to satisfy the required number of parking spaces for another.

Zoning Ordinance § 1102.3. The amendment violates the parking requirements by failing to provide the adequate number of spaces for Gulfstream, the Marina, and Version 3.0.

Under the Zoning Ordinance, "action shall not be initiated for a zoning amendment affecting the same parcel or parcels of property or any part thereof, and requesting the same change in district classification by a property owner or owners of more often than once every twelve (12) months measured from the date of original recommendation by the Planning Commission." Zoning Ordinance § 1702.1. Palmetto submitted the Application for Version 3.0 without waiting the required twelve months after the recommendation by the Planning Commission for Version 2.0.

Section 1702.201 of the Zoning Ordinance provides that “[a]pplications for all amendments must be submitted, in proper form, at least thirty [45] days prior to a Planning Commission meeting in order to be heard at that meeting.” Palmetto submitted the Application without any of the information necessary for the County or members of the public to adequately evaluate the requested amendment to the PD.

The Zoning Ordinance requires that “[a] list of all property owners, as reflected by the tax records, to whom the letters are addressed must accompany the application.” Zoning Ordinance § 1702.206. All individuals within 400 feet of the property subject to the application are required to receive letter by mail of the proposed rezoning. Id. Palmetto did not send individual mailed notice to the individual owners of the condominiums located in Marlin Quay (within 400 feet) and did not include the required list with the Application. Members of the public did not have information regarding Palmetto’s building plans sufficiently in advance to know whether or not to appear at the hearing to oppose Version 3.0.

For Gulfstream’s substantive due process claim, in Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280 (2013), the Supreme Court of South Carolina explained that “[i]n 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.” Id. at 296. Moreover, “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.” Id. at 297 (quoting Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 827 (4th Cir. 1995)). The County arbitrarily and irrationally exercised its power by approving the Application, which had no substantial relation to the public health, public morals, public safety, and public welfare.

The County's parking regulations are there for the express purpose of promoting public safety, and the County blatantly ignored these rules, risking the safety and welfare of the citizens of the County by doing so. South Carolina courts have also looked to the requirements set forth by a municipality's code to determine whether an action was arbitrary and capricious. As explained above, the County violated its own regulations by: (1) allowing Palmetto to seek the same change in district classification in a twelve-month period, (2) allowing Palmetto to submit the Application that was not in proper form in the time period requirement, (3) not giving adequate notice to the individual Marlin Quay condominium owners, and (4) entirely disregarding its own parking rules.

For procedural due process, at a minimum, "the Constitution requires notice and some opportunity to be heard." Mallette v. Arlington Cnty. Employees' Supplemental Retirement Sys. II, 91 F.3d 630, 640 (4th Cir. 1996). "Above that threshold," due process is "flexible and calls for such procedural protections as the particular situation demands." Id. (internal quotation marks omitted). Here, because of the deficiencies in the materials submitted with the Application, and the failure to timely supplement the Application with substantive information about the Version 3.0 proposal, those in opposition to the application did not have the facts they needed to adequately prepare for the hearing. See Mallette, 91 F. 3d at 641 (reversing the grant of summary judgment to the defendant where the plaintiff received a misleading notice and did not receive unfavorable evidence against her until she arrived at the hearing). Moreover, because Palmetto failed to provide notice to all property owners located within 400 feet of the property, adjacent owners did not even receive the notice required by Georgetown County's Zoning Ordinances. See also Mallette, 91 F. 3d at 641 (noting that the County "failed to provide to Mallette that measure of process which it had itself determined to be appropriate.").

For Gulfstream’s taking and inverse condemnation claims, a violation of the takings clause can occur through multiple ways. A taking can occur through a *per se* taking in two scenarios: (1) where an owner is required to suffer a permanent physical invasion of property, or (2) where the regulation denies the owner all economically beneficial or productive use of the land. Dunes West Golf Club, LLC, v. Town of Mount Pleasant, 401 S.C. 280, 313 (2013) (internal quotation marks omitted). In addition, for alleged regulatory takings, a plaintiff’s claims are analyzed under the test set forth in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), which 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.” Dunes West Golf Club, LLC, 401 S.C. at 315. The extent of diminution in value is one factor for consideration in determining whether the governmental action constitutes a taking. Id. at 317.

The County’s actions constitute a *per se* taking depriving Gulfstream of all economically beneficial use of its land, and a regulatory taking under the Penn Central test. Specifically, in support of its *per se* taking claim, the property owned by Gulfstream can only be used a restaurant. Gulfstream cannot operate its restaurant without adequate parking. Parking is absolutely essential to Gulfstream’s operations. Should Palmetto’s restaurant open, Gulfstream will not have enough parking spaces to support its business. There is not another parking lot in the area, and there are no sidewalks so there is not sufficient foot traffic to generate enough business to keep Gulfstream open. Accordingly, since Gulfstream cannot continue to operate as a restaurant after the loss of the parking, the only use of Gulfstream’s property will be for vacant land which will only have nominal value.

Moreover, Gulfstream meets the Penn Central test for a regulatory taking. With respect to the character of the government action, Gulfstream has shown above that approving the Application did not advance the public health, safety, and welfare, and was not based on legitimate land use considerations. The grant of the Application disadvantaged Gulfstream in a constitutionally significant way because Gulfstream will not be able to operate its restaurant as a result of the Application. The grant of the Application will cause Gulfstream to suffer a loss in the value of Gulfstream's property in the amount of \$1,760,100. Gulfstream's property will only have the nominal value attributable to raw land after the grant of the Application. Gulfstream has legitimate investment-backed expectations to use the parking lot and to continue operating as a restaurant. "Continuation 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," Dunes West Golf Club, LLC, 401 S.C. at 319 (internal quotation marks omitted), and that expectation will be destroyed as a result of the County's conduct.

The defenses set out by Defendants in the Pre-Trial Brief are set forth below, along with Gulfstream's concise responses.¹

A. Failure to bring action within time allowed under § 6-29-760, Code of Laws of the State of South Carolina. Gulfstream's Response: The Court decided at the summary judgment stage that Gulfstream brought this action within the time required by law as a matter of law. This is no longer in dispute.

B. Collateral Estoppel/Issue Preclusion. Gulfstream's Response: At issue in the 2016 lawsuit was construction of Version 2.0 of the building. Version 3.0, which is the Version at issue here, was not even approved until January 2019. Therefore, the specific facts and

¹ Gulfstream reserves the right to supplement these responses as necessary at trial.

issues regarding Version 3 could not have already been litigated. More specifically, the issues in the 2016 case included whether those defendants (J. Mark Lawhon and Palmetto Industrial Development, LLC) interfered with the easement and whether the building planned at that time interfered with the easement. In contrast, the issues here are whether Ordinance 2018-40 was approved in an unconstitutional manner or unlawful manner. See Holmes v. E. Cooper Cmty. Hosp., Inc., 408 S.C. 138, 156, (2014) (“The estoppel of a judgment does not extend to matters not expressly adjudicated, and which can be inferred only by argument or construction from the judgment, except where they are necessary and inevitable inferences in the sense that the judgment could not have been rendered as it was without deciding such points.”).

C. Gulfstream does not have a property interest in the Ordinance. Gulfstream’s response: Gulfstream has a property interest in its easement and its restaurant, which are both located within the Marlin Quay PD amended by the Ordinance, as well as the right to be protected from arbitrary and capricious zoning decisions. S.C. Pipeline Corp. v. Lone Star Steel Co., 345 S.C. 151, 153 (2001).

D. Failure to prove damages as a result of the allegations asserted. Gulfstream’s Response: Gulfstream has produced an appraisal and will introduce evidence from its appraiser demonstrating its monetary damages as a result of the approval of the amendment. Gulfstream will also introduce evidence that the approval of the Application reduces the value of Gulfstream’s property to a nominal value and will render the property unmarketable.

E. Goggans cannot have personal liability. Gulfstream’s Response: Defendants argue that Goggans “cannot be sued in his individual capacity” because “the Georgetown County

Council acts as a unit and not as individual officials.” Defendants show a lack of understanding between individual and official capacity suits. Goggans can be held liable for damages caused by his actions taken in advocating for the approval of Version 3.0 as a Councilmember, which resulted in violations of the U.S. Constitution. And a suit to hold Goggans liable must be brought against him in his individual, or personal, capacity under § 1983—an official capacity suit is a suit against the entity he is a part of, which is the County Council. West v. Atkins, 487 U.S. 42, 49–50 (1988).

F. Doctrine of election of remedies. Gulfstream’s Response: Gulfstream has asserted multiple claims entitling it to damages, and it will not result in double recovery. Moreover, to the extent Gulfstream must elect its remedies, the time for doing so should be after verdict is entered. “As its name states, the doctrine applies to the election of ‘remedies’ not the election of ‘verdicts.’” Oaks at Rivers Edge Prop. Owners Ass’n, Inc. v. Daniel Island Riverside Devs., LLC, 420 S.C. 424, 443 (Ct. App. 2017).

III. Exhibits and Witness Lists.

Possible Witnesses:

1. Greg Greenbaum
2. Jef Kirk
3. Vince Van Brunt
4. Linda Barnaba
5. Jake Knight
6. Jim Moring
7. Robert Castles
8. Jody Bishop
9. Holly Richardson
10. Boyd Johnson
11. Steve Goggans
12. Dan Stacy
13. Tiffany Coleman
14. Teresa Floyd
15. John Thomas
16. Ron Charlton

17. Lillie Johnson
18. Austin Beard
19. Louis Morant
20. Luda Sobchuk
21. Beth Novak

Possible Exhibits:

See Plaintiff's Exhibit List, attached hereto as Attachment A and incorporated herein by reference. Plaintiff identifies the following, potential additional exhibits:

- (a) Any and all documents produced in discovery by any party or non-party;
- (b) All pleadings, discovery responses served in the case, and any motions, responses, or supporting exhibits;
- (c) Demonstrative evidence generated by or for Plaintiff or their counsel, including without limitation any charts, images, or other visual depictions;
- (d) Documentary or physical evidence that may be listed herein by Defendants;
- (e) Any and all documents that may be used for impeachment purposes;
- (f) Any and all documents produced by Defendants in response to FOIA requests related to this matter.

Plaintiff reserves the right to supplement, amend, or withdraw exhibits in Plaintiff's Exhibit List.

Plaintiff and Defendants are communicating regarding potential stipulations related to exhibits.

IV. Unusual Problems Relating to Evidence.

Plaintiff will file its motions in limine in advance of trial.

V. Unusual Question or Matters to be Brought to the Attention of the Trial Court.

Plaintiff is unaware of an unusual matters to be brought to the Court's attention at this time.

VI. Settlement Negotiations.

Settlement negotiations have been attempted and proven unsuccessful.

Respectfully submitted,

/s/ Sean M. Foerster

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Myrtle Beach, South Carolina
August 26, 2022

Attorneys for Plaintiff

ATTACHMENT A

PLAINTIFF’S TRIAL EXHIBIT LIST

No.	Description
P-1	Marlin Quay PUD Documents (including surveys and ordinance)
P-2	1986 Easement Documents
P-3	1990 Easement Documents
P-4	Ordinance Excerpts, including Article I, Article XVII Sections 1700-1703, Article VI Sections 608, 619
P-5	Off-Street Parking Regulations
P-6	05.06.16 Email from Mark Lawhon to Steve Goggans re Message from KMBT_C454e(1) ¹
P-7	05.13.16 Email from Steve Goggans to Holly Richardson and Boyd Johnson re: MQ parking study
P-8	09.22.16 Letter from Steve Goggans to Mark Lawhon
P-9	02.02.17 Transcript of Board of Zoning Appeals Georgetown County
P-10	09.06.17 Email re meeting 8-24-17 summary
P-11	Photos of MQ 1.0 (TUNGSTEN 42)
P-12	11.03.17 Application to Amend a Planned Development (PD)
P-13	Notice of Public Hearing – December 21, 2017
P-14	12.21.17 Georgetown County Planning Commission Agenda
P-15	12.21.17 Georgetown County Planning Commission Minutes
P-16	04.11.18 Steve Goggans Deposition Transcript - FULL with Exhibits
P-17	06.04.18 Form 4 Judgment in <i>Gulfstream v. Lawhon, et al.</i> Civil Case 2016-CP-22-00961
P-18	Verdict Form, signed 06.11.18, <i>Gulfstream v. Lawhon, et al.</i> Civil Case 2016-CP-22-00961
P-19	07.27.18 Order Granting Plaintiff’s Motion to Alter or Amend Judgment, <i>Gulfstream v. Lawhon, et al.</i> 2016-CP-22-00961
P-20	August 2018 Application
P-21	09.24.18 Email from Tiffany Coleman to Surfside Realty with notice

¹ Emails are notated/named herein using the email at the top of the chain.

No.	Description
P-22	Tax Map Property Owner List
P-23	10.02.18 Email from Luda Sobchuk to Christie Lawhon re MQ2 Property Line Wall
P-24	10.10.18 Email from Beth Novak to Holly Richardson re 18118_MQ-3_Review Additional Info
P-25	10.10.18 Email from Luda Sobchuk to Holly Richardson re call me
P-26	10.10.18 Email from Tiffany Coleman to Judy Blankenship re Notice of Public hearing
P-27	10.11.18 (12:33 pm) Email from Luda Sobchuk to Dan Stacy re MQ
P-28	10.11.18 (12:53 pm) Email from Luda Sobchuk to Richardson re MQ
P-29	10.12.18 Stacy Letter to Holly Richardson
P-30	10.12.18 Email from Luda Sobchuk to Holly Richardson re Updated Plans, including attachments
P-31	10.12.18 Email from Holly Richardson to Stacy re Marlin Quay Staff Report
P-32	Square Footage Charts
P-33	10.17.18 Adam Nugent Letter to Wesley Bryant
P-34	October 2018 Notice of Public Hearing
P-35	10.18.18 Planning Commission Staff Report
P-36	10.18.18 Planning Commission Agenda Addendum
P-37	10.18.18 Planning Commission Meeting Minutes
P-38	10.19.18 Email from Boyd Johnson to Dany Stacy re PC Letter
P-39	10.22.18 Email from Boyd Johnson re questioning application for MQ3
P-40	10.25.18 Email from Steven Elliott to Boyd Johnson re Marlin Quay Marina Restaurant and Store – Code Review Questions
P-41	11.09.18 Email from Steve Goggans to Beth Novak re Marlin Quay 3 - Georgetown County Follow
P-42	11.13.18 County Council Meeting Minutes
P-43	12.11.18 Agenda Request Form
P-44	12.11.18 County Council Meeting Minutes
P-45	01.08.19 County Council Minutes
P-46	01.08.19 Ordinance 2018-40
P-47	01.23.19 George E. Knight, Jr. MAI Appraisal Report of 1536 South Waccamaw Dr.

No.	Description
P-48	01.23.19 Email from Beth Novak to Steve Goggans re Marlin Quay Plans
P-49	01.24.19 Email from Luda Sobchuk to Mark Lawhon re Marlin Quay Plans
P-50	01.24.19 Email from Steve Goggans to Mark Lawhon re Marlin Quay Plans
P-51	01.25.19 Email from Steve Goggans to Boyd Johnson re Marlin Quay Plans
P-52	01.25.19 Email from Boyd Johnson to S. Goggans re: Marlin Quay Plans
P-53	02.18.19 Email from Beth Novak to Luda Sobchuk & Steve Goggans re Marlin Quay Plans
P-54	03.27.19 Email from Steve Goggans to Mark Lawhon re Marlin Quay
P-55	06.09.19 Email from Steve Goggans to Mike Rolison re Urgent
P-56	06.11.19 Email from Boyd to Richardson re MQ
P-57	Consent Judgment signed 09.05.19, Entered by SC Ethics Commission
P-58	11.04.19 Defendant Steve Goggan's Answer to Plaintiff's First Interrogatories
P-59	11.04.19 Defendant Georgetown County's Answer to Plaintiff's First Interrogatories
P-60	12.11.19 Gulfstream Position Paper with comments
P-61	12.13.19 Email from Goggans to Brian Turner et al re Marlin Quay elevator front beam question
P-62	04.16.20 Email from Steve Goggans to Lindsey Pascoe re- Marlin Quay
P-63	11.06.20 Email from Mike Rolison to Beth Novak, Steve Goggans & Laura Helminski re- MQ3 elevator
P-64	11.11.20 Email from Mark Lawhon to Steve Goggans and group re- MQ3 elevator revision drawings
P-65	02.03.21 Email from Dan Stacy to Sonya Papanikolaou re Wall
P-66	02.03.21 Email from Dan Stacy to Sonya Papanikolaou re Marlin Quay
P-67	BP Invoices
P-68	Aerial Photo
P-69	Cost Receipts
P-70	Jake Knight Work File
P-71	MQ3 Plans
P-72	November 25, 2019 Appraisal of Jake Knight
P-73	Jim Moring Work File
P-74	Robert Castles Work File

No.	Description
P-75	Plat
P-76	05.03.16 Email Chain from Holly Richardson to Steve Goggans and Boyd Johnson re marlin quay flood maps
P-77	06.15.16 Email from Boyd Johnson to Steve Goggans and Holly Richardson re Marlin Quay Planned Development (DEFS 1202)
P-78	05.26.16 Letter from Steve Goggans to Holly Richardson and Boyd Johnson re construction at marlin quay (DEFS 1203-1204)
P-79	08.04.15 Email from Holly Richardson to Joanne Ochal, Boyd Johnson and Judy Blankenship re marlin quay (DEFS 1194)
P-80	07.20.15 Email from David Victoria to Chris Hollingsworth, Mark Lawhon, Holly Richardson, Dan Stay and Joanne Ochal re marlin quay (DEFS 1195-1196)
P-81	12.06.16 Email from Wesley Bryant to Redman, Lusk, Kovach re Gulfstream Case (DEFS 1244-1245)
P-82	12.07.16 Email from Wesley Bryant to Redman re Marlin Quay (DEFS 1247)
P-83	09.22.16 Letter from Steve Goggans to Mark Lawhon re- Marlin Quay Project (DEFS 1223-1224)
P-84	November 13, 2018 Georgetown County Council Agenda Packet
P-85	December 11, 2018 Georgetown County Council Agenda Packet
P-86	January 8, 2019 Georgetown County Council Agenda Packet
P-87	USPAP 2020-2021 Edition, Standard 3: Appraisal Review, Development
P-88	USPAP 2020-2021 Edition, Standard 4: Appraisal Review, Reporting
P-89	USPAP 2020-2021, Record Keeping Rule
P-90	USPAP 2020-2021, Scope of Work Rule
P-91	USPAP 2020-2021, Standard 1: Real Property Appraisal, Development
P-92	USPAP 2020-2021 Edition, Standard 2: Appraisal Reporting
P-93	Marlin Quay Property Aerial (DEFS001660)

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

The Gulfstream Café, Inc.,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2019-CP-22-00212

PLAINTIFF THE GULFSTREAM CAFÉ,
INC.'S MOTIONS *IN LIMINE*

TO: HENRIETTA U. GOLDING, ESQ., AS COUNSEL FOR THE DEFENDANTS:

The Plaintiff, The Gulfstream Café, Inc. (hereinafter “Plaintiff”), hereby moves this Court to exclude at trial evidence of, mention of, or reference to the specific subject matter and topics identified in this motion.¹

I. MOTION IN LIMINE STANDARD

Motions *in limine* are designed to seek the Court’s ruling on the admissibility of arguments, assertions, and evidence in advance of trial and outside the presence of the jury. To be relevant, evidence must have a tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE. Evidence which is not relevant is not admissible. Rule 402, SCRE. Even if relevant, evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE.

¹ Plaintiff reserves the right to object to specific exhibits that Defendants attempt to introduce at trial.

Evidence is unfairly prejudicial where it has an undue tendency to suggest a decision on an improper basis. Johnson v. Sam Eng. Grading, Inc., 412 S.C. 433, 448 (Ct. App. 2015).

II. THE COURT SHOULD EXCLUDE AT TRIAL EVIDENCE OF, MENTION OF, OR REFERENCE TO THE FOLLOWING SUBJECT MATTER AND TOPICS

1. Timing of Bringing this Lawsuit:

Defendants have previously introduced, and again attempt to introduce, the unavailing argument that this lawsuit was not brought within the applicable time to do so under S.C. Code Ann. § 6-29-760. In Defendants’ motion for summary judgment, the Defendants made the same argument that because Plaintiff did not challenge the approval of an earlier version of the development application (“Version 2.0”)—which was found to be illegal—Plaintiff is barred from timely challenging the most recent version of the development application (“Version 3.0”). This Court denied Defendants’ motion for summary judgment and ruled as a matter of law that Plaintiff timely filed this lawsuit pursuant to S.C. Code Ann. § 6-29-760. (Order Denying Defendants’ Motion for Summary Judgment, 7–8). Therefore, this issue is resolved and there is no question for the Court or issue of fact for the jury to decide regarding this issue.

Defendants should be precluded from making any argument regarding whether this lawsuit was timely filed because the issue has already been resolved as a matter of law, there are no questions of fact for the jury to decide regarding this issue, and the issue is no longer relevant to the claims brought in this lawsuit.

2. Current Status of Palmetto Industrial Development, LLC’s Building and Effect of Verdict on the Building:

Defendants may attempt to introduce evidence of or make reference to the current status of Palmetto Industrial Development, LLC’s (“Palmetto”) building and the effect of this Court’s decision on the building.

The current status of the building, whether it be still under construction, almost completed, or ready to be opened, is completely irrelevant to the claims brought in this suit. Even if Defendants attempt to craft a relevancy argument, any possible probative value is substantially outweighed by the danger of unfair prejudice. Jurors may be improperly swayed by the current status of the building's completion, and it could influence their decision to declare the major amendment invalid.

Additionally, the effect of the jury's verdict on the subject building—which may result in inability to open and Palmetto resubmitting a development application to Defendants—has no bearing on the claims brought in this suit and is not relevant. See State v. Poindexter, 314 S.C. 490, 492, 431 S.E.2d 254, 255 (1993) (“[Defendant]’s efforts to educate the jury as to the consequences of the available verdicts conflict with our prior decisions which hold that the consequences of a verdict are of no concern to the jury.”); Hoeffner v. The Citadel, 311 S.C. 361, 366, 429 S.E.2d 190, 193 (1993) (“[C]omments directing the jury’s attention to the impact that an adverse verdict will have . . . are objectionable.”); see also City of Columbia v. Myers, 278 S.C. 288, 294 S.E.2d 787 (1982) (holding that City’s argument about consequences of a potential jury verdict was so prejudicial as to require reversal).

Even if Defendants attempt to craft a relevancy argument, any possible probative value is substantially outweighed by the danger of unfair prejudice. Jurors may be improperly swayed by the effect of their verdict and may decide the possible effect is not worth the finding of invalidity or a constitutional violation.

Therefore, both the current status of the building and the effect of the jury's verdict on the building are not relevant to the resolution of the claims in the suit. Further, any possible probative value of these two topics is substantially outweighed by the danger of unfair prejudice.

3. Wealth or Monetary Worth:

Defendants may attempt to introduce evidence of or make reference to the wealth of Plaintiff's owners and its management company, CentraArchy Restaurant Management Company. Such evidence is not relevant to any issues in the matter. Any attempt to make such references creates a serious danger of unfair prejudice to Plaintiff, with no probative value to the nature of the dispute, which is about Defendants' violation of its own Ordinances and Gulfstream's constitutional rights.

4. Gulfstream's Tax Returns:

Defendants may attempt to introduce evidence of or make reference to Gulfstream's tax returns and information contained in same. Such evidence is not relevant to any issues in the matter. Any attempt to introduce such evidence or make such references creates a serious danger of unfair prejudice to Plaintiff, with no probative value to the nature of the dispute, which is about Defendants' violation of its own Ordinances and Gulfstream's constitutional rights.

5. Reference to Plaintiff's Lead Counsel Being from Out of State:

Defendants may attempt to introduce evidence or make reference to the fact that Plaintiff's lead counsel, attorneys from Bloom Parham, LLP, are from out of state or admitted pro hac vice. This fact has absolutely no bearing on any issues in this case. As such, any evidence regarding or referencing these attorneys being from out of state or admitted pro hac vice should be excluded.

6. Witnesses' Health Issues or Absence Prior to Trial and Continuance of Trial:

Defendants may attempt to question witness George E. "Jake" Knight, Jr. and other witnesses regarding their possible health issues and the prior continuance of this trial. Specifically for Mr. Knight, questioning him regarding his health issue, and the prior continuance of this trial, is irrelevant and should be excluded. Further, even if Defendants craft a relevancy argument, any possible probative value of Mr. Knight's health issue and the continuance of this trial is

substantially outweighed by the danger of unfair prejudice. The focus of Mr. Knight's testimony will be, and should be, his appraisal and the valuation of the subject property.

III. CONCLUSION

As set forth above, Plaintiff requests the Court to make a final ruling: (1) excluding the evidence; (2) forbidding counsel or witnesses from mentioning the evidence before the jury in statements, arguments, questions or testimony; and (3) warning that appropriate sanctions may issue if any of those occur before the jury.

Respectfully submitted,

s/ Sean M. Foerster

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August 26, 2022

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.	)	
	)	

**DEFENDANTS’
MEMORANDUM OF LAW IN
SUPPORT OF THEIR MOTION IN
LIMINE**

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

Defendants.	)	
	)	

Pursuant to Rules 401, 402, 403, and 404 of the South Carolina Rules of Evidence (“SCRE”) and applicable authorities, the Defendants Georgetown County (sometimes referred to herein as “the County”), Georgetown County Council (sometimes referred to herein as “County Council”), and Steven Goggans (collectively hereinafter “Defendants”) move this Court to exclude any and all evidence, argument, or references thereto, concerning those items and topics set forth in Defendants’ Motion in Limine as those documents and evidence seek to introduce evidence that is irrelevant and otherwise inadmissible as set forth below. Furthermore, those documents and evidence are inadmissible pursuant to Rule 403, SCRE, because any probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury.

FACTS

This case concerns a parking lot owned by Palmetto Industrial Development, LLC (“Palmetto”)¹ and located within the Marlin Quay Planned Development (“PD”) between two neighboring businesses: Plaintiff Gulfstream Café, Inc. (“Plaintiff”) and Palmetto. Plaintiff possesses a non-exclusive easement to use the parking lot. Subsequent to its purchase of the initial Marlin Quay Marina Store and Restaurant in 2014, Palmetto demolished that building in 2016 with plans to construct a new Marina Store and Restaurant. Palmetto hired SGA Architecture to design the plans for the new building.

In 2016 and 2017, Steve Goggans was principal architect for the Marlin Quay new building. Also, he served as a Georgetown County Councilmember. In 2016, Palmetto completed an application with the County for a minor amendment² (“MQ1”) to the PD. This minor amendment passed, and Plaintiff appealed its passage to the Georgetown County Board of Zoning Appeals (“the Board”).

At a hearing before the Board, held on February 2, 2017, Mr. Goggans appeared as witness for his client. Subsequently, Plaintiff filed a complaint with the South Carolina State Ethics Commission (“the Commission”) due to Mr. Goggans’ appearance before the Board. By Consent Order dated September 16, 2019, Mr. Goggans received a written warning and a civil penalty of \$700.00.

¹ Palmetto is owned by J. Mark Lawhon. Mr. Lawhon is not a party to this suit.

² Section 619.301 of the 2018 Zoning Code provides that minor changes in a planned development may be approved by the Zoning Administrator. However, Section 619.302 of the 2018 Zoning Code provides that major changes in a planned development “shall require another public hearing and shall be treated as an amendment to the Ordinance.”

Following the passage of the minor amendment, Palmetto withdrew its application for the minor amendment and instead filed an application for a major amendment (“MQ2”) November 3, 2017. MQ2 was passed as a major amendment in February 2018, the Ordinance being 2018-03. However, concurrent litigation by Plaintiff against Palmetto and Mr. Lawhon, in civil action number 2016-CP-22-00961, resulted in the Court’s issuance, in June 2018,³ of a permanent injunction requiring that the construction of the new building not be outside of the footprint of the initial building. For that reason, Palmetto submitted another application for a major amendment (“MQ3”) on August 27, 2018 so as to comply with the Court’s July 27, 2018 Order. On January 8, 2019, the County passed that major amendment, which is Ordinance 2018-40. Mr. Goggans did not continue as the principal architect for the designs associated with MQ2 and MQ3, and Mr. Goggans did not participate in the amendment process, the readings, or votes before County Council regarding the MQ2 and MQ3 applications or their respective Ordinances (2018-03 and 2018-40).

On March 4, 2019, Plaintiff initiated this action against Georgetown County, Georgetown County Council, and all six of the County Councilmembers in both their official capacities and individually,⁴ seeking a declaratory judgment that the passage of Ordinance 2018-40 as unconstitutional and further alleging that by passing Ordinance 2018-40, Defendants violated Plaintiff’s state and federal constitutional substantive and procedural due process rights, and Defendants committed a taking and inverse condemnation of Plaintiff’s property.

³ The trial court issued a Form 4 Order on June 12, 2018. On June 22, 2018, Plaintiff filed a Motion to Alter or Amend, which the Court granted in part in its formal, written order entered July 27, 2018.

⁴ By Consent Order dated December 14, 2021, all County Councilmembers with the exception of Mr. Goggans were dismissed from the action.

ARGUMENT

1. Evidence related to Defendant Steve Goggans’ involvement with the South Carolina Ethics Commission and the circumstances pertaining thereto are irrelevant, and admission would result in unfair prejudice, confusion of the issues, and misleading the jury. Further, this evidence is improper character evidence and may be presented as evidence of a prior bad act to which Plaintiff can establish no exception for its admissibility.

Rule 401, SCRE, defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 402, SCRE, states in part, “Evidence which is not relevant is not admissible.” When evidence “tends to prove or disprove the existence of a material fact,” it is considered relevant. *Watson ex rel. Watson v. Chapman*, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000). The evidence of Mr. Goggans’ involvement with the Commission is irrelevant to the issues in this action and should be excluded.

To illustrate, in *Nedrow v. Pruitt*, the South Carolina Court of Appeals held the trial court’s exclusion of certain drug use and disciplinary actions toward an employee witness was proper, although exclusion of drug use on the day in question was not properly excluded. 336 S.C. 668, 674 & n.2, 521 S.E.2d 755, 758 & n.2 (Ct. App. 1999). In that case, the plaintiff sued a gas company for negligence and breach of warranty after the plaintiff sustained injuries due to an improperly repaired gas heater. *Id.* at 671, 521 S.E.2d at 756. At issue was evidence that the employee of the gas company, who sold Plaintiff a piece for the gas heater that did not fit properly, used Valium on the day of the sale. *Id.* at 673-74, 521 S.E.2d at 758. There was also evidence that the employee used cocaine in the past, and that he received disciplinary action, all of which the trial court excluded. *Id.* at 674 & n.2, 521 S.E.2d at 758 & n.2. While the Court of Appeals held that the employee’s use of Valium on the day of the sale should have been admitted, the Court

affirmed the trial court's exclusion of the employee's cocaine use and other disciplinary action taken against him as irrelevant. *Id.*

Here, like the evidence properly excluded by the trial court in *Nedrow*, the evidence Defendants seek to exclude is irrelevant to the issues, claims, and defenses in this case. To begin, any evidence of Mr. Goggans' involvement with the Commission is irrelevant to the later passage of two amendments by Georgetown County Council. Stated differently, Mr. Goggans did not have any participation in his role as a Georgetown County Councilmember in the passage of the major amendments (which became Ordinance 2018-03 and Ordinance 2018-40), and there is no evidence that Georgetown County Council, the Planning Commission, or the Planning Department were persuaded by Mr. Goggans in the process of passing Ordinance 2018-40. Thus, any evidence of his involvement with the Commission, his appearance at the February 2, 2017 Board hearing, the September 5, 2019 Consent Order he entered into, and any emails or letters between Mr. Goggans and his client, Mr. Lawhon, owner of Palmetto, or with members of the Planning Department in relation to MQ1, are irrelevant for purposes of this action.

In addition to being irrelevant to the issues, evidence of Mr. Goggans' involvement with the Commission is inadmissible character evidence and does not qualify under any exception for admitting this prior bad act. Rule 404(a), SCRE, states evidence of a person's character is not admissible for proving action in conformity therewith. Further, Rule 404(b), SCRE provides evidence of other wrong or acts is not admissible to prove the character of a person in order to show conformity therewith.⁵ Here, any evidence related to Mr. Goggans and the Commission is

⁵ Although Rule 404(b), SCRE provides for five exceptions for when "prior bad acts" made be admissible—to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent—none of those exceptions apply to this case. The actions of Mr. Goggans in a previous, separate application for a minor amendment does not prove any motive, identity, common scheme, absence of mistake, or intent on the part of Georgetown County, County

inadmissible and would be offered to only suggest that because there was an unethical act related to his representation in the application for the minor amendment, the Defendants must have also acted unethically in its passage of 2018-40. The first logical flaw in this prior-bad-acts analysis is Plaintiff's attempt to impute the actions of one individual, Mr. Goggans, to all of the entity of Georgetown County, including the County Council and Planning Commission. But no evidence exists that demonstrates County Council or the Planning Commission was influenced by Mr. Goggans when Ordinance 2018-40 was passed.⁶ Plaintiff wants to improperly use this character evidence as circumstantial evidence to suggest that because Mr. Goggans allegedly had ulterior motives in relation to MQ1, the entire County process, regardless of the application or procedures followed, was unconstitutional. This is improper; accordingly, this evidence of Mr. Goggans' involvement with the Commission or any of the circumstances related thereto is improper character and prior bad act evidence that does not qualify under any exception.

Moreover, even if the Court disagrees, any evidence of Mr. Goggans' involvement with the Commission or any circumstance leading thereto should be excluded because any potential probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

Council, the Planning Commission, or the Planning Department. The most clear evidence in support of this is Mr. Goggans' recusal of himself in relation to the second and third applications (MQ2 and MQ3), and consideration by County Council of those amendments, 2018-03 and 2018-40, respectively, the latter of which is the sole controversy of this case.

⁶ To the extent Plaintiff asserts the actions of Mr. Goggans with respect to the MQ1 application for a minor amendment were improper because he used his influence as a County Councilmember to sway a decision of the Zoning Administrator and Zoning Board of Appeals, that alleged impropriety would have been remedied by the very nature of Palmetto's following application, which was one for a *major* amendment. As mentioned above, a major amendment is a more rigorous process that requires County Council approval, which in turn means the process is more open as there are numerous opportunities for public input. Palmetto submitted not one, but two, applications for major amendments, both of which passed through County Council's legislative process—and both without the involvement of Mr. Goggans.

issues, and misleading the jury. Rule 403, SCRE. As noted, the evidence that Mr. Goggans was present and spoke to the Board on February 2, 2017 in relation to MQ1 and later consented to a disciplinary agreement with the Commission is entirely irrelevant to the issue of whether the County's passage of Ordinance 2018-40 violated Plaintiff's constitutional rights. However, even if relevant, Rule 403, SCRE, requires the exclusion of this evidence. Like the defendant gas company in *Nedrow*, Defendants would be unfairly prejudiced by any evidence of disciplinary action regarding Mr. Goggans' involvement in MQ1 because, judging by Plaintiff's exhibit list, Plaintiff's intention is to focus this case on prior disciplinary action related to an action that is not at issue in this lawsuit. Further, any focus on Mr. Goggans' 2017 presentation to the Board and subsequent investigation and disciplinary action would only confuse the issues and mislead the jury by turning the case into a "referendum" on Mr. Goggans. The question for the jury is not whether Mr. Goggans, and by extension, the County, should be punished now with the passage of a third application because of his actions related to the first application, but rather, whether the County—not Mr. Goggans—in passing Ordinance 2018-40, failed to comply with the Zoning Ordinances so as to deprive Plaintiff of its constitutional rights to due process. Any attention given to Mr. Goggans in this action is a thinly-veiled attempt to mislead the jury and confuse it as to the sole issue of whether the County provided Plaintiff all the process it was due. Accordingly, the Court should not permit Plaintiff to introduce evidence related to Mr. Goggans' involvement with the Commission.⁷

⁷ Pursuant to Plaintiff's exhibit list produced to Defendants on March 16, 2022 and as supplemented on August 15, 2022, Defendants move to exclude the following exhibits related to Mr. Goggans: Plf's Ex. 6 (email from Mark Lawhon to Steve Goggans, May 6, 2016); Ex. 7 (email from Steve Goggans to Holly Richardson and Boyd Johnson, May 13, 2016); Ex. 8 (letter from Steve Goggans to Mark Lawhon, September 22, 2016); Ex. 9 (transcript of Georgetown County Zoning Board of Appeals' hearing, February 2, 2017); Ex. 57 (Consent Judgment entered into by Goggans and S.C. Ethics Comm'n in relation to February 2, 2017 appearance before Zoning Board

2. Any questions of Mr. Goggans soliciting information subject to legislative immunity and all references to Georgetown County Council deliberations at any time should be barred.

Councilmembers as individuals possess absolute legislative immunity. *Bruce v. Riddle*, 631 F.2d 272, 274 (4th Cir. 1980) (holding Greenville County Councilmembers entitled to absolute legislative immunity in their capacity as individuals in a § 1983 claim); *S.C. Pub. Int. Found. v. Courson*, 420 S.C. 120, 125, 801 S.E.2d 185, 187 (Ct. App. 2017) (“South Carolina recognizes the longstanding doctrine of legislative immunity for legislators carrying on their legislative duties.”). “Legislative immunity protects legislators from ‘deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence, but for the public good.’” *Id.* (quoting *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951)). Specifically, statements made by councilmembers during the course of their functions that are relevant thereto are protected by this absolute privilege. *Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979) (citations omitted). Thus, any evidence or questions eliciting a response related to Mr. Goggans’ statements with County Council or other deliberations among County Council should be excluded. For the same legal reasons, Plaintiff should not be permitted to state, or even insinuate to the jury, that because Mr. Goggans was a councilmember, the Council must have passed the MQ3 ordinance improperly.

3. Any pictures of renderings, other evidence, or mention of the former building that previously occupied the property at issue is irrelevant and would result in unfair prejudice, misleading the jury, and confusion of the issues.

of Appeals, September 5, 2019). Defendants object to these exhibits for the reasons set forth in Subsection 1 and because these documents constitute inadmissible hearsay to which no exception applies. *See* Rules 801(c), 802, SCRE. Defendants reserve the right to supplement their objection to any other exhibits or evidence that may be introduced during trial on these grounds and any other applicable ground.

Plaintiff's Proposed Exhibit 11 includes photos of the initial Marlin Quay Store and Restaurant prior to its demolition in 2016. However, those pictures are not relevant because Plaintiff is challenging the January 8, 2019 passage of Ordinance 2018-40. This ordinance specifically required certain measurements of the heated square footage, seating capacity, and height of the proposed structure. The pictures Plaintiff wishes to introduce do not reflect the heated square footage, seating capacity, or actual height of the former building, and even if the pictures did display such information, the question is not whether the initial building and approved building are similar; the issues in this case are whether the County's passage of Ordinance 2018-40 deprived Plaintiff of procedural or substantive due process rights or constituted a taking or inverse condemnation. Accordingly, the pictures are not relevant and are likely to unfairly prejudice Defendants, confuse the issues, and mislead the jury. *See* Rules 401—403, SCRE.

4. The issue of the former Marlin Quay Store and Restaurant Building operating during the daytime was decided by previous court order, is not relevant, and is likely to confuse the issues and mislead the jury.

Similar to the irrelevancy of the former Marlin Quay Store and Restaurant's appearance, any evidence that the former restaurant once operated during the daytime is not relevant, is likely to confuse the issues and mislead the jury, and was previously decided by court order dated July 27, 2018. In civil action number 2016-CP-22-00961, Plaintiff Gulfstream Café, Inc. alleged Palmetto interfered with its easement rights, specifically, Plaintiff's alleged right to operate its restaurant during the evening while the other restaurant could operate only primarily during the day. In that suit, the circuit court issued a permanent injunction requiring Palmetto to comply with the easement by constructing a new building only within the footprint of the former building, and accordingly, specifics as to when the previous restaurant operated has already been litigated and is not at issue in this case. In fact, the Plaintiff, in its Motion to Reconsider in that action, asked for a ruling as to hours of operation, which the Court refused. This case is about the alleged acts

of Georgetown County—not the interpretation of an easement or alleged interference therewith. Any evidence of the same, including Plaintiff’s Exhibits 2 and 3 (recorded easements), would be irrelevant and likely to confuse the issues and mislead the jury in violation of Rule 403, SCRE.

5. Any argument that Georgetown County allegedly “violated” the easement between J. Mark Lawhon/Palmetto and Plaintiff is irrelevant, likely to confuse the issues and mislead the jury, and was already decided by Civil Action Number 2016-CP-22-00961.

For the same reasons Defendants take issue with Plaintiff’s Exhibit 18 (the completed jury verdict form from civil action number 2016-CP-22-00961) and as described in Section 4 above, any statement or argument that Georgetown County allegedly “violated” the easement between two other, private parties, is not only inaccurate as a matter of law, but also irrelevant and likely to confuse the issues and mislead the jury in violation of Rule 403, SCRE.

6. Any evidence or mention of any alleged deaths, wrecks, accidents, or dangerous traffic near the parking lot at issue in this litigation is irrelevant and likely to unfairly prejudice Defendants, confuse the issues, and mislead the jury.

Plaintiff’s Exhibit 44, which are meeting minutes from the December 11, 2018 Georgetown County Council Meeting, includes the summaries of several members of the public who spoke concerning the Council’s second reading of Ordinance 2018-40. In their comments, some speakers referenced fatalities, accidents, and the need to call the Sheriff’s Office regarding the parking lot between the two restaurants while other commentators described the parking lot as “scary,” “dangerous,” and “unsafe.” Specifically, these comments appear in the following speakers’ summaries: Jef Krik; Clete Skipper; Rob Boros; Chris Causey; and Micah Sawyer. Plaintiff’s Exhibit 44 should redact those comments from the exhibit because the comments are irrelevant as to whether the Defendants violated Plaintiff’s due process rights or committed a taking or inverse condemnation in passing Ordinance 2018-40. These comments also have the great potential of emotionally inflaming the jury so that the jurors are misled as to the issues in this case. Pursuant to Rule 403, SCRE, the admission of these identified comments or anything similar, whether

through testimony or statements of counsel, would be unfairly prejudicial to Defendants, and as such, they should be prohibited.

7. Any statements or evidence that Ordinance 2018-03 was declared “illegal” or “unlawful” by any court is incorrect, irrelevant, and likely to unfairly prejudice Defendants, confuse the issues, and mislead the jury.

Any statements by counsel or elicited testimony referring to Ordinance 2018-03 (the approval of MQ2) being declared “illegal” or “unlawful” by any court is not only incorrect, but would be irrelevant and likely to unfairly prejudice Defendants, confuse the issues, and mislead the jury. In civil action number 2016-CP-22-00961, the jury found Palmetto/Mark Lawhon had interfered with Plaintiff’s easement, and the court issued a permanent injunction holding that Palmetto and Mark Lawhon were “enjoined from preventing the Plaintiff from enjoying the right granted to it in the recorded nonexclusive joint easement” and could not expand the “outside boundaries” of any new building beyond the previous building’s footprint.⁸ There was no finding or order issued by any court that Ordinance 2018-03 was “unlawful” or “illegal,” and as such, any similar statements should be prohibited.

8. Aerial photograph, Plaintiff’s Exhibit 68, should be excluded because of its late disclosure and lack of foundation.

Plaintiff’s Exhibit 68 depicts an aerial photograph of the Marlin Quay Planned Development. However, Plaintiff did not produce this photograph until March 14, 2022, prior to the last time the trial was scheduled. Defendants do not know who took the picture or when it was taken, and it would be unfairly prejudicial to allow Plaintiff to introduce this photograph.

⁸ Plaintiff has identified the jury verdict form in that case as Exhibit 18, the Court’s Form 4 Order issuing the permanent injunction as Exhibit 17, and the Court’s Order Granting Plaintiff’s Motion to Alter or Amend Judgment as Exhibit 19. As described more fully in Section 13, Defendants object to the jury verdict form, but Defendants do not object to the admission of the Court’s two Orders.

Moreover, Plaintiff and Defendants entered into a Scheduling Order, which was last amended on June 29, 2021. Pursuant to that Order, discovery ended September 23, 2021. Plaintiff did not seek to re-open discovery when it produced this photograph nearly six months after discovery was closed.⁹ Accordingly, this photograph is improper and should not be admissible.

9. Any evidence, testimony, argument, or mention about any issue of whether Palmetto is violating the current zoning ordinance should be prohibited because Palmetto is not a party to this action, and this lawsuit concerns only Georgetown County's passage of Ordinance 2018-40.

To the extent Plaintiff intends to present any evidence, make any statement, or elicit any testimony regarding the current status of the new building and whether it complies with Georgetown County's current Zoning Ordinance, this evidence should be prohibited. The allegations at issue revolve around Georgetown County Council's passage of Ordinance 2018-40, which was approved in January 2019, and which had to comply with the 2018 Zoning Ordinance in place at the time of its application and approval. Accordingly, any evidence regarding the current status of the building and its compliance with any updated zoning ordinances would only confuse the issues and mislead the jury so as to make the case about the property owner's behavior—and neither Palmetto nor Mark Lawhon are parties to this action. Pursuant to Rules 402 and 403, SCRE, any such evidence should not be admitted.

10. The additional expert witness, Jody Bishop, who was disclosed to Defendants' counsel on Friday, August 12, 2022, should not be permitted to testify because the close of discovery has long passed, and an *additional* expert witness at this stage would unfairly prejudice Defendants.

⁹ Furthermore, re-opening discovery or even changing the deadlines set forth in the Amended Scheduling Order would be unlikely given Defense counsel's attempt to do so in by Motion filed September 9, 2021, Plaintiff's opposition, and the denial by order entered September 10, 2021.

Rule 26(e), SCRCP provides that “a party is under a duty *seasonably* to supplement his response with respect to any question directly addressed to . . . (2) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.” (Emphasis added.) The purpose of parties disclosing information before trial is “designed to avoid surprise and to promote decisions on the merits after a full and fair hearing[.]” and it is within the trial court’s discretion to determine whether a witness’s testimony should be excluded. *Bensch v. Davidson*, 354 S.C. 173, 182, 580 S.E.2d 128, 123-33 (2003) (citation omitted). When determining whether to prevent a witness from testifying, the trial court has a duty to “ascertain[] the type of witness involved and the content of his evidence, the nature of the failure or neglect . . . to furnish the witness’ name, and the degree of surprise to the other party, including prior knowledge of the name by said party.” *Callen v. Callen*, 365 S.C. 618, 627, 620 S.E.2d 59, 63-64 (2005) (citation omitted).

Although Plaintiff’s counsel did disclose Jody Bishop by supplementing its answers to Defendants’ interrogatories, Plaintiff did not do so until just two weeks prior to the date trial is set to begin. Trial of this case was previously scheduled to begin on March 21, 2022. However, on March 15, 2022, Plaintiff’s counsel sought a continuance on the grounds that one of its expert witnesses, George “Jake” Knight, an appraiser, would be unable to testify due to an illness, and further, another appraiser would have to conduct an entirely new appraisal, which could take several months. By order entered March 21, 2022, the case was continued.

Then, on Friday, August 12, 2022, Plaintiff’s counsel stated it was “disclosing Jody Bishop as an additional appraisal expert[.]” When the undersigned attempted to clarify whether Mr. Bishop would be the replacement appraisal expert, Plaintiff’s counsel responded that *both* Mr. Knight and Mr. Bishop would be Plaintiff’s “appraisal experts at trial.”

First and foremost, as with the photograph Plaintiff seeks to include as its Exhibit 68, this witness should be barred from testimony because the close of discovery had long passed. Furthermore, the use of two experts to testify as to an appraisal, specifically when one expert and his findings were disclosed on the eve of trial, would be highly prejudicial to Defendants. The type of witness Plaintiff purports to use would seemingly provide duplicative and cumulative evidence of appraisals. This expert witness was not “seasonably” disclosed per Rule 26(e), SCRCP, and given that there is no apparent reason for the delay in the disclosure of this witness just two weeks prior to trial when the issue of a “new expert” was the very reason for the continuance earlier this year, and that the addition of this expert would unfairly prejudice the Defendants, the Court should rule Mr. Bishop is not permitted to testify. *Cf.* Fed. R. Civ. P. 37(c)(1) (“If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.”).

11. Plaintiff did not disclose Jef Kirk, Linda Barnaba, or Theresea Floyd as potential witnesses in its answers or supplemental answers to any Defendant’s interrogatories, and therefore, those individuals should not be permitted to testify.

Rule 33(b), SCRCP, provides in part that “interrogatories shall be deemed to continue from the time of service until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers to interrogatories have been submitted, shall be promptly transmitted to the other party.” “Therefore, there is a continuing duty on the part of the party from whom information is sought to answer a standard interrogatory. . . .” *Bensch*, 354 S.C. at 182, 580 S.E.2d at 132. As discussed in Section 10, the failure to disclose witnesses in a party’s answers to interrogatories requires the trial court to weigh several factors when determining whether to exclude a witness’s testimony: (1) the type of witness

involved; (2) the content of his evidence; (3) the reason for failing or neglecting to disclose the witness' name; and (4) the degree of surprise to the other party, including prior knowledge of the name by that party. *Callen*, 365 S.C. at 627, 620 S.E.2d at 63-64 (citation omitted).

Here, both Jef Kirk and Linda Barnaba appear to be witnesses who previously presented comments at a Georgetown County Council meeting as opponents to the passage of Ordinance 2018-40. While a summary of their comments is included within a single paragraph of the meeting minutes included in Plaintiff's Exhibit 44, Defendants do not know the extent of the content of their testimony or Plaintiff's reason for neglecting to disclose these witnesses prior to the close of discovery. Similarly, Theresea Floyd, Clerk to Georgetown County Council, was not disclosed in previous answers to interrogatories, and Plaintiff's reason for failing to do so is unknown. Had Plaintiff identified these persons as witnesses, the Defendants would have their depositions. The failure to disclose is highly prejudicial. Therefore, these witnesses should be struck.

12. Any expert report is inadmissible hearsay that should not be published to the jury or introduced into evidence.

Rule 803(b)(6), SCRE, provides that records kept "in the course of a regularly conducted business activity" are admissible, "*provided, however*, that subjective opinions and judgments found in business records are not admissible." In this case, Plaintiff, according to its Answers to Defendants' Interrogatories, purports to offer testimony from four expert witnesses, including Jake Knight, Jody Bishop, Jim Moring, and Robert Castles. Specifically, Mr. Knight and Mr. Bishop may testify as to the value of the property at issue as well as the impact the approval of the amendment has had on Plaintiff's property; Mr. Moring may testify regarding the marketability of the property at issue as well as the impact of the amendment's passage on Plaintiff's property; and Mr. Castles may testify as to parking requirements and the impact on parking the passage of this

amendment has had on the parking lot at issue. Allowing written reports or other portions of these experts' written work files would be improper because these items contain inadmissible hearsay.

The South Carolina Court of Appeals has recognized that subjective opinions and judgments, such as appraisals, are not admissible. *See Duncan v. Ford Motor Co.*, 385 S.C. 119, 137, 682 S.E.2d 877, 886 (Ct. App. 2009) ("The business records exception does not allow subjective opinions to be introduced into evidence. [The expert's] valuation of the [plaintiff's] home was nothing more than a subjective opinion."). Accordingly, Plaintiff's Exhibits 47 (Mr. Knight's Appraisal Report), 70 (Mr. Knight's "Work File"), 72 (Mr. Knight's Appraisal), 73 (Mr. Moring's "Work File"), and 74 (Mr. Castles' "Work File") should be barred from evidence.

13. The jury verdict form is inadmissible hearsay.

As set forth more fully in Defendants' pre-trial brief, civil action number 2016-CP-22-00961, caption *The The Gulfstream Café, Inc. v. J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC*, involved the same plaintiff suing the property owner who applied for the amendments mentioned herein (MQ1, MQ2, and MQ3). Plaintiff's Exhibit 18, a copy of the jury's completed Verdict Form in that action, is inadmissible hearsay and would be highly prejudicial to Defendants if introduced as a matter of law.

To illustrate, in *Mizell v. Glover*, the South Carolina Supreme Court held a jury interrogatory was inadmissible hearsay and unfairly prejudicial. 351 S.C. 392, 402-03, 570 S.E.2d 176, 181-82 (2002). In that case, a patient and her husband ("plaintiffs") sued the patient's doctor for medical malpractice. *Id.* at 395, 570 S.E.2d at 177. When the plaintiffs' expert testified, the doctor introduced evidence of a jury interrogatory from a separate civil suit against the witness wherein the jury found the witness had made misrepresentations to his insurance company. *Id.* at 398, 570 S.E.2d at 179. When plaintiffs objected, the trial court overruled the objections and found

the jury interrogatory was admissible for impeachment purposes pursuant to Rule 608, SCRE. *Id.* at 399, 570 S.E.2d at 179-80. In reversing this ruling on appeal, the Court found persuasive federal law that recognized “that judicial findings of fact from one trial constitute hearsay when offered for admission in the context of another trial.” *Id.* at 402, 570 S.E.2d at 181 (citations omitted). The Court held that even though the evidence at issue was a decision by the jury as opposed to a judge, the jury interrogatory was inadmissible hearsay and prejudicial. *Id.* at 402-03, 507 S.E.2d at 181-82. In the same way the jury interrogatory was inadmissible and unfairly prejudicial in *Mizell*, the completed jury verdict form finding there had been interference with Plaintiff’s easement is also inadmissible and equally prejudicial as a matter of law.

14. Plaintiff’s Exhibit 38 is incomplete and should not be introduced into evidence unless the exhibit is complete.

Plaintiff has marked an email as its Exhibit 38. The body of the email itself references an attachment. However, the attachment referenced therein is not included in Plaintiff’s exhibit. As such, the exhibit is incomplete and should not be introduced into evidence.

If the Court does allow this Exhibit into evidence, the Court should also require Plaintiff to simultaneously introduce the attachment. Rule 106, SCRE (“When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”).

15. Plaintiff’s Exhibit 60 contains two levels of hearsay, one of which is Holly Richardson’s personal notations, and as such, the exhibit should be excluded.

Plaintiff has identified its counsel’s December 11, 2018 letter to Georgetown County Council as Exhibit 60. However, this copy of the letter also contains notations made by Holly Richardson, Chief Planner at the Georgetown County Planning Department, at the date of the

letter. These notations were prepared in anticipation of litigation, and as such, are subject to the work product doctrine's protection. *See, e.g.*, Pl.'s Ex. 60, pg. 5 ("for court to decide."). Furthermore, these notes contain Ms. Richardson's opinions, judgments, and conclusions, which are not admissible pursuant to Rule 803(8), SCRE.

Because there are two levels of hearsay, the letter itself in addition to Ms. Richardson's notations must be admissible. Rule 805, SCRE ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."). The letter, prepared by Plaintiff's counsel, does not contain facts personally known to Plaintiff's counsel, but rather, legal arguments made by counsel, which are self-serving statements. *See Woodward v. S.C. Farm Bureau Ins. Co.*, 277 S.C. 29, 34-35 282 S.E.2d 599, 602 (1981) (citations omitted) (holding the admission of a letter written by a doctor in response to a claimant's attorney, who had previously expressed concern regarding the reliability of the doctor's diagnosis and treatment, was prejudicial error where the letter contained an "argumentative presentation of the writer's rights and the alleged damages he suffered"). Accordingly, this Exhibit should be excluded.

16. References to MQ1 are irrelevant and likely to confuse the issues and mislead the jury.

Plaintiff purposes to enter several 2015 and 2016 email exchanges and letters related to the initial application for a minor amendment (referred to as "MQ1" or "Version 1"). The amendment at issue here is the third application, filed on August 27, 2018, and the passage of Ordinance 2018-40 on January 8, 2019. Accordingly, any reference to MQ1 is irrelevant to the issues, and evidence of MQ1 would likely confuse the issues and mislead the jury so that the focus of the case centers around the first application for a minor amendment to the planned development as opposed to the third application for a major amendment to the planned development. "Evidence which is not

relevant is not admissible.” Rule 402, SCRE. As such, Plaintiff’s Exhibits 10, 76, 77, 78, 79, 80, 81, 82, and 83 should be excluded.

17. Any communications unrelated to the zoning ordinances is irrelevant to the allegations and claims in this action and would confuse the issues.

Plaintiff’s Exhibits 23, 40, 41, 48, 49, 50, 51, 52, and 53 include email communications related to compliance with the Georgetown County *Building* Code and not the Zoning Code. According to Plaintiff’s allegations, Georgetown County violated Plaintiff’s due process rights and committed a taking/inverse condemnation when the Georgetown County Planning Department processed MQ3 and allegedly failed to follow Georgetown County’s 2018 Zoning Ordinances, and when County Council approved Ordinance 2018-40. These allegations against these particular defendants do not have anything to do with whether the County’s Building Code was followed, but rather, whether the Zoning Ordinance was complied with. Accordingly, these exhibits should be excluded from evidence.

18. Communications and other documents post-passage of Ordinance 2018-40 are irrelevant, likely to confuse the issues and mislead the jury, and would result in the presentation of needless information.

Plaintiff’s Exhibits 54, 55, 56, 61, 62, 63, 64, 65, and 66 are emails that were sent subsequent to the passage of Ordinance 2018-40 in January 2019. As such, these communications are entirely irrelevant as to the issues in this case. Plaintiff’s claim is that the passage of Ordinance 2018-40 is invalid because the process by which it was passed was unconstitutional and constituted a taking/inverse condemnation. Therefore, any communication that took place after those acts that Plaintiff alleges were unconstitutional—i.e., the passage of Ordinance 2018-40—is irrelevant and likely to confuse the issues and mislead the jury. Presentation of this evidence would be needless, because it would not establish or support any allegation that subsequent behavior or

communication aided in the passage of the amendment that already occurred. As such, the Court should exclude the above-named exhibits.

19. Evidence of Steve Goggans’ deposition transcript from an earlier, separate civil lawsuit is irrelevant, likely to confuse the issues, and likely to mislead the jury as neither Georgetown County nor Steve Goggans were parties in that case.

The South Carolina Supreme Court has held that deposition testimony from a separate action between different parties is not admissible in another lawsuit between different parties. “The objection that the deposition was taken in another independent case between different parties is fatal to the introduction of the paper as a deposition in this case.” *Holden v. Cantrell*, 88 S.C. 281, ---, 70 S.E. 815, 816 (1911) (holding the deposition of a witness taken in another case in which the plaintiff was the same, but “in which defendants had no interest and were not parties” was inadmissible).¹⁰

Furthermore, this hearsay evidence is prohibited by Rule 403, SCRE because any probative value is substantially outweighed by undue prejudice, confusion of the issues, and misleading the jury. This case does not center around the exchanges between an architect and his client regarding a project; rather, this case is focused on whether Georgetown County, County Council, the Planning Commission, or the Planning Department violated Plaintiff’s constitutional rights by passing Ordinance 2018-40—a process with which Mr. Goggans was not involved in at all.

20. Defendants’ answers to interrogatories are inadmissible hearsay and are irrelevant.

¹⁰ Although Rule 804(b)(1), SCRE permits the introduction of former deposition testimony in the “same or another proceeding,” that exception only applies when the declarant is unavailable *and* the party against whom the testimony is offered “had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” Thus, this exception is inapplicable here.

Plaintiff identified Defendant Steven Goggans' Answers to Plaintiff' First Interrogatories and Defendant Georgetown County's Answers to Plaintiff's First Interrogatories as Exhibits 58 and 59. However, these answers are inadmissible hearsay, irrelevant, and certainly not the best evidence when these witnesses themselves have been subpoenaed to testify at trial. *See, e.g., Lynch v. Carolina Self Storage Ctrs., Inc.*, 409 S.C. 146, 162-63, 760 S.E.2d 111, 120 (Ct. App. 2014) (holding the trial court did not err in excluding the defendant's interrogatory answers and citing to Rules 401 and 402, SCRE regarding the admissibility of relevant evidence). Accordingly, the Court should exclude these exhibits.

21. Plaintiff's Exhibit 33, a letter from Adam Nugent to Wesley Bryant, is inadmissible hearsay, constitutes a self-serving statement, and discusses legal opinions.

Self-serving statements are generally inadmissible. *Woodward*, 277 S.C. at 34, 282 S.E.2d at 602 (citations omitted). The letter Plaintiff has identified as Exhibit 33 is a letter from its counsel to the then-Georgetown County attorney, setting forth all the ways in which Plaintiff believes the application for MQ3 is "procedurally defective" and therefore "should not be considered at the [Georgetown County Planning Commission] hearing." The letter also references "significant controversy in Georgetown County" created by previous applications by Palmetto Industrial Development, LLC, as well as "clear defects" in the pending application. Given these self-serving statements and the letter, which in its entirety does nothing more than state the legal position of Plaintiff via Plaintiff's attorney, Plaintiff's Exhibit 33 is inadmissible.

22. Plaintiff's Exhibit 39, an email exchange involving Boyd Johnson and Wesley Bryant, is inadmissible because it is irrelevant and contains discussions of legal opinions.

Plaintiff identified an email exchange dated October 22, 2018 between Boyd Johnson, then-Director of Georgetown County Planning and Code Enforcement, Ms. Richardson, Mr. Bryant, and Dan Stacy regarding the letter identified as Plaintiff's Exhibit 33. This email exchange

includes discussions of legal opinions regarding the letter, and as such, the email exchange should be deemed inadmissible.

23. Plaintiff's Exhibit 67 contains inadmissible invoices and receipts for attorneys' fees associated with this litigation given that attorneys' fees are not issues for the jury, and the determination of attorneys' fees is premature at this stage of trial.

Plaintiff's Exhibit 67 contains 102 pages of attorneys' fees invoices. Assuming Plaintiff is suggesting it is entitled to an award of attorneys' fees because it believes it will be the prevailing party on its § 1983 claims, this evidence is premature because Plaintiff will likely lose its case. Further, the award of attorneys' fees is not an issue for the jury, but for the court: "In any action or proceeding to enforce a provision of section[] . . . 1983 . . . , *the court*, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs[]" 42 U.S.C.A. § 1988(b) (emphasis added). Therefore, Plaintiff's Exhibit 67 should be excluded from evidence at this time.

CONCLUSION

Defendants respectfully request, pursuant to Rules 401, 402, 403, 404, SCRE and the applicable authorities, that this Honorable Court preclude Plaintiff from presenting arguments, eliciting testimony, or admitting any other evidence, or reference thereto, concerning the above-identified items. Plaintiff's proposed evidence is irrelevant, unfairly prejudicial, and hearsay. As a result, Plaintiff's Exhibits are properly excluded. Defendants reserve the right to supplement their objection to any other exhibits or evidence that may be introduced during trial on these grounds and any other applicable ground.

[Signature on Following Page]

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Myrtle Beach, South Carolina

August 29, 2022

Attorney for Defendants

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,	)	DEFENDANTS'
	)	SUPPLEMENT TO THEIR PRE-
vs.	)	TRIAL BRIEF
	)	
Georgetown County, Georgetown County	)	
Council, and Steve Goggans, individually	)	
and in his official capacity as Georgetown	)	
County Councilmember,	)	
	)	
Defendants.	)	
_____	)	
	)	
	)	

Defendants Georgetown County (“the County”), Georgetown County Council (“County Council”), and Steve Goggans (collectively hereinafter “Defendants”) hereby supplement their Pre-Trial Brief with the following legal analysis that the jury does not render any verdict on constitutional issues:

1. Declaratory Judgment Claim – Approval of Palmetto’s Application for Major Amendment is “Invalid” (First Cause of Action)¹

¹ Plaintiff asserted eight (8) causes of action in its complaint:

- 1) Declaratory Judgment;
- 2) Violation of S.C. Constitution Substantive Due Process;
- 3) Violation of U.S. Constitution Substantive Due Process per 42 U.S.C. § 1983;
- 4) Violation of S.C. Constitution Procedural Due Process;
- 5) Violation of U.S. Constitution Procedural Due Process per 42 U.S.C. § 1983;
- 6) Violation of S.C. Constitution’s Takings Clause;
- 7) Inverse Condemnation; and
- 8) Attorneys’ Fees pursuant to [42] U.S.C. § 1988.

The Declaratory Judgment Act, South Carolina Code Section 15-53-90 states in part, “When a proceeding under this chapter involves the determination of an issue of fact[,] such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.” In this action, a declaration of a governmental action as constitutional is for the court, not the jury. *Cf. Joseph v. S.C. Dep’t of Lab., Licensing & Regul.*, 417 S.C. 436, 453, 790 S.E.2d 763, 772 (2016) (“It is the duty of [the South Carolina Supreme] Court, not the legislature, to determine the constitutionality of a statute.”).

2. Violation of Substantive Due Process Rights – Article I, Section 3 of the South Carolina Constitution Claim (First, Second, and Third Causes of Action)

Determinations of whether a law is constitutional are for the court, not the jury. *See, e.g., McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 503-04, 719 S.E.2d 660, 662 (2011) (noting appellants’ constitutional challenge to a zoning ordinance, specifically alleging the ordinance violated their substantive due process rights, was an issue regarding interpretation of a legislative enactment, which is a question of law) (citation omitted). *Cf. Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006-07 (4th Cir. 1985) (reversing and remanding where, in an action challenging the administration of a company benefit plan, the trial court improperly submitted the question of whether the administrator’s actions were “arbitrary and capricious” to the jury, and explaining, “The significance of the [arbitrary and capricious] standard, while second-nature to a judge, is not readily communicated to jurors.”).

Defendants’ Motion objects to all of Plaintiff’s causes of action being submitted to the jury. Because some arguments and authority overlap, the parentheses following each heading in this Motion are intended to signal with which causes of action the arguments and authorities correspond.

3. Relief Under 42 U.S.C. § 1983 for Violation of Right to Substantive Due Process – United States Constitution Claim (Third Cause of Action)

“Whether governmental conduct violates substantive due process is a matter of law for the court to decide.” *Bower v. Lawrence Cnty. Child. & Youth Servs.*, 964 F.Supp.2d 475, 487 (W.D. PA 2013) (citing *Benn v. Universal Health Sys., Inc.*, 371 F.3d 165, 174 (3rd Cir. 2004)). The test for whether government conduct violates substantive due process is “whether the conduct shocks the *judicial* conscience in a constitutional sense.” *Id.* (citing *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847-48 (1998)) (emphasis added). “Because the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury.” *Doe v. Univ. of Nebraska*, 451 F.Supp.3d 1062, 1112-13 (D. NE 2020) (internal citation and quotation marks omitted).

4. Violation of Right to Procedural Due Process – Article I, Section 3 of the South Carolina Constitution Claim (First and Fourth Causes of Action)

As with substantive due process, the issue of whether procedural due process was provided is an issue for the court. *See McMaster*, 395 S.C. at 503-04, 719 S.E.2d at 662. *Cf. Walbeck v. I’On Co., LLC*, 426 S.C. 494, 524, 827 S.E.2d 348, 363 (Ct. App. 2019) (holding where there was only one reasonable inference from the evidence, the “question was one of law to be decided by the circuit court”).

5. Relief Under 42 U.S.C. § 1983 for Violation of Right to Procedural Due Process – United States Constitution Claim (Fifth Cause of Action)

Similarly, the question of whether procedural due process rights provided under the federal constitution have been violated is for the Court. *See Melnik v. Dzurenda*, No. 3:16-cv-00670-MMD-CLB, 2020 WL 607122, at *3 (D. NV Feb. 7, 2020), *aff’d*, 14 F.4th 981 (9th Cir. 2021)

(noting that whether an allegation of violation of procedural due process rights “is a question of law, not of fact”).

6. Violation of South Carolina Taking Clause – Article I, Section 13 of the South Carolina Constitution Claim (Sixth Cause of Action)

Neither a categorical nor a regulatory taking are determinations to be made by the jury. *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 304-05, 737 S.E.2d 601, 614 (2013) (holding neither a categorical nor regulatory taking occurred and summary judgment was appropriate “as such a determination is a question of law *for the court*”) (emphasis added); *Frampton v. S.C. Dep’t of Transp.*, 406 S.C. 377, 385, 752 S.E.2d 269, 273 (Ct. App. 2013) (“An action brought by a property owner against a [governmental entity] for the taking of the owner’s property without just compensation is an action at law.”) (citations and internal quotation marks omitted).

7. Inverse Condemnation Claim – Establishment of the Claim (Sixth and Seventh Cause of Action)

The threshold issue of whether Plaintiff has established its claim for inverse condemnation is for the court, although a jury may determine an award of compensation under an inverse condemnation claim. *Frampton*, 406 S.C. at 385, 752 S.E.2d at 274 (“In an inverse condemnation case, the trial court will first determine whether a claim has been established. . . . Then, the issue of compensation may be submitted to a jury at either party’s request.”) (quoting *Cobb v. S.C. Dep’t of Transp.*, 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005)); *Ray v. City of Rock Hill*, 434 S.C. 39, 45, 862 S.E.2d 259, 262 (2021) (noting the “trial court must decide the threshold question of whether a government entity’s actions amount to an affirmative, positive, aggressive act” which is a question of fact).

8. Attorneys' Fees (Eighth Cause of Action)

The award of attorneys' fees is not an issue for the jury, but for the court: "In any action or proceeding to enforce a provision of section[] . . . 1983 . . . , *the court*, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs[]" 42 U.S.C.A. § 1988(b) (emphasis added).

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Myrtle Beach, South Carolina

August 29, 2022

Attorney for Defendants

RECEIPT FOR EXHIBITS

Case Number: 2019-CP-22-00212

Judge: R. Griffin

Plaintiff: Gulfstream Cafe, Inc.

Plaintiff Attorney: S. Bloom, S. Foerster, A. Pearson

Defendant: Georgetown County, et al.

Defendant Attorney: H. Golding, T. Voegel

Date Started: August 29, 2022

Date Ended:

Received of **KAY H. RICHARDSON**, Court Reporter for the above case, these exhibits:

P / D / CT* Number	Description	COC USE:
1 P1 E	PD for Marlin Quay	
2 P2 E	Basement	
3 P3 E	Easement	
4 P4	Zoning Ordinance A1 & 2 (NOT ID OR E)	
5 P5	Article XI (NOT ID OR E)	
6 P6 E	05/06/16 Email Lawhon	
7 P7 E	Emails (SGA)	
8 P8 E	09/22/16 Letter Goggans to Lawhon	
9 P9	02/02/17 Transcript BZA Appeals (NOT ID OR E)	
10 P10 E	09/06/17 Email	
11 P11 E	2 Photos	
12 P12 E	11/3/17 Application to Amend	
13 P13 E	Notice of Public Hearing	
14 P14 E	12/21/17 Georgetown County Planning Commission Agenda	
15 P15 E	12/21/17 Georgetown County Planning Commission Minutes	
16 P16	04/11/18 Goggans Deposition Transcript (NOT ID OR E)	
17 P17	Form 4 (NOT ID OR E)	
18 P18 E	06/11/18 Verdict Form 16-CP-22-00961	
19 P19	07/27/18 Order 16-CP-22-00961 (NOT ID OR E)	
20 P20 E	August 2018 Application	
21 P21 E	9/24/18 Email Coleman to Surfside Realty	
22 P22 E	Tax Map Property Owner List	
23 P23	10/02/18 Email Sobchuk (NOT ID OR E)	
24 P24 E	10/10/18 Email Novak to Richardson	
25 P25 E	10/10/18 Email Sobchuk to Richardson	

Received this 1st day of September, 2022.Page 1 of 5

GEORGETOWN COUNTY CLERK OF COURT

By: Chloe Salt

RECEIPT FOR EXHIBITS

Case Number: 2019-CP-22-00212

Judge: R. Griffin

Plaintiff: Gulfstream Cafe, Inc.

Plaintiff Attorney: S. Bloom, S. Foerster, A. Pearson

Defendant: Georgetown County, et al.

Defendant Attorney: H. Golding, T. Voegel

Date Started: August 29, 2022

Date Ended:

Received of **KAY H. RICHARDSON**, Court Reporter for the above case, these exhibits:

P / D / CT* Number	Description	COC USE:
1 P26 E	10/10/18 Email Coleman to Blakenship	
2 P27 E	10/11/18 Email Sobchuk to Stacy	
3 P28 E	10/11/18 Email Sobchuk to Richardson	
4 P29 E	10/12/18 Letter Stacy to Richardson	
5 P30 E	10/12/18 Email Sobchuk to Richardson	
6 P31	10/12/18 Email Richardson to Stacy (NOT ID OR E)	
7 P32	Square Footage Chart (NOT ID OR E)	
8 P33	10/17/18 Letter Nugent to Bryant (NOT ID OR E)	
9 P34 E	10/2018 Notice of Public Hearing	
10 P35 E	10/18/18 Planning Commission Staff Report	
11 P36 E	10/18/18 Planning Commission Agenda Addendum	
12 P37 E	10/18/18 Planning Commission Meeting Minutes	
13 P38	10/19/18 Email Johnson to Stacy (NOT ID OR E)	
14 P39	10/22/18 Email Johnson (NOT ID OR E)	
15 P40	10/25/18 Email Elliott to Johnson (NOT ID OR E)	
16 P41	11/09/18 Email Goggans to Novak (NOT ID OR E)	
17 P42 E	11/13/18 County Council Meeting Minutes	
18 P43	12/11/18 Agenda Request Form (NOT ID OR E)	
19 P44 E	12/11/18 County Council Meeting Minutes	
20 P45 E	01/08/19 County Council Meeting Minutes	
21 P46 E	01/08/19 Ordinance 2018-40	
22 P47 E	01/23/19 MAI Appraisal Report 47(a), (b), (c), (d), (e), (f), (g)	
23 P48	01/23/19 Email Novak to Goggans (NOT ID OR E)	
24 P49	01/24/19 Email Subchuk to Lawhon (NOT ID OR E)	
25 P50	01/24/19 Email Goggans to Lawhon (NOT ID OR E)	

Received this 1st day of September, 2022.Page 2 of 5

GEORGETOWN COUNTY CLERK OF COURT

By: Amber Hart

RECEIPT FOR EXHIBITS

Case Number: 2019-CP-22-00212

Judge: R. Griffin

Plaintiff: Gulfstream Cafe, Inc.

Plaintiff Attorney: S. Bloom, S. Foerster, A. Pearson

Defendant: Georgetown County, et al.

Defendant Attorney: H. Golding, T. Voegel

Date Started: August 29, 2022

Date Ended:

Received of **KAY H. RICHARDSON**, Court Reporter for the above case, these exhibits:

P / D / CT* Number	Description	COC USE:
1 P51 ID	01/25/19 Email Goggans to Johnson ~~(NOT ID OR E)~~	
2 P52	01/25/19 Email Johnson to Goggans (NOT ID OR E)	
3 P53	02/18/19 Email Novak to Subchuk, Goggans (NOT ID OR E)	
4 P54	03/27/19 Email Goggans to Lawhon (NOT ID OR E)	
5 P55	06/09/19 Email Goggans to Rolison (NOT ID OR E)	
6 P56	06/11/19 Email Boyd to Richardson (NOT ID OR E)	
7 P57 ID	09/05/19 Consent Judgment (Ethics) ~~(NOT ID OR E)~~	
8 P58	11/04/19 Goggans' Answer to Interrogatories (NOT ID OR E)	
9 P59	11/04/19 County's Answer to Interrogatories (NOT ID OR E)	
10 P60	12/11/19 Gulfstream Position Paper (NOT ID OR E)	
11 P61	12/13/19 Email Goggans to Turner (NOT ID OR E)	
12 P62	04/16/20 Email Goggans to Pascoe (NOT ID OR E)	
13 P63	11/06/20 Email Rolison to Novak (NOT ID OR E)	
14 P64	11/11/20 Email Lawhon to Goggans (NOT ID OR E)	
15 P65	02/03/21 Email Stacy to Papanikolaou (NOT ID OR E)	
16 P66	02/03/21 Email Stacy to Papanikolaou (NOT ID OR E)	
17 P67	BP Invoices (NOT ID OR E)	
18 P68 E	1 Photo (Aerial)	
19 P69	Cost Receipts (NOT ID OR E)	
20 P70	Jake Knight Work File (NOT ID OR E)	
21 P71	MQ3 Plans (NOT ID OR E)	
22 P72	11/25/19 Appraisal of Jakie Knight (NOT ID OR E)	
23 P73	Jim Moring Work File (NOT ID OR E)	
24 P74	Robert Castles Work File (NOT ID OR E)	
25 P75 E	Plat	

Received this 1st day of September, 2022.Page 3 of 5

GEORGETOWN COUNTY CLERK OF COURT

By: Andrew Malt

RECEIPT FOR EXHIBITS

Case Number: 2019-CP-22-00212

Judge: R. Griffin

Plaintiff: Gulfstream Cafe, Inc.

Plaintiff Attorney: S. Bloom, S. Foerster, A. Pearson

Defendant: Georgetown County, et al.

Defendant Attorney: H. Golding, T. Voegel

Date Started: August 29, 2022

Date Ended:

Received of **KAY H. RICHARDSON**, Court Reporter for the above case, these exhibits:

P / D / CT* Number	Description	COC USE:
1 P76 E	05/03/16 Email Richardson to Goggans	
2 P77 E	06/15/16 Email Johnson to Coggans, Richardson, Johnson	
3 P78 E	Letter Goggins	
4 P79 E	08/04/15 Email Richardson to Ochal, Johnson and Blankenship	
5 P80 E	07/20/15 Email Victoria to Hollingsworth, Lawhon, et al.	
6 P81	12/06/16 Email Bryant to Redman, et al. (NOT ID OR E)	
7 P82 E	12/07/16 Email Bryant to Redman	
8 P83	09/22/16 Letter Goggans to Lawhon (NOT ID OR E)	
9 P84 E	11/13/18 County Council Agenda Packet	
10 P85 E	12/11/18 County Council Agenda Packet	
11 P86 E	01/08/19 County Council Agenda Packet	
12 P87	USPAP 20-21 Edition, Standard 3 (NOT ID OR E)	
13 P88	USPAP 20-21 Edition, Standard 4 (NOT ID OR E)	
14 P89	USPAP 20-21 Record Keeping Rule (NOT ID OR E)	
15 P90	USPAP 20-21 Scope of Work Rule (NOT ID OR E)	
16 P91	USPAP 20-21 Standard 1 (NOT ID OR E)	
17 P92	USPAP 20-21 Edition, Standard 2 (NOT ID OR E)	
18 P93 E	Aerial Photo Marlin Quay	
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Received this 1st day of September, 2022.Page 4 of 5Georgetown
GEORGETOWN COUNTY CLERK OF COURTBy: Amber Galt

RECEIPT FOR EXHIBITS

Case Number: 2019-CP-22-00212

Judge: R. Griffin

Plaintiff: Gulfstream Cafe, Inc.

Plaintiff Attorney: S. Bloom, S. Foerster, A. Pearson

Defendant: Georgetown County, et al.

Defendant Attorney: H. Golding, T. Voegel

Date Started: August 29, 2022

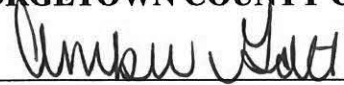
Date Ended:

Received of **KAY H. RICHARDSON**, Court Reporter for the above case, these exhibits:

P / D / CT* Number	Description	COC USE:
1 D1 E	2018 Georgetown County Zoning Ordinance	
2 D2 E	Georgetown Times Ad for 12/21/17 Public Hearing	
3 D3 E	Coastal Observer Ad for 12/21/17 Public Hearing	
4 D4 E	Emails Blankenship to newspapers 12/21/17 Public Hearing	
5 D5 E	12/21/17 Planning Commission Staff Report	
6 D6 E	01/09/18 County Council Meeting Minutes	
7 D7 E	02/13/18 County Council Meeting Minutes	
8 D8 E	02/27/18 County Council Meeting Minutes	
9 D9 E	Ordinance No. 2018-03 - Adopted 02/27/18	
10 D10 E	08/27/18 Letter Oxner & Stacy, P.A. to Planning Commission	
11 D11 E	1 Photo	
12 D12 E	Emails Blankenship to newspapers for 10/18/18 Public Hearing	
13 D13 E	Georgetown Times ad for 10/18/18 Public Hearing	
14 D14 E	Coastal Observer ad for 10/18/18 Public Hearing	
15 D15	09/24/18 Email Coleman to Nappier	
16 D16	09/25/18 Email Gardner to MQ Unit Owners	
17 D17	10/12/18 Email Gardner to MQ Unit Owners	
18 D18 E	10/12/18 Ticket from Blankenship	
19 D19 E	Public Sign-in Sheet for Planning Commission Meeting 10/18/18	
20 D20 E	Gulfstream Cafe 2018-21 Property Tax Receipts and Invoices	
21 D21	Gulfstream Cafe 2010-20 Tax Returns	
22 D22	Gulfstream Cafe 2018-21 Property Tax Receipts and Invoices	
23 D23	02/16/22 Travis Avant's Appraisal Report	
24 D24 E	Motion to Alter or Amend Judgment - 2016CP2600961	
25		

Received this 1st day of September, 2022.Page 5 of 5

GEORGETOWN COUNTY CLERK OF COURT

By: 

2019-CP-22-00212

Witness Form for Non-Jury Trial

Date of Hearing: August 30, 2022
Case Caption: The Gulfstream Café Inc vs. Georgetown County et al
Plaintiff's Attorney: Simon H. Bloom, Sean Matthew Foerster, Andrea J. Pearson
Defendant's Attorney: Henrietta U. Golding, Brooke Raylynn Watson

Plaintiff's Witnesses

Jeff Kirk
James Moring
Robert Castles
George Knight

Defendant's Witnesses

Holly Richardson
Boyd Johnson
Steve Goggans
Judy Blakenship