

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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 VIII)**

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

Defendants.)

**DEFENDANTS’
POST-TRIAL BRIEF**

Defendants Georgetown County (“the County”), Georgetown County Council (“County Council”), and Steve Goggans (collectively hereinafter “Defendants”) hereby submit this Post-Trial Brief.

INTRODUCTION

The issue before this Court is whether Plaintiff The Gulfstream Café, Inc. (“Plaintiff”) has met its burden of proof and overcome the presumptions that the legislative enactment, Ordinance 2018-40, is constitutional and valid as a matter of law.

At best, Plaintiff is asking this Court to overcome what prior courts and the laws of the state of South Carolina have set as a very high bar, namely to declare a legislative act invalid. At worst, Plaintiff seeks to have this Court do what it has attempted and failed to do for a number of years: stop the re-opening of a competitor restaurant.

FACTS

The Marlin Quay Planned Development

In 1982, Georgetown County created a Planned Development¹ (“PD”) named Marlin Quay. Under South Carolina law, local governments are empowered to create PDs in order to provide for more flexibility in land developments, among other objectives. S.C. Code Ann. § 6-29-740. According to Holly Richardson, Georgetown County’s Director of Planning and Code Enforcement, Georgetown County currently contains over one hundred PDs, and each PD stands alone as its own zoning ordinance. Marlin Quay PD was one of the earliest in Georgetown County.

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

As depicted in the Preliminary Master Plan, which accompanies the 1982 ordinance creating the Marlin Quay PD, three areas for parking are shown, including thirteen spaces² for the Gulfstream Café, sixty parking spaces between the Marina Store and Restaurant and the

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

² Today, The Gulfstream Café now has twenty-three parking spaces exclusive to its business.

Gulfstream Café (“the Parking Lot”), and private parking for the Marlin Quay Condominiums. (Pl.’s Ex. 1.) Since 1982, the Marlin Quay PD has been amended numerous times, as Ms. Richardson testified.

The Gulfstream Café is owned by Plaintiff, which is a South Carolina corporation solely owned by Jerry Greenbaum. Mr. Greenbaum purchased the Gulfstream Café in 1986, and at that time, the Marlin Quay PD existed with the approved uses being: the Marlin Quay Condominiums; the Marlin Quay Marina Store and Restaurant; the Marina with boat slips; and the Gulfstream Café. These uses have not changed since Plaintiff purchased Gulfstream Café.

This controversy relates to the use of the Parking Lot. In 2014, Palmetto Industrial Development, LLC (“Palmetto”), became the owner of the Parking Lot, the Marina, and the Marina Store and Restaurant. Plaintiff does not own the Parking Lot. Plaintiff’s right to use the Parking Lot derives solely from non-exclusive easements, which do not guarantee Plaintiff a certain number of parking spaces within the Parking Lot. Rather, Plaintiff has a non-exclusive right to use the Parking Lot, which it obtained in 1986 and 1990 through easements granted by a previous property owner, Marlin Quay Marina Corporation. (Pl.’s Exs. 2 & 3.) Specifically, these easements grant Plaintiff the “right of ingress and egress” “together with the rights of vehicular and pedestrian access and also for the purpose of maintenance, repair, alteration and/or improvements.” (*Id.*) Today, in addition to Plaintiff possessing the non-exclusive right to use the sixty-two spaces in the Parking Lot, Plaintiff also owns seventeen parking spaces that are exclusively for the Gulfstream Café, as well as six parking spaces under its restaurant, which are primarily used by its employees.

For many years, the Marlin Quay PD contained two restaurants: The Gulfstream Café and the Marlin Quay Marina Store and Restaurant. The old Marlin Quay Marina Store and Restaurant

was a two-story, cinder-block building, with the first floor being on the ground level, next to the Marina. When Palmetto purchased the Marlin Quay Marina Store and Restaurant, the building was in need of much repair and did not comply with current flood requirements per the Federal Emergency Management Agency (“FEMA”) regulations, Americans with Disabilities Act (“ADA”) regulations, or other fire and building codes. Further, the old building encroached onto the Marlin Quay Condominiums’ property.

In 2014, Palmetto retained architect David Victoria to design a replacement Marina Store and Restaurant. In 2016, Palmetto hired SGA Architecture, LLC (“SGA”) for the project. SGA was formed in the late 1980s by Steve Goggans, a Georgetown resident and architect, and since its formation has been located in Pawleys Island, South Carolina. Mr. Goggans has served as a member of Georgetown County Council since 2014. He did not seek re-election in 2022.

MQ1 or 1.0 (Minor Amendment) Application

In 2016 and 2017, Mr. Goggans was the principal architect for the rebuild of the Marlin Quay Marina Store and Restaurant. In 2016, Palmetto submitted a request for a minor amendment to the Georgetown County Planning and Zoning Department. Pursuant to Article VI, Section 619.301 of the 2018 Zoning Ordinance, minor amendments to a PD are considered by the Zoning Administrator. Boyd Johnson, then-Director of Planning and Code Enforcement, testified that the determination of the zoning application was accepted as a minor amendment. Subsequently, in November 2016, Palmetto received a demolition permit and demolished the existing Marina Store and Restaurant.

Plaintiff objected to the zoning amendment application being considered as a minor amendment, arguing that it should have been considered a major amendment. On that ground, Plaintiff appealed the minor amendment interpretation to the Georgetown County Board of Zoning

Appeals (“the Board”).³ At the behest of Palmetto’s attorney, Mr. Goggans appeared in his capacity as architect for the project and testified at the Board’s hearing held February 2, 2017. At the time of his testimony, Mr. Goggans was unaware that his appearance in his capacity as architect constituted a violation of his ethical obligations as a councilmember. Several months later, Plaintiff filed a complaint with the South Carolina Ethics Commission (“the Commission”). By Consent Order⁴ dated September 16, 2019, Mr. Goggans received a written warning and paid a civil penalty of \$700.00.

MQ2 or 2.0 (Major Amendment) Application

As former Director of Planning and Code Enforcement, Mr. Johnson, testified, because of the objection from Plaintiff, Palmetto submitted a modified zoning amendment application (referred to as “MQ2” or “2.0”) on November 3, 2017—this time as one for a major amendment to the Marlin Quay PD pursuant to Section 619.302 of the 2018 Georgetown County Zoning Ordinance.⁵ (Pl.’s Exs. 1 & 12).

³ The Board affirmed the interpretation of the zoning amendment application as one for a minor amendment.

⁴ Pursuant to the court reporter’s records filed September 1, 2022, this Consent Order, Plaintiff’s Exhibit 57, was identified but not entered into evidence. Thus, the Order’s specific findings set forth therein, as mentioned in Plaintiff’s closing argument, are improper and should not be considered by the Court.

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

At the trial of this case, Mr. Goggans testified that although Palmetto continued to employ his firm for the project, Mr. Goggans no longer served as the lead architect, and he had no contacts with the Georgetown County Planning and Zoning Department. On December 21, 2017, the Georgetown County Planning Commission heard this 2.0 zoning application, and according to the Minutes of the Planning Commission meeting, representatives of Plaintiff appeared and spoke in opposition. (Pl.'s Ex. 15.) Specifically, two attorneys for Plaintiff spoke at the hearing: George Redman and Simon Bloom. (*Id.*) At the close of the hearing, the Planning Commission recommended approval of the application, which then became the proposed Ordinance 2018-03, with the requirement that the seating capacity for the restaurant be limited to 110 seats—the same number of seats that existed in the old building. (*Id.*)

Ordinance 2018-03 was presented to Georgetown County Council for a first reading on January 9, 2018, a second reading on February 13, 2018, and a third reading on February 27, 2018. (Defs.' Exs. 6, 7, & 8.) At each reading, Mr. Goggans recused himself and remained absent during discussions regarding Ordinance 2018-03. (*Id.*) According to the testimony of Jef Kirk, General Manager of Gulfstream Café, representatives of Plaintiff attended each reading, and its representatives, including Plaintiff's legal counsel, spoke in opposition. (*See id.*) At the final reading, County Council voted to adopt Ordinance 2018-03. (Defs.' Ex. 9.) This Ordinance required the following:

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

Neither Plaintiff nor any other third party challenged the passage of this Ordinance, MQ2./2.0.⁶ Consequently, as of February 27, 2018, the Marlin Quay PD was amended, without challenge, in order to rebuild the Marina Store and Restaurant, subject to the aforementioned specific requirements.

Lawsuit by Plaintiff Against Palmetto

In November 2016, Plaintiff filed a lawsuit against Palmetto, alleging interference with its easement rights—civil action number 2016-CP-22-00961. In June 2018, a jury trial was held that resulted in a \$1,000.00 jury verdict and the issuance of an Order granting Plaintiff’s Motion to Amend or Alter the Judgment. (Defs.’ 18; Pl.’s Ex. 19.) In that Order, the Honorable Steven H. John directed that Palmetto not expand the outside boundaries of any new building beyond the outside boundaries of the old building. Judge John further identified the “outside boundaries” of the old building as those boundaries set forth in a 1985 plat recorded in Georgetown County. Because the existing PD, as amended, had the new building located somewhat outside the footprint of the old building, on August 27, 2018, Palmetto filed a zoning application for a major amendment to the PD in order to locate the building inside the footprint, as ordered by the Court. (Pl.’s Ex. 20.)

MQ3 or 3.0 (Major Amendment) Application

Palmetto’s third application, referred to as “3.0” during the trial of this case, provided that its purpose was to comply with the court order. (Pl.’s Ex. 20, pg. 5.) Palmetto’s attorney delivered to the Georgetown County Planning and Zoning Department, by cover letter dated August 27, 2018, the 3.0 PD amendment application, a check in the amount of \$262.50 for the application fee,

⁶ As noted above, Plaintiff did appeal MQ1/1.0.

and stamped envelopes to be used for mailing required notice to property owners within a 400-foot radius of the affected property. (Defs.' Ex. 10; Pl.'s Ex. 20.)

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

As testified to at trial, the tax map did not identify each condominium unit owner, but rather, the Association. Accordingly, the Planning and Zoning Department sent the Notice of Public Hearing, and accompanying map of the affected property to Nancy Gardner, Community Manager at Surfside Realty Company, the management company for the Marlin Quay Homeowners' Association. (Pl.'s Ex. 21.) Ms. Richardson testified that according to past practices, the Association would email the Notice and Map of the affected property to all unit owners. This

was the standard method to notify condominium unit owners.⁷ Ms. Gardner sent the unit owners the Notice. (Pl.'s Ex. 26.)

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

At the conclusion of the Planning Commission's meeting, it voted to recommend approval to County Council of the proposed Ordinance 2018-40. (Pl.'s Ex. 37.) Readings were held before County Council on November 13, 2018, December 11, 2018, and January 8, 2019. (Pl.'s Exs. 42, 44, & 45.)⁸ As at the hearing before the Planning Commission, representatives for Plaintiff attended each of the readings and spoke in opposition. At the conclusion of the County Council meeting on January 8, 2019, the Councilmembers voted to amend the PD, being Ordinance 2018-40. (Pl.'s Ex. 46.) The only changes made to the existing PD as a result of the passage of Ordinance 2018-40 was that the proposed building be located within the footprint of the old building and it

⁷ Ms. Richardson also testified that the Planning and Zoning Department does not conduct title searches before sending out the notices because the Zoning Ordinance specifically provides that only persons identified by the tax map be provided notice. *See* GEORGETOWN COUNTY, S.C., ZONING ORDINANCES art. XVII, § 1702.206 ("A list of all property owners, *as reflected by the tax records*, to whom letters are addressed must accompany the application.") (emphasis added).

⁸ Mr. Goggans recused himself at each reading of Ordinance 2018-40, including Council's vote on its adoption of the Ordinance. (Pl.'s Exs. 85 & 86.)

not exceed a forty-seven-foot height limit. Stated differently, the passage of Ordinance 2018-40 did not change the heated square footage (beyond reducing the total by two square feet), the sixty-two parking spaces, or the seating capacity of 110, all of which were enacted as part of the PD in February 2018 through the passage of Ordinance 2018-03. Plaintiff initiated this litigation on March 8, 2019.⁹

Current Litigation

Plaintiff alleges eight causes of action in its complaint. Until February 2022, in addition to Steve Goggans, six other council members were named defendants.¹⁰ The causes of action are:

1. Declaratory Judgment—Approval of Palmetto’s Application for Major Amendment is Invalid;
2. Violation of Substantive Due Process Rights –Article I Section 3 of the South Carolina Constitution;
3. Relief Under 42 U.S.C. § 1983 for Violation of Right to Substantive Due Process—United States Constitution;
4. Violation of Right to Procedural Due Process—Article I Section 3 South Carolina Constitution;
5. Relief Under 42 U.S.C. § 1983 for Violation of Right to Procedural Due Process—United States Constitution;
6. Violation of South Carolina’s Taking Clause—Article I, Section 13 of the South Carolina Constitution;
7. Inverse Condemnation; and
8. Attorneys’ Fees.

⁹ Plaintiff’s complaint challenging Ordinance 2018-40 was filed within the sixty-day window required by South Carolina Code Section 6-29-760(D): “No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it . . . may be made sixty days after the decision of the governing body if there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission.”

¹⁰ The County Councilmembers named by Plaintiff were John Thomas, Ron Charlton, Lillie Johnson, Austin Beard, Louis Morant, and Steve Goggans. By Consent Order entered December 14, 2021, all Councilmembers, except for Mr. Goggans, were dismissed with prejudice.

A bench trial commenced before the Honorable R. Kirk Griffin on August 29, 2022 and concluded on September 1, 2022.

LEGAL STANDARD AND BURDEN OF PROOF

“A municipal ordinance is a legislative enactment and is presumed to be constitutional.” *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1992). “Every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution.” *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 296, 737 S.E.2d 601, 609 (2013) (quoting *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 663 (2011)) (internal quotations marks omitted). “The authority of a municipality to enact zoning ordinances, restricting the use of privately owned property is founded in the police power.” *McMaster*, 395 S.C. at 505, 719 S.E.2d at 663 (2011) (citation and internal quotation marks omitted).

“The burden of proving the invalidity of a zoning ordinance is on the party attacking it, and it is incumbent upon [the challenger] to show the arbitrary and capricious character of the ordinance through clear and convincing evidence.” *Dunes*, 401 S.C. at 298, 737 S.E.2d at 610 (quoting *Willoughby*, 306 S.C. at 422, 412 S.E.2d at 425) (internal quotation marks omitted).

“It is not the function of the courts to pass upon the wisdom or folly of municipal ordinances or regulations.” *Dunes*, 401 S.C. at 300, 737 S.E.2d at 611. “The power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations.” *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965).

LEGAL ANALYSIS

I. Declaratory Judgment Act

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

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

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

In the case *sub judice*, two directors of planning and code enforcement, Ms. Richardson and Mr. Johnson, testified that planned developments create distinct and separate zoning ordinances and do not require adherence to every portion of Georgetown County’s general Zoning Ordinance. Specifically, Ms. Richardson and Mr. Johnson both explained that in the context of a PD, Georgetown County Ordinance Article XI, titled “Off-Street Parking Regulations,” may be

referenced as a guide when evaluating parking, but its application is not required. Given that the Parking Lot was used by multiple parties and that the Marlin Quay PD was one of the first PDs in the County, the Planning and Zoning Department imposed a limitation on the new Marina Store and Restaurant to the same seating capacity as the original building.

Both Ms. Richardson and Mr. Johnson further explained that Article XI, Section 1101, titled “General Requirements,” excludes the proposed Marina Store and Restaurant since it is not an “initial construction” nor a change in use. At trial, Plaintiff mocked this interpretation, even though the plain language in Section 1101 squarely supports the interpretation of the Planning and Zoning Department.

Plaintiff asserts baseless opinions that Article XI should have been strictly followed by the Planning and Zoning Department when it prepared its reports and recommendations, yet Plaintiff did not offer any zoning or planning expert to testify that in PDs, the application of general ordinances, such as Article XI, are mandatory over the particular ordinances governing the PD or that the General Requirements in Article XI specifically do not exclude the planned Marina Store and Restaurant. Consequently, regarding its claim that Ordinance 2018-40 is invalid, Plaintiff failed to present any evidence and meet its burden of proof.

At trial, Plaintiff repeatedly asserted that the Court need not determine the constitutionality of Ordinance 2018-40, but could simply find the passage of the Ordinance “invalid” because, as Plaintiff’s counsel said, it was a “bad decision.” Plaintiff’s assertion is contrary to well-established law in South Carolina, and Plaintiff provided no authority to support its notion that the Court could substitute its own judgment for that of the local legislature. Plaintiff did point to the Declaratory Judgment Act as a vehicle for finding the Ordinance “invalid.” However, Plaintiff failed to plead

any such relief in its complaint,¹¹ and Plaintiff further failed to comply with the requirements of the Declaratory Judgment Act.

In seeking declaratory relief, Plaintiff failed to make Palmetto, the Parking Lot owner, a party to this action. South Carolina Code Section 15-53-80 states in part: “When declaratory relief is sought[,] all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.” Accordingly, issuing a declaratory judgment would be inappropriate where Palmetto has not been joined in this action.

Assuming, *arguendo*, that Plaintiff complied with Section 15-53-80 of the Declaratory Judgment Act and pleading requirements, Plaintiff’s claim still fails because Defendants complied with the 2018 Zoning Ordinance and applicable statutory law in the passage of Ordinance 2018-40.¹²

¹¹ Paragraphs 71 through 77 of the complaint contain Plaintiff’s allegations pursuant to the declaratory judgment claim. Specifically, Plaintiff alleged the approval of 3.0 constituted a taking and violated Plaintiff’s rights to substantive and procedural due process. (Compl. ¶¶ 74-76.) Accordingly, Plaintiff did not seek declaratory relief related to the “invalidity” of Ordinance 2018-40 for any reason other than the alleged unconstitutionality of the Ordinance, and as a result, Plaintiff is limited to only those constitutional claims.

¹² Although South Carolina courts have reviewed the validity of municipal action in terms of whether the action complied with the municipality’s own codes, *see, e.g., Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), Plaintiff did not cite to any authority that recognizes a court’s ability to substitute its judgment for that of the municipality’s so as to decide if a municipality’s action was “good” or “bad,” as Plaintiff urged this Court to do at trial. *See id.* at 555, 590 S.E.2d at 351 (“In reviewing the discretionary decision of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives.”); *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 . . .”). *See also Bear Enters. v. Cnty. of Greenville*, 319 S.C. 137, 141-42, 459 S.E.2d 883, 886 (Ct. App. 1995) (“Of course, *if the court finds a violation of constitutional rights*, it may invalidate the ordinance. A court may not, however, substitute its judgment for that of the local zoning ordinance.”) (emphasis added). *Cf.*

II. Substantive Due Process

Plaintiff contends the passage of Ordinance 2018-40 violated its substantive due process rights granted in both the federal and state constitutions when Defendants allegedly did not consider the impact of 3.0 on the Parking Lot. (Compl. ¶¶ 81, 83, & 91.) Contrary to Plaintiff's assertion, the testimony and exhibits introduced at trial established that the Planning and Zoning Department, Planning Commission, and County Council in fact did consider the impact of 3.0 on parking.

When reviewing an alleged violation of federal substantive due process rights, a claimant must demonstrate “(1) that [it] had property or a property interest; (2) that the state deprived them of this property or property interest;¹³ and (3) that the state's action falls so far beyond the outer limits of legitimate governmental authority that no process could cure the deficiency.” *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 328 (4th Cir. 2005) (citation omitted) (internal quotation marks omitted). For a government actor's conduct to rise to the level of a violation, the “conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.” *Cnty. of Sacramento*

Kurschner v. City of Camden Plan. Comm'n, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008) (citing S.C. Code Ann. § 6-29-340) (“The legislature expressly granted [] discretionary authority in the area of local planning to the Commission.”); *Knowles v. City of Aiken*, 305 S.C. 219, 224, 407 S.E.2d 639, 642 (1991) (“Zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of citizen's constitutional rights.”).

¹³ Although Defendants focus their analysis on the third element, Defendants do not concede Plaintiff established a deprivation of its property rights by the Defendants. Plaintiff's alleged property interest is a non-exclusive easement to use the Parking Lot; Plaintiff alleges that because the new Marina Store and Restaurant will bring its own customers to use the Parking Lot, the Parking Lot will be overburdened. However, the result Plaintiff complains of would deprive from the actions of a private entity, and not the County's passage of an ordinance permitting the construction of a new building.

v. Lewis, 523 U.S. 833, 849 (1998). “Irrationality and arbitrariness imply a most stringent standard against which state action is to be measured in assessing a substantive due process claim.” *Rucker v. Harford Cnty., Md.*, 946 F.2d 278, 281 (4th Cir. 1991).

Similarly, South Carolina appellate courts have held, “In reviewing substantive due process challenges to municipal ordinances, a court must consider whether the ordinance bears a reasonable relationship to *any* legitimate interest of government.” *McMaster*, 395 S.C. at 505, 719 S.E.2d at 663 (citation omitted) (emphasis in original). “In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law.” *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 96, 596 S.E.2d 917, 922 (2004) (citation omitted). “The State’s deprivation of the property interest must fall so far beyond the outer boundaries of legitimate governmental authority that no process could remedy the deficiency.” *Harbit v. City of Charleston*, 382 S.C. 383, 394, 675 S.E.2d 776, 782 (Ct. App. 2009) (citing *Sunrise*, 420 F.3d at 328). Stated differently, “in the context of a zoning action involving property, it must be clear that the state’s action ‘has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.’” *Dunes*, 401 S.C. at 297, 737 S.E.2d at 610 (citation omitted).

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

[of invalidating zoning restrictions] affecting other property owners as well as the public.” *Rush*, 246 S.C. at 281, 143 S.E.2d at 533.¹⁴

At trial, Plaintiff focused on the circumstances surrounding Palmetto’s initial application for a minor amendment submitted in 2016, referred to as 1.0. Specifically, Plaintiff contended the conduct of Mr. Goggans at that stage “infected” the entire process with regard to parking calculations. In so arguing, Plaintiff neglects numerous critical facts that were unrebutted at trial, with two being: (1) Mr. Goggans recused himself as councilmember and lead architect in relation to MQ2/2.0 and MQ3/3.0—both of which were *major* amendments that required a much more rigorous process, with multiple public hearings for passage; and (2) the Planning and Zoning Department, Planning Commission, and County Council were not required to apply Article XI of the Zoning Ordinance when assessing proposed amendments to the Marlin Quay PD.

a. Plaintiff presented no evidence that Mr. Goggans’ involvement as an architect in 2016 during the submission of a minor amendment dictated or controlled the passage of the major amendment, Ordinance 2018-40, in January 2019.

In asserting that Mr. Goggans’ initial design involvement led to Council’s decision being arbitrary and capricious by the passage of Ordinance 2018-40, Plaintiff insinuated that by extension, the continuation of SGA throughout the 2.0 and 3.0 zoning applications tainted the public processes of the passage of Ordinances 2018-03 and 2018-40. Plaintiff’s assertions are wrong.

¹⁴ Given the similar nature in the analysis of both federal and state substantive due process claims, these claims will be analyzed together, as will Plaintiff’s federal and state procedural due process claims. *See, e.g., Rush*, 246 S.C. 268, 143 S.E.2d 527 (analyzing both state and federal due process violation claims together); *cf. Byrd v. City of Hartsville*, 365 S.C. 650, 656 n.6, 620 S.E.2d 76, 79 n.6 (2005) (holding “[t]akings analysis under South Carolina law is the same as the analysis under federal law.”).

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

The South Carolina Ethics Commission issued an opinion on January 17, 2007, in which the Commission determined a business associate of a sitting county councilmember would not be prohibited from submitting land development plans to the county's planning department because decisions at the planning department level were *per se* ministerial and non-discretionary, and therefore, subject to the exception identified in Subsection 8-13-740(A)(7)(a). *Op.*, S.C. State Ethics Comm'n, SEC AOO2007-006 (Jan. 17, 2007).¹⁵ The Commission recognized that county planners and reviewers were tasked with reviewing and approving sketch plans and minor plats, communicating with developers and their engineering firms, and making recommendations to the planning commission regarding major developments. *Id.* The Commission also noted that Planning Department staff and the Planning Commission "administer and interpret" the zoning ordinance "on a daily basis," and when reviewing a major development plan, staff "regularly seeks additional

¹⁵ The heading of this opinion contains seemingly boiler plate language stating the opinion was "overturned in part by amendment to Section 8-13-740(4) and (5)." However, that amendment simply deleted language that referenced individuals who may be associated with a public official, public member, or public employee of a county, and therefore, reaffirms the opinion's holding on different grounds.

information and clarification from the engineering firms as they shepherd the plan from submission to final approval.” *Id.* Ultimately, the Commission concluded, “This information gathering and requests for information is ministerial . . . and *non-discretionary*.” *Id.* (emphasis added). Instead, the Planning Commission is the entity that may “exercise its discretion in reviewing major developments and projects of regional significance.” *Id.*

This particular opinion demonstrates two fallacies in Plaintiff’s position: (1) a business associate of a sitting councilmember is not prevented from representing an applicant or from assisting with the submission of an application and accompanying materials; and (2) a Planning and Zoning Department’s very job encompasses all of the tasks Plaintiff seeks to fault the Georgetown County Planning and Zoning Department’s staff for. In other words, the Ethics Commission’s perspective of a Planning and Zoning Department’s role in preparing staff reports and reviewing information in addition to remaining in communication with applicants and their representatives dispels Plaintiff’s assertions that there was any impropriety, favoritism, arbitrariness, or capriciousness on the part of the County when it cooperated and communicated with Palmetto and its representatives throughout the application process. In addition, Robert Castles, Plaintiff’s engineer, testified that after submission of a zoning applications with local governments, it was customary for applicants’ representatives to engage in communications with staff members in the planning and zoning departments.

Moreover, Plaintiff’s argument requires the Court to entirely ignore the procedure that ensued by virtue of the subsequent applications being for major amendments. As explained above, an application for a major zoning amendment requires the preparation of a staff report and its submittal to the Planning Commission; the Planning Commission, made up of multiple members, receives public comment and subsequently makes a recommendation to County Council; then,

after not one, not two, but three public readings wherein the public is permitted to express their opinions regarding a zoning application to County Councilmembers, County Council votes whether to approve. In this case, this entire process occurred not once, but twice. Furthermore, as presented at trial, Mr. Goggans recused himself from participating in both of the major zoning applications.

To further illustrate, in *Kurschner v. City of Camden Planning Commission*, the Supreme Court of South Carolina noted, in dicta, that even if a sitting planning commission member had a conflict of interest, the decision by the commission would not automatically be void. 376 S.C. 165, 170-71, 656 S.E.2d 346, 349 (2008). In that case, a planning commission member was elected as a state representative after a special election, but had not yet taken the oath of office. *Id.* at 170, 656 S.E.2d at 349. The applicants wanted the commission member to recuse herself because, the applicant argued, South Carolina Code Section 6-29-350(B) and Article III, Section 24 and Article VI, Section 3 of the South Carolina Constitution prohibited a planning commission member from holding an elected public office in the county from which she was appointed. *Id.* However, pursuant to a letter issued by the House Legislative Ethics Committee, the commission member did not recuse herself since she had not taken yet taken the oath, and in turn, had not begun “holding office.” *Id.* The Court affirmed this reasoning, and in dicta, noted:

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

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

Like the applicants in *Kurschner*, Plaintiff cannot demonstrate that it was prejudiced by Mr. Goggans' 2016 involvement with Palmetto's minor application. Plaintiff presented no such evidence at trial, and to the contrary, Planning and Zoning Department staff, Holly Richardson and Boyd Johnson, confirmed there was no pressure or influence from Mr. Goggans.

In order for Plaintiff's theory to be correct, Plaintiff would have to prove that Mr. Goggans' involvement with 1.0 in 2016 tainted the decisions of the Planning Commission and County Council *twice*. Even in a much closer question wherein the commission member participated in the vote of the very action at issue, the South Carolina Supreme Court gave great weight to the remaining votes as a cure of any alleged prejudice had there been a conflict of interest. Similarly, this Court should give great weight to the facts of this case wherein two subsequent applications for major amendments were approved, Mr. Goggans was not involved, public comments were allowed, meetings and votes were public, and most significantly, two levels of multi-member decision-makers approved the passage of each ordinance. Indeed, Plaintiff did not present one iota of evidence that the Council vote of approval of Ordinance 2018-40 was influenced by Mr. Goggans. Thus, Plaintiff's contention that Mr. Goggans' initial involvement "infected" the entire process up to and including the passage of Ordinance 2018-40 is without merit and wholly unsupported by any evidence. *See, e.g., Bear*, 319 S.C. at 139 n.1, 459 S.E.2d at 885 n.1 ("The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise. *If individuals are not satisfied with decisions made by members of a municipal government within the limits of the law, their remedy is at the polls, not the courts.*") (emphasis added).

b. Neither the Planning and Zoning Department, Planning Commission, nor County Council's actions in passing Ordinance 2018-40 rise to the level of arbitrary and capricious.

Plaintiff further alleges the passage of Ordinance 2018-40 violated its substantive due process because it was not rationally related to a legitimate government interest, but rather, will negatively impact the public's health, safety, and welfare. Plaintiff failed to present clear and convincing evidence to support these allegations, and in fact, the contrary was established at trial. *Bear*, 319 S.C. at 140-41, 459 S.E.2d at 886 ("The burden of proving the invalidity of a zoning ordinance is on the party attacking it; thus it is incumbent upon [plaintiff] to show by clear and convincing evidence the arbitrary and capricious nature of the ordinance.") (citing *Willoughby*, 306 S.C. 421, 412 S.E.2d 424).

"Courts cannot become city planners but can only correct injustices when they are clearly shown to result from municipal action." *Knowles*, 305 S.C. at 222, 407 S.E.2d at 642 (citation and internal quotation marks omitted). "In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and unreasonable." *Id.* at 224, 407 S.E.2d at 642 (citation omitted).

At trial, Mr. Kirk, the Gulfstream Café general manager, testified that the original Marina Store and Restaurant was in poor condition. Ms. Richardson and Mr. Johnson testified that the replacement building could not be built as it previously existed, but rather, must be compliant with existing flood regulations under FEMA, the ADA, and other current building and fire codes, all of which promoted and benefited the public health, safety, and welfare as well as the end result being a much safer structure. Moreover, Ms. Richardson explained that when the rebuilding of the Marina Store and Restaurant was initially discussed, the new building would resolve an issue wherein the former building technically encroached on the Marlin Quay Condominiums' property.

Given that this new building would remedy a potential property dispute, Ms. Richardson testified this too counted toward furthering the public health, safety, and welfare. *See Berman v. Parker*, 348 U.S. 26, 33 (1954) (“The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”); *McMaster*, 395 S.C. at 507-08, 719 S.E.2d at 664 (“Where the rational relationship standard is utilized, the law must be upheld if it furthers any legitimate governmental purpose.”).

Mr. Kirk testified that the Parking Lot, which had experienced an overburdening of parking for many years, would become dangerous. However, even though Mr. Kirk testified safety, due to the volume of traffic in the Parking Lot, had been a concern for many years, Plaintiff provided no evidence, but rather, only speculation, that the passage of Ordinance 2018-40—which limited the seating capacity to the same seating capacity¹⁶ as the former building—would result in bodily injury or death.¹⁷ Plaintiff hired no safety expert, had no testimony from law enforcement, nor provided any other safety analysis or study to support the notion that now, all of the sudden, the Parking Lot would lead to physical harm because County Council approved an ordinance permitting a replacement building that would be compliant with flood regulations as well as other safety requirements. Ms. Richardson and Mr. Johnson testified that consideration was given for

¹⁶ As Ms. Richardson testified at trial, the fire code capacity, as with easements between private parties, is not applicable to zoning matters and therefore, not considered by the Planning and Zoning Department.

¹⁷ Indeed, in its closing argument, Plaintiff asserted people would die as a result of the passage of Ordinance 2018-40. However, arguments of counsel are not evidence. *S.C. Dep’t of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (citations omitted).

the impact the new building would have on parking, and for that very reason, they recommended that the new building have the same seating capacity as the initial building and a limitation on the amount of heated square footage, both of which became requirements.

These requirements and considerations were not arbitrary nor capricious, and they do not shock the judicial conscience. Rather, the findings and recommendations of the Planning and Zoning Department were logical, reasonable, and well contemplated, and Ordinance 2018-40 is rationally related to achieving legitimate government interests of promoting the health, safety, and welfare of the community. Even if this Court disagrees with the County's decision to adopt Ordinance 2018-40, when the question of the County's action is even "fairly debatable," the action must stand. *Dunes*, 401 S.C. at 300, 737 S.E.2d at 611 ("It is not the function of the courts to pass upon the wisdom or folly of municipal ordinances or regulations."); *cf. Harbit*, 382 S.C. at 394, 675 S.E.2d at 782 (citation omitted) ("A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property."). Accordingly, Plaintiff's claims of substantive due process violations fail.

III. Procedural Due Process

Plaintiff next asserts the passage of Ordinance 2018-40 resulted in a violation of its federal and state procedural due process rights. "Procedural due process requires notice, the opportunity to be heard in a meaningful way, and judicial review." *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 570 (Ct. App. 2002) (citing *Grannis v. Ordean*, 234 U.S. 385 (1914)); *Kurschner*, 376 S.C. at 171, 656 S.E.2d at 350 (2008) (citing S.C. Const. art. 1, § 22; *Stono River Env't Prot. Ass'n v. S.C. Dep't of Health & Env't Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991)). Plaintiff failed to meet its burden of proof.

Here, Plaintiff presented no evidence it did not receive notice, an opportunity to be heard, or judicial review. In fact, Plaintiff's representatives, including employees and its attorneys, not only submitted multiple letters to various County agencies, but also participated at the public hearings and expressed their opposition to the passage of Ordinance 2018-40 at every stage. *See Harbit*, 382 S.C. at 393-94, 675 S.E.2d at 781 (holding claimant had a meaningful opportunity to be heard because he was allowed to present arguments before the Planning Commission and City Council, and even when claimant was not personally present, his attorney appeared on his behalf). Given that Plaintiff actively engaged with the County Departments at every level, participated in public hearings, and received its opportunity for judicial review, Plaintiff's claims of lack of procedural due process are baseless and without merit. Thus, Plaintiff was not deprived of procedural due process.

Nonetheless, Plaintiff specifically alleges several "deficiencies" with regard to procedural due process. Without conceding that any of these points of which Plaintiff complains is required by the state and federal constitutions, Defendants address each allegation below:

1. The 3.0 application was not the second application submitted by the property owner for the same parcel of property during a twelve-month period (Section 1702.1).

Section 1702.1 states in part that a party may not initiate an application for an amendment affecting the same property "*and requesting the same change in district classification*" more than once in a twelve-month period. (Emphasis added.) The 3.0 application did not request a change in district classification, because the district classification was a PD prior to the application, and Palmetto did not seek a change from a PD. Therefore, Section 1702.1 did not apply to 3.0.

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

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

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

The application, in proper form, was provided at least forty-five days prior to the Planning Commission meeting as required by Section 1702.201. The Planning Commission meeting was scheduled for October 18, 2018. (Pl.'s Ex. 34.) Palmetto submitted the 3.0 application to the Planning and Zoning Department on August 27, 2018. (Defs.' Ex. 10; Pl.'s Ex. 29). Therefore, the application was submitted in excess of fifty days before the Planning Commission meeting.

4. There was substantial compliance with Section 1702.206 and 1702.207 of the 2018 Zoning Ordinances.¹⁸

When Palmetto submitted the 3.0 application, it delivered envelopes addressed to each property owners within 400 feet of the subject property. Section 1702.206 provides that an

¹⁸ Defendants address this allegation without conceding Plaintiff has standing to challenge it, as set forth more fully in Subsection 5.

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

According to the testimony of Ms. Richardson and Planning and Zoning Department staff member, Judy Blankenship, the Planning and Zoning Department staff does not require letters from the applicant, but rather, only envelopes because the Planning and Zoning Department prefers to provide the letter containing the Notice of Meeting as well as the map. Although an applicant does provide a list of property owners, the staff always obtains its own list from its tax records in order to ensure the correct owners are included. The tax list of the property owners affected by the 3.0 application was introduced as Plaintiff’s Exhibit 22. Ms. Richardson testified that this list was obtained from the County’s tax records by using the County’s Geographic Information System (“GIS”). Thus, this portion of the notice requirements was substantially complied with. *See* S.C. Code Ann. § 6-29-760(D) (providing there can be no challenge to the adequacy of notice if there has been substantial compliance with the notice requirements of established procedures); GEORGETOWN COUNTY, S.C., ZONING ORDINANCES art. XVII, § 1702.207 (“Failure to strictly comply with the notification requirements contained in Sections 1702.206 and 1702.207 shall not render the rezoning of the property invalid.”).

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

The tax map property owners’ list identifies The Gulfstream Café, Inc., Palmetto Industrial Development, LLC, and Marlin Quay Homeowners Association as property owners within 400

feet of the subject property. Plaintiff contends that because the unit owners at the Marlin Quay Condominiums were not mailed a physical letter, Plaintiff's procedural due process rights were violated.

First and foremost, Plaintiff did not present any evidence that it did not receive notice. The Planning Commission Meeting Minutes identify Plaintiff's representatives as attending and speaking at the meeting. (Pl.'s Ex. 37.) Accordingly, Plaintiff does not have standing to complain about lack of notice to another. *See State v. Chavis*, 261 S.C. 408, 411, 200 S.E.2d 390, 391 (1973) ("It is elementary that one has no standing to challenge the constitutionality of a statute unless *his* rights have been invaded and injuriously affected.") (emphasis added); *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (citing the elements of standing, including that a plaintiff must have suffered an injury in fact and that there must be a causal connection between the injury and the conduct complained of) (citation omitted); *Oasis Goodtime Emporium I, Inc. v. City of Doraville*, 773 S.E.2d 728, 734 (Ga. 2015) (rejecting claimant's argument that because it was affected by the passage of a bill, it had an interest in ensuring compliance with notice procedures and holding claimant received notice and lacked standing to attack the lack of notice to another party); *In re Single Cnty. Ditch*, 361 N.E.2d 1353, 1356 (Ohio Ct. App. 1976) ("An appellant landowner has no standing . . . to complain of lack of notice (to other landowners) . . . when the record does not support a conclusion that the appellant did not receive notice . . .").

Notwithstanding the foregoing, Plaintiff presented no evidence that any Marlin Quay unit owner failed to receive actual notice of the Planning Commission meeting. Because the tax map list does not identify each individual owner in the condominium project, the Notice and the Map were sent to the property management company, Surfside Realty Company, which then emailed

the Notice to each unit owner at Marlin Quay. It is correct that the Marlin Quay unit owners, who fall within the 400 feet, were not mailed a physical letter, but rather, were emailed by the property management company. However, Section 1702.207 specifically states the following: “Failure to strictly comply with the notification requirements contained in Sections 1702.206 and 1702.207 shall not render the rezoning of the property invalid.”¹⁹ Accordingly, proper notice was given pursuant to Section 1702.207. It should also be noted that not one condominium unit owner appeared at trial as a witness.

IV. Takings

Plaintiff asserts that as a result of the passage of Ordinance 2018-40, “Gulfstream will not be able to operate a restaurant and will not enjoy the rights granted to it in the Easement.” (Compl. ¶ 119.) Not only is this assertion contrary to the evidence, but Plaintiff has failed to prove by the elements of a taking under South Carolina law.

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

In this case, Plaintiff has not alleged that there has been any physical invasion of its property, but rather, that the passage of Ordinance 2018-40 equates a taking. However, Plaintiff

¹⁹ Moreover, on the issue of notice, Ms. Richardson and Ms. Blankenship testified that the Planning and Zoning Department complied with Section 1702.3 by submitting an ad containing notice of the Planning Commission hearing in not one, but two, local newspapers of general circulation fifteen days in advance of the scheduled public hearing date. (Defs.’ Exs. 2 & 3.) Ms. Richardson also testified that the Planning and Zoning Department placed a “conspicuous notice” on the affected property, which was visible from the public street that bordered the property, all in compliance with Section 1702.209. (Defs.’ Ex. 11.)

presented no evidence that all economically beneficial uses of the land have been deprived, but rather, only that some of its customers may potentially have greater difficulty parking. Although Plaintiff has known about the rebuilding of this neighboring restaurant for approximately six years, Plaintiff did not conducted any study, test, or evaluation of the method or manner of travel its customers use when dining at its restaurant nor were any customer surveys conducted. Testimony of Mr. Kirk and Plaintiff's appraiser, George Knight, verified that many of the Gulfstream Café's customers travel by foot, charter bus, golf cart, bicycle, and ride-sharing services, and both agreed that there were at least 400 to 500 condominium units, and numerous vacation homes, within walking distance of Gulfstream Café. Not only does Plaintiff ask the Court to assume there will be absolutely no parking for any Gulfstream Café customer, apparently despite the separate twenty-three spaces that are exclusive to Gulfstream Café, but Plaintiff also ignores the fact that its customers traverse in numerous ways aside from parking, meaning the restaurant should still have business, even if Plaintiff's "extraordinary assumptions" are true. Moreover, Plaintiff's appraiser also agreed that if a zoning amendment were approved, the Gulfstream Café could be rezoned and used as housing. Accordingly, Plaintiff provided no evidence that the passage of Ordinance 2018-40 would result in a categorical taking. *Cf. Dunes*, 401 S.C. at 314, 737 S.E.2d at 619 (holding summary judgment was appropriate where challenger presented no evidence that the situation was the "extraordinary circumstance when *no* productive or economically beneficial use of land is permitted") (citation and internal quotation marks omitted) (emphasis in original).

Even in the event there is no categorical taking based on a total elimination of all economically beneficial use, the court must still weigh whether a taking has occurred depending on a complex set of factors set forth in *Penn Central Transportation Co. v. City of New York*. 438 U.S. 104 (1978). "The 'common touchstone' of each regulatory taking theory is 'to identify

regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.” *Dunes*, 401 S.C. at 314, 737 S.E.2d at 619 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005)) (emphasis in original). The factors for the court’s consideration are: (1) the character of the government action; (2) the economic impact of the regulation on the claimant; and (3) the extent to which the regulation has interfered with distinct investment-backed expectations. *Dunes*, 401 S.C. 315, 737 S.E.2d at 619.

a. Character of the Government Action

When reviewing the character of the government action, the South Carolina Supreme Court has acknowledged government regulation by its very nature involves some effect on rights for the benefit of the public good. *Dunes*, 401 S.C. at 315, 737 S.E.2d at 620. Further, not all damages suffered by a private property owner are compensable. *Id.* at 316, 737 S.E.2d at 620 (quoting *Carolina Chloride, Inc. v. Richland Cnty.*, 394 S.C. 154, 170, 714 S.E.2d 869, 877 (2011)).

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

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

Here, like the Town in *Dunes*, Georgetown County achieved legitimate public purposes by adopting Ordinance 2018-40, such as correcting property lines, complying with a court order, as well as building a structure that complied with flood requirements of FEMA, ADA, and other building and fire code regulations which have come into existence since the old building was first erected.²⁰ The County did not eliminate all development potential of Plaintiff’s property interest—which is a non-exclusive easement right to use an unspecified amount of parking spaces. Moreover, Plaintiff undeniably still has a right to sell its restaurant if it wishes, and Georgetown County has not in any way exploited the Parking Lot for its own use or to gain an economic advantage. Therefore, the character of the government action in passing Ordinance 2018-40 weighs heavily in favor of Defendants.

b. Economic Impact of the Ordinance on Plaintiff

In determining the economic impact of government regulations on land owners, courts have rejected the notion that diminution in property value alone can establish a taking, and instead hold that a focus on the uses permitted by a regulation is the proper analysis. *Dunes*, 401 S.C. at 317, 737 S.E.2d at 621 (quoting *Penn Central*, 438 U.S. at 131). While the consideration of a property’s value before and after the regulatory action is relevant, that comparison is “by no means

²⁰ Further, the replacement building provides services to the public, such as fuel sales, and again, a second restaurant on the area.

conclusive.” *Dunes*, 401 S.C. at 317, 737 S.E.2d at 621 (quoting *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 490 (1987)).

Although Plaintiff’s appraiser testified that the loss in value to the restaurant would be \$1,760,100.00, he conceded his opinion was based on the “extraordinary assumption” that there would be absolutely no parking available for the restaurant. (Pl.’s Ex. 47, pg. 3.)²¹ Here, there is no evidence that Plaintiff would lose the ability to utilize sixty-two parking spaces due to the passage of Ordinance 2018-40. Plaintiff has never been entitled to a certain number of parking spaces in the Parking Lot, and Ordinance 2018-40 does not restrict the use of the Parking Lot by Plaintiff’s customers and employees. Plaintiff’s property sits on the Inlet, across from the beach in Garden City, South Carolina, and as Plaintiff’s expert conceded, this property would be extremely valuable if Plaintiff were to receive approval to rezone to residential. Therefore, Plaintiff—who has not placed the restaurant on the market for sale and failed to even track or otherwise attempt to calculate what percentage of its customers who actually utilize the Parking Lot—has not proven that there is any legitimate basis for the hypothetical diminution in value it alleges.

Nonetheless, even if the Court disagrees and finds some evidence, a diminution in market value alone cannot establish a taking. *See Dunes*, 401 S.C. at 318, 737 S.E.2d at 621; *Penn Cent.*, 438 U.S. at 131 (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value cause by zoning law) and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87.5% diminution in value)). *Cf. Rush*, 246 S.C. at 280-81, 143 S.E.2d at 533 (“[M]ere disadvantage in property value

²¹ Mr. Knight did not take into consideration any walk-ins, charter buses, ride-sharing arrangements, nor that some of the use of the Parking Lot would continue. He testified that the “extraordinary assumption” of absolutely no parking was only an assumption without any independent verification.

or income, or both, to a single owner of property, resulting from application of zoning restrictions ordinarily does not warrant relaxation in his favor on the ground of practical difficulty or unnecessary hardship.”) (quoting *Simmons v. Bd. of Adjustment of City of Charleston*, 226 S.C. 459, 85 S.E.2d 708 (1955) (internal quotation marks omitted)). Therefore, this factor weighs in favor of Defendants.

c. Interference with Investment-Backed Expectations

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

First, Plaintiff did not identify any investment-back expectations. Nevertheless, Plaintiff’s non-exclusive right to use the Parking Lot has not been changed by Ordinance 2018-40 because Plaintiff is not prohibited from using the Parking Lot. To the extent Plaintiff suggests the Parking Lot will be overburdened due to the passage of Ordinance 2018-40, which allows a new building with the same seating capacity as the former restaurant, Plaintiff’s witnesses testified that parking has long been a problem. Specifically, Mr. Kirk testified that during his time as the manager at Gulfstream Café, he directed traffic on shifts or saw customers turned away because of parking; in other words, pursuant to Plaintiff’s own witnesses’ testimony, inadequate parking has long been a problem, and as such, this testimony cuts against any alleged investment-backed expectations Plaintiff could have ever had regarding adequate parking. Accordingly, this factor weighs in favor of Defendants, and Plaintiff has not established a taking has occurred.

V. Inverse Condemnation

Plaintiff's last claim²² is one of inverse condemnation. "An inverse condemnation occurs when a governmental agency commits a taking of private property without exercising its formal powers of eminent domain." *Ray v. City of Rock Hill*, 434 S.C. 39, 45, 862 S.E.2d 259, 262 (2021) (quoting *Hawkins v. City of Greenville*, 358 S.C. 280, 290, 594 S.E.2d 577, 562 (Ct. App. 2004)) (internal quotation marks omitted). In order to establish a cause of action for inverse condemnation, Plaintiff must prove: (1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for public use; and (4) the taking has some degree of permanence. *Id.*

As described above, Plaintiff has not established the passage of Ordinance 2018-40 constituted a taking. However, even if the Court disagrees, Plaintiff's claim for inverse condemnation must fail because there has been no evidence, or even an argument, that any alleged taking was committed for public use. Rather, the supposed infringement on Plaintiff's right to use the Parking Lot would be committed by customers of the Marina Store and Restaurant—a private entity—which would result in that entity's profit, not for the public's use. Accordingly, Plaintiff has not and cannot establish a claim for inverse condemnation under these facts.

²² In its complaint, Plaintiff categorized "attorneys' fees" as its own cause of action. Setting aside the technicality that a claim for attorneys' fees is not a separate cause of action, Plaintiff is not entitled to attorneys' fees pursuant to 42 U.S.C. § 1988(b) because, as discussed above, Plaintiff is not a prevailing party on either of its 42 U.S.C. § 1983 claims for violation of substantive or procedural due process under the U.S. Constitution.

VI. Failure to Timely Challenge and Collateral Estoppel

a. Failure to Timely Challenge

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

No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it . . . may be made after sixty days after the decision of the governing body if there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission.

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

b. Collateral Estoppel

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

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

In its action against Palmetto and Mr. Lawhon, 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 right’s to use the Parking Lot.*” *Id.* at ¶ 28 (emphasis added). After a jury trial, the jury found for Plaintiff, awarding just \$1,000.00 in damages.²³ The court issued an injunction, which stated:

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

²³ The jury first awarded Plaintiff \$0.00. (Pl.’s Ex. 18.) The trial court instructed the jury to award some dollar amount, and the jury returned with a \$1,000.00 verdict. (*Id.*)

of any new building beyond those previously used. . . . As a result, any new building must be located on the same footprint as the old building. The Court is specifically not talking about height, only the outside boundaries.

(Order, July 27, 2018.)²⁴ Accordingly, at issue in the 2016 action was Plaintiff’s challenge of Palmetto’s construction of a building currently at issue. As evidenced by the court’s issuance of an injunction concerning the construction of the building and its effect on the Parking Lot, the issue of whether the building would infringe on 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 right to use of the Parking Lot,” the court’s holding regarding the building’s permitted construction was necessary to support that judgment.

Stated differently, 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—Ordinance 2018-40—and at issue in this case. As such, Plaintiff is estopped from complaining of any alleged damage resulting from the passage of

²⁴ On June 12, 2018, the circuit court issued a permanent injunction by Form 4 Order. On June 22, 2018, Plaintiff filed a Motion to Alter or Amend the Judgment. (Defs.’ Ex. 24.) In that Motion, Plaintiff requested the court to prohibit Palmetto and Mr. Lawhon from “operating a restaurant that serves dinner in the evening.” (*Id.*) Plaintiff also asked the court clarify that the “outside boundaries” were those that were reflected in a plat book recorded with Georgetown County real estate records. On July 27, 2018, the court granted the Motion in part, only to clarify that the “outside boundaries” referred to those defined by the plat book. The court did not require the Marina Store and Restaurant to operate only during the day, and thus, any argument by Plaintiff to that effect is estopped by the doctrine of issue preclusion.

Ordinance 2018-40, which merely approved an amendment that actually conformed with the trial court's prior order.

CONCLUSION

Plaintiff did not present sufficient evidence to even rebut the presumptions of Ordinance 2018-40's constitutionality and validity, much less prove, by clear and convincing evidence, that Georgetown County, County Council, and Steve Goggans violated Plaintiff's due process rights. As to the taking and inverse condemnation claims, neither claim exists under these facts. Even if Plaintiff is somehow inhibited from making the most beneficial use of its easement rights, this is not grounds for nullifying a zoning ordinance. Plaintiff's thinly-veiled attempt to quash competition cannot be supported by any of its legal claims, and ultimately, Plaintiff's referendum on Defendants belongs "at the polls, not the courts." *Bear*, 319 S.C. at 139 n.1, 459 S.E.2d at 885 n.1.

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Myrtle Beach, South Carolina

September 15, 2022

Attorneys for Defendants

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CIVIL ACTION NO. 2019-CP-22-00212
COUNTY OF GEORGETOWN	)	
	)	
The Gulfstream Café, Inc.,	)	
	)	
Plaintiff,	)	
	)	PLAINTIFF THE GULFSTREAM CAFÉ,
vs.	)	INC.'S POST-TRIAL BRIEF
	)	
Georgetown County, Georgetown County	)	
Council, and Steve Goggans, individually	)	
and in his official capacity as a	)	
Georgetown County Councilmember,	)	
	)	
Defendants.	)	
	)	
	)	

Plaintiff The Gulfstream Café, Inc. (“Gulfstream”) hereby submits this Post-Trial Brief, and respectfully shows the Court as follows.

INTRODUCTION

Putting aside lawyerly advocacy and the trappings of these legal proceedings, and instead, focusing on the gut reaction to the facts presented at trial, the only conclusion to be drawn is that Defendants’ decision defies common sense. The County approved a major amendment that allowed a 13,000 square foot building where a 4,600 square foot building previously stood, which would share a parking lot containing 62 parking spaces with two other uses such that the County’s Zoning Ordinance required 170 spaces, when the County knew parking in the lot was already taxed even before approval of the amendment. Gulfstream’s evidence at trial overcomes any presumption of legality of the approval of the major amendment, as the Defendants’ conduct is so far outside the bounds of what is allowed by the South Carolina Constitution, the U.S. Constitution, and the County’s Zoning Ordinance, that the only permissible result is for the major amendment to be declared invalid.

Gulfstream also convincingly demonstrated the unethical and improper conduct by Defendant Steve Goggans (“Goggans”) with respect to this project. It could not be more obvious that Goggans, while acting as a County Councilmember, could not actively negotiate with members of County planning staff and advocate for approval of Palmetto Industrial Development, LLC’s (“Palmetto”) building. The pressure from Goggans, who approved the salaries and raises of planning staff, resulted in the agreement with planning staff that only certain arbitrary characteristics would be considered when evaluating Palmetto’s building, and those decisions carried through the life of the project, resulting in the approval of 3.0.

I. Gulfstream Proved a Violation of its Substantive Due Process Rights.

Gulfstream’s evidence at trial clearly and convincingly showed the arbitrary and capricious nature of the major amendment, resulting in a violation of the Substantive Due Process Clauses of the South Carolina and U.S. Constitutions. Therefore, Gulfstream has proved entitlement to relief under Counts I (Declaratory Judgment), Count II (Violation of Substantive Due Process Rights Under South Carolina Constitution), and Count III (Relief Under 42 U.S.C. § 1983 for Violation of Substantive Due Process Rights Under U.S. Constitution).

“In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law.” Dunes W. Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 296, 737 S.E.2d 601 (2013). 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 Cnty., Md., 48 F.3d 810, 827 (4th Cir. 1995)). The burden of proving the invalidity of a zoning ordinance is on the party

attacking it, and that party must show the arbitrary and capricious character of the ordinance through clear and convincing evidence. Id. at 610.

A. Gulfstream has a Property Interest Protected by the Substantive Due Process Clauses of the State and Federal Constitutions.

Gulfstream has a property interest in its property as well as the easement over the parking lot. The approval of the major amendment effectively deprives Gulfstream of those interests. South Carolina law recognizes easements as protectable property interests. See Carolina Chloride, Inc. v. S.C. Dep't of Transp., 391 S.C. 429, 436, 706 S.E.2d 501 (2011); S.C. Pipeline Corp. v. Lone Star Steel Co., 345 S.C. 151, 153, 546 S.E.2d 654 (2001).

South Carolina law also recognizes the property interest of owners of real property to continued use of their property. Byrd v. City of N. Augusta, 261 S.C. 591, 595, 201 S.E.2d 744 (1974); Friarsgate, Inc. v. Town of Irmo, 290 S.C. 266, 270, 349 S.E.2d 891 (Ct. App. 1986) (explaining how a property owner acquires vested rights for use of its property); Scott v. Greenville Cnty., 716 F.2d 1409, 1418 & n.11 (4th Cir. 1983) (noting vested rights are a cognizable property interest, rooted in state law, to which federal due process extends).

Gulfstream has a property interest as an owner of property located in the Marlin Quay PD to its property and to the current zoning of the PD, which allows Gulfstream to use its property as a restaurant. (P-1). Gulfstream has been using its property as a restaurant since 1985 and incurs expenses for that use each year, as testified to by Jef Kirk ("Kirk"), operating partner. Therefore, Gulfstream has more than a unilateral expectation to continue using its property as a restaurant. As Kirk testified, allowing amendment to the Marlin Quay PD will have a devastating impact on Gulfstream's ability to operate as a restaurant, depriving Gulfstream of a property interest protected by state law.

B. The Major Amendment Should be Declared Invalid as an Arbitrary and Irrational Exercise of Governmental Power.

Where an ordinance is unreasonable, South Carolina has long recognized the Court's power to declare it invalid. For example, in Henderson v. City of Greenwood, 172 S.C. 16, 172 S.E. 689 (1934), the Supreme Court of South Carolina examined an ordinance that forbid the erection of any building or other structure within two hundred feet of a railroad crossing. Id. at 690. The Court noted that the ordinance gave council absolute control, so far as buildings were concerned, of all real estate within the city limits within two hundred feet of all railroad crossings, requiring the land to remain unbuildable, regardless of whether the property owner wanted to build a poultry house, a store, a residence, or a skyscraper. Id. at 692. The city insisted that the ordinance came within its police powers, but the Court observed that the "mere statement in the preamble of an ordinance that it is passed under the police power does not give a municipality carte blanche to pass an unreasonable ordinance or one opposed to the Constitution or laws of the state." Id. at 691. Finding the ordinance unreasonable, the Court declared the ordinance unconstitutional, null, and void. Id. at 692.

The decision to approve 3.0 is patently unreasonable and shocks the conscience. The decision blatantly ignores the County's Zoning Ordinance, creates a situation that poses a direct threat to public safety, and defies common sense.

Goggans, Holly Richardson ("Richardson"), and Boyd Johnson ("Johnson") established arbitrary "parameters" for reviewing Palmetto's building in 1.0, even though those parameters directly violated their own code. These parameters established the characteristics the Defendants reviewed for each iteration of Palmetto's building, including 3.0. Goggans explained to Mr. Lawhon, owner of Palmetto, that he had negotiated "favorable outcomes" with Richardson and Johnson. (P-8). He certainly did. He induced the staff that he controlled as a Councilmember to

march the County right into a patently illegal rezoning approval. The clear violations of the Zoning Ordinance Goggans induced include: (1) comparing only heated square footage to heated square footage when determining whether the new building could be approved; (2) ignoring thousands of square feet of unheated deck space that was to be occupied by patrons; and (3) ignoring Article 11, the parking section of the Zoning Ordinance, altogether. (P-8). These violations of the code infected the County's treatment of this project through all three versions and resulted in the County approving a 4-story, 13,000 square foot building where a 4,600 square foot building previously stood. One need only look at P-8 where Goggans makes a victory lap and asks his client for more money. The County never questioned or revisited these parameters going forward, resulting in the arbitrary and capricious approval of 3.0.

1. The County Put on Blinders to the Reality of 3.0 in Order to Get it Approved.

First, the illegal "heated" square footage rule Goggans established with his employees at the County allowed Defendants to ignore obvious differences in the sizes of the prior building and 3.0.

The County justified approving the 13,000 square foot building by saying that the heated space was actually decreasing by a few feet. Never mind that the new building would be almost three times the size as the old, with several thousand square feet of outdoor seating and deck space for bar customers, and a max occupancy of 350. Who can argue with a straight face that the new building creates no more burden on the PD or parking lot?

The former marina store and restaurant was 4,603 square feet total. (P-80). Moreover, the former marina store and restaurant had only 1,957 square feet for the restaurant area. (P-80). Even Richardson testified that the former marina store and restaurant was a 1 ½ story building.

Defendants, in reviewing 3.0, compared the **total** square footage of the original building of 4,603 to only **heated** square footage for 3.0. (P-35, P-84, P-85, P-86).

This was a totally arbitrary point of comparison for trying to determine the purported “impact” of 3.0, as 3.0 had more than 5,000 square feet of **unheated** square footage. (P-24, P-35, P-84, P-85, P-86). In fact, Goggans testified that he was able to add a whole additional story to the building since Defendants were not counting unheated square footage when comparing the buildings sizes. Accordingly, the comparison between the old building and marina looks more like this:

	Old Building	3.0
Floors	1 ½ stories	4 stories
Heated Square Footage	4,603	4,596
Unheated Square Footage	N/A	5,326

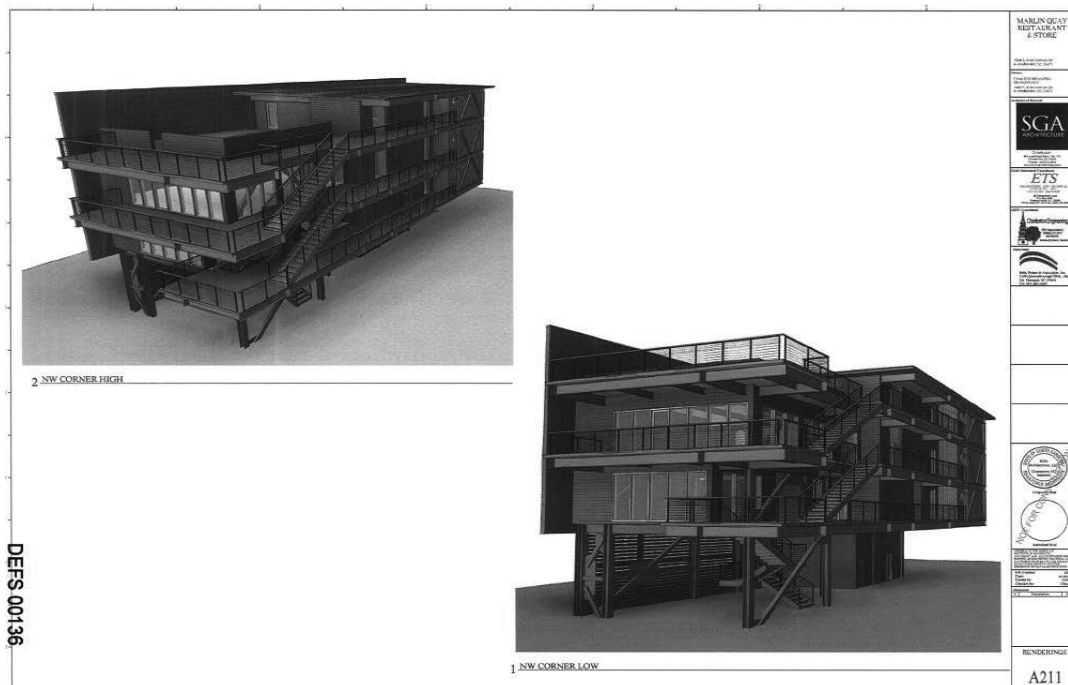
(See P-80, P-35, see also P-24, showing even more square footage for deck area). Ignoring the true square footage of the new building allowed the County to ignore parking requirements.

Photographs of the former marina store and restaurant and renderings of 3.0 are below, demonstrating the blatant differences in sizes of the buildings:

[space intentionally left blank]



(P-11).



(P-24, P-35).

What is even more offensive is that Richardson admitted that the distinction regarding heated versus unheated can be found nowhere in the Zoning Ordinance. There is nothing more arbitrary than picking a characteristic that is not contained in the Zoning Ordinance to use to determine whether or not to approve 3.0.

Defendants point to the restriction that 3.0 is limited to 110 seats, but that has nothing to do with the actual number of people that could frequent the building. 3.0 has extensive deck and bar space, which people could use to stand and have a drink. Johnson admitted that the fire code capacity limit for 3.0 was 350 people, much greater than the purported 110 seat limit.

2. Defendants Utterly Ignored Article 11 of the Zoning Ordinance.

In addition, Goggans convinced Richardson and Johnson not to look at the parking requirements of Gulfstream and the marina. This decision was critical in the approval of 3.0, as the evidence is entirely undisputed that approval of 3.0 does not meeting the parking requirements in Article 11 of the Zoning Ordinance. Who would ever approve a 13,000 square foot building with a need for at least 72 parking spaces of its own when two other uses require 22 spaces and 76 spaces and the only available spaces for all three uses is a 62 space parking lot?

Defendants willfully ignored the parking requirements for Gulfstream and the marina in reviewing 3.0. It is undisputed that Defendants did not do parking calculations for Gulfstream and the marina when reviewing the application. (P-35, P-84, P-85, P-86). Richardson and Johnson testified that they did not conduct the analysis under Article 11 regarding Gulfstream's required parking. Richardson testified that Defendants did not conduct the shared parking analysis under Article 11. Defendants' refusal to consider Article 11 is nonsensical, as Article 11 expressly states that the parking standards set forth in the Article will "assist in improving the appearance and

safety of required parking facilities while promoting desirable development, thereby improving public health, safety and general welfare of the community.” (D-1 § 1100).

The reason Defendants did not do the parking calculations under Article 11 is because everyone agrees that approval of 3.0 violates those requirements. If there is more than one principal use on the same premises, Article 11 requires that the total number of spaces must equal the sum of the required spaces for each use calculated separately, or stated differently, the parking requirements for each use are “stacked.” (D-1 § 1102.3). Article 11 sets forth the following requirements for each use that shares the parking lot:

Use	Parking Requirement
Marina	One space per three wet slips, plus one space per five dry slips, plus one space per employee based on the largest shift
General retail use	Less than 5,000 sq. ft., one space per 200 sq. ft. of gross floor area. More than 5,000 sq. ft., one space per 450 sq. ft. of gross floor area
Restaurant, standard	One space per 100 sq. ft. of gross floor area plus one space per 150 sq. ft. of outdoor seating area

(D-1 § 1102.1). Richardson and Robert Castles (“Castles”), expert civil engineer, both testified that the above categories set forth the parking requirements applicable to Gulfstream, 3.0, and the marina. For the marina, Castles testified that the marina had 67 slips, so it required 22 parking spaces under Article 11 ($67/3 = 22$). (See also P-75) (plat for marina showing 67 slips).

For the “Restaurant, Standard” requirements, Richardson, Castles, and Johnson all agreed that gross floor area means square footage inside the four walls of the building. Richardson conceded that gross floor area includes unheated, as well as heated, square footage. Castles testified that Gulfstream had 5,150 square feet of gross floor area, so it required 51 parking spaces for its interior space ($5,150/100 = 51$). Castles further testified that Gulfstream had 3,742 square

feet of outdoor seating area, so it required 25 parking spaces for its outdoor seating ($3,742/150 = 25$). Accordingly, the total required for Gulfstream is 76 parking spaces.

For 3.0, Castles testified that it had 1,966 square feet for the marina store, requiring 10 parking spaces ($1,966/200 = 10$). For gross floor area, Castles testified that 3.0 had 4,421 square feet, which requires 44 parking spaces ($4,421/100 = 44$). With respect to outdoor seating, Castles testified that 3.0 had 2,772 square feet of outdoor seating, resulting in the need for 18 additional spaces ($2,772/150$). Thus, 3.0 required 72 parking spaces under Article 11.

Under Article 11, Gulfstream, the marina, and 3.0 require a total of 170 parking spaces, but only 62 spaces exist in the lot. There is a shortage of **108 parking spaces** in the parking lot as a result of approval of 3.0.

Moreover, Defendants' post-hoc justification for ignoring Article 11 does not pass the smell test. Article 11 has always been mandatory and not a "guide." The best evidence of this is how the players on the ground treated the requirements in real time throughout the initial negotiation. Defendants throughout the process of reviewing Palmetto's building, despite their position now to the contrary, considered Article 11 to be mandatory. (P-76, P-77, P-78, P-79). For example, Richardson provided the following explanation to Goggans regarding deck space:

3. Do decks count in the total calculation for square footage assuming parking can be accommodated?

Since the decks on the existing building are open, we are assuming they were not included in the total square footage amount that was provided earlier (4,603 SF), so any decking on the new building would similarly not be included in this maximum. However, any deck area that is to be used for outdoor seating or a bar area must meet the parking requirements.

(P-76) (emphasis added). Similarly, Johnson said that "[w]e understand that parking can be provided as required in the ZO." (P-77). Goggans himself said that "per our parking analysis, approximately 31 parking spaces are needed to accommodate the proposed use per the ordinance, and 50 parking spaces are provided." (P-78).

Article 11 itself says it is mandatory through all zoning districts. (D-1 § 1100) (“It is the intent of this section to establish standards for the provision of off-street parking facilities throughout the unincorporated area of Georgetown County.”). Richardson agreed this includes PD districts. Even now Defendants acknowledge that Article 11 should be used as a guide, but instead of actually analyzing what Article 11 required for 3.0, Defendants willfully ignored Article 11 in its entirety.

Defendants’ argument that Marlin Quay is a PD, so the parking requirements do not apply, is similarly unavailing. Again, Article 11 unequivocally states it applies throughout all of Georgetown County, without any carve out for PD districts. The PD did not include parking requirements, so the only logical place to turn to review parking is Article 11. Even if Article 11 does not technically apply to PDs, it makes no sense to ignore Article 11, as it sets forth what the County has legislatively decided is required for parking in order to protect the public health, safety, and welfare.

Finally, citing to Section 1101, Defendants contend that Article 11 does not apply because approval of 3.0 did not involve “initial construction,” and claim that term should be read to mean initial construction of the PD. The Court should reject this argument, as tearing down a building and reconstructing a new one certainly qualifies as “initial construction” of 3.0.

3. Approval of 3.0 is Directly Contrary to the Public Health, Safety, and Welfare.

Approving 3.0 directly threatens the public health, safety, and welfare. Defendants knew that the parking lot contained inadequate parking, even before approval of 3.0. Defendants ignored the dangers of traffic accidents created by approving a much larger building on the already “substandard” parking lot. Richardson knew that the entire PD was “nonconforming” even before Defendants approved 3.0. Despite the knowledge that the parking was inadequate, Defendants

approved a building that is at least two times the size of the former marina store and restaurant. Kirk testified that an accident occurred on July 16, 2021, which entirely shut down traffic on Waccamaw Drive because it is a two-lane road. Multiple members of the public raised safety concerns at the public meetings for approval of 3.0. (P-44, P-45). Article 11 is expressly designed to protect the public health, safety, and welfare. Defendants' conduct in approving 3.0 is the antithesis of acting in the interest of public health, safety, and welfare.

4. Defendants Did Not Establish a Rational Basis for Approving 3.0.

Defendants proffered several reasons for approving 3.0, including that it would allow a safer building, would not straddle the property line, and would comply with flood regulations. While these reasons may theoretically justify allowing Palmetto to build a new building, those reasons do not provide a rational basis for approving a 4-story, 13,000 square foot building in place of the 4,600 square foot ship store and restaurant. Defendants could have required Palmetto to build a new building that did not straddle the property line and was raised up to comply with flood regulations without allowing a massive, 4-story building with an entire extra story addition that includes outdoor seating. Accordingly, Defendants' proffered reasons for approving the major amendment are not rationally related to the approval of 3.0.

For these reasons, the Court should declare Ordinance No. 2018-40 invalid as a violation of the South Carolina and U.S. Constitutions.

C. **If the Court Declines to Invalidate the Rezoning, Gulfstream is Entitled to Damages Under 42 U.S.C. § 1983.**

If for any reason the Court declines to set aside the approval, Gulfstream proved at trial that approval of 3.0 will result in damages to Gulfstream, such that Gulfstream is entitled to recover damages for violation of its substantive due process rights under 42 U.S.C. § 1983.

Gulfstream currently has the right to use the parking lot through its easements with Palmetto. (P-2, P-3). Those easements set forth that Gulfstream is to use the parking lot primarily at night and Palmetto is to use the parking lot primarily in the day. (Id.). Kirk testified that Gulfstream currently requires all of the parking spaces at night. If 3.0 is allowed to open, Kirk testified that it would have a devastating effect on Gulfstream's ability to operate as a restaurant and its rights to the easement will effectively be destroyed. The restaurant will fail.

Jim Moring ("Moring"), an expert real estate broker, whose testimony was unrebutted, testified that Gulfstream will not be marketable, and Gulfstream would not have a willing buyer as a result of the approval of 3.0. Moring also testified that there is no offsite parking in the surrounding area, and there is no street parking on Waccamaw Drive. Moring testified that the impact on marketability of Gulfstream would be massive because parking is an essential factor in determining the marketability of a restaurant.

Castles testified that in his experience as an engineer, there is a substantial shortage of parking in the parking lot and not sufficient parking in the lot after approval of 3.0. Jake Knight ("Knight") an expert real estate appraiser, whose testimony was unrebutted, testified that Gulfstream's property will suffer a reduction in value from \$1,850,000 to \$89,000, for a loss of \$1,760,100, due to the loss of easement parking resulting from approval of 3.0. (P-47, P47(a)-(g)).

Thus, if the approval of the major amendment stands, Gulfstream is entitled to damages in the amount of \$1,760,100.

D. Goggans is Liable to Gulfstream Under 42 U.S.C. § 1983.

Goggans admitted that the parameters he negotiated in 2016 regarding parking and how to "measure" the size of the new building were set for the rest of the life of the project, including for

3.0. As shown above, these parameters are entirely arbitrary and have no basis in the County's code requirements.

Goggans' negotiations with Richardson and Johnson, and his inappropriate conduct in interacting with them for approval of Palmetto's building, while at the same time serving as a County Councilmember and their boss, led to the arbitrary and capricious approval of 3.0. (P-8). Goggans bragged to his client, Mr. Lawhon, that "Boyd and Holly are friends by the way, and they are usually helpful in my efforts." (P-6). Richardson and Johnson also said they would try to find a way to "help" Goggans out with an interpretation he wanted. (P-6). Goggans used the favorable results he obtained from Richardson and Johnson as a bargaining chip to try to get paid an additional \$72,000 from Mr. Lawhon. (P-8).

This wrongful conduct by Goggans infected the approval of 2.0 and 3.0. In fact, Goggan's appointee on the Planning Commission, Johnny Weaver, made the motion to approve 3.0. (P-37). Under South Carolina law:

A public official, public member, or public employee of a county may not knowingly represent a person before an agency, unit, or subunit of that county for which the public official, public member, or public employee has official responsibility[.]

S.C. Code Ann. § 8-3-740. Beyond appearing at the BZA hearing, Goggans violated this prohibition through his repeated interactions with Johnson and Richardson in trying to get Palmetto's building approved. He knowingly represented Palmetto before County planning staff, actively negotiated with them and advocated for his client, while at the same time having responsibility over the department as a Councilmember. Accordingly, Goggans should be held accountable for his wrongful conduct.

II. Defendants Violated the Georgetown County Zoning Ordinance in Approving the Application, and the Court Should Declare the Major Amendment Invalid.¹

Beyond a substantive due process violation, the Court should declare the major amendment invalid because the process for 3.0's approval violated the County's Zoning Ordinance. Each of these violations shows how far Defendants were willing to go to approve the major amendment.

A. The County Did Not Make Palmetto Comply with the County's 12-Month "Penalty Box" Before Reapplying.

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." (D-1 § 1702.1).

Palmetto sought the same change in district classification in less than twelve months from the Planning Commission recommendation for 2.0, in violation of the Zoning Ordinance. Richardson testified that the district classification for Marlin Quay was a PD. 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 2.0. (P-12). The Planning Commission held a hearing on the application for 2.0 in December of 2017. (P-15). The County approved the major amendment on February 27, 2018. (D-9).

Then, in August 2018, less than twelve months after the Planning Commission recommendation, Palmetto filed the Application for Version 3.0. (P-20, P-29). Just like for 2.0, the Application was to "Amend a Planned Development" and sought a "Change of Building

¹ These violations provide additional grounds to grant Gulfstream relief under Counts I-V of its Complaint.

Configuration.” (P-20). The change requested was the same, such that it qualified as the same change in the PD classification.

While the County contends the application for 3.0 did not seek a change in district classification, this argument is unpersuasive. The Zoning Ordinance makes clear that any major amendment to a PD must be treated as an amendment to the Ordinance. (D-1 at § 619.302). Richardson testified as well that a major amendment is subject to the same procedures as a rezoning. Palmetto sought the same classification change—major amendment to a PD—for both 2.0 and 3.0. Accordingly, the application was barred by Section § 1702.1, and the County violated its own rules in approving it.

B. Defendants Did Not Make Palmetto Submit the Required Information, Likely Because the County Planned to Approve the Application Regardless of the Information Contained in the Application.

Section 1702.201 of the Zoning Ordinance provides that applications for all amendments 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. (D-1 Section § 1702.1).

The application for 3.0 was not in proper form at the time of its original submission. The application for 3.0 did not provide any building elevations or design plans showing the proposed building type, seating layout, size of the building, or proposed density at the time of initial application. (P-20). Accordingly, the County did not have any information before it to show it essential information regarding the proposed building at the time of the initial application. (*Id.*). The application itself stated that “revised calculation[s] to follow under separate cover,” and the omitted calculations included critical information such as density and parking requirements. (*Id.* at 5). How was the County supposed to evaluate the request for “Building Configuration Change” when it did not even have the building plans?

Information regarding the building elevations and proposed seating were not submitted until less than a week before the Planning Commission Meeting. (P-29, P-37). Therefore, the application was not submitted in proper form at least 45 days before the Planning Commission Meeting, in violation of the Zoning Ordinance. The failure of the Application to contain full, substantive information about Version 3.0 necessarily hampered the ability of the County and the public to properly evaluate the proposal.

C. The Notice Requirements Were Not Complied With For the Application.

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.” (D-1 § 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.*).

Here, Palmetto did not submit the required list to the County. (P-20). In addition, the Marlin Quay condominiums are within 400 feet of Palmetto’s property, but 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. (P-22). Instead, the County relied on the Marlin Quay Homeowners Association manager, Nancy Gardner, to notify homeowners. (P-21). Moreover, this notice was not provided by mail as required by the Ordinance, and instead was only emailed. (*Id.*). Richardson admitted that notice was not sent in the mail to the individual owners in the Marlin Quay condominiums.

While Defendants argue that “strict compliance” with the notice requirements is not necessary, this is not a strict compliance concern. The County utterly failed to provide mailed notice in violation of its Zoning Ordinance. This substantively impacted the ability of the public to consider the application. (P-26). The dozens of homeowners located within 400 feet of this

project were entitled to mailed notice. The County's failure to ensure proper notice to affected property owners goes well beyond an issue of strict compliance.

D. Defendants Did Not Comply with Article 11.

As fully set forth above, Defendants violated the Zoning Ordinance by failing to comply with the parking requirements set out in Article 11.

For all of these reasons, in addition to Defendants' violation of substantive due process, the major amendment should be declared invalid.

III. Gulfstream Demonstrated that Defendants' Conduct Ran Afoul of Procedural Due Process.

For procedural due process, at a minimum, "the Constitution requires notice and some opportunity to be heard." Mallette v. Arlington Cnty. Employees' Supplemental Ret. 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 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 the Zoning Ordinance. 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."). In fact, an owner in the Marlin Quay condominiums complained prior to approval of 3.0 that she had not received mail notice as required by the Zoning Ordinance,

and she also raised concerns that “no hard information as to the elevations or number of floors of the planned building was included” with the information she did receive. (P-26). Even for the sign posted regarding the Planning Commission public hearing, the sign did not include the date and time for the hearing. (D-11). All of these deficiencies add up to failure to provide adequate notice and opportunity to be heard.

IV. If the Court Upholds the Major Amendment, Gulfstream is Entitled to Just Compensation for Inverse Condemnation/Takings.

If the Court upholds the major amendment, Gulfstream is entitled to relief for Counts VI (Violation of South Carolina Takings Clause) and Count VII (Inverse Condemnation). For a regulatory takings claim, like the one at issue here, there are two questions to answer. First, has there been an affirmative government action? If so, does that action result in a taking? See Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76 (2005). There is no requirement the taking be for a “public use” in regulatory takings cases. Id.

There is no doubt in this case that the answer to the first question is yes. The approval of the major amendment is an affirmative governmental act for purposes of the takings analysis. (P-46).

As for the second question, a regulatory taking can occur multiple ways. A *per se*/categorical taking can occur where the regulation denies the owner all economically beneficial or productive use of the land. Dunes West Golf Club, LLC, 401 S.C. at 313 (internal quotation marks omitted). If there has been no categorical taking, then the plaintiff’s claims are analyzed under the test set forth in Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), 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.

A. The County's Conduct Deprived Gulfstream of all Economically Beneficial Use of its Property.

For the *per se* taking, Gulfstream's evidence proves that the County deprived Gulfstream of all economically beneficial use of the property. Kirk testified that approval of 3.0 will have a devastating impact on Gulfstream, and Gulfstream cannot survive without parking. Moring testified that Gulfstream's property will not be marketable as a result of the approval of 3.0. Gulfstream's appraiser, Knight, provided testimony showing that the value of Gulfstream's property will be for vacant land worth the nominal value of \$89,000, as compared to its pre-taking value of \$1,850,000. (P-47, P-47(a)-(g)). This evidence proves a deprivation of all economically beneficial use of Gulfstream's property.

B. Gulfstream Meets the Penn Central Test.

Even if Gulfstream did not prove a deprivation of all economically beneficial use of its property, Gulfstream proved a regulatory taking under the Penn Central test. With respect to the character of the government action, Gulfstream has shown above that approving 3.0 **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, as testified to by Knight. (P-47, P-47(a)-(g)). Gulfstream's property will only have the nominal value attributable to raw land after the grant of the application.

Finally, Gulfstream has legitimate investment-backed expectations to use the parking lot and to continue operating as a restaurant. Gulfstream is required to operate as a restaurant under the PD, and Kirk testified that Gulfstream expects to operate as a restaurant, that is what they do. (P-1). “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.

Accordingly, if the Court declines to invalidate the approval of 3.0, Gulfstream is entitled to just compensation in the amount of \$1,760,100.

V. Defendants’ Defenses Fail².

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

S.C. Code Ann. § 6-29-760 provides that “[n]o challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether enacted before or after the effective date of this section, may be made sixty days after the decision of the governing body if there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission.” S.C. Code Ann. § 6-29-760(d). In accordance with this statute, Gulfstream filed this lawsuit on March 8, 2019, within 60 days of the County’s enactment of Ordinance No. 2018-40 on January 8, 2019. (P-46).

² Gulfstream is addressing the defenses set forth in Defendants’ Pre-Trial brief. Gulfstream has previously addressed Defendants’ arguments that Gulfstream does not have a property interest and that Gulfstream has suffered no damages in Sections I(A) and I(C) of this brief, so they are not readdressed here.

Defendants again make the convoluted argument that since Gulfstream did not challenge the approval of 2.0, Gulfstream is barred from timely challenging 3.0. This argument has already been rejected as a matter of law at summary judgment.

Even if the Court reconsiders this argument, it is entirely misguided for multiple reasons. First, the application for 3.0 was an entirely new application that went through the complete major amendment process, such that the County's approval of 3.0 was a new decision with its own 60-day clock for challenge. (Compare P-12 with P-20).

Moreover, Gulfstream did challenge 2.0, as testified to by Kirk, through the suit against Palmetto, and Gulfstream successfully got 2.0 enjoined. That injunction is what required Palmetto to go back to the drawing board for 3.0. (P-20) (noting that "[p]er separate litigation, a court has ordered that the site plan approved by the Planning Commission and Couty Council cannot be built, and the applicant has to rebuild wholly within the footprint of the building that existed prior on the site. This change is to bring the site into compliance with said Court Order.").

In addition, despite Defendants' attempt to only point the Court to characteristics Defendants deem comparable between 2.0 and 3.0, comparison between the building plans for 3.0 and 2.0 show markedly different structures. (Compare P-12 with P-29). Gulfstream's lawsuit centers on the site plan amendment and change in building configuration permitted by approval of 3.0, which includes a different building layout for 3.0 than 2.0. Moreover, Gulfstream's challenge goes beyond a challenge to the additional conditions set forth in Ordinance No. 2018-40 and takes issue with the approval of the 3.0 in its entirety.

Finally, Ordinance 2018-40 approving 3.0 entirely superseded and replaced Ordinance 2018-03 approving 2.0. (P-46). As a result, Ordinance 2018-03 was no longer valid, and the failure to challenge that ordinance and cannot serve as basis to preclude Gulfstream's challenge to

Ordinance No. 2018-40. Thus, Gulfstream timely filed this action and is not statutorily barred from challenging the grant of the Application.

B. Gulfstream's Lawsuit is Not Barred By Collateral Estoppel/Issue Preclusion.³

Under South Carolina law, a party is precluded from relitigating an issue that was decided in a previous action. Kunst v. Loree, 404 S.C. 649, 653, 746 S.E.2d 360 (Ct. App. 2013). Defendants, as 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. Defendants did not, and could not, prove these three elements at trial.

To begin, the issues of whether Defendants violated Gulfstream's constitutional rights or whether the County violated its own ordinances in approving 3.0 were not issues that were litigated in the prior action with Palmetto. That would be impossible, as the application for approval of 3.0 was not even submitted until after the jury verdict was entered in the Palmetto case. (Compare P-18 with P-20 and 29) (jury verdict entered on June 22, 2018 and application submitted on August 27, 2018). Accordingly, the conduct by Defendants in approving 3.0 had not even happened at the time the lawsuit was litigated with Palmetto, so the issues in this case could not have been litigated in that action.

Moreover, the Court's injunction order is not in evidence, so Defendants have not proved that the issues in this case were directly determined in the prior matter and that they were necessary to support the judgment. Even if Defendants had shown that the Court in the lawsuit with Palmetto restrained Palmetto from constructing its building outside the footprint of the former marina store

³ Gulfstream's position is that Defendants did not raise this issue on its directed verdict motion or at summary judgment so therefore it is waived. Gulfstream addresses it out of an abundance of caution.

and snack bar (which they did not), that does not directly or even implicitly imply that the Court gave permission for Palmetto to construct 3.0, or that 3.0 complied with the Zoning Ordinance and did not run afoul of Gulfstream's constitutional rights. Defendants simply have not met their burden to show that collateral estoppel applies, and the Court should reject this defense.

C. Goggans is Personally Liable to Gulfstream⁴.

Defendants appear to argue that Goggans cannot be individually liable to Gulfstream because only the County as a whole can violate Gulfstream's constitutional rights. That is simply not the law. Gulfstream concedes that its claims against Goggans in his official capacity are against the County itself. But that does not mean that Goggans cannot be personally/individually liable for actions he took that violated Gulfstream's constitutional rights. That is the express purpose of an action against an individual governmental officer under 42 U.S.C. § 1983. "Personal-capacity suits seek to impose personal liability upon a governmental official for actions he takes under color of state law." Kentucky v. Graham, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). To establish personal liability in a § 1983 case, "it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." Id.

That is exactly what Gulfstream showed here. Gulfstream showed that Goggans abused his power as a County Councilperson to negotiate favorable outcomes for approval of Palmetto's building, which infected the entire approval process, including for 3.0. Goggans misuse of his power resulted in the acceptance by the County of the arbitrary and capricious conditions for approval of Palmetto's building, which have no bearing on the reality of the impact of Palmetto's building and are not at all grounded in the County's Zoning Ordinance. Goggan's misuse of his

⁴ Gulfstream's position is that Defendants did not raise this issue on its directed verdict motion so therefore it is waived. Gulfstream addresses it out of an abundance of caution.

position played a significant role in the County's decision to approve 3.0 that resulted in a violation of Gulfstream's substantive due process rights.⁵ For that he can be, and should be, individually liable to Gulfstream for damages.

D. Defendants' Standing Argument Has Been Waived.

Defendants claim, for the first time on their directed verdict motion, that Gulfstream does not have standing to complain about the County's failure to mail notice to the individual owners in the Marlin Quay condominiums, contending that Gulfstream cannot complain about something that does not affect them.

Defendants have waived this argument. Defendants did not raise standing as a defense in their Answer, Amended Answer, motion for summary judgment, or pre-trial brief. As such, Defendants cannot raise it for the first time after the conclusion of evidence at trial. Tower S. Prop. Owners Ass'n v. Summey Bldg. Sys., Inc., 47 F.3d 1165 (4th Cir. 1995) (Table) (rejecting challenge to standing as untimely where it was not raised in the answer, as an affirmative, or even the pretrial motion). Where standing to sue is not timely raised in an answer, it is waived. H & H Glass Co. v. Wynne, 289 S.C. 389, 391, 346 S.E.2d 523 (1986). Thus, this defense should be rejected.

E. Election of Remedies.

Gulfstream does not seek to double recover in this action. As its primary remedy, Gulfstream seeks to declare the major amendment invalid. If the Court declines to grant declaratory relief for any reason, Gulfstream is entitled to damages under either 42 U.S.C. § 1983 or takings/inverse condemnation. Gulfstream does not seek to recover damages under both causes

⁵ To clarify, Gulfstream does not seek to hold Goggans accountable for the procedural due process violations by the County or for inverse condemnation/takings.

of action. If the Court determines that Gulfstream is entitled to damages under both 42 U.S.C. § 1983 and takings/inverse condemnation, Gulfstream should be permitted to elect between its remedies at that time.

CONCLUSION

As set forth above, Gulfstream respectfully requests that the Court find in Gulfstream's favor and enter an order accordingly⁶.

Respectfully submitted,

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September 15, 2022

Attorneys for Plaintiff The Gulfstream Café, Inc.

⁶ Gulfstream will make its motion for attorneys' fees as appropriate upon the Court's entry of its order.

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’ REPLY TO
	)	PLAINTIFF’S
vs.	)	POST-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”) submit this Reply to Plaintiff The Gulfstream Café, Inc.’s (“Plaintiff”) Post-Trial Brief.

INTRODUCTION

As predicted, Plaintiff wants nothing more than for this Court to disregard the law and substitute its judgment for that of a local county based on a “gut reaction” as opposed to a close and careful examination and application of the law. (Pl.’s Br. pg. 1.) Plaintiff harps on the physical differences between the initial building and 3.0, but intentionally fails to address the applicable law and facts because they are not favorable to Plaintiff. For example, Plaintiff gives no weight to the fact that from the time 1.0 was approved as a minor amendment to the time 3.0 was enacted as Ordinance 2018-40 in January 2019, not one, but two planned development (“PD”) amendments were processed and approved as major amendments, presenting multiple opportunities for Plaintiff to make its concerns and complaints known to the Planning and Zoning Department, the Planning Commission, County Council, and members of the public—which it most certainly did. Plaintiff

disagrees with the County’s decision to adopt Ordinance 2018-40, but there must be substance to its legal claims. This Court does not have the ability—even if it shares Plaintiff’s disagreement with the County’s decision to adopt Ordinance 2018-40—to invalidate the ordinance on those grounds.¹

REPLY ARGUMENT

I. Plaintiff did not prove a violation of its substantive due process rights by clear and convincing evidence.²

To the extent Plaintiff insinuates the Court need only determine whether Ordinance 2018-40 is “unreasonable” in the sense that the question is one of whether the decision was “good” or “bad,” such a standard is contrary to the law. “[T]he power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations.” *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965). Although the Court may consider the reasonableness of an Ordinance, “reasonableness” is not akin to whether the Court agrees or disagrees with the decision, but rather, whether the ordinance is so unreasonable as to impair constitutional rights. *Bear Enters. v. Cnty.*

¹ Defendants incorporate by reference their analysis of Plaintiff’s takings claim as set forth in Defendants’ Post-Trial Brief. Defendants also note that Plaintiff appears to have abandoned its argument concerning inverse condemnation.

Defendants do not concede any argument that is not specifically addressed herein, but rather, Defendants incorporate by reference and rest on their Post-Trial Brief.

Defendants will seek attorneys’ fees by separate motion at the appropriate time.

² Defendants concede only that Plaintiff has a non-exclusive easement to use the Parking Lot—not that Plaintiff is entitled to a certain number of parking spaces or any greater right to use the Parking Lot than the lot owner.

of *Greenville*, 319 S.C. 137, 141-42, 459 S.E.2d 883, 886 (Ct. App. 1995) (“[I]f the court finds a violation of constitutional rights, it may invalidate the ordinance. A court may not, however, substitute its judgment for that of the local zoning authority.”); *Knowles v. City of Aiken*, 305 S.C. 219, 224, 407 S.E.2d 639, 642 (1991) (“Zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of citizen’s constitutional rights.”).³

As fully addressed in Defendants’ Post-Trial Brief, Defendants did not violate Plaintiff’s federal or state substantive due process rights. The County’s adoption of Ordinance 2018-40 was neither arbitrary nor capricious, as evidenced by the purposes for passing the Ordinance, which included furthering the public health, safety, and welfare by approving the construction of a structure that: did not encroach on another’s property; complied with a court order; and is safer and code-compliant, with a seating capacity limited to the same number of seats as the former restaurant. Although quick to criticize the differences in the square footage of the buildings, Plaintiff disregarded the undisputed evidence that the building’s increase in size was largely due to the necessity of being compliant with the Federal Emergency Management Agency (“FEMA”)

³ Plaintiff cites to the Supreme Court of South Carolina’s 1934 decision in *Henderson v. City of Greenwood* as an example of the Court finding an ordinance unreasonable so as to be unconstitutional. 172 S.C. 16, 172 S.E. 689 (1934). However, Plaintiff failed to mention the facts that led to the passage of that ordinance. Significantly, the plaintiff in that case submitted an application for a building permit, paid a requisite fee, and received a permit in order to construct a building on a lot situated near railroad tracks. *Id.* at 16, 172 S.E. at 689. After receiving the permit but prior to construction commencing, certain members of the community complained to the city council regarding the construction of the building. *Id.* As a result of the complaints, the city council revoked the plaintiff’s permit and enacted an ordinance that prohibited the construction of any building within 200 feet of any railroad without permission of the city council. *Id.* at 16, 172 S.E. at 689-90. The plaintiff subsequently applied for a new permit, which the city council unanimously denied. *Id.* at 16, 172 S.E. at 689. In determining that the ordinance was so unreasonable it violated the plaintiff’s constitutional rights, the Court found the very purpose of the ordinance was to seriously impair the plaintiff’s lawful business. *Id.* at 16, 172 S.E. at 692. Here, Plaintiff has neither presented evidence nor even argued—as it cannot—that the motive or intent for passing Ordinance 2018-40 was to destroy Plaintiff’s business.

regulations, Americans with Disabilities Act (“ADA”) regulations, and other fire⁴ and building codes.

Plaintiff relies heavily on the assertion that Defendants should have complied with Article XI, of the County’s Zoning Ordinance, when considering parking. However, Plaintiff provided no evidence that Article XI is controlling. Both Holly Richardson and Boyd Johnson, directors of Georgetown County Planning and Code Enforcement, testified that Article XI was inapplicable to the PD amendment because the proposed amendment was related to a PD, the building was not the “initial construction” of the PD district, and the proposed amendment did not seek a “conversion in use” or to increase seating capacity. (Defs.’ Ex. 1, GEORGETOWN COUNTY, S.C., ZONING ORDINANCES art. XI, § 1101.) Thus, according to the plain language of Article XI, the 3.0 application was exempt from the requirements set forth in Article XI. (*Id.*)

Further, the email communications between Mr. Goggans, Ms. Richardson, and Mr. Johnson simply show Palmetto’s attempt to cooperate and comply with the County’s Zoning Ordinance. Most telling of the weakness of Plaintiff’s allegations is Plaintiff’s failure to give weight to—or to even mention—the public, legislative process that occurred not once, but twice. If Plaintiff believed at the time of 3.0’s consideration that the County did not follow its ordinances, Plaintiff had the opportunity to present those concerns to the public and County officers—and it did. *See, e.g.*, Pl.’s Ex. 44, Dec. 11, 2018, County Council Meeting Minutes (“Mr. [Adam] Nugent, an attorney representing the Gulf Stream Café, voiced concerns regarding the proposed

⁴ Plaintiff asserts the building capacity pursuant to the fire code—a limit of 350 people—is somehow indicative of how parking should have been calculated. However, Holly Richardson, current Director of Planning and Code Enforcement, testified it is not the prerogative of the Planning and Zoning Department to consider the fire code, building code, or other codes outside of zoning ordinances.

amendment to the Marlin Quay Planned Development (Ordinance No. 2018-40) currently before County Council. He said there was reason to believe that proper procedure under the County's Zoning Ordinance had not been followed. He said the building being proposed was far different than the building that was there before. The County's Zoning Code requires that County Council consider whether adequate parking accommodations exist. *He encouraged Council members to observe the situation firsthand to ensure that the proper procedures were followed*, and that this building will be beneficial to the entire area.") (emphasis added). As the South Carolina Court of Appeals recognized, "[t]he governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise. If individuals are not satisfied with the decisions made by members of a municipal government within the limits of the law, their remedy is at the polls, not the courts." *Bear*, 319 S.C. at 139 n.1, 459 S.E.2d at 885 n.1.

II. Mr. Goggans is not liable to Plaintiff pursuant to § 1983.

In order to succeed against Mr. Goggans under 42 U.S.C.A. § 1983, Plaintiff must prove a violation of its Constitutional rights, and Plaintiff "must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988) (citations omitted). "[A] public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *Id.* at 50.

First and foremost, Plaintiff did not established it suffered any deprivation of its rights to substantive due process.⁵ In addition, Mr. Goggans was not acting under color of state law in his communications with the Planning and Zoning Department—his communications were in his

⁵ In Footnote 5 of Plaintiff's Post-Trial Brief, Plaintiff conceded it did not seek to hold Mr. Goggans liable for any claim but violation of its substantive due process rights.

capacity as an architect in relation to 1.0 or MQ1. Although Plaintiff places much emphasis on the language used by Mr. Goggans in his communications to his client, Plaintiff does not challenge the fact that Mr. Goggans was hired by Palmetto and communicated with the Planning and Zoning Department in his capacity as *an architect*—not a councilmember. Plaintiff asks this Court hold that simply by virtue of being a councilmember, any communication Mr. Goggans may have had with County employees was improper and coercive. To the contrary, Ms. Richardson and Mr. Johnson both testified they felt no pressure from Mr. Goggans to disregard the Zoning Ordinance or otherwise provide any special treatment to him that they would not otherwise provide to other applicants.

Regardless, even assuming, *arguendo*, that there was any impropriety on the part of Mr. Goggans, Plaintiff presented no evidence that 1) those intentions had any effect on members of the Planning and Zoning Department, the Planning Commission, or County Council, or 2) any communications at the time of application 1.0's submission had any effect on application 3.0's passage—which is the government action Plaintiff is challenging.⁶ Plaintiff's own expert, Robert Castles, testified it is common practice for applicants, or their representatives, to remain in constant contact with planning and zoning departments from the time of initial submission until its

⁶ Plaintiff's reliance on South Carolina Code Subsection 8-13-740(A)(5) as evidence of Mr. Goggans' improper conduct is misplaced. First, Plaintiff has cited no authority that supports that violation of that statute is *per se* evidence of a violation of Plaintiff's substantive due process rights. Second, as the South Carolina Ethics Commission has already addressed in an opinion issued on January 17, 2007, the exception to the general prohibition of public members communicating with public bodies applies in this circumstance because a county's planning department's decisions are *per se* ministerial and non-discretionary. Op., S.C. State Ethics Comm'n, SEC AOO2007-006 (Jan. 17, 2007); S.C. Code Ann. § 8-13-740(A)(7)(a) ("The restrictions set forth in items (1) through (6) of this subsection do not apply to: (a) purely ministerial matters which do not require discretion on the part of the governmental entity before which the public official. . . is appearing[.]"). Thus, Plaintiff's assertion Mr. Goggans can be liable in its § 1983 action is without merit.

consideration for approval. Accordingly, these communications are not evidence of impropriety or collusion, and Mr. Goggans is not individually liable pursuant to § 1983.

III. Plaintiff presented no evidence that it did not receive notice or an opportunity to be heard.

In a rather astonishing misrepresentation of the facts, Plaintiff alleges that “Palmetto failed to provide notice to all property owners located within 400 feet of the property, [and therefore] adjacent owners did not even receive the notice required by the Zoning Ordinance.” (Pl.’s Post-Trial Br. pg. 18.) As support, Plaintiff cites to an email exchange between a Marlin Quay condominium unit owner and an employee of the Planning and Zoning Department, wherein the unit owner complained of not receiving the notice of hearing *by U.S. Mail*. (Pl.’s Ex. 26.) However, the unit owner, in the same sentence, disclosed she did in fact receive the notice via email. (*Id.*)

Apparently insisting upon strict interpretation of only those portions of the Zoning Ordinance that further Plaintiff’s argument, Plaintiff asks this Court to give no weight to Article XVII, Section 1702.207 of the County’s Zoning Ordinance (“Failure to strictly comply with the notification requirements contained in Sections 1702.206 or 1702.207 shall not render the rezoning of the property invalid.”) or South Carolina Code Subsection 6-29-760(D) (providing there can be no challenge to the adequacy of notice if there has been substantial compliance with the notice requirements of established procedures).

Regardless, Plaintiff cannot complain about lack of notice to another.⁷ *See State v. Chavis*, 261 S.C. 408, 411, 200 S.E.2d 390, 391 (1973) (“It is elementary that one has no standing to

⁷ Plaintiff erroneously asserts Defendants waived a lack of standing argument because Defendants did not plead lack of standing in their answer. *See Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417-18, 498 S.E.2d 906, 907-08 (Ct. App. 1998) (holding standing is a “limitation on the subject matter jurisdiction” and “objections to standing . . . cannot be waived” and may be raised by the court *sua sponte*) (citations and emphasis omitted); *Bradacs v. Haley*, 58 F.Supp.3d 499, 506 n.4 (D.S.C. 2014) (“Because questions of standing are jurisdictional in nature, they may be raised at

challenge the constitutionality of statute unless his rights have been invaded and injuriously affected thereby.”); *Oasis Goodtime Emporium I, Inc. v. City of Doraville*, 773 S.E.2d 728, 734 (Ga. 2015) (rejecting claimant’s argument that because it was affected by the passage of a bill, it had an interest in ensuring compliance with notice procedures, and holding claimant received notice and therefore lacked standing to attack the lack of notice to another party).⁸

CONCLUSION

Plaintiff failed to prove the elements of any of its causes of action against any Defendant, and accordingly, judgment should be entered for Defendants.

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any time by a party or *sua sponte* by the court.”) (citations omitted). In support of its erroneous assertion, Plaintiff cites to two decisions, an unpublished Fourth Circuit Court of Appeals’ decision, *Tower S. Prop. Owners Ass’n v. Summey Bldg. Sys., Inc.*, No. 93-2557, 1995 WL 60765, at *1-9 (4th Cir. Feb. 15, 1995), which cites Plaintiff’s second case, a 1986 South Carolina Supreme Court decision, *H & H Glass Co., Inc. v. Wynne*, 289 S.C. 389, 346 S.E.2d 523 (1986). However, in *H & H Glass Co., Inc.*, the issue of standing was not before the Court; rather, the Court held the defense of capacity to sue could be waived if not asserted in an answer. 289 S.C. at 391, 346 S.E.2d at 525. See *Lennon*, 330 S.C. at 417, 498 S.E.2d at 907 (noting the difference between the concepts of standing, capacity to sue, and real party in interest) (quoting *Bardoon Props., NV v. Eidolon Corp.*, 326 S.C. 166, 169 n.3, 485 S.E.2d 371, 373 n.3 (1997)). Accordingly, the Fourth Circuit’s reference to *H & H Glass Co., Inc.* as a case deciding the waiver of standing appears to be in error, particularly where a later, published, South Carolina Court of Appeals opinion holds to the contrary. See *Lennon*, 330 S.C. 414, 498 S.E.2d 906 (Ct. App. 1998).

⁸ Plaintiff again asserts Defendants could not raise the issue that Plaintiff was barred from challenging the passage of 2018-40 because it did not challenge the passage of 2018-03 due to the Court’s denial of Defendants’ motion for summary judgment. (Pl.’s Br. pg. 22.) This assertion is a direct contradiction to the law: “[The denial of a motion for summary judgment] does not. . . strike a defense . . . [or] ‘establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings’” *Watson v. Underwood*, 407 S.C. 443, 457, 756 S.E.2d 155, 162 (Ct. App. 2014) (citation omitted).

Myrtle Beach, South Carolina

September 27, 2022

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Attorneys for Defendants

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CIVIL ACTION NO. 2019-CP-22-00212
COUNTY OF GEORGETOWN	)	
	)	
The Gulfstream Café, Inc.,	)	
	)	
Plaintiff,	)	
	)	PLAINTIFF THE GULFSTREAM CAFÉ,
vs.	)	INC.'S POST-TRIAL REPLY BRIEF
	)	
Georgetown County, Georgetown County	)	
Council, and Steve Goggans, individually	)	
and in his official capacity as a	)	
Georgetown County Councilmember,	)	
	)	
Defendants.	)	
	)	
	)	

Plaintiff The Gulfstream Café, Inc. (“Gulfstream”) hereby submits this Post-Trial Reply Brief, and respectfully shows the Court as follows.¹

INTRODUCTION

Gulfstream proved at trial that Defendants violated Gulfstream’s constitutional rights and violated the County’s Zoning Ordinance in approving the major amendment for 3.0. The approval of 3.0 should not stand, but if it does, Gulfstream proved entitlement to damages. Goggans’ conduct shaped the outcome of the approval by defining what information would be presented and evaluated through the life of the project, including for 3.0. He convinced the County staff to distort and defy their own code from the very start. Goggans and County staff decided upon an illegal set of “parameters” that pervaded the County’s treatment of the project even through today. Despite

¹ Gulfstream submits this Post-Trial Reply Brief for purposes of responding to specific arguments made by Defendants in their Post-Trial Brief and is not intended to restate every argument or fact set forth in Gulfstream’s Post-Trial Brief. Gulfstream’s Post-Trial Brief is expressly incorporated herein by reference. Gulfstream uses the same defined terms stated in its Post-Trial Brief.

Defendants' attempts to justify their conduct and distract the Court, the outcome is clear: the approval of 3.0 is unlawful.

FACTUAL BACKGROUND

Defendants' Post-Trial Brief includes pages of factual background, the majority of which does not cite to Exhibits presented at trial or point to specific witness testimony.² Gulfstream takes issue with specific factual assertions by Defendants in the argument section of this Reply Brief below.

ARGUMENT AND CITATION OF AUTHORITY

I. Gulfstream Met its Burden Under the Declaratory Judgment Act.

Gulfstream seeks a declaration that the major amendment is invalid. Gulfstream proved the invalidity of the major amendment because the County, without question, arbitrarily and capriciously approved 3.0.³ The County put on blinders with respect to the obvious size differences between the old building and 3.0, permitting a 13,000 square foot building where a 4,600 square foot building previously stood. Instead of comparing the actual size differences between the buildings, the County only looked at heated square footage of 3.0, ignoring more than 5,000 square feet of unheated square footage for 3.0. (P-24, P-35, P-84, P-85, P-86). Defendants also ignored Article 11 of the Zoning Ordinance by failing to consider the parking needs of Gulfstream and the marina. When the parking calculations under Article 11 are done, as Castles testified, 170 parking spaces are required for all of the uses of the parking lot, and only 62 are provided. The County approved a major amendment that results in a parking shortage of **108 parking spaces**.

² Gulfstream reserves the right to challenge any fact set forth in Defendants' briefing upon receipt of the transcript.

³ The major amendment is also invalid because it violates Gulfstream's procedural due process rights and the County's Zoning Ordinance, as explained in more detail below.

Defendants contend that Article 11 does not apply to PDs. But the Zoning Ordinance does not create an exception to its requirements for PDs. (D-1 § 1100) (“It is the intent of this section to establish standards for the provision of off-street parking facilities throughout the unincorporated area of Georgetown County.”). Article 11 contains mandatory language requiring its application to all zoning districts. Moreover, Castles, an expert civil engineer with experience interpreting municipal codes, testified that Article 11 did not provide for any exceptions.

Defendants point out that Richardson and Johnson testified that Article 11 does not apply to the Marlin Quay PD. Richardson’s and Johnson’s testimony is belied by their own conduct and prior statements in connection with review of this project. Richardson and Johnson both repeatedly stated that the parking requirements had to be met. (P-76, P-77, P-78, P-79). Defendants’ *post-hoc* rationalization that Article 11 is only a “guide” is inconsistent with Defendants’ prior conduct, prior statements, and the County’s Zoning Ordinance.

Article 11 sets forth the applicable parking requirements. Gulfstream most certainly offered planning experts to testify that the general requirements of Article 11 trump the provisions of the Marlin Quay PD. The County’s own #1 planning expert confirmed that the PD sections of the Code—and this PD in particular—are totally silent on the parking requirements. Therefore, the rules regarding parking can only be found in Article 11, and those provisions applied to the review of 3.0. Even accepting Defendants’ current contention that Article 11 is a mere guide, it is a guide that Defendants ignored in its entirety throughout this process.

Gulfstream does not contend that the Court could declare the approval invalid simply because it was a “bad decision.” To be clear, Gulfstream does contend that the major amendment is invalid because it was an arbitrary, capricious, illegal, and unconstitutional decision. Gulfstream claims that the major amendment is also invalid because it violates the Zoning Ordinance in

multiple ways. The violations of the Zoning Ordinance constitute evidence in support of Gulfstream's constitutional claims, as well as being independent evidence and reasons to set aside the major amendment. Gulfstream clearly raised these issues in its pleadings, Defendants had notice of them, and Defendants defended these issues at trial. (Compl. ¶¶ 35-39, 60-64). To the extent Gulfstream did not separately plead in the declaratory judgment count itself that the violations of the Zoning Ordinance are reasons to set aside the major amendment apart from the constitutional violations, the pleadings conform to the evidence presented at trial, which expressly included violations of the County's Zoning Ordinance. Rule 15(b), SCRPC ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.").

Defendants also argue that because Palmetto was not joined in this action, declaratory relief would be inappropriate. Defendants neglect to mention, however, that Ms. Golding represents both the County and Palmetto with respect to the dispute related to the parking lot against Gulfstream. (D-24). As such, Palmetto's agent, Ms. Golding, has been involved in the County litigation from the outset. Palmetto has been apprised of every step, decision, and issue involved in this case. In addition, since Ms. Golding represents both Palmetto and Defendants, and has vigorously defended this lawsuit, Palmetto's interests have been adequately protected in this case and there is no prejudice in not joining them. The best proof of this is the fact that Ms. Golding had her other client, Mr. Lawhon, lined up to testify in this case. (Defendants' Pre-Trial Brief at 33). Further, South Carolina Code Section 15-53-80 provides that in a proceeding involving the validity of a municipal ordinance, the municipality shall be made a party, and that is what Gulfstream did here. S.C. Code Ann. § 15-53-80. Moreover, the County waived this defense because they failed to raise it at trial. Rule 12(h), SCRPC (noting that the defense of failure to

join an indispensable party under Rule 19 must be made before or at trial). Finally, even if Palmetto should have been joined with respect to Gulfstream's declaratory judgment count under South Carolina Code Section 15-53-80, the same exact relief is available to Gulfstream for its § 1983 claims for violation of its substantive and procedural due process rights. Burt v. Abel, 585 F.2d 613, 617 (4th Cir. 1978).

Accordingly, Gulfstream is entitled to a declaration invalidating the major amendment.

II. Gulfstream Proved a Violation of its Substantive Due Process Rights.

A. Goggans's Conduct Resulted in a Violation of Gulfstream's Substantive Due Process Rights.

Gulfstream proved that Goggans, along with Richardson and Johnson, established the parameters which set forth the characteristics the Defendants reviewed for each iteration of Palmetto's building, including 3.0. Those parameters were illegal and violated their own code and paved the way for the County to make an arbitrary, capricious, and unconstitutional decision. Goggans explained to Mr. Lawhon, owner of Palmetto, that he had negotiated "favorable outcomes" with Richardson and Johnson. (P-8). The parameters established by Goggans that violated the Zoning Ordinance include: (1) comparing only heated square footage to heated square footage when determining whether the new building could be approved; (2) ignoring thousands of square feet of unheated deck space that was to be occupied by patrons; and (3) ignoring Article 11, the parking section of the Zoning Ordinance, altogether. (P-8). Looking at the information presented to Council, it is clear these decisions permeated and resulted in the passage of 3.0. The Staff Report only compared heated square footage for 3.0 to the original 4,603 for the original building, ignored the unheated square footage for purposes of the comparison, and did not do any parking calculations for Gulfstream or the marina, despite acknowledging that Gulfstream and the marina also used the parking lot. (P-35). Richardson and Johnson presented this same

misinformation to Council for its consideration of the application. (P-84, P-85, P-86). As a result, the fact that a staff report was prepared for the application, the fact that the Planning Commission reviewed it, and the fact that the County Councilmembers held public readings does not alter the conclusion that Goggans unlawfully prejudiced the proceedings. The application was unlawfully prejudiced from the beginning because the County Council and Planning Commission relied on legally defective and arbitrary “parameters” Goggans established years earlier. The fact that he formally recused himself from the hearings does not change his culpability. Moreover, his firm, SGA Architecture, was still the architect on the plans for 3.0 and interacted with Richardson and Johnson with respect to the application. (P-35, P-84, P-85, P-86, P-24, P-25, P-27, P-28, P-29). It was not necessary for Goggans to be personally involved, as everyone knew who his firm was and that he had previously represented Palmetto with respect to building’s approval.

Goggans’s conduct was inappropriate, as it involved a blatant conflict of interest on his behalf to represent Palmetto, while at the same time, acting as a County Councilmember who held influence over Richardson’s and Johnson’s jobs. Defendants argue that this conduct did not violate South Carolina Code Section 8-13-740(a)(4) because Richardson’s and Johnson’s conduct was ministerial, such that an exception applies. Defendants rely on State Ethics Opinion SEC AOO2007-006 (Jan. 17, 2007), but that opinion is distinguishable from the circumstances here. To begin, that opinion dealt with the question of whether a Councilmember’s business associate—not the Councilmember himself—may submit land development plans to the planning department for consideration. In the opinion, the Commission recognized that ministerial actions involve information gathering, procedural questions, or requests for information. Id. Discretionary matters would include presenting evidence, testimony, or argument concerning a person’s position on a contested issue. Id. That is exactly what Goggans, Richardson, and Johnson did. Goggans

presented argument in favor of his client's position to establish favorable parameters for the project, and planning staff (Johnson and Richardson), not the Planning Commission, made decisions on those arguments. (P-8). Accordingly, the ethics opinion relied on by Defendants does not apply in this case.

Defendants also argue that Kurschner v. City of Camden Planning Commission, 376 S.C. 165, 170-71, 656 S.E.2d 346, 349 (2008), supports their position, but that case is also distinguishable. First, it relates to whether a planning commission member impermissibly voted at a planning commission meeting where she had been elected to the House of Representatives but had not taken an oath of office. The decision related to whether she had impermissibly held two offices and had nothing to do with a conflict of interest like that at issue here. Second, unlike in Kurschner, Goggans's participation did prejudice the vote on 3.0, because the misinformation related to the arbitrary parameters established by Goggans skewed the presentation of evidence to the County Council.

B. Defendants' Approval of the Major Amendment is Not Rationally Related to a Legitimate Government Interest.

Gulfstream demonstrated in its Post-Trial Brief how the approval of the major amendment made absolutely no sense and was an arbitrary and irrational exercise of governmental power. The County offers several reasons to justify the decision, including that the old building was in poor condition, the new building had to comply with FEMA, the ADA, and fire codes, and the new building would no longer encroach on the Marlin Quay Condominiums' property. But, as explained in Gulfstream's Post-Trial Brief, those reasons are not rationally related to the approval of 3.0. The County could have achieved these goals without approving a massive structure that would overburden the parking lot, fail to comply with the County's parking regulations, and risk

the public health, safety, and welfare. Accordingly, approval of 3.0 was not rationally related to the purported governmental interests in approving the application.

Defendants contend that Gulfstream did not show that the parking lot will be dangerous because it did not put forward a public safety expert or law enforcement expert. Again, all the Court must do here is apply its common sense. Kirk testified that the parking lot is already dangerous, and accidents have already occurred. Castles testified that parking is necessary for the public health, safety, and welfare. Members of the public presented concerns regarding safety to Council at the public hearings on the application. (P-44). Even the County's own Zoning Ordinance provides that the parking regulations were enacted to improve the public health, safety, and welfare of the community. (D-1 § 1100). It is not speculation to conclude that locating a building that is (at a minimum) twice the size of the former building without adequate parking conditions will increase the likelihood of accidents and create a danger to the public safety.

The County repeatedly points out that it limited 3.0 to 110 seats. The only basis the County has to conclude that the former restaurant had 110 seats is information from the applicant, P-35 at DEFS 00157, and Richardson conceded the County did nothing to verify this information. Kirk and Castles testified that the seating capacity in reality was smaller. The County also points out that fire code capacity is not applicable to zoning matters. Regardless of whether the fire code capacity of 350 people was technically applicable in zoning matters, Johnson testified he knew of the fire code limit, and it certainly should not have been ignored in reviewing the application. This is yet again another example of the County clinging to arbitrary characteristics like seating capacity of 110 when, in reality, 3.0 can hold up to 350 people under the fire code.

III. Procedural Due Process.

Defendants argue that Gulfstream participated in the public hearing process, so no violation of its procedural due process rights occurred. As pointed out in Gulfstream's Post-Trial brief,

although Gulfstream did attend hearings, a meaningful opportunity to be heard was not provided due to the irregularities in the application process. The application was not in proper form and did not contain sufficient information for members of the public, including Gulfstream, to evaluate it. (P-20; D-1 § 1702.1). The building plans were submitted less than a week before the Planning Commission meeting, which did not give Gulfstream or others an adequate opportunity to review them in advance of the hearing. (P-26, P-29, P-37). With respect to the mailed notice to the individual owners of the Marlin Quay condominiums, this did impact the proceedings with respect to Gulfstream, as if more homeowners knew about the proceedings, there would have been a greater opportunity for individuals to come out in opposition the application.⁴ (P-26).

IV. Inverse Condemnation/Takings.⁵

With respect to Gulfstream's *per se* takings claim, Gulfstream proved that its property will only have value attributable to raw land as a result of approval of 3.0. In addition, Gulfstream can only use its property for a restaurant, and it will be deprived of that use as a result of approval of 3.0. Thus, approval of 3.0 deprives Gulfstream of all economically beneficial use of its property.

Defendants argue that Gulfstream only showed that its customers may have greater difficulty parking. This mischaracterizes the evidence Gulfstream presented at trial. Kirk testified that Gulfstream's customers will leave and not come back if there is no parking. Kirk knows this because he sees it with his own eyes. According to Kirk, Gulfstream needs all of the parking at night to serve its restaurant. Kirk testified that Gulfstream will not be able to survive if it has to

⁴ Gulfstream's Post-Trial Brief sets forth in more detail how the application process violated the County's Zoning Ordinance.

⁵ Gulfstream analyzes its takings and inverse condemnation claims together. Defendants contend that there are four elements to Gulfstream's inverse condemnation claim, but the elements that the taking be for public use and the taking have a degree of permanence do not apply to regulatory inverse condemnation claims. See Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76 (2005).

share its parking with another restaurant at night. Kirk testified that Gulfstream will not be able to operate without adequate parking and will have to close its doors as a result of the approval of 3.0. Moring testified that parking is a primary factor in determining the marketability of a restaurant, Gulfstream will not have adequate parking as a result of approval of 3.0, and Gulfstream will not have a willing buyer for its restaurant due to approval of 3.0. Castles testified that there is a substantial shortage of parking in the parking lot and 3.0 will overburden the parking lot. Moreover, the fact that there is a possibility that customers can visit Gulfstream by other means does not overcome the testimony that parking is critical to Gulfstream's operations. Even if some customers get to the restaurant by walking, Kirk testified that Gulfstream is a destination restaurant and that customers primarily travel there by car. All of this testimony stands as wholly undisputed.

Contrary to Defendants' claims, Gulfstream's expert did not agree that Gulfstream's property could be used for residential purposes. Knight testified that in order to conclude that the property could be used for residential, he would have to undertake an analysis of whether there is a reasonable likelihood that the County would approve the rezoning. He testified that he had not done that analysis here, so could not say that the property could be rezoned and used as housing. Defendants presented no evidence to rebut Knight's testimony, which proved a reduction in value from \$1,850,000 to \$89,000, for a loss of \$1,760,100. (P-47, P47(a)-(g)). Knight's opinion is that the property has no value other than for vacant land, which constitutes a deprivation of all economically beneficial use of the property. Therefore, Gulfstream proved that a *per se* taking has occurred.

Even if no *per se* taking occurred, Gulfstream met the Penn Central test, which considers: (1) the character of the government action, (2) the economic impact of the ordinance on the plaintiff, and (3) the interference with the plaintiff's investment backed expectations.

The governmental action factor weighs in favor of Gulfstream. As explained above, there was no rational relationship between any legitimate governmental interest and the approval of 3.0. The County's proffered reasons for approval—of bringing the old building into compliance with various regulations and not having the building straddle the property line—have no rational relationship to allowing the massive building the County actually approved. In fact, if bringing 3.0 into compliance with County and other regulations was the County's reason for approving 3.0, it would have not approved a building that blatantly violates Article 11 of the Zoning Ordinance.

Defendants cite to Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 737 S.E.2d 601 (2013), in support of their argument that the character of the government action favors their position, but Dunes is distinguishable. In Dunes, the Court noted that the ordinance at issue did not eliminate all development potential, there still existed some permitted uses that would allow further development of the property, and the plaintiffs were not prevented from selling the property. Dunes West Golf Club, LLC, 401 S.C. at 316, 737 S.E.2d at 620. In contrast, Richardson testified that Gulfstream can only be used as a restaurant under the PD. (P-1). As a result, since Gulfstream will not be able to operate as a result of approval of 3.0, and there is no other permitted use of the property other than as a restaurant, the County's conduct deprived Gulfstream of all possible use of the property. Further, multiple witnesses testified that approval of 3.0 effectively deprived Gulfstream of use of the parking lot, essentially eliminating Gulfstream's easement rights. Also, unlike in Dunes, Moring testified that the marketability of Gulfstream's property has been destroyed as a result of approval of 3.0, such that Gulfstream cannot sell its property if it wanted to. Thus, the character of the governmental action weighs in favor of Gulfstream.

With respect to the economic impact of the approval of the major amendment, the un rebutted testimony from Gulfstream's appraiser is that the property will suffer a reduction in value of \$1,760,100. As noted in Dunes, comparison of values before and after the taking is a relevant consideration for the Penn Central analysis. Here, Gulfstream's property value will be reduced from \$1,850,000 to \$89,000. Dunes West Golf Club, LLC, 401 S.C. at 317, 737 S.E.2d at 621. This represents greater than a 95% reduction in value, which is certainly constitutionally significant.

Defendants take issue with Knight's assumption that Gulfstream will effectively be deprived of its ability to park in the parking lot as a result of approval of 3.0, but this assumption was verified and supported by the testimony of Kirk, Moring, and Castles throughout the trial, without any evidence to the contrary. Gulfstream's easement allows it to use the parking lot primarily in the evening, Gulfstream uses all of the parking at night, and Kirk testified that Gulfstream will not be able to survive without this parking. (P-2, P-3). Accordingly, Knight's extraordinary assumption is not an assumption, but instead is the reality of what will happen as a result of the approval of 3.0.

With respect to the potential to rezone as residential, as explained above, it cannot be assumed that the County would permit any such rezoning, and any evidence to the contrary is speculation. The economic impact of the major amendment factor favors Gulfstream.

The final factor, interference with investment backed expectations, clearly favors Gulfstream. As conceded by Defendants, continuation of the existing use of the property is a property owner's primary expectation when considering an investment-backed expectation for the property. (Defendants' Post-Trial Brief at 34). Gulfstream certainly has investment-backed

expectations to continue using its property as a restaurant and the parking lot consistent with its easement rights.

Defendants contend that because parking has always been a problem, Gulfstream does not have an investment-backed expectation of adequate parking. Gulfstream certainly has an investment-backed expectation in continuation of the status quo related to its parking lot, consistent with its easement rights, and an expectation the County will not approval a major amendment that will make the parking situation *considerably worse*. This final factor favors Gulfstream, and the Court should find that a regulatory taking has occurred.

V. The Defendants' Defenses Fail.

A. Gulfstream Timely Challenged 3.0.

Defendants' argument that Gulfstream did not timely challenge 3.0 is fundamentally flawed. South Carolina Code Section 6-29-760 says that the challenge may be made sixty "after the decision of the governing body." The decision challenged in this case is the County's decision to approve 3.0, and Gulfstream timely filed its challenge to that decision.

Moreover, Gulfstream did challenge 2.0 in court, and the Court found 2.0 could not be built. This finding by the Court necessitated 3.0, and important changes with respect to the footprint of the building had to be made, such that a totally different building layout was approved for 3.0. That the County imposed the same arbitrary restrictions on 3.0 that it imposed on 2.0 does not mean that 2.0 and 3.0 are the same.

B. Defendants Did Not Meet Their Burden to Prove Collateral Estoppel.

Defendants have not met any element of collateral estoppel. This litigation concerns whether the County's approval of 3.0 violates the Zoning Ordinance and Gulfstream's constitutional rights. Those issues were not, and could not, have been actually litigated and determined in the action with Palmetto because the application for 3.0 had not even been submitted

at that time. The construction project at issue in the case with Palmetto was 2.0, and 3.0 is a totally different building with a different footprint and layout. (P-12, P-20, P-29). The action with Palmetto did not challenge the construction of the building currently at issue. The action with Palmetto could not have involved the violations of the Zoning Ordinance that occurred with respect to 3.0 either, because those violations were specific to the approval process for 3.0. Finally, the Court's injunction order is not in evidence in this case and should not be considered by the Court. Even if the injunction order was in evidence, it does not even implicitly decide whether 3.0 violates Gulfstream's constitutional rights or the Zoning Ordinance. Thus, this defense fails.

CONCLUSION

As set forth above, Gulfstream respectfully requests that the Court find in Gulfstream's favor and enter an order accordingly.

Respectfully submitted,

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September 27, 2022

Attorneys for Plaintiff The Gulfstream Café, Inc.

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

) IN THE COURT OF COMMON PLEAS
) 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'
ITEMIZED STATEMENT OF COSTS**

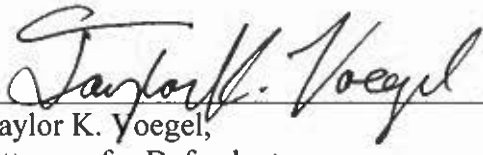
Description	Date Incurred	Cost	Authority
Defendants' Motion to Dismiss from the Complaint Counts II, III, IV, V, and VIII (Rule 12(b)(6), SCRCP)	April 11, 2019	\$31.74	Rule 54(e)(2), SCRCP
Defendants' Motion to Compel Plaintiff's Discovery Responses	July 1, 2019	\$31.74	Rule 54(e)(2), SCRCP
Defendants' Motion to Compel Plaintiff to Produce a 30(b)(6) Designee in Georgetown County	December 18, 2019	\$31.74	Rule 54(e)(2), SCRCP
Deposition and Deposition Transcript of 30(b)(6), SCRCP of the Gulfstream Café, Inc.	March 1, 2021	\$1,127.75	S.C. Code Ann. § 15-37-40
Defendants' Motion for a Protective Order	March 5, 2021	\$31.74	Rule 54(e)(2), SCRCP
Defendants' Second Motion for a Protective Order	March 9, 2021	\$31.74	Rule 54(e)(2), SCRCP

Deposition Transcripts of Boyd Johnson and Tiffany Coleman	March 22, 2021	\$1,562.00	S.C. Code Ann. § 15-37-40
Deposition Transcript of John Thomas, taken March 1, 2021	March 24, 2021	\$631.50	S.C. Code Ann. § 15-37-40
Deposition Transcripts of Holly Richardson and Judy Blankenship	March 24, 2021	\$1,033.00	S.C. Code Ann. § 15-37-40
Defendants' Motion to Amend Answer to Complaint	June 28, 2021	\$31.74	Rule 54(e)(2), SCRCP
Defendants' Motion for Protective Order	September 9, 2021	\$31.74	Rule 54(e)(2), SCRCP
Deposition Transcripts of Austin Beard and Lillie Johnson	September 15, 2021	\$466.01	S.C. Code Ann. § 15-37-40
Deposition Transcripts of John Thomas, taken September 8, 2021, Ron Charlton, and Louis Morant	September 15, 2021	\$736.62	S.C. Code Ann. § 15-37-40
Consent Motion for Protective Order for Deposition of Travis Lee Avant	September 17, 2021	\$31.74	Rule 54(e)(2), SCRCP
Consent Motion for Protective Order for Deposition of Travis Lee Avant	September 20, 2021	\$31.74	Rule 54(e)(2), SCRCP
Defendants' Motion for Protective Order	October 5, 2021	\$31.74	Rule 54(e)(2), SCRCP
Deposition Transcript of Travis Avant, taken September 27, 2021	October 13, 2021	\$1,053.50	S.C. Code Ann. § 15-37-40
Defendants' Motion for Summary Judgment	October 22, 2021	\$31.74	Rule 54(e)(2), SCRCP
Deposition Transcript of Steve Goggans	November 30, 2021	\$1,095.50	S.C. Code Ann. § 15-37-40
Consent Motion to Dismiss Defendants John Thomas, Ron Charlton, Lillie Johnson, Austin Beard, and Louis Morant, individually and in their official capacity as Georgetown County Councilmembers	December 13, 2021	\$31.74	Rule 54(e)(2), SCRCP
Deposition Exhibits for Depositions of Holly	January 20, 2022	\$50.00	S.C. Code Ann. § 15-37-40

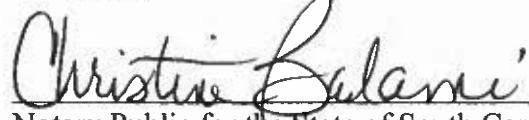
Richardson and Judy Blankenship			
Deposition Transcript of Travis Avant, taken March 16, 2022	March 28, 2022	\$897.04	S.C. Code Ann. § 15-37-40
Defendants' Motion in Limine	August 24, 2022	\$31.74	Rule 54(e)(2), SCRCF
Total	\$9,065.54		

[Signature on Following Page]

I, Taylor K. Voegel, do swear that the foregoing costs are correct and were necessarily incurred in this action.


Taylor K. Voegel,
Attorney for Defendants

Subscribed and sworn before me
this 20th day of February, 2023.


Notary Public for the State of South Carolina

My Commission Expires: April 16, 2029
(Seal)

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 FOR COSTS**

Defendants Georgetown County (“the County”), Georgetown County Council (“County Council”), and Steve Goggans (collectively hereinafter “Defendants”), by and through their undersigned counsel, hereby submit this motion for costs against Plaintiff The Gulfstream Café, Inc. (“Plaintiff”) pursuant to Rule 54, SCRCP, South Carolina Code Sections 15-37-10, et seq., and South Carolina Code Section 15-53-100.

This action came before the Honorable R. Kirk Griffin for a bench trial beginning August 29, 2022. Plaintiff alleged causes of action against the Defendants for: (1) Declaratory Judgment; (2) Violation of Substantive Due Process Rights pursuant to Article I, Section 3 of the South Carolina Constitution; (3) Relief Under 42 U.S.C. § 1983 for Violation of Substantive Due Process Rights pursuant to the United States Constitution; (4) Violation of Right to Procedural Due Process pursuant to Article I, Section 3 of the South Carolina Constitution; (5) Relief Under 42 U.S.C. § 1983 for Violation of Right to Procedural Due Process pursuant to the United States Constitution; (6) Violation of South Carolina’s Takings Clause pursuant to Article I, Section 13 of the South

Carolina Constitution; (7) Inverse Condemnation; and (8) Attorneys' Fees pursuant to 28 [sic] U.S.C. § 1988. By Order dated February 3, 2023, the Court entered judgment in favor of the Defendants on all causes of action.

Rule 54(d), SCRCP provides in part, "Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ." Specifically, Rule 54(e)(2), SCRCP provides that "[a]ll filing and recording fees charged by the clerk of the court in which the action was pending . . . are taxable."

South Carolina Code Section 15-37-20 states, "No costs shall be allowed to any party unless he succeed, in whole or in part, in his claim or defense, unless otherwise directed by the judge hearing the cause." Section 15-37-40 provides:

The clerk shall insert in the entry of judgment, on the application of the prevailing party . . . the sum of the allowances for costs and disbursements as provided by law . . . including the fees of officers allowed by law, the fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees and the expense of printing the papers for any hearing when required by a rule of the court

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

Accordingly, Defendants are the prevailing parties on every cause of action, and an award of costs to Defendants as set forth in the undersigned's accompanying affidavit would be equitable and just.

[Signature on Following Page]

BURR & FORMAN LLP

s/Taylor K. Voegel
Henrietta U. Golding, S.C. Bar # 2173
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Attorneys for Defendants

Myrtle Beach, South Carolina

February 13, 2023

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'
ITEMIZED STATEMENT OF COSTS**

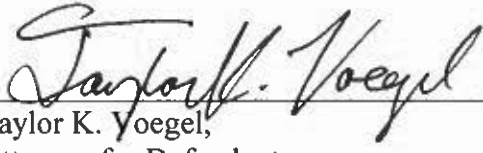
Description	Date Incurred	Cost	Authority
Defendants' Motion to Dismiss from the Complaint Counts II, III, IV, V, and VIII (Rule 12(b)(6), SCRCP)	April 11, 2019	\$31.74	Rule 54(e)(2), SCRCP
Defendants' Motion to Compel Plaintiff's Discovery Responses	July 1, 2019	\$31.74	Rule 54(e)(2), SCRCP
Defendants' Motion to Compel Plaintiff to Produce a 30(b)(6) Designee in Georgetown County	December 18, 2019	\$31.74	Rule 54(e)(2), SCRCP
Deposition and Deposition Transcript of 30(b)(6), SCRCP of the Gulfstream Café, Inc.	March 1, 2021	\$1,127.75	S.C. Code Ann. § 15-37-40
Defendants' Motion for a Protective Order	March 5, 2021	\$31.74	Rule 54(e)(2), SCRCP
Defendants' Second Motion for a Protective Order	March 9, 2021	\$31.74	Rule 54(e)(2), SCRCP

Deposition Transcripts of Boyd Johnson and Tiffany Coleman	March 22, 2021	\$1,562.00	S.C. Code Ann. § 15-37-40
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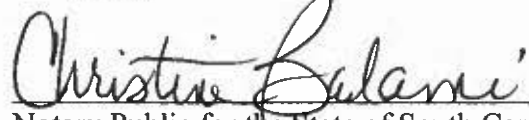
Richardson and Judy Blankenship			
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Defendants' Motion in Limine	August 24, 2022	\$31.74	Rule 54(e)(2), SCRCF
Total	\$9,065.54		

[Signature on Following Page]

I, Taylor K. Voegel, do swear that the foregoing costs are correct and were necessarily incurred in this action.


Taylor K. Voegel,
Attorney for Defendants

Subscribed and sworn before me
this 20th day of February, 2023.


Notary Public for the State of South Carolina

My Commission Expires: April 16, 2029
(Seal)

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

MOTION TO ALTER OR AMEND
JUDGMENT

TO: HENRIETTA U. GOLDING, ESQUIRE, AS COUNSEL FOR DEFENDANTS:

Plaintiff The Gulfstream Café, Inc. (hereinafter “Gulfstream”) hereby moves this Court pursuant to Rule 59(e), SCRPC, to alter or amend the Order entered on February 3, 2023.

INTRODUCTION

This matter came before the Court for a bench trial, which was held on August 29, 2022, to September 1, 2022. During the trial, the parties put on multiple witnesses and introduced a voluminous record of evidence, all of which support a finding for Gulfstream. Gulfstream appreciates the time the Court has devoted to its ruling in its Order entered on February 3, 2023 (the “Order”), but Gulfstream respectfully contends that the Order overlooks key evidence proffered by Gulfstream, misapplies certain legal standards, and draws the wrong conclusions regarding the proffered explanations provided by Defendants for their conduct in this case. Accordingly, Gulfstream requests that the Court alter and amend its judgment to find in favor of Gulfstream, not Defendants, and reverse the Order and find for Gulfstream.

I. Factual Findings¹

The Order makes multiple factual findings which overlook evidence presented by Gulfstream that impact the outcome of the Court's decision.

Critically, the Order finds that Gulfstream was not guaranteed a specific number of parking spots by the Easement, merely the right of ingress and egress. This finding overlooks that the Easement grants Gulfstream the right to use all 62 of the parking spaces at night. (Exhibits P-2, P-3.) Misconstruing the rights granted by the Easement impacts the remainder of the Court's decision, as it downplays the importance of the Easement to Gulfstream's survival as a restaurant and the impact approval of 3.0 has on Gulfstream and the Easement.

The Order finds that Gulfstream did not challenge the passing of 2.0. But Gulfstream did challenge 2.0 by filing the injunction action against Palmetto, which resulted in a finding that 2.0 could not be built.

The Order finds that the application for 3.0 included envelopes to be used for mailing notices to property owners within 400 feet. The envelopes were not introduced into the record, and no one testified to who the envelopes were actually addressed. In any event, the evidence confirmed that the envelopes were not sent to the individual property owners of the Marlin Quay Condominiums. Instead, the notice was only sent to the Homeowners' Association, not the individual owners themselves. (Ex. P-21, P-22.) There was no evidence whatsoever that Palmetto

¹ Gulfstream takes issue with additional factual findings, but they are addressed later in this Motion for Reconsideration. Those factual findings include the finding that: (1) Richardson and Johnson testified that in a PD, zoning regulations are guides, but not requirements; (2) repairs to 3.0 consisted of complying with flood requirements with FEMA, the ADA, and other building codes, and that 3.0 would remedy encroachment; (3) Goggans was not involved in the submission of 2.0, and (4) Goggans was not involved in the filing, voting, or approval process for 3.0.

or the County sent notice to the individual owners of the Marlin Quay Condominiums. The evidence presented, which was undisputed, showed the opposite.

The Order finds that the only changes between 2.0 and 3.0 were to keep the footprint of the building inside the old footprint and the roof would not exceed 47 feet. The Order then accepts the Defendants' characterization of what factors are important when comparing the buildings, including heated square footage, 62 parking spaces, and 110 seating capacity. But the factual finding that 2.0 and 3.0 were otherwise the same is simply not accurate. Comparing the plans for 2.0 and 3.0 shows dramatically different structures, which used different building materials and had entirely different layouts. (Compare Ex. P-12 with Ex. P-24.) Moreover, as explained below, the characteristics emphasized by the County have no foundation whatsoever in the Zoning Ordinance and should not be considered as relevant for determining whether 3.0 should have been approved.

II. Declaratory Judgment

With respect to Gulfstream's declaratory judgment claim, the Order concludes that Gulfstream did not overcome the presumption that a legislative enactment is constitutional. The Order bases this conclusion on its findings that there was no evidence that Ordinance No. 2018-40 (the "Ordinance") was so unreasonable as to destroy constitutional rights, the approval process followed the requirement of public readings and voting, the decision was not arbitrary and capricious, and the County Council voted on the Ordinance without Goggans partaking in the votes or public readings. These findings mirror and incorporate the Court's decisions regarding Gulfstream's substantive due process and procedural due process claims, so Gulfstream will address them in more detail in Sections III and IV, respectively.

For Goggans' involvement, the Order finds that there was no evidence that he was involved in 2.0 or 3.0, and there was no evidence that Goggans participated in or influenced in any way the new plans contained in the 2.0 or 3.0 amendments. The Order acknowledges that Goggans was involved with 1.0, but the Order overlooks how that involvement critically impacted the County's decisions with respect to 2.0 and 3.0. Gulfstream introduced key emails and correspondence demonstrating that Richardson and Johnson were "friends" of Goggans and were "usually helpful in [his] efforts." (Ex. P-6.) Goggans, while serving on County Council, met with Richardson and Johnson multiple times regarding the project, which Richardson testified was highly unusual for a Councilmember to do. For 2.0 and 3.0, Goggans' firm, SGA, remained the architects for the project, and Richardson and Johnson testified that they were aware that Goggans owned SGA. (P-24, P-25, P-26, P-27, P-28, P-30.) Goggans remained on the Council while 3.0 was pending, and Richardson and Johnson testified that Goggans had power over their hiring, firing, budget, raises, and promotions. It is not as if these relationships suddenly disappeared during the review and approval process for 3.0 and the slate was magically wiped clean of Goggans' involvement. Therefore, the decision on 3.0 decidedly was influenced by Goggans, and the approval process for 3.0 was irreparably tarnished, and the Order should be reconsidered on this ground.

Moreover, Goggans bragged to his client that he negotiated "favorable outcomes" for Palmetto with Richardson and Johnson, which outcomes permeated the entire process for approval of 2.0 and 3.0. The "favorable outcomes" were the only factors the County (arbitrarily) deemed relevant to the approval of the new building. (Ex. P-8.) Those parameters included: (1) comparing only heated square footage to heated square footage when determining whether the new building could be approved; (2) ignoring thousands of square feet of unheated deck space that was to be occupied by patrons; and (3) ignoring Article 11, the parking section of the Zoning Ordinance,

altogether. (Ex. P-8.) Goggans testified that the County stuck to these “favorable outcomes” as the parameters for approval of both 2.0 and 3.0. Therefore, Goggans’ initial influence pervaded the subsequent decisions on 2.0 and 3.0, and even the Court’s decision here. This influence cannot be overlooked, and the Court should reconsider its Order.

The Order also decides that there is no evidence that Goggans convinced or influenced Richardson and Johnson to overlook the Zoning Ordinance. But the Order does not acknowledge the key evidence presented by Gulfstream on this point. There are multiple email examples that show that throughout the negotiations with Goggans regarding the project, all parties believed that the parking regulations must be complied with. For example, Goggans and his own team prepared parking calculations based on the buildings proposed square footage, including conceding that “[w]e did not include the decks in this analysis, which may require an additional 2 or 3 spaces.” (Ex. P-7.) Richardson herself told Goggans that “any deck area that is to be used for outdoor seating or a bar area must meet parking requirements.” (Ex. P-76); see also (Ex. P-10, P-77, P-78, P-79) (including additional discussions between the County and Goggans stating that parking requirements had to be met and preparing parking calculations). Despite these acknowledgments that the parking requirements in the Zoning Ordinance had to be met, Goggans negotiated a “favorable outcome” that the admittedly substandard existing parking would comply with zoning requirements. (Ex. P-8.) This evidence shows that Goggans convinced Johnson and Richardson to ignore the Zoning Ordinance in order to obtain approval of his client’s project, and Goggans’ role should not be disregarded by the Court. Goggans should be held liable for this conduct, and the decision regarding his involvement should be altered and amended.²

² Gulfstream will address the Order’s findings regarding compliance with the Zoning Ordinance’s procedural and notice requirements in Section IV of this Motion.

III. Substantive Due Process

For Gulfstream’s substantive due process claim, in Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 737 S.E.2d 601 (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, 737 S.E.2d at 610 (quoting Sylvia Dev. Corp. v. Calvert Cnty., 48 F.3d 810, 827 (4th Cir. 1995)).

The Order should not have included the “shocks the conscience” question, and instead, should have applied a rational basis review. The analysis a court uses when determining whether a substantive due process violation under the United States Constitution has occurred depends upon “whether the claimed violation is by executive act or legislative enactment, [because] different methods of judicial analysis are appropriate.” Hawkins v. Freeman, 195 F.3d 732, 738–39 (4th Cir. 1999) (citing Cnty. of Sacramento v. Lewis, 523 U.S. 833, 845 (1998)). For executive acts, such as the government’s decision to revoke parole and reincarnate an individual, the court must determine whether the challenged conduct “shocks the conscience.” Id. at 738–39, 740. For legislative acts, such as the government enacting a statute, the court’s analysis “does not involve any threshold ‘conscience-shocking’ inquiry,” but instead involves a separate two-step process. Id. at 739; see Colon Health Centers of Am., LLC v. Hazel, 733 F.3d 535, 548 (4th Cir. 2013). The two-step process is (1) to determine whether the claimed violation involves a fundamental right or liberty, then (2) if the asserted interest is “fundamental,” the challenged legislation is

entitled to strict scrutiny judicial review, and if the interest is not “fundamental,” it is entitled only to the protection of rational-basis judicial review. Hawkins, 195 F.3d at 739.

Here, the Order includes in its analysis of whether a substantive due process claim occurred the “shocks the conscious” standard. The Order states that “[t]h conduct must be such that it is intended to injure in some way unjustifiable by any government interest and is the sort of official action that most likely rises to the level of shocking the conscience.” (Order at 8.) This is the wrong standard for this case. This case is about a legislative act effecting property rights—the passing of an ordinance—and not an executive act. Therefore, the only analysis required is a rational basis review of whether the government’s decision was arbitrary and capricious. Because the Order applied the wrong legal standard, the Order should be altered and amended on this ground.

A. Approval of 3.0 Deprived Gulfstream of its Property Interests.

The Order does acknowledge that Gulfstream has a property interest in the Easement. But the Order finds that Gulfstream will not be deprived of that interest because Gulfstream will still have the right to ingress and egress over the parking lot. The Order overlooks that the approval of the Ordinance eviscerates Gulfstream’s right to the Easement, and that Gulfstream has a property right in its restaurant that will also be destroyed.

The evidence is undisputed regarding the devastating impact approval of 3.0 will have on Gulfstream’s rights to the Easement and to Gulfstream’s property. Mr. Kirk testified that Gulfstream uses the entire parking lot for its guests at night. Gulfstream has a right under the Easement to primary access to the entire parking lot at night. (Ex. P-2.) Mr. Kirk further testified that Gulfstream has an average of 350 guests at night, and that Gulfstream needs access to the entire parking lot to service those guests. Mr. Kirk, Mr. Moring, and Mr. Castles testified that

there is nowhere else in the area to park. Mr. Kirk testified that if people come to Gulfstream and cannot find a place to park, they will leave and never come back. Mr. Kirk testified that both restaurants cannot survive on the parking lot, and Gulfstream will have to close. Mr. Moring further testified that there is no parking in the immediate area, there is no street parking, and there will not be adequate parking for Gulfstream as a result of the approval of 3.0. Mr. Moring testified that approval of 3.0 will have a devastating impact on Gulfstream's marketability and that no one will want to buy the restaurant due to lack of parking.

The Order does not recognize this evidence of the destruction of both Gulfstream's rights to the Easement and to its restaurant itself resulting from approval of 3.0. The Court should reevaluate its failure to recognize the loss of these interests resulting from the passage of the Ordinance.

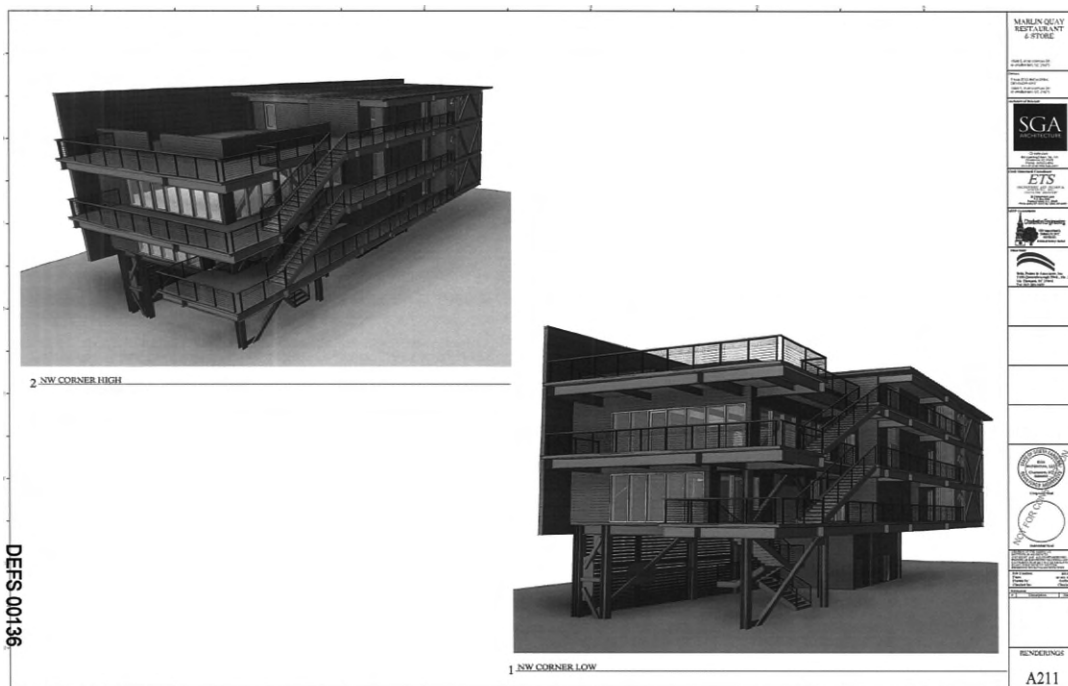
B. The Decision to Approval 3.0 was Arbitrary, Capricious, and Without Rational Basis.

i. Approval of 3.0 Will Create a Public Safety Issue.

The Order ignores the undeniable public safety issue created by the approval of 3.0. Richardson and Johnson testified as planning experts that parking is a public safety issue and Mr. Castles agreed. Even the Zoning Ordinance states that the parking requirements are for purposes of "improving the public health, safety and general welfare of the community." (Ex. D-1 at § 1100.)

By all accounts, approval of 3.0 will make a "substandard" parking situation untenable. Mr. Kirk testified that there have already been accidents in front of the restaurant due to a paucity of available parking. The County ignored its own rules regarding parking, neglecting to do the required shared parking analysis from Article 11 for consideration of Gulfstream and the marina's

parking needs. The County put on blinders with respect to the size differences between the old restaurant and 3.0, allowing the County to approve 3.0 to replace the snack bar:



(Ex. P-24, P-35, P-11.) There is nothing more arbitrary and capricious than approval of an Ordinance that will create a danger to the public health, safety, and welfare, but that is exactly what the County did. What's more, the County approved 3.0 in violation of its own Zoning Ordinance, which in itself is grounds for finding the decision arbitrary and capricious.

ii. The Zoning Ordinance is Not a Guideline, it is a Requirement.

Instead of recognizing the arbitrary and capricious nature of the decision, the Order credits Defendants' argument that for PDs, the provisions in the Zoning Ordinance related to parking are not requirements. This conclusion is based on Richardson and Johnson's testimony that a PD is a zoning variance, and the Zoning Ordinance is just a guideline for PDs. But regardless of this testimony, that is simply not what the Zoning Ordinance says. The Zoning Ordinance clearly provides in Article 11 that "[a]reas suitable for parking or storing automobiles in off-street locations shall hereafter be required in all districts at the time of initial construction or conversion in use of any principal building which produces or proposes to produce an increase in dwelling units, guest rooms, floor area, seating or bed capacity." (Ex. D-1 at § 1101.) Richardson admitted that "all districts" includes PDs. The intent section of Article 11 similarly provides that "[i]t is the intent of this section to establish standards for the provision of off-street parking facilities **throughout the unincorporated area of Georgetown County.**" (Ex. D-1 at § 1100) (emphasis added). Again, this includes no exceptions, and Article 11 applies to all districts and throughout the County. There is no room for Richardson, Johnson, or the Court to interpret the language otherwise.

Although the Order finds that Gulfstream did not present expert testimony to rebut Richardson and Johnson, that is inaccurate. Mr. Castles, an expert in civil engineering, testified that his job is to interpret and apply zoning ordinances every day. He testified that there are no

exceptions to the parking requirements in the Zoning Ordinance. Richardson testified that the PD sections of the Zoning Ordinance were silent on parking requirements. Therefore, the rules regarding parking can only be found in Article 11.

Finally, the best evidence that the County itself knew, at all times, that these parking requirements governed is in their words written and spoken in real time when the project was being “negotiated.” Richardson, Johnson, Goggans, and his team made repeated references to the parking rules as requirements and repeated negotiations with Goggans related to compliance with those regulations. (Ex. P-7, P-0, P-76, P-77, P-78, P-79.) The Staff Report for 3.0 included parking calculations, as did the discussion at the public meeting for 2.0. (Ex. P-15 at 4, P-35.) If Article 11 was inapplicable, why did everyone involved with this project rely on it so heavily at every turn?

It is undisputed that the approval of 3.0 did not comply with Article 11. Because compliance with Article 11 is mandatory based on the plain language of the Zoning Ordinance, and approval of 3.0 violates Article 11, the Court should reconsider its decision on the arbitrariness of approval of the Ordinance.

iii. Richardson and Johnson Ignored the Shared Parking Calculation Requirement for Purposes of Approving 3.0.

The Order finds that Richardson and Johnson testified that they did not calculate the parking based on the Zoning Ordinance, but that is not correct. In the early negotiations with Goggans, the County did do parking calculations based on the Zoning Ordinance. (Ex. P-7, P-0, P-76, P-77, P-78, P-79.) Even in the Staff Report for 3.0 includes a parking requirement analysis. (Ex. P-35.)

What Richardson and Johnson actually testified to is that they did not evaluate whether the approval of the Ordinance met the shared parking requirements under Section 1102.3, which

requires consideration of Gulfstream and the marina's parking needs. Why not? Because, as Johnson testified, the County knew that the PD would not comply with the Zoning Ordinance. Despite this knowledge, the County approved a building that resulted in a parking shortage of **108 parking spaces** according to Gulfstream's expert, Mr. Castles. Richardson walked through the parking calculations and admitted that approval of 3.0 did not meet Article 11's shared parking requirements.

Moreover, if one believes Richardson and Johnson that the regulations served as a guide, Richardson and Johnson completely ignored the guidance provided. They knew that Article 11 is designed to protect the public health, safety, and welfare. Yet Johnson and Richardson consciously decided to disregard those rules. That is the epitome of an arbitrary decision, and the Court should reconsider its ruling on this point.

iv. The County's Purported Grounds for Approving 3.0 Are Completely Baseless and Not Rationally Related to the Decision.

The Court explains that the decision to approve 3.0 was not completely baseless because the Ordinance required 3.0 to have the same seating capacity as the old building and the County limited the heated square footage of 3.0. In reality, the County had no idea what the seating capacity of the old building was. Richardson testified that the County did nothing to verify the number of seats in the old building and had no actual knowledge of how many seats the old building actually had.

With respect to making seat count a requirement, Boyd admitted that the Zoning Ordinance says nothing about counting seats. The Ordinance calls for counting gross floor area when figuring car count and parking requirements. Limiting seats has nothing to do with the number of people who can visit the restaurant, as Johnson admitted that there were thousands of square feet of unheated square footage in deck space and outdoor area where patrons can stand, have a drink,

and watch the sunset. Johnson admitted that the new building had an occupancy limit of 350 people, so 240 more people can be in the restaurant but not in a seat.

Richardson also admitted that the distinction regarding heated versus unheated square feet can be found nowhere in the Zoning Ordinance. Instead, the Zoning Ordinance talks about gross floor area and outdoor seating area for the parking calculations, as admitted by Johnson. (D-1 at § 1102.1) (including the requirements for “Restaurant, standard”).

There is nothing more arbitrary than enacting an Ordinance based on characteristics that have no foundation in the County code. County officials are not permitted to make decisions based on rules not set forth in County Ordinance, as it allows for arbitrary and discriminatory enforcement, as happened here. The Court should revisit this conclusion in its Order.

The County’s proffered reasons for approval of 3.0 of bringing 3.0 into compliance with FEMA, ADA, and building codes could have been accomplished without allowing Palmetto to build a 4-story, 13,000 square foot building in place of the 4,600 square foot ship store and restaurant. Defendants could have required Palmetto to build a new building that did not straddle the property line and was raised up to comply with flood regulations without allowing a massive, 4-story building with an entire extra story addition that includes outdoor seating. Accordingly, Defendants’ proffered reasons for approving the major amendment are not rationally related to the approval of 3.0.

v. Approving a Building that Will Result in a Dramatic Increase on Parking Demand was Not Rational.

The Court acknowledges that Gulfstream’s expert calculated that Gulfstream needed 76 parking spaces under the Ordinance, but the Court does not acknowledge that the marina required 22 spaces and 3.0 required 76 spaces under Article 11. The Order overlooks that the shared parking requirements of Section 1102.3 are not met by the Ordinance. Gulfstream’s evidence with respect

to the number of parking spaces required under Section 1102.3 was un rebutted, and the Order should acknowledge this violation.

Instead of recognizing that approval of 3.0 does not comply with Section 1102.3, the Order finds that even before 3.0, the parking lot was non-conforming and the PD was created before the Zoning Ordinance was written. But the fact that the parking lot was nonconforming before the approval of 3.0 does not justify approval of a building that will dramatically increase non-conformity. The fact that the parking lot situation was bad before does not justify making that situation radically worse through the approval of 3.0. The number one rule of nonconforming use cases is that you cannot expand or increase the nonconformity or rebuilt once removed. (D-1 at § 400.)

The Court also notes that there is no evidence the PD was required to follow the Zoning Ordinance because it was enacted before the Zoning Ordinance was written. This overlooks that Article 11 is mandatory across all zoning districts. Moreover, the amendment to the PD through the Ordinance occurred after the Zoning Ordinance was written, clearly bringing the approval of the Ordinance under the purview of the Zoning Ordinance.

For the reasons set forth above, the Order's decision on substantive due process should be altered and amended, and the Court should find for Gulfstream.

IV. Procedural Due Process

A procedural due process claim requires three elements: (1) a life, liberty, or property interest; (2) deprivation of that interest caused by state action; and (3) procedures that were constitutionally inadequate. Sansotta v. Town of Nags Head, 724 F.3d 533, 540 (4th Cir. 2013). Regarding the procedure itself, at a minimum, "the [United States] 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). The Supreme Court of South Carolina has held that under its constitution, for proceedings before a local governing body: “Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses.” Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007).

The Order credits Richardson’s testimony that the application was complete and that the incomplete sections were not required based on the type of change the applicant was seeking. It is undisputed that the application did not include any building plans or parking calculations, and those were submitted by Palmetto within a week of the Planning Commission meeting. (Ex. P-20, P-29, P-30.) How can the application be complete enough for the County to evaluate a proposed change in site plan and building configuration—which was the change sought by Palmetto—without knowing what kind of building Palmetto was looking to build? (Ex. P-27, P-28, P-29, P-30) (submitting the plans shortly before the Planning Commission meeting). Because the County planned to rubber stamp the approval regardless of what Palmetto wanted to do.

Moreover, how are Gulfstream and neighboring property owners supposed to evaluate the plans in time to prepare for the hearing or know if they even want to oppose the building if the plans are only provided within a week of the meeting? (Ex. P-26) (showing email from concerned neighbor and noting that “no hard information as to the elevations or numbers of floors of the planned building was included. I am most interested in knowing of this latter information.”). This certainly deprived Gulfstream of a meaningful opportunity to be heard and violated the Zoning

Ordinance rules regarding submitting the application in proper form at least 45-days prior to the Planning Commission meeting. (Ex. D-1 at § 1702.1.)

Palmetto did not provide the County with the required list of individual property owners within 400 feet of the property, and those individuals did not receive mailed notice. (Ex. P-20.) 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. (Ex. P-22.) Instead, the County relied on the Marlin Quay Homeowners Association manager, Nancy Gardner, to notify homeowners. (Ex. P-21.) Moreover, this notice was not provided by mail as required by the Ordinance, and instead was only emailed. (*Id.*). Richardson admitted that notice was not sent in the mail to the individual owners in the Marlin Quay condominiums. This violates Section 1702.206 and procedural due process.

The Order does not include a ruling on Gulfstream's argument regarding compliance with the County's 12-month "penalty box" requirement in the Zoning Ordinance. (D-1 § 1702.1.) For the reasons set forth in Gulfstream's Post-Trial Brief, the decision should be reversed on this ground, and the Order should be altered and amended to include a finding on this issue.

V. Takings/Inverse Condemnation

For Gulfstream's taking and inverse condemnation claims, a violation of the takings clause can occur 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 W. Golf Club, LLC, 401 S.C. at 313, 737 S.E.2d at 619 (internal quotation marks omitted).

For alleged regulatory takings that do not result in the loss of all economically beneficial use, 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, 737 S.E.2d at 619. The extent of diminution in value is one factor for consideration in determining whether the governmental action constitutes a taking. Id. at 317, 737 S.E.2d at 621.

Importantly, the Supreme Court of South Carolina has clarified that for regulatory takings, only two elements are required: (1) affirmative conduct of a government entity and (2) the conduct effects a taking. Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76, 79-80 (2005) (holding that the elements of whether the “taking is for public use” and the “taking has some degree of permanence” do not apply to regulatory takings claims). The elements that the taking be for a “public use” and have “some degree of permanence” do not apply to regulatory inverse condemnation claims. Id.

Here, the Order mistakenly applied the non-regulatory taking elements to the inverse condemnation section of its order, whereas it should have applied the two-element test as previously stated, and then applied the Penn Central test to determine whether the second element—whether the conduct effects a taking—was satisfied. Id. at 658, 620 S.E.2d at 80. Because the wrong legal standard was applied, the Order should be altered and amended on this ground.

A. A Per Se Taking has Occurred.

Approval of 3.0 deprives Gulfstream of its rights to the Easement and to the value of its restaurant. The Court finds that Gulfstream has not been deprived of all economically beneficial or productive use of its land and still retains a non-exclusive easement to the parking lot. This conclusion overlooks un rebutted evidence presented by Gulfstream on this issue. The Order does

not recognize that Gulfstream has been deprived of all economically beneficial use of its land because its physical property will be worth a nominal amount of \$89,500 as a result of the approval of 3.0, as testified to by Gulfstream's expert appraiser, Mr. Knight. (Ex. P-47.) The Order also overlooks the evidence explained above in Section III(A) regarding how the approval of 3.0 guts Gulfstream's right to the Easement. Mr. Kirk testified that Gulfstream needs all of the parking spaces at night and that two restaurants will not survive competing for parking in the parking lot. Customers will not have the ability to use the lot because they will not be able to find parking, as testified by Mr. Kirk, and they will turn around and leave and never come back. As a result, a *per se* taking of all beneficial use did occur, and the Court's decisions should be altered.

B. Approval of 3.0 Results in a Regulatory Taking.

For the Penn Central test, the Court concludes that the County had a legitimate public purpose for enacting the Ordinance, including compliance with FEMA, ADA, fire, and building codes. But, again, these reasons were not legitimate reasons for enacting 3.0, as the building could have complied with these regulations and still been similar in size to the old restaurant.

The Order reiterates its conclusion that Gulfstream did not have entitlement to a certain number of parking spaces, but only a non-exclusive right to ingress and egress. This overlooks that Gulfstream did have entitlement to 62 spaces at night. The Order's misapprehension of Gulfstream's rights should be re-evaluated, since the right to those 62 parking spaces will be destroyed by the passage of 3.0.

The Order also notes that there could be walk up traffic, but Mr. Moring testified there will not be enough parking in the parking lot for Gulfstream due to 3.0's approval and that anyone looking to buy the restaurant will know that. Therefore, according to Gulfstream's expert restaurant broker, the walk up traffic would not be sufficient to keep Gulfstream marketable after

the passage of 3.0. Mr. Knight testified that approval of 3.0 will result in a reduction in value of Gulfstream's property from \$1,850,000 to \$89,900, resulting in a loss of \$1,760,100. This evidence is undisputed and unrebutted. Because the Order does not recognize these deprivations, the Order should be reconsidered.

The Order also includes several incorrect findings, which the Court considers for purposes of discrediting Mr. Knight's testimony. For example, Mr. Knight did not testify that if Gulfstream's property were rezoned for commercial use it would be extremely valuable. Instead, on cross-examination, Mr. Knight was asked questions regarding potential rezoning to residential, not commercial, but Mr. Knight clarified upon redirect examination that he cannot come to any conclusions regarding the value of Gulfstream as a residential property without conducting an analysis of the reasonable probability that the property would be rezoned, which he had not done, and no one has done. Moreover, Mr. Knight's testimony about the value of Gulfstream as residential is irrelevant, because Richardson testified that the only permitted use for Gulfstream's property under the PD is as a restaurant. Mr. Knight also did not testify that he never visited the property, and instead, he testified that he conducted an onsite inspection of the property. The cover letter to his expert appraisal report states that he inspected Gulfstream's property on November 25, 2019, as part of this appraisal assignment. (Ex. P-47.) The Court's mis-recollection of Mr. Knight's testimony results in an erroneous decision on the takings question.

Finally, Gulfstream does have an investment backed expectation in the use of 62 spaces in the Easement at night. (Ex. P-2, P-3.) Gulfstream also has an investment-backed expectation in continuing to use its property as a restaurant, which Mr. Kirk testified will not be able to continue as a result of the Ordinance. Based on this evidence of legitimate investment-backed expectations,

which must be considered in the Penn Central analysis, the regulatory taking of Gulfstream's property should be recognized.

VI. Attorneys' Fees

Because Gulfstream is entitled to recover on its federal constitutional claims, the Court should reconsider its decision that Gulfstream should not receive its attorneys' fees in this case.

CONCLUSION

The Order erroneously concludes that Gulfstream is not entitled to declaratory judgment or to recover for violations of its substantive and procedural due process rights or for takings/inverse condemnation. For the reasons set forth above, the Order should be altered and amended to reverse the decision in its entirety and to find in favor of Gulfstream. Plaintiff's counsel certifies that consultation with Defendants' counsel prior to filing this motion would serve no useful purpose.

[signature block on the following page]

Respectfully submitted,

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February 13, 2023

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,) **DEFENDANTS' RESPONSE TO**
) **PLAINTIFF'S**
vs.) **MOTION TO ALTER OR AMEND**
) **JUDGMENT**
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") submit this Response to Plaintiff The Gulfstream Café, Inc.'s ("Plaintiff") Motion to Alter or Amend ("Motion").

INTRODUCTION

After four days of trial before the Honorable R. Kirk Griffin, post-trial briefs and replies, and careful consideration of the evidence, arguments, issues, facts, and applicable law, this Court entered a thorough and detailed analysis of the issues before it and found Plaintiff did not meet its burden on any cause of action by Order dated on February 3, 2023 ("Order"). On February 13, 2023, Plaintiff filed a Motion to Alter or Amend, setting forth a list of issues the Court should reconsider. For the reasons set forth below, Plaintiff's Motion should be denied, as the Court did not misunderstand, fail to consider, or fail to rule upon any argument or issue.

LEGAL STANDARD

"A party *may* wish to file [a Rule 59(e), SCRCP] motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the

party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised but not rule on, in order to preserve it for appellate review.” *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original).

ARGUMENT

In its Order, the Court analyzed all facts and legal issues properly. Plaintiff made its positions clear at the trial, and the Court gave great consideration to Plaintiff’s arguments and the evidence presented therein. Further, the Court did not fail to rule on any issue or argument raised by Plaintiff. Plaintiff’s Motion can be summarized as insisting the Court did not give the weight to certain evidence as Plaintiff wanted. Therefore, Plaintiff’s Motion should be denied.

I. The Court properly considered the parking lot easement and did correctly acknowledge the Plaintiff’s easement rights.

Despite the fact that the Court cited the exact language of the parking lot easement on the second page of its Order, Plaintiff contends the Court did not consider that the easement provides it “the right to use all 62 of the parking spaces at night.” (Pl.’s Mot. to Alter or Amend at 2.) However, Plaintiff, in its Motion, misrepresents the easement. The easement, both the 1986 and 1990 versions, contains the following language: “It is *anticipated* by the parties that while they will *each have joint and non-exclusive use at all times of the area covered by this easement* that Grantor will utilize the premises primarily during the daytime [regular business hours of Grantor] and the Grantee will utilize the premises primarily in the evening [regular business hours of Grantee].” (Pl.’s Exs. 2 & 3 (emphasis added) (bracketed language added in 1990 version).)

Moreover, Plaintiff sued the County. Holly Richardson, Georgetown County’s Director of Planning and Code Enforcement, testified the Planning Department, when reviewing applications for amendments, does not consider easements between private parties when evaluating an

application. If Plaintiff alleges an easement is being violated, its remedy is not to sue the County for passage of an application for a major amendment to a planned development (“PD”).

II. The Court properly found that Plaintiff failed to challenge the passing of 2.0.

There was no appeal of the Version 2.0 application to the Board of Zoning Appeals. Further, even if Plaintiff’s filing of a lawsuit in November 2016, against Mark Lawhon and Palmetto Industrial Development LLC, could remotely constitute a “challenge” as anticipated by South Carolina Code Section 6-29-760(D), Plaintiff did not initiate such action specific to 2.0 within the timeframe required by Section 6-29-760(D); rather, it filed its lawsuit nearly a year and a half prior to 2.0’s passage.

III. The Court properly considered the notice requirements.

Plaintiff repeats the misleading statement that individual owners at Marlin Quay Condominiums were not “sent notice” by “Palmetto or the County.” (Pl.’s Mot. to Alter or Amend at 2-3.) As the Court noted, Palmetto delivered envelopes addressed to the required property owners and attached them to the application, and therefore, the notice requirements were met. (Order at 11.) Further, the notice was publicly posted by the County, and the Marlin Quay unit owners received emails regarding the notice. As Richardson testified, a tax list of the property owners affected by the 3.0 application was obtained by reviewing the County’s tax records using the County’s Geographic Information System (“GIS”), which populated only the Marlin Quay condominium and not each individual unit owner. *See* S.C. Code Ann. § 6-29-760(D) (providing there can be no challenge to the adequacy of notice if there has been substantial compliance with the notice requirements of established procedures); GEORGETOWN COUNTY, S.C., ZONING ORDINANCES art. XVII, § 1702.207 (“Failure to strictly comply with the notification requirements contained in Sections 1702.206 and 1702.207 shall not render the rezoning of the property

invalid.”). The Court, after acknowledging Plaintiff’s argument that “other owners within the area did not receive proper notice,” correctly held that Plaintiff had “no standing to complain about the notice of other individuals not a party to this lawsuit.” (Order at 11.) And, Plaintiff did not allege it did not receive proper notice. (*Id.*) Accordingly, the Court did not misapprehend or overlook any arguments or evidence.

IV. The Court did not misapprehend any argument related to the differences in the 2.0 and 3.0 building structure.

Plaintiff states the Court failed to consider differences in building materials and differing layouts between the proposed building in 2.0 and 3.0, but Plaintiff fails to demonstrate how those considerations would have made any impact on the analysis of the legal claims. *Cf. McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (“[W]hatever doesn’t make any difference, doesn’t matter.”). Any differences required to be considered are set out in the Zoning Ordinance. The Court did not overlook the differences between 2.0 and 3.0, but rather, considered the height, heated square footage, parking spaces, and seating capacity, which does have foundation in the Zoning Ordinance, contrary to Plaintiff’s assertion. *See* GEORGETOWN COUNTY, S.C., ZONING ORDINANCES art. XI, § 1101 (“Areas suitable for parking . . . shall hereafter be required in all districts at the time of initial construction or conversion in use . . . which produces or proposes to produce an increase in dwelling units, guest rooms, floor area, seating or bed capacity.”).

V. The Court did not misunderstand Plaintiff’s arguments as to its alleged entitlement to a Declaratory Judgment in its favor.

Plaintiff states the Court overlooked how Goggans’ involvement in the 1.0 amendment “critically impacted the County’s decisions with respect to 2.0 and 3.0.” (Pl.’s Mot. to Alter or Amend at 4.) Specifically, Plaintiff argues the Court did not consider Goggans was “friendly” with Richardson and Boyd Johnson, the former Director of the Georgetown County Planning and

Zoning Department, Richardson and Johnson knew Goggans owned SGA, he remained on the Council while 3.0 was pending,¹ he had power to hire, fire, budget, raise, and promote Richardson and Johnson, he “bragged” to his client that he negotiated “favorable outcomes,” and Plaintiff introduced emails allegedly reflecting an acknowledgment that the parking regulations had to be followed. (Pl.’s Mot. to Alter or Amend at 3-5.)

Plaintiff’s assertions relating to Goggans’ alleged influence over Richardson and Johnson are fatal for several reasons. First, Plaintiff’s view of the relationship between Goggans, Richardson, and Johnson as leading to a disregard of allegedly applicable parking regulations entirely ignores the fact that the 3.0 application was approved by the Planning Commission after a public hearing, and County Council after three public readings—all with the recusal of Goggans from the process but with significant input from Plaintiff and its attorneys as to its parking concerns. Second, PDs are designed to be flexible and “may provide for variations from other ordinances” S.C. Code Ann. § 6-29-740. Then, as the Court noted, Goggans did not remain involved in the application process or approval for 2.0 or 3.0, and Richardson and Johnson testified “they did not feel pressure or influence from Goggans in the 2.0 or 3.0 process.” (Order at 7.)

Further, nothing Plaintiff cited rebuts that Article XI of the Georgetown Zoning Ordinance was not required to be followed in the context of a PD—and specifically in the context of an application for amendment to a PD that was not “at the time of initial construction or [for] conversion in use.” GEORGETOWN COUNTY, S.C., ZONING ORDINANCES art. XI, § 1101 (“Areas suitable for parking . . . shall hereafter be required in all districts at the time of initial construction or conversion in use”). Richardson’s email further supports her testimony: if the deck area

¹ Defendants take issue with Plaintiff’s characterization of Richardson’s testimony that it was “highly unusual” for a councilmember to meet with the Planning Department as that was not Richardson’s testimony.

was to be used for outdoor *seating*, then the number of seats would affect parking. (Pl.’s Ex. 76.) Johnson and Richardson both testified the number of seats and the heated square footage from the previous building to the proposed 3.0 would remain the same, and therefore, parking requirements were not changed. This reasoning is the antithesis of arbitrary or capricious decision-making, and rather, is a sound logic that maintains the protection of the constitutional presumption. The Court did not overlook or misunderstand any evidence or issues as to Goggans’ alleged involvement, and denial of Plaintiff’s claim for a declaratory judgment was proper.

VI. The Court did not overlook or misapprehend any argument or evidence regarding Plaintiff’s Substantive Due Process claims.

Mistakenly, Plaintiff asserts the Court used a “shocks the conscience” analysis instead of a rational basis review. Not only did the Court conduct a rational basis review, but Plaintiff is incorrect that the Court improperly referenced “shocking the conscience” language.

In *Siena Corp. v. Mayor & City Council of Rockville Maryland*, the Fourth Circuit Court of Appeals, in deciding whether an amendment to a zoning ordinance violated the claimants’ substantive due process rights, noted that, “State deprivation of a protected property interest violates substantive due process only if it is ‘so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies.’ . . . The state action must be ‘conscience shocking, in a constitutional sense.’” 873 F.3d 456, 63-64 (4th Cir. 2017) (citations omitted). The Court acknowledge the conscience-shocking language and proceeded to conduct a rational basis analysis. The Court did not apply incorrect law.

Plaintiff also argues the Court overlooked “the evidence of the destruction of both [Plaintiff’s] rights to the Easement and to its restaurant itself from approval of 3.0” because

Plaintiff's expert and manager testified the restaurant's business will suffer due to decreased parking. (Pl.'s Mot. to Alter or Amend at 7-8.) Plaintiff further asserts the passage of Ordinance 2018-40 was arbitrary, capricious, and without rational basis because lack of parking would create a safety issue, as one non-safety expert testified. (Pl.'s Mot. to Alter or Amend at 8.) Plaintiff also argues Article XI is a requirement and not a guidance, and the passage of Ordinance 2018-40 was not rationally related to any governmental interest because seating in the old building was allegedly not evaluated, and parking per Article XI was not implemented. (Pl.'s Mot. to Alter or Amend at 10-14.) As the Order held, the passage of Ordinance 2018-40 does not deprive Plaintiff of its non-exclusive right of ingress and egress over the parking lot, the Ordinance is rationally related to a legitimate government interest that actually *advanced* the health, safety, and welfare of the community by approving a building that would comply with FEMA, the ADA, and building and fire codes, and the County imposed regulations such as limiting the seating capacity and the amount of heated square footage similar to that of the former building. (Order at 9-10.)

Further, Plaintiff did not present any evidence from a zoning or planning expert—and despite Plaintiff's inferences to the contrary, Robert Castles, a civil engineer, was not qualified as such—to support the notion that the parking regulations were mandatory for PDs or that the seating capacity was unchanged. *See S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (citations omitted) (noting arguments of counsel are not evidence); (Order at 10 (“According to the State of South Carolina, PDs are variations to Zoning ordinances that ‘constitute zoning ordinance amendments.’”) (citing S.C. Code Ann. § 6-29-740, which also provides, “Planned development districts may provide for variations from other ordinances and regulations of other established zoning districts. . . .”).) And, as previously noted, the application for this amendment to a PD was not an application for initial construction or for a conversion in

use, and the County made certain neither the heated square footage nor seating capacity would increase. *See* GEORGETOWN COUNTY, S.C., ZONING ORDINANCES art. XI, § 1101 (“Areas suitable for parking . . . shall hereafter be required in all districts at the time of initial construction or conversion in use . . . which produces or proposes to produce an increase in dwelling units, guest rooms, floor area, seating or bed capacity.”).² Thus, the Court did not overlook any fact or err in holding that Plaintiff’s substantive due process rights were not violated by the passage of Ordinance 2018-40.

Plaintiff asserts, “County officials are not permitted to make decisions based on rules not set forth in County Ordinance, [sic] as it allows for arbitrary and discriminatory enforcement, as happened here,” but Plaintiff cites to no law whatsoever to support that contention. Indeed, the law provides great deference to local municipalities’ discretion to approve amendments to zoning laws, which the Court recognized in its Order. (Order at 6 (citing *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965) (“[The power to invalidate an ordinance should be] exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations.”))).)

Plaintiff’s arguments regarding Richardson and Johnson’s testimony not only ignore other significant portions of their testimony, but paints the Court a picture that its selective points are the only facts the Court should consider. Plaintiff would like the Court to give no weight to, and

² Plaintiff also asks the Court to give great weight to emails between Richardson, Johnson, and Goggans as supposed evidence that all parties considered the parking requirements of Article XI to be mandatory, but such an argument is inapposite and contradicted by the testimony at trial. Richardson and Johnson both testified they considered Article XI to be a guideline, and such emails—as well as the inclusion of this calculation in the analysis in the Staff Report—prove as much. As the Court noted, “By Plaintiff’s own calculations, the parking lot was non-conforming prior to any amendments to the Marina Store and Restaurant.” (Order at 10.) Thus, Plaintiff is fine with deviating from the parking requirements of Article XI—so long as Plaintiff is the only one to benefit from such variance.

indeed, makes no mention of, the fact that both the County Planning Commission and County Council—without the involvement of Goggans—considered the proposal of 3.0, including all of the very same arguments and assertions Plaintiff makes to the Court now, along with other public members’ opposition and support, and voted to approve this amendment.

By the continual insistence that Article XI calculations should apply to this original planned development, Plaintiff essentially conveys it would not be satisfied unless it were the only entity permitted to use the parking lot according to its own rationale. (Pl.’s Mot. to Alter or Amend at 13) (“Gulfstream needed 76 parking spaces under the Ordinance, but . . . the marina required 22 spaces and 3.0 required 76 spaces under Article 11.”). If the Order did not recognize the flexibility this State’s legislature has provided for planned developments, the entirety of the Marlin Quay PD would be out of compliance. Regardless, neither the law nor testimony supports the mandatory application of Article XI to a PD. *See* S.C. Code Ann. § 6-29-740 (“Planned development districts *may provide for variations from other ordinances and the regulations of other established zoning districts* concerning use, setbacks, lot size, density, bulk, and other requirements to accommodate flexibility in the arrangement of uses for the general purpose of promoting and protecting the public health, safety, and general welfare.”) (emphasis added). For those same reasons, the County’s consideration of heated square footage and seating capacity were logical and rational and had foundation in the Zoning Ordinance. *See* GEORGETOWN COUNTY, S.C., ZONING ORDINANCES art. XI, § 1101 (“Areas suitable for parking . . . shall hereafter be required in all districts at the time of initial construction or conversion in use . . . which produces or proposes to produce an increase

in dwelling units, guest rooms, floor area, seating or bed capacity.”). Such considerations were not arbitrary or capricious.³

The Court did not misunderstand or fail to rule on any argument made by Plaintiff. To be clear: Plaintiff’s arguments require the Court to pick apart the reasoning of the Planning Department and insert its judgment for that of the local municipality, all the while entirely disregarding the remainder of the legislative process, which included a hearing before the Planning Commission and three readings before County Council—with Goggans’ removal from those processes. Ultimately, Plaintiff disagrees with the weight the Court gave to its arguments and evidence. The Court’s Order thoroughly summarized the evidence presented related to the parking calculations, seating restrictions, and rational relation of furthering the public health, safety, and welfare by approving plans for a building that would be code-compliant. Accordingly, Plaintiff’s Motion to Alter or Amend as it relates to the Court’s analysis of Plaintiff’s substantive due process claims should be denied.

VII. The Court did not overlook or misapprehend any argument or evidence regarding Plaintiff’s Procedural Due Process claims.

Plaintiff next contends it did not have enough notice to review the 3.0 application. This argument ignores the context in which the 3.0 application was presented, which was to conform with the boundary line specified by the Court in a separate action. The plans may have been supplemented, but the application was provided within the required timeframe. There is no

³ Plaintiff also asserts that the County did nothing to go behind the information provided to verify the number of seats in the previous building, but Richardson testified that would be impossible given that the store was demolished by the time the application was reviewed, and the Planning Department relied on the information the applicant provided to it. Plaintiff also insists compliance with current local, state, and federal laws could have been completed without building a larger building, but Plaintiff cited to no authority that places the burden of designing proposed buildings on the County Planning Department, the County Planning Commission, or County Council.

evidence the County “planned to rubber stamp the approval regardless of what Palmetto wanted to do.” (Pl.’s Mot. to Alter or Amend at 15.) *See Thompson*, 357 S.C. at 105, 590 S.E.2d at 513 (citations omitted) (noting arguments of counsel are not evidence).

Moreover, it is elementary Plaintiff cannot complain about lack of notice to another. *See State v. Chavis*, 261 S.C. 408, 411, 200 S.E.2d 390, 391 (1973) (“It is elementary that one has no standing to challenge the constitutionality of a statute unless *his* rights have been invaded and injuriously affected.”) (emphasis added); *Sea Pines Ass’n for Prot. of Wildlife, Inc. v. S.C. Dep’t of Nat. Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (citing the elements of standing, including that a plaintiff must have suffered an injury in fact and that there must be a causal connection between the injury and the conduct complained of) (citation omitted); *Oasis Goodtime Emporium I, Inc. v. City of Doraville*, 773 S.E.2d 728, 734 (Ga. 2015) (rejecting claimant’s argument that because it was affected by the passage of a bill, it had an interest in ensuring compliance with notice procedures and holding claimant received notice and lacked standing to attack the lack of notice to another party); *In re Single Cnty. Ditch*, 361 N.E.2d 1353, 1356 (Ohio Ct. App. 1976) (“An appellant landowner has no standing . . . to complain of lack of notice (to other landowners) . . . when the record does not support a conclusion that the appellant did not receive notice . . .”). In the same breath, Plaintiff complains that neither it nor neighboring property owners had an opportunity to “evaluate the plans in time to prepare for the hearing” while also arguing, “This certainly deprive Gulfstream of a meaningful opportunity to be heard . . .” (Pl.’s Mot. to Alter or Amend at 15.)

However, Plaintiff fails to articulate what would have been more meaningful about having updated plans prior to the time its attorneys spoke before these public bodies and wrote letters to these bodies numerous times. As the Court noted, Plaintiff’s attorneys were present and expressed

their opposition to the 3.0 amendment at the hearing before the Planning Commission and the three readings before County Council. (Order at 5.)

Lastly, Plaintiff contends the Court did not address whether Section 1702.1 was violated. First and foremost, the Court correctly provided the law for alleged violations of procedural due process, which require a showing that *Plaintiff* did not receive notice, an opportunity to be heard in a meaningful way, and/or judicial review. (Order at 10.) Any alleged failure of the County to follow a subsection that does not affect Plaintiff's notice, opportunity to be heard, or opportunity to receive judicial review is irrelevant, and a mere technicality does not in and of itself give rise to a claim for violation of procedural due process.

Notwithstanding, the 3.0 application did not violate Section 1702.1, which provides in part that an applicant may not seek 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" GEORGETOWN COUNTY, S.C., ZONING ORDINANCES art. XI, § 1702.1. Neither 2.0 nor 3.0 sought a change in district classification; the district classification of the affected property was a PD prior to the applications, and Palmetto did not seek change the property from the PD classification. The Court did not fail to rule on the issue of Plaintiff's procedural due process claim because Section 1702.1 has nothing to do with the elements of procedural due process.

VIII. The Court did not overlook or misapprehend any argument or evidence regarding Plaintiff's Takings or Inverse Condemnation Claims.

Plaintiff's complaint about the Court's takings and inverse condemnation analyses is an incorrect reading of the plain language of the Court's Order. Plaintiff, combining in its Motion the claims of takings and inverse condemnation, alleges the "Order mistakenly applied the non-regulatory taking elements to the inverse condemnation section of its order, whereas it should have

applied the two-element test as previously stated, and then applied the *Penn Central* test to determine whether the second element—whether the conduct effects a taking—was satisfied.” (Pl.’s Mot. to Alter or Amend at 17.) Essentially, Plaintiff appears to assert that the Court should have performed an identical analysis to the inverse condemnation claim as it did when reviewing the takings cause of action. Plaintiff cites to *Byrd v. City of Hartsville* for support that the Court should have only determined whether there was affirmative conduct of the County and whether the conduct effects a taking—as determined by a *Penn Central* analysis—because Plaintiff has alleged a regulatory taking. 365 S.C. 650, 620 S.E.2d 76 (2005). Plaintiff contends the Court’s consideration of two elements cited for inverse condemnation—whether the taking is for public use and whether the taking has some degree of permanence—was erroneous pursuant to *Byrd*. However, even if Plaintiff is correct, Plaintiff’s claim that a taking was committed is no different than Plaintiff’s claim for inverse condemnation, and the Court thoroughly analyzed Plaintiff’s takings claim as well as Plaintiff’s requested analysis of its inverse condemnation claim.⁴

Regardless, the analysis Plaintiff requests for its inverse condemnation claim—which it alleges is not a physical appropriation but a regulatory one—was performed by the Court within

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

its analysis of Plaintiff's takings claim, and therefore, the result would have been the same. Specifically, the Court restated in its analysis of the inverse condemnation that the passing of Ordinance 2018-40 was not a taking. (Order at 15.) The Court did not overlook or misapprehend any issue or argument. *Cf. McCall*, 294 S.C. at 4, 362 S.E.2d at 28 (“[W]hatever doesn’t make any difference, doesn’t matter.”).

Plaintiff further disagrees with the Court’s finding that Plaintiff has not been deprived of all economically beneficial use of its land. Plaintiff argues testimony supports the finding that customers who cannot find parking will leave and “never come back.” (Pl.’s Mot. to Alter or Amend at 8.) Despite this hyperbolic statement that may not have actually been in evidence, the Court considered Plaintiff’s experts’ testimony as to the diminution in value if there was no parking, but found that evidence to be outweighed by the fact that Plaintiff’s expert, George Knight, agreed the property would be extremely valuable if rezoned.⁵ The Court also noted that hundreds of condominiums within walking-distance of Plaintiff would not utilize the parking lot. (Order at 13-14.) As the Court noted, “Not all damages that are suffered by a property owner are compensable.” (Order at 13 (citing *Dunes W. Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280, 315, S.E.2d 601, 620 (2013)).

⁵ Plaintiff suggests Knight testified as to the value of the property were rezoned as residential rather than commercial. Despite the possible scrivener’s error, the point remains that Plaintiff’s own expert conceded the property could be extremely valuable if rezoned, and Plaintiff’s expert was an appraiser who was qualified to testify to such without conducting a full analysis and preparing a full report given his familiarity with the property and its location and surroundings. Any alleged “mis-recollection” of Knight’s testimony would not result in an erroneous decision as to Plaintiff’s takings claim as Plaintiff was not deprived of all economically beneficial use, a legitimate public purpose was furthered by the passage of Ordinance 2018-40, Plaintiff’s non-exclusive right of ingress and egress to the parking lot remained, Plaintiff’s property and restaurant would still be valuable, and the passage of Ordinance 2018-40 would not interfere with Plaintiff’s investment-backed expectations. (Order at 12-14.)

Plaintiff's contentions that the building should have been smaller and that Plaintiff was entitled to all sixty-two parking spaces at night are beyond the scope of what governmental entities are responsible for when determining zoning amendments. Plaintiff cannot expect local planning departments to hire architects to conduct sketches of buildings to make them as small as possible while still complying with state and federal laws and building and fire codes. Further, if Plaintiff believes a party to an easement is violating the easement, the County is not responsible for ensuring compliance with easements between private parties, and the remedy is not a suit against the County for an alleged taking. As the Court found, Plaintiff is not prevented from using the parking lot per its *non-exclusive easement* to do so or from operating its business as a restaurant as a result of the passage of Ordinance 2018-40. (Order at 12 (emphasis added).)

Simply because the Court did not find Plaintiff's evidence and arguments sufficient to meet the burden of each cause of action does not mean the Court failed to consider or comprehend any fact or issue for its determination, and amendment of the Order on such grounds would be improper.⁶

CONCLUSION

The Court did not misunderstand, fail to fully consider, or fail to rule on an argument or issue. Plaintiff made its positions clear at trial, and the Court gave great consideration to all of Plaintiff's and Defendants' arguments. Accordingly, the Court should deny Plaintiff's Motion to Alter or Amend pursuant to Rule 59(e), SCRCP.

[Signature on Following Page]

⁶ Plaintiff is not entitled to attorneys' fees because it is not entitled to recover under any federal constitutional claim.

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March 3, 2023

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

REPLY IN SUPPORT OF MOTION TO
ALTER OR AMEND

TO: HENRIETTA U. GOLDING, ESQUIRE, AS COUNSEL FOR DEFENDANTS:

Plaintiff The Gulfstream Café, Inc. (hereinafter “Gulfstream”) hereby submits this Reply in Support of its Motion to Alter or Amend the order entered on February 3, 2023 (the “Order”).

ARGUMENT

I. The Shared Parking Analysis Applies in these Precise Circumstances, and the County Turned a Blind Eye to It.

Defendants ask the Court to ignore that the Easement provides for an orderly arrangement for how the parties are to share the parking lot. The Easement provides that Gulfstream is to use the parking lot at night and Palmetto is to use the parking lot during the day. (Pl.’s Exs. 2 & 3). In addition, Article XI provides for a formula when there are shared and mixed uses of a parking lot, to determine if the appropriate amount of parking is provided for the different uses of the parking lot. (Defs.’ Ex. 1 § 1102.3). Richardson and Johnson testified that they did not conduct this shared parking analysis. Gulfstream is not simply complaining about the Defendants’ failure to enforce the Easement between private parties. Gulfstream proved at trial that Article XI set forth exactly how the County was to evaluate whether sufficient parking existed when there were

multiple uses of the parking lot, and the County willfully ignored the Zoning Ordinance. Whether this was a “guide” or a requirement does not change that the County could have, and should have, followed its own Zoning Ordinance to determine if the parking lot would be overburdened by 3.0. The County’s failure was a violation of its own Zoning Ordinance and was arbitrary and capricious.

II. The Court Did Not Base its Decision on Plaintiffs’ Purported Failure to Challenge 2.0.

Defendants mischaracterize the Court’s Order by claiming that the Court found Gulfstream failed to timely challenge 2.0 under South Carolina Code Section 6-29-760(D). The Court’s Order did not deny Gulfstream’s claims on that ground. In fact, the Court already ruled on that issue on summary judgment in Gulfstream’s favor.

III. Defendants Did Not Meet the Notice Requirements in the Zoning Ordinance.

With respect to notice, Defendants contend that Palmetto delivered envelopes addressed to the “required” property owners. But the evidence introduced at trial failed to include any identification of who the envelopes were addressed to. The envelopes were not in evidence, and no one from Palmetto testified as to who was named on the envelopes. The only evidence at trial was with respect to the notice by the County, and it is undisputed the County only sent notice to the Marlin Quay HOA, not the individual owners of the condominiums. (Pl.’s Ex. 22). Therefore, Defendants again failed to comply with their own Zoning Ordinance. (Defs.’ Ex. 1 § 1702.206). This was not a “strict compliance” issue. It was a complete lack of compliance.

IV. Differences in 2.0 and 3.0 were Significant, and 3.0 Should have Been Considered on its Merits.

The differences between 2.0 and 3.0 do not matter to Defendants because it was a foregone conclusion that 3.0 was going to be approved. The Application for 3.0 was an application for an entirely new building with a completely different layout and different building type. The request

for 3.0 was a “Site Plan” amendment and “Change in Building Configuration.” (Pl.’s Ex. 20). The Site Plan and Building Configuration were different for 2.0 than for 3.0. Therefore, if Defendants were approaching 3.0 objectively, they would have evaluated the Application for 3.0 on its own merits and without consideration of 2.0. But that is not what Defendants did. Instead, they prejudiced the Application by couching it in terms of what Defendants did for 2.0 and rubberstamped the approval of 3.0.

V. Declaratory Judgment Should Have Been Issued and the Amendment Declared Invalid.

Defendants try to avoid the impact of Goggans’ influence by claiming that 3.0 was approved by the Planning Commission and County Council held three public meetings on 3.0. Beyond Goggans’ influence over Richardson and Johnson, however, he also had influence over the Planning Commission. Goggans’ appointed member of the Planning Commission was the person who moved to approve 3.0. (Pl.’s Ex. 37). Moreover, Richardson and Johnson fed the County Council the misleading characteristics of 3.0 which they developed with Goggans: seating capacity and heated square footage. Those characteristics permeated the staff’s recommendation to the County Council and ultimate decision, as those factors were emphasized as the important information for consideration of 3.0. (Pl.’s Ex. 35).

Defendants also reiterate their argument that Article XI did not apply for the additional reason that Palmetto’s construction of 3.0 was not “at the time of initial construction.” This argument defies common sense. Palmetto completely razed the marina store and restaurant. 3.0 is a brand-new building. To contend that building the entirely new 3.0 was not “initial construction” is nonsensical. Moreover, Article XI also states that it applies when there is an increase in “dwelling units, guest rooms, floor area, seating or bed capacity.” It is undisputed that

3.0 represented an increase in floor area from the marina store and snack bar. Defendants' contention on this point must be rejected.

Furthermore, as Richardson and Johnson admitted at trial, nothing in the Zoning Ordinance provides any requirement regarding seat number or heated square footage. Any decision with respect to parking based on those characteristics was entirely arbitrary, particularly where the Zoning Ordinance spelled out exactly what characteristics the County *was* supposed to consider, but those were entirely ignored.

VI. Defendants Violated Gulfstream's Substantive Due Process Rights.

Defendants use a quote from Siena Corporation v. Mayor & City Council of Rockville Maryland, 873 F.3d 456 (4th Cir. 2017), to support their incorrect statement that the “shocks the conscious” standard applies here. The Court in Siena Corporation, unfortunately, like Defendants here, failed to notice the nuance of when a “shocks the conscious” standard applies.

The relevant quote found in Siena Corporation is a quote from Huggins v. Prince George's County, 683 F.3d 525 (4th Cir. 2012), which in turn quotes County of Sacramento v. Lewis, 523 U.S. 833 (1998). Both Huggins and Lewis use the “shocks the conscious” language because they deal with plaintiffs alleging that government *executive* acts violated their substantive due process rights. In fact, the entire quote—which Siena Corporation only quotes the end of—is as follows: “[T]he substantive component of the Due Process Clause is violated by *executive action* only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.” Huggins, 683 F.3d at 535 (quoting Lewis, 523 U.S. at 847) (emphasis added).

In Siena Corporation, the Court classified the government's decision as legislative, but conducted a “shocks the conscious” analysis with a discussion about why the decision was not

arbitrary. Siena Corp., 873 F.3d at 464. If the Court in Siena Corporation would have quoted the entirety of the line from Huggins and Lewis, it would have noticed the “shocks the conscious” analysis would not apply to legislative acts.

Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999), as quoted in Plaintiff’s motion for reconsideration, clearly explains the duality of an executive act and legislative act requiring different judicial analysis:

Depending upon whether the claimed violation is by *executive act or legislative enactment*, different methods of judicial analysis are appropriate. See Lewis This is so because there are different “criteria” for determining whether executive acts and legislative enactments are “fatally arbitrary,” an essential element of any substantive due process claim. Id.

In executive act cases, the issue of fatal arbitrariness should be addressed as a “threshold question,” asking whether the challenged conduct was “so egregious, so outrageous, that it may fairly be said to *shock the contemporary conscience*.” Id.

If the claimed violation is by *legislative enactment* (either facially or as applied), analysis proceeds by a different two-step process that *does not involve any threshold “conscience-shocking” inquiry*.

Hawkins, 195 F.3d at 738–39 (citing Lewis, 523 U.S. at 845) (emphasis added).¹

Therefore, because Defendants’ action here is legislative, the Court must analyze Plaintiff’s substantive due process claim under a rational basis level of review—not a “shocks the conscious” review—pursuant to established caselaw originating in the Supreme Court case of Lewis, and as clearly explained in Hawkins.

Defendants take issue with Gulfstream’s position that overburdening the parking lot created a safety issue, but the evidence is undisputed from Mr. Kirk that accidents have already

¹ Hawkins has been favorably cited most recently in Callahan v. N. Carolina Dep’t of Pub. Safety, 18 F.4th 142, 149 n.5 (4th Cir. 2021).

occurred at the parking lot, Richardson and Johnson agreed that parking is an issue of the public welfare, and numerous people spoke at the public meetings regarding their safety concerns. (Pl.'s Exs. 44, 45). Gulfstream's argument is not based on unsupported speculation, as Defendants attempt to argue, but instead is demonstrated through the undisputed evidence in this case.

With respect to Castles' testimony, he does not have to be qualified as a zoning or planning expert to testify to his interpretation of the Zoning Ordinance based on his experience and expertise as a civil engineer. Moreover, it does not require expert testimony from Castles, Richardson, or Johnson to read the clear words on the page of the Zoning Ordinance that make consideration of Article XI mandatory.

The South Carolina Supreme Court has held that when "exercising discretion, a local board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary." Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997). That is the opposite of what happened here. Defendants reviewed and approved 3.0 based on standards the County created out of thin air, resulting in an arbitrary and capricious decision by Defendants. Under the law, Defendants cannot make decisions based on characteristics and calculations, like limiting seats and heated square footage, which have no foundation in the Zoning Ordinance. See id. at 237 (finding the denial of building permits for billboards to be arbitrary where the board and council failed to apply any of the specific criteria in the ordinance when making the decision to deny the permits and instead improperly considered other factors).

Defendants again point out that if flexibility were not allowed in PDs, then the entire Marlin Quay PD would be out of compliance. The fact that the Marlin Quay PD was previously out of compliance does not justify the County's decision to allow it to become *more* out of compliance.

Defendants ultimate position is that because parking was insufficient before, it does not matter if that concern is compounded exponentially. This position entirely ignores the principles of good planning practice and the public health, safety, and welfare. It should not be credited by the Court.

Moreover, Gulfstream is not trying to place the burden of designing 3.0 on the Defendants. Gulfstream is, however, placing the burden of evaluating whether 3.0 complies with the Zoning Ordinance on Defendants. Defendants utterly failed at this task. Defendants should have gone back to Palmetto and required them to redesign the building such that it complied with FEMA, ADA, and building codes (Defendants' purported rationale for approving 3.0), while at the same time not overburdening the parking lot by actually requiring Palmetto to conform to the size of the old marina store and snack bar. Instead, Defendants approved a building that was at least twice the size of the old building and will create a hazardous parking situation that will destroy Gulfstream's rights to the parking lot.

VII. Gulfstream's Procedural Due Process Rights were Violated.

With respect to providing adequate information to evaluate the Application, Defendants contend that having the building plans in advance of the public meetings was somehow unnecessary. The fundamental question before the County was whether to approve a Site Plan amendment and Change in Building Configuration. It is almost incomprehensible that Defendants take the position that building plans are unnecessary to answer that question. The better question is how did Richardson prepare a staff report without even knowing what the type, size, and layout of the building was that Palmetto was proposing? Because as with everything else, the County took Palmetto's word for it and filled in the blanks at the last minute in advance of the public meetings for the Application. (Pl.'s Exs. 24, 27, 28, 29, 30). This process did not give Gulfstream, or anyone else, adequate time to evaluate and prepare for the hearings in opposition to 3.0.

Gulfstream pointed to numerous failures of the County, such as allowing another amendment application within less than twelve months, that violated both the Zoning Ordinance and amounted to a procedural due process violation. These failures should result in the approval being declared invalid because the County violated the Zoning Ordinance and because they violated Gulfstream's procedural due process rights.

Defendants contend that the twelve-month penalty box rule did not apply because the Application for 3.0 did not request a change in district classification because it did not request a change from the PD zoning classification. Richardson admitted, however, that a major amendment to a PD must follow all the same procedures as a rezoning. This means that a change in a PD is essentially seeking a rezoning, because it is changing the PD itself. Therefore, the County should not have allowed the Application for 3.0 to proceed, because it violated Section 1702.1 of the Zoning Ordinance.

VIII. Gulfstream Proved a Takings/Inverse Condemnation Claim.

Regardless of the precise elements of a taking/inverse condemnation claim,² Gulfstream proved that its property has been taken by the approval of 3.0 without just compensation. Gulfstream presented evidence from Mr. Kirk that customers will leave and never come back if they cannot find parking, a marketing expert testified that approval of 3.0 has devastating impact on the marketability of Gulfstream's property, and Gulfstream's appraiser testified that the property will only have nominal value due to the loss of easement parking. This evidence is un rebutted. There is no contrary evidence in the record to refute these facts. There was no basis

² Defendants essentially acknowledge that Gulfstream is correct that the Supreme Court of South Carolina eliminated the "taking for public use" and "some degree of permanence" elements. See Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005).

in the record for the Order to decline to find Gulfstream is entitled to compensation for the taking resulting from approval of 3.0.

With respect to Gulfstream's appraiser's statement about the value of the property if rezoned, the expert immediately upon redirect examination clarified that his statement was mere speculation because he had not done the required analysis of the likelihood of rezoning. That analysis must be done before an appraiser can testify as to any value of the property if rezoned.³ Mr. Knight had not done that analysis, and neither has any other expert or witness in this case. To consider any statement by Mr. Knight to the contrary is error.

³ "[T]he owner is to be given, by way of compensation for his land, its fair price for any use for which it has a commercial value of its own in the immediate present or in reasonable anticipation in the near future...[t]he uses which may be considered must be so reasonably probable as to have an effect on the present market value of the land; a purely imaginative or speculative value cannot be considered." Carolina Power & Light Co. v. Copeland, 258 S.C. 206, 215, 188 S.E.2d 188, 192 (1972)(quoting 27 Am. Jur. (2d) Eminent Domain § 280 (1966)). "[I]t is not sufficient to show that the potential is a mere possibility." Id. "It must be shown that the potential is reasonably probable." Id.

CONCLUSION

For the reasons set forth above, the Order should be altered and amended to reverse the decision in its entirety. The Order should be altered and amended to find in favor of Gulfstream.

Respectfully submitted,

s/ Sean M. Foerster

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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'S RESPONSE TO
DEFENDANTS' MOTION FOR COSTS

TO: HENRIETTA U. GOLDING, ESQUIRE, AND TAYLOR K. VOEGEL, ESQUIRE, AS COUNSEL FOR DEFENDANTS:

Plaintiff The Gulfstream Café, Inc. (hereinafter "Gulfstream") hereby responds to Defendants' Motion for Costs and respectfully requests that the Court deny the motion for the following reasons:

Relevant Facts

Following a bench trial that took place from August 29 to September 1, 2022, the Court entered an Order on February 3, 2023, finding in favor of Defendants on all causes of action.

On February 13, 2023, Gulfstream timely filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRCP, seeking the Court's reconsideration of its trial order.

Later that same day, Defendants filed a Motion for Costs pursuant to Rule 54, SCRCP, S.C. Code Ann. § 15-37-40, and S.C. Code Ann. § 15-53-100. Defendants supported the motion with an Itemized Statement of Costs attested to by their counsel and listing motion filing fees, deposition transcript costs, deposition exhibit costs, and the cost of their deposition of Gulfstream. This itemization cited to only Rule 54(e)(2), SCRCP, and S.C. Code Ann. § 15-37-40 as the supporting authority for each of these costs.

Legal Standard for Taxation of Costs

"Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs..." Rule 54(d), SCRCP. The plain language of the rule grants the Court the authority to award costs to a

party, but in no way requires the Court to do so and it remains within the discretion of the Court to deny such an award.

Further, the party seeking costs “must point to a specific statute or rule of court to support each of his claims for costs, fees, and disbursements.” *Black v. Roche Biomedical Labs., Div. of Hoffman-Laroche*, 315 S.C. 223, 228, 433 S.E.2d 21, 24 (Ct. App. 1993). “[C]osts have always been regarded in this state as in the nature of penalties; hence statutes allowing them are strictly construed...” *Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 318, 422 S.E.2d 128, 131 (1992)(internal citation and quotation marks omitted).

Arguments

The Court must deny Defendants’ request for recovery of their costs for depositions, deposition transcripts, and deposition exhibits and must limit their recovery of motion filing fees to \$10 per motion.

1. Defendants are not entitled to recover their costs for depositions, deposition transcripts, and deposition exhibits.

Defendants seek to recover the costs of the following items pursuant to S.C. Code Ann. § 15-37-40: 14 deposition transcripts, the “Deposition ... of Rule 30(b)(6), SCRCp, of the Gulfstream Café, Inc.”, and the “Deposition Exhibits” for the depositions of Holly Richardson and Judy Blankenship.

However, S.C. Code Ann. § 15-37-40 provides for recovery of only the following specific fees and expenses:

- “the fees of officers allowed by law”;
- “the fees of witnesses”;
- “the reasonable compensation of commissioners in taking depositions”;
- “the fees of referees”; and
- “the expense of printing the papers for any hearing when required by a rule of the court.”

S.C. Code Ann. § 15-37-40 is silent as to court reporter’s fees for depositions, deposition transcript costs, and deposition exhibit costs. Further, court reporters are not “commissioners”—the procedures for examining witnesses by commission under former S.C. Code §§ 19-15-10 to 19-15-110 were repealed in 1985 when the General Assembly promulgated the South Carolina Rules of Civil Procedure.

The South Carolina Court of Appeals has noted that it “doubt[s] the applicability of this provision to present day deposition practice.” *Black*, 315 S.C. at 229 n.7, 433 S.E.2d at 25 n.7.

Under the required strict reading of S.C. Code Ann. § 15-37-40, Defendants are not entitled to recover their costs for depositions, deposition transcripts, and deposition exhibits.

2. Defendants’ Recovery of Motion Filing Fees is Limited by Statute.

Defendants also seek to recover the filing fees for 13 motions in the amount of \$31.74 each pursuant to Rule 54(e)(2), SCRCF.

Although Rule 54(e)(2) provides that “[t]axable costs shall include ... [a]ll filing and recording fees charged by the clerk of the court in which the action was pending...”, this rule does not apply to taxation of costs “when express provision therefor is made ... in a statute...” Rule 54(d), SCRCF.

S.C. Code Ann. § 15-37-90 expressly provides for costs on a motion, and states that “[c]osts may be allowed on a motion, in the discretion of the court or judge, not exceeding ten dollars, and may be absolute or directed to abide the event of the action.”

Therefore, while Gulfstream concedes that Defendants are generally entitled to recover their filing fees under Rule 54(e)(2) if they prevail on the pending Motion to Alter or Amend Judgment and any subsequent appeal, their recovery of filing fees specifically for motions is capped at \$10 per motion pursuant to S.C. Code Ann. § 15-37-90.

Conclusion

For the reasons set forth herein, the Court must deny Defendants’ Motion for Costs to the extent that it requests their costs for depositions, deposition transcripts, and deposition exhibits, and the Court must limit their recovery of motion filing fees to \$10 per motion.

Respectfully submitted,

s/ Sean M. Foerster

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Inc.

March 15, 2023

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

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.

NOTICE OF APPEAL

Appellant The Gulfstream Café, Inc., appeals the order of The Honorable R. Kirk Griffin entered on February 3, 2023, and the order of The Honorable R. Kirk Griffin denying Appellant's Motion to Alter or Amend entered on April 3, 2023. Appellant received written notice of the entry of these orders on February 3, 2023, and April 3, 2023, respectively.

Appellant files this appeal with the South Carolina Supreme Court because the appealed orders of the Circuit Court ruled that Respondents' enactment of a county ordinance did not violate Appellant's right to substantive and procedural due process under both the United States Constitution and the South Carolina Constitution and did not violate the Takings Clause under the South Carolina Constitution. As such, the ruling involves a challenge on state and federal grounds to the constitutionality of a county ordinance where the principal issue is one of the constitutionality of the ordinance as contemplated by Rule 203(d)(1)(A)(ii), SCACR.

April 24, 2023

[signature block on the following page]

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Counsel for Respondents

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

This matter came before the Court for a bench trial which began on August 29, 2022, and concluded on September 1, 2022. The Plaintiff was represented by Simon H. Bloom, Esquire, Sean M. Forester, Esquire, and Andrea J. Pearson, Esquire. Defendants were represented by Henrietta U. Golding, Esquire and Taylor K. Vogel, Esquire. Having carefully considered the pleadings, testimony, evidence, arguments, and post-trial briefs, for the reasons set forth below, the Court finds in favor of the Defendants on all causes of action.

FINDINGS OF FACT

In 1982, Georgetown County created a Planned Development (PD) named Marlin Quay located on South Waccamaw Drive in Garden City, South Carolina. This PD is home to the Marlin Quay Condominiums, Gulfstream Café, and the Marlin Quay Marina Store and Restaurant. In the initial PD, three areas for parking were created. 13 spaces for Gulfstream Café, 60 shared spaces for Gulfstream Café and the Marlin Quay Marina Store and Restaurant, and separate parking for the condominiums. The PD has been amended over time. In 1986, Gulfstream Café was purchased by Jerry Greenbaum; at the time, the parking lot was authorized for use by the Marlin Quay Marina

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PLAINTIFF'S CAUSES OF ACTION

The following causes of action are at issue:

1. Declaratory Judgment to invalidate approval of Palmetto's Application for Major Amendment;
2. Violation of Substantive Due Process Rights under Article I Section 3 of the South Carolina Constitution;

3. Relief Under 42 U.S.C. § 1983 for Violation of Right to Substantive Due Process under the United States Constitution;
4. Violation of Right to Procedural Due Process under Article I Section 3 of the South Carolina Constitution;
5. Relief Under 42 U.S.C. § 1983 for Violation of Right to Procedural Due Process under the United States Constitution;
6. Violation of South Carolina's Taking Clause under Article I Section 13 of the South Carolina Constitution;
7. Inverse Condemnation; and
8. Attorneys' Fees.

DECLARATORY JUDGMENT

The courts have the “power to invalidate an ordinance where it is so unreasonable as to impair or destroy constitutional rights.” *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965). This power should be “exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations.” *Id.*

However, a municipal ordinance is presumed to be constitutional. *Town of Scranton v. Willoughby*, 603 S.C. 421, 422, 412 S.E.2d 424, 425 (1992). “Every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly so as to leave no room for reasonable doubt that it violates some provision of the Constitution.” *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 296, 737 S.E.2d 601, 609 (2013) (quoting *McMaster v. Columbia Bd. Of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 663 (2011)) (internal quotation marks omitted).

The burden of proving a zoning ordinance to be invalid is on the party who brings the action; to attack it, they must show the arbitrary and capricious nature of the ordinance through clear and convincing evidence. *Dunes*, 401 S.C. at 298, 737 S.E.2d at 610 (quoting *Willoughby*, 306 S.C. at 422, 412 S.E.2d at 425) (internal quotation marks omitted).

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

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

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

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

SUBSTANTIVE DUE PROCESS

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

In order for the claimant to prove a denial of substantive due process, a claimant must show that he was "arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 96, 569 S.E.2d 917, 922 (2004) (citation omitted). "In the context of a zoning action involving property, it must be clear that the state's action "has no foundation in reason and is mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Dunes*, 401 S.C. at 297, 737 S.E.2d at 610 (citation omitted).

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

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

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

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

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

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

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

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

PROCEDURAL DUE PROCESS

Procedural Due Process claims require (1) notice, (2) the opportunity to be heard in a meaningful way, and (3) judicial review. *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 570 (Ct. App. 2002) (citing *Grannis v. Ordean*, 234 U.S. 385 (1914)); *Kurschner*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (citing S.C. Const. Art. 1, § 22; *Stono River Env't Prot. Ass'n v. S.C. Dep't of Health & Env't Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991)).

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

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

TAKINGS CLAUSE VIOLATION

For a regulatory taking claim, there are two questions that must be answered: (1) has there been an affirmative government action and (2) does that action result in a taking; *See Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76 (2005). A per se taking occurs where either (1) an owner is required to suffer a permanent physical invasion of property or (2) a regulation denies all economically beneficial or productive use of land. *Dunes*, 401 S.C. at 313, 737 S.E.2d at 619 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-16 (1992)).

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

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

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

Government regulation by its very nature involves some effect on rights for the benefit of the public good. *Dunes*, 401 S.C. at 315, 737 S.E.2d at 620. In *Dunes*, the Court noted how the Town provided a legitimate public purpose by enacting the ordinance, that the Town did not eliminate all development potential, that the claimant still had a right to sell, and that the Town did not exploit the property for its own use or economic advantage. *Id.* at 316-17, 737 S.E.2d at 620-21. Here, the government action was the passing of Ordinance 2018-40. The county had a legitimate public purpose by enacting Ordinance 2018-40. It provided a safer facility for patrons in the county that was up to newest FEMA and ADA regulations, amongst other building and fire codes.

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

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

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

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

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

INVERSE CONDEMNATION

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

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

ATTORNEY’S FEES

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

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

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

CONCLUSION

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

IT IS SO ORDERED.

September 3, 2023
Sumter, SC

R. Kirk Griffin, Circuit Court Judge



Georgetown Common Pleas

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

Case Number: 2019CP2200212

Type: Order/Other

So Ordered

s/ R. Kirk Griffin 2768

Electronically signed on 2023-02-03 13:46:14 page 17 of 17

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

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

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

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

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

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

AND IT IS SO ORDERED.

Sumter, South Carolina

April 3, 2023

 R. Kirk Griffin
 Judge, Third Judicial Circuit



Georgetown Common Pleas

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

Case Number: 2019CP2200212

Type: Order/Other

So Ordered

s/ R. Kirk Griffin 2768

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

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

The Gulfstream Café, Inc. Appellant,

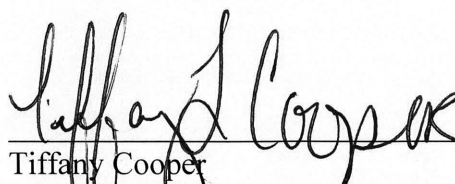
v.

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

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondents Georgetown County, Georgetown County Council, and Steve Goggans, individually and in his official capacity as Georgetown County Councilmember, by depositing a copy in the U.S. Mail, postage prepaid, on April 24, 2023, addressed to their following attorneys of record:

Henrietta U. Golding, Esquire
Taylor K. Voegel, Esquire
Burr & Forman LLP
Post Office Box 336
Myrtle Beach, SC 29578



Tiffany Cooper
Legal Assistant to Sean M. Foerster, Esquire
ROGERS TOWNSEND LLC

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.

AMENDED NOTICE OF APPEAL

Appellant The Gulfstream Café, Inc., appeals the order of The Honorable R. Kirk Griffin entered on February 3, 2023, and the order of The Honorable R. Kirk Griffin denying Appellant’s Motion to Alter or Amend entered on April 3, 2023. Appellant received written notice of the entry of these orders on February 3, 2023, and April 3, 2023, respectively.

Appellant also appeals the order of The Honorable R. Kirk Griffin entered on May 26, 2023, awarding costs to the Respondents. Appellant received written notice of the entry of this order on May 26, 2023.

Appellant files this appeal with the South Carolina Supreme Court because the appealed orders of the Circuit Court ruled that Respondents’ enactment of a county ordinance did not violate Appellant’s right to substantive and procedural due process under both the United States Constitution and the South Carolina Constitution and did not violate the Takings Clause under the South Carolina Constitution. As such, the ruling involves a challenge on state and federal grounds to the constitutionality of a county ordinance where the principal issue is one of the constitutionality of the ordinance as contemplated by Rule 203(d)(1)(A)(ii), SCACR.

June 7, 2023

[signature block on the following page]

s/ Sean M. Foerster

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Counsel for Respondents

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

This matter came before the Court for a bench trial which began on August 29, 2022, and concluded on September 1, 2022. The Plaintiff was represented by Simon H. Bloom, Esquire, Sean M. Forester, Esquire, and Andrea J. Pearson, Esquire. Defendants were represented by Henrietta U. Golding, Esquire and Taylor K. Vogel, Esquire. Having carefully considered the pleadings, testimony, evidence, arguments, and post-trial briefs, for the reasons set forth below, the Court finds in favor of the Defendants on all causes of action.

FINDINGS OF FACT

In 1982, Georgetown County created a Planned Development (PD) named Marlin Quay located on South Waccamaw Drive in Garden City, South Carolina. This PD is home to the Marlin Quay Condominiums, Gulfstream Café, and the Marlin Quay Marina Store and Restaurant. In the initial PD, three areas for parking were created. 13 spaces for Gulfstream Café, 60 shared spaces for Gulfstream Café and the Marlin Quay Marina Store and Restaurant, and separate parking for the condominiums. The PD has been amended over time. In 1986, Gulfstream Café was purchased by Jerry Greenbaum; at the time, the parking lot was authorized for use by the Marlin Quay Marina

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PLAINTIFF'S CAUSES OF ACTION

The following causes of action are at issue:

1. Declaratory Judgment to invalidate approval of Palmetto's Application for Major Amendment;
2. Violation of Substantive Due Process Rights under Article I Section 3 of the South Carolina Constitution;

3. Relief Under 42 U.S.C. § 1983 for Violation of Right to Substantive Due Process under the United States Constitution;
4. Violation of Right to Procedural Due Process under Article I Section 3 of the South Carolina Constitution;
5. Relief Under 42 U.S.C. § 1983 for Violation of Right to Procedural Due Process under the United States Constitution;
6. Violation of South Carolina's Taking Clause under Article I Section 13 of the South Carolina Constitution;
7. Inverse Condemnation; and
8. Attorneys' Fees.

DECLARATORY JUDGMENT

The courts have the “power to invalidate an ordinance where it is so unreasonable as to impair or destroy constitutional rights.” *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965). This power should be “exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations.” *Id.*

However, a municipal ordinance is presumed to be constitutional. *Town of Scranton v. Willoughby*, 603 S.C. 421, 422, 412 S.E.2d 424, 425 (1992). “Every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly so as to leave no room for reasonable doubt that it violates some provision of the Constitution.” *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 296, 737 S.E.2d 601, 609 (2013) (quoting *McMaster v. Columbia Bd. Of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 663 (2011)) (internal quotation marks omitted).

The burden of proving a zoning ordinance to be invalid is on the party who brings the action; to attack it, they must show the arbitrary and capricious nature of the ordinance through clear and convincing evidence. *Dunes*, 401 S.C. at 298, 737 S.E.2d at 610 (quoting *Willoughby*, 306 S.C. at 422, 412 S.E.2d at 425) (internal quotation marks omitted).

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

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

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

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

SUBSTANTIVE DUE PROCESS

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

In order for the claimant to prove a denial of substantive due process, a claimant must show that he was "arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 96, 569 S.E.2d 917, 922 (2004) (citation omitted). "In the context of a zoning action involving property, it must be clear that the state's action "has no foundation in reason and is mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Dunes*, 401 S.C. at 297, 737 S.E.2d at 610 (citation omitted).

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

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

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

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

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

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

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

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

PROCEDURAL DUE PROCESS

Procedural Due Process claims require (1) notice, (2) the opportunity to be heard in a meaningful way, and (3) judicial review. *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 570 (Ct. App. 2002) (citing *Grannis v. Ordean*, 234 U.S. 385 (1914)); *Kurschner*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (citing S.C. Const. Art. 1, § 22; *Stono River Env't Prot. Ass'n v. S.C. Dep't of Health & Env't Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991)).

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

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

TAKINGS CLAUSE VIOLATION

For a regulatory taking claim, there are two questions that must be answered: (1) has there been an affirmative government action and (2) does that action result in a taking; *See Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76 (2005). A per se taking occurs where either (1) an owner is required to suffer a permanent physical invasion of property or (2) a regulation denies all economically beneficial or productive use of land. *Dunes*, 401 S.C. at 313, 737 S.E.2d at 619 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-16 (1992)).

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

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

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

Government regulation by its very nature involves some effect on rights for the benefit of the public good. *Dunes*, 401 S.C. at 315, 737 S.E.2d at 620. In *Dunes*, the Court noted how the Town provided a legitimate public purpose by enacting the ordinance, that the Town did not eliminate all development potential, that the claimant still had a right to sell, and that the Town did not exploit the property for its own use or economic advantage. *Id.* at 316-17, 737 S.E.2d at 620-21. Here, the government action was the passing of Ordinance 2018-40. The county had a legitimate public purpose by enacting Ordinance 2018-40. It provided a safer facility for patrons in the county that was up to newest FEMA and ADA regulations, amongst other building and fire codes.

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

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

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

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

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

INVERSE CONDEMNATION

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

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

ATTORNEY’S FEES

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

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

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

CONCLUSION

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

IT IS SO ORDERED.

September 3, 2023
Sumter, SC

R. Kirk Griffin, Circuit Court Judge



Georgetown Common Pleas

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

Case Number: 2019CP2200212

Type: Order/Other

So Ordered

s/ R. Kirk Griffin 2768

Electronically signed on 2023-02-03 13:46:14 page 17 of 17

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

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

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

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

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

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

AND IT IS SO ORDERED.

Sumter, South Carolina

April 3, 2023

 R. Kirk Griffin
 Judge, Third Judicial Circuit



Georgetown Common Pleas

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

Case Number: 2019CP2200212

Type: Order/Other

So Ordered

s/ R. Kirk Griffin 2768

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

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

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

LEGAL STANDARD

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

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

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

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

ANALYSIS

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

AND IT IS SO ORDERED.

Sumter, South Carolina

May 26, 2023

 R. Kirk Griffin
 Judge, Third Judicial Circuit



Georgetown Common Pleas

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

Case Number: 2019CP2200212

Type: Order/Costs

So Ordered

s/ R. Kirk Griffin 2768

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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.

PROOF OF SERVICE

I certify that I have served the Amended Notice of Appeal on Respondents Georgetown County, Georgetown County Council, and Steve Goggans, individually and in his official capacity as Georgetown County Councilmember, by depositing a copy in the U.S. Mail, postage prepaid, on June 7, 2023, addressed to their following attorneys of record and by email on June 7, 2023, to the following email addresses from the Attorney Information System ("AIS") for their attorneys of record:

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s/ Sean M. Foerster
Sean M. Foerster (SC Bar# 77466)
Local Counsel
ROGERS TOWNSEND LLC

Certificate of Attorney

Pursuant to Rule 210(g), SCACR, I certify that this record contains all material proposed to be included by any of the parties and not any other material.

s/ Sean M. Foerster

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November 13, 2023