RECEIVED

Dec 04 2023

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

---

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

---

Case No. 2019-CP-22-00212
Appellate Case No. 2023-000646

---

The Gulfstream Café, Inc. .....Appellant,

v.

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

---

# FINAL BRIEF OF APPELLANT

---

Sean M. Foerster (SC Bar# 77466)
Local Counsel
ROGERS TOWNSEND LLC
1221 Main Street, 14th Floor (29201)
Post Office Box 100200
Columbia, South Carolina 29202-3200
(803)771-7900
sean.foerster@rogerstownsend.com

Simon H. Bloom (GA Bar# 064298)
Andrea J. Pearson (GA Bar# 409604)
Admitted Pro Hac Vice
BLOOM PARHAM, LLP
977 Ponce de Leon Avenue NE
Atlanta, Georgia 30306
(404) 577-7710
sbloom@bloom-law.com
apearson@bloom-law.com

Counsel for Appellant The Gulfstream Café, Inc.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

## STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S SUBSTANTIVE DUE PROCESS CLAIMS UNDER THE SOUTH CAROLINA AND U.S. CONSTITUTIONS?

   a. DID THE TRIAL COURT ERR IN APPLYING THE "SHOCKS THE CONSCIENCE" STANDARD?

   b. DID THE TRIAL COURT ERR IN NOT FINDING THAT THE REZONING DEPRIVED APPELLANT OF A PROPERTY RIGHT?

   c. DID THE TRIAL COURT ERR IN NOT FINDING THE REZONING ARBITRARY AND CAPRICIOUS?

II. DID THE TRIAL COURT ERR IN FAILING TO DECLARE THE APPROVAL OF THE MAJOR AMENDMENT TO THE PD VOID AND RESPONDENT GOGGANS' INVOLVEMENT UNLAWFUL?

III. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S TAKINGS AND INVERSE CONDEMNATION CLAIMS UNDER THE SOUTH CAROLINA AND U.S. CONSTITUTIONS?

   a. DID THE TRIAL COURT APPLY THE WRONG STANDARD TO APPELLANT'S INVERSE CONDEMNATION CLAIM?

   b. DID THE TRIAL COURT ERR IN DETERMINING THAT A PER SE TAKING HAS NOT OCCURRED AND THAT APPELLANT HAS NOT MET THE *PENN CENTRAL* TEST?

IV. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S PROCEDURAL DUE PROCESS CLAIMS UNDER THE SOUTH CAROLINA AND U.S. CONSTITUTIONS?

V. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S CLAIM FOR ATTORNEYS' FEES AND AWARDING COSTS TO RESPONDENTS?

## STATEMENT OF THE CASE

This action relates to Appellant The Gulfstream Café, Inc.'s ("Gulfstream" or "Appellant") challenge to the enactment of a municipal ordinance amending a Planned Development ("PD" or "PUD") to permit construction of a building which will eviscerate Appellant's easement rights in a shared parking lot. This case is entirely about parking and the lack thereof for two full-service dinner restaurants. Parking is a life safety issue. When too many

cars are racing after too few spaces, people get hurt and property destroyed. In the wake, businesses fail. Despite proclaiming commitment to public health and safety, Respondents approved a redevelopment plan with a parking load of 170 spaces on a parking lot that only contains 62 spaces on its best day.

There are multiple property owners that share the parking lot with 62 spaces. The easement over the parking lot calls for Gulfstream to use those spaces at night for dinner and the marina and snack bar to use the spaces during the day. Under no scenario—in fact or at law—are there enough spaces for two full-service restaurants serving dinner. No one in this case contends otherwise. Yet somehow, by hiring a sitting county council member, Respondent Goggans, to be its architect and project consultant, the applicant secured the County's approval of rezoning, permitting redevelopment of the snack bar into a 3-story, almost 10,000 square foot restaurant and bar, which the County's own code requires it alone to have 72 dedicated parking spaces.

Yes, the County approved the redevelopment of the applicant's property that needs a total of 72 parking spaces itself, while the preexisting Gulfstream restaurant requires 76 spaces itself, according to the County Zoning Ordinance. And recall, the subject parking lot only contains 62 spaces in total. Respondent Goggans is either the most persuasive architect in America or his powers of persuasion had something to do with the fact that he controlled the jobs and budgets of the people evaluating his client's rezoning applications and calculating parking requirements.

In light of this, Appellant filed a Summons and Complaint in Georgetown County on March 8, 2019. The Complaint included claims for: (1) declaratory judgment to declare the major amendment to the PD invalid, (2) violation of substantive due process 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 – 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. (R. pp. 67–73). Appellant sought to have the major amendment declared null and void and set aside. (R. p. 73). If the trial court declined to grant that relief, Appellant sought damages in the amount of $1,760,100, which is the loss of value to Appellant's property which resulted from Respondents' conduct in approving the major amendment. (R. p. 73); (R. p. 4207). Respondents filed an answer on April 11, 2019 (R. pp. 172–176), which Respondents amended on August 11, 2021 (R. pp. 177–182). By consent order, all of the individual County Councilmembers except for Respondent Goggans were dismissed from the action with prejudice. (R. p. 15).

The matter came before the trial court for a bench trial on August 29, 2022, and concluded on September 1, 2022. Following the bench trial, both parties filed post-trial briefs and post-trial reply briefs. (R. pp. 4187–4212); (R. pp. 4148–4186); (R. pp. 4222–4236); (R. pp. 4213–4221). On February 3, 2023, the trial court entered an order finding in favor of Respondents on all causes of action (the "Order"). (R. pp. 36–51). Appellant filed a motion to alter or amend the judgment (R. pp. 4248–4268), which the trial court denied on April 3, 2023. (R. p. 53). Appellant filed its Notice of Appeal on April 24, 2023. (R. pp. 4299–4300).

Respondents filed a Motion for Costs on February 13, 2023. (R. pp. 4241–4243). Appellant opposed the Motion for Costs by filing a Response on March 15, 2023. (R. pp. 4295–4298). Despite Appellant's filing of the Notice of Appeal, on May 26, 2023, the trial court granted Respondents' Motion for Costs. (R. pp. 55–56). Accordingly, on June 7, 2023,

Appellants filed an Amended Notice of Appeal to include the trial court's order awarding costs to Respondents. (R. pp. 4321–4345).

## STATEMENT OF THE FACTS

### I. The History of the Marlin Quay PD and Gulfstream's Easement.

The Marlin Quay PD is the location of the Gulfstream Café, which has operated as a restaurant for over 30 years. (R. p. 325, lines 13–16). The Marlin Quay PD is a planned development containing several specified uses, including condominiums, a marina store, and a restaurant. (R. pp. 1180–1182). Gulfstream's property is designated in the PD documents as a restaurant. (*Id.*). Under the PD, Gulfstream's property can only be used as a restaurant. (R. p. 413, lines 1–5). Gulfstream has never used the property for anything other than a restaurant. (R. p. 333, lines 4–16).

The property adjacent to Gulfstream is designated in the PD documents as a parking lot and a marina store. (R. pp. 1180–1182). Gulfstream has an easement permitting it to use the parking lot adjacent to its restaurant. (R. pp. 1183–1211). Specifically, Gulfstream's easement expressly provides that Gulfstream perpetually and currently enjoys the following rights:

> 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 **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.**

(R. p. 1203 (emphasis added)).

### II. Palmetto's Plans for a New Building to Replace the Marina Store and Snack Bar and Respondent Goggans' Heavy Involvement as Architect for the Project.

The property adjacent to Gulfstream is currently owned by Palmetto Industrial Development, LLC ("Palmetto"). After purchasing the property in 2014, Palmetto demolished the building that had included the marina store and snack bar. (R. p. 420, lines 15–24). When

initially seeking approval to rebuild, Palmetto sought a minor amendment for its first set of plans for the new building ("1.0"). (R. pp. 399, 554–55).

Palmetto hired Respondent Steve Goggans ("Goggans") and his firm, SGA Architecture, to design 1.0. (R. p. 650, lines 18–23). Goggans was a County Councilmember at the time, having been sworn into the position in 2014. (R. p. 641, lines 19–21). Despite his position as a County Councilmember, Goggans testified he was "heavily involved" with the development of the plans for 1.0 and was "heavily involved" with interfacing with the County. (R. p. 651, lines 4–9). Goggans testified he had multiple emails, phone calls, and face to face meetings with County staff, including Boyd Johnson ("Johnson") and Holly Richardson ("Richardson"). (R. p. 651, lines 10–18). Goggans viewed Johnson and Richardson as "friends," who were "usually helpful in [his] efforts." (R. p. 1212).

Under Article 11 of the Zoning Ordinance, which sets forth parking 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." (R. pp. 1027–1028; p. 688, lines 16–20). Being a "restaurant, standard" use under Article 11, Palmetto's new building required one parking space per 100 sq. ft. of gross floor area plus one space per 150 sq. ft. of outdoor seating area (its parking load). (R. pp. 1023–1026).

Goggans' negotiations and interactions with County staff included negotiation of parking requirements for Palmetto's building. (R. p. 652, lines 9–13). Goggans, Johnson, and Richardson established certain "parameters" for review of Palmetto's building, including parking. (R. p. 652, line 17–p. 655, line 17). Those parameters included the agreement that County staff would interpret the parking requirements for 1.0 and determine the "impact" of 1.0

based on heated square footage of the building and seating count and would not consider unheated square footage. (R. p. 654, line 14–p. 655, line 1). Johnson and Richardson also decided that the parking calculations did not need to include evaluation of the parking needs of the other uses of the parking lot. (R. p. 655, lines 10–17). These amounted to massive concessions by the County in favor of Goggans and his client. Not counting heated square footage meant the new building would need fewer parking spaces. Secondly, ignoring Gulfstream's need for parking spaces meant the new building could count all of the available spaces towards its parking requirement.

According to Goggans, these decisions resulted in "favorable outcomes" for Palmetto. (R. p. 1216). In fact, Goggans requested that Palmetto pay him an additional $72,000 for the favorable outcomes he obtained. (R. p. 1217). The favorable outcomes included, among other things, that: (1) approval of the porch did not count against the 4600 square foot limit of the building, which Goggans noted "had to be negotiated in consideration of local parking requirements"; (2) approval for confirming the existing parking, which according to Goggans was "substandard," would comply with zoning requirements; and (3) approval of a full second story (unconditioned), and designed for future expansion. (R. p. 1217).

As part of the scope of his representation of Palmetto, Goggans attended a Board of Zoning Appeals ("BZA") meeting on Palmetto's behalf. (R. p. 674, lines 23–24). As a result of that appearance, an ethics complaint was filed against Goggans and an investigation conducted by the State Ethics Commission. (R. p. 674, lines 7–16). Goggans entered into a consent order with the Ethics Commission, which found him in violation of Section 8-13-740(a) of the Ethics Code, sanctioned him with a $1,000 fine, and issued a warning. (R. p. 674, lines 17–24).

## III. Palmetto Files a Major Amendment to the PD.

Then, in November 2017, Palmetto submitted a new and revised plan for redevelopment ("2.0"). It was an "Application to Amend a Planned Development" for Marlin Quay seeking a "Change of Building Location" to obtain approval of Palmetto's plans for its new restaurant ("2.0"). (R. pp. 1220–1235). The application explained that it was "[t]o approve the plans for the proposed redevelopment of the Marlin Quay Marina Store/Restaurant operation as an approved 'Major Change' to the Marlin Quay Planned Development." (R. p. 1223).

Gulfstream challenged Palmetto's plan for 2.0 in the Circuit Court contending it violated the express terms of the easement in the action captioned The Gulfstream Café, Inc. v. J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC, C.A. No. 2016-CP-22-00961.[1] Gulfstream prevailed in that action, as the jury found in favor of Gulfstream on its claim for interference with its easement. (R. p. 1248). Accordingly, the Court issued a permanent injunction barring Palmetto from constructing a building on any portion of the property subject to Gulfstream's easement. (R. p. 358, lines 7–9).

## IV. Palmetto Seeks Another Rezoning to Redevelop the Marina.

### A. The Application Requested Approval of an Unlawful Building.

Due to the Court's injunction, on August 27, 2018, Palmetto submitted another "Application to Amend a Planned Development" (the "Application") for a new building ("3.0") also requesting a "Change of Building Configuration" and a "Site Plan Amendment." (R. pp. 1250–1261). Palmetto's building will be open at night. (R. p. 696, lines 13–22). Palmetto

[1] The trial court erroneously concluded that Gulfstream did not challenge 2.0. Gulfstream takes issue with additional findings, but they are addressed later in this Brief. 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.

submitted the Application even though it had been less than twelve months from the December 2017 hearing by the Planning Commission on the application for 2.0. (R. pp. 1240, 1242–1245). Since the Application sought a major change to the PD, it had to follow the same steps as a rezoning. (R. p. 396, line 22–p. 397, line 3).

If the County had objectively reviewed the Application, it would have recognized the dangers to the public health, safety, and welfare created by approving a building that will so clearly overload the parking lot. Gulfstream's operations manager, Jef Kirk ("Kirk"), testified that there have been car accidents in the parking lot before. (R. p. 345, lines 5–21). Kirk also testified that he already has to direct traffic in the parking lot. (R. p. 345, line 22-p. 346, line 11). Multiple members of the public raised safety concerns at the public meetings for approval of 3.0. (R. pp. 1357–1359, 1366–1369). Article 11 itself states that the parking requirements, which Respondents ignored, are for purposes of "improving the public health, safety and general welfare of the community." (R. p. 1023). Richardson and Johnson recognized that parking is a public safety and a public health issue. (R. p. 454, lines 21–22; p. 456, line 12–p. 457, line 20; p. 567, lines 1–2).

The Application sought approval of a blatantly unlawful building, a reality that Respondents willfully ignored. In reviewing the Application, when comparing 3.0 to the former marina store and snack bar to purportedly evaluate the "impact" of 3.0, the County only compared heated square footage of the buildings and entirely ignored unheated square footage. (R. p. 430, line 20–p. 431, line 12). For example, the staff report only mentions the square footage of the original building of 4,603 square feet and states that 3.0 had "less" heated square footage. (R. pp. 1317–1318). Richardson admitted that the distinction between heated and

unheated square footage is not set forth anywhere in the Zoning Ordinance. (R. p. 424, line 4–p. 425, line 1).

The County also allegedly compared seating of 110 seats in the marina store to the 110-seat limit for 3.0. (R. p. 1318). But Richardson admitted that seat count is not a metric found in the Zoning Ordinance either. (R. p. 435, lines 17–p. 436, line 1). Respondents knew that despite the seat count limit of 110, the actual occupancy limit for 3.0 was 350 people, and that people would use the unheated decks to stand and have drinks. (R. p. 597, line 23–p. 598, line 9; R. p. 593 lines 10–18). Goggans admitted that the "parameters" related to seat count and heated square footage were established during the negotiations for 1.0 and were not reevaluated for 2.0 or 3.0. (R. p. 652, line 14–p. 653, line 1; p. 666, lines 3–6; p. 671, lines 7–22).

If the County had fairly evaluated the Application, it would have recognized that the Application also violated the County's parking regulations. Article 11 of the Zoning Ordinance sets forth the parking requirements for the County. Article 11 states that its requirements are mandatory through all zoning districts. (R. p. 1023) ("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."). Gulfstream's civil engineering expert, Mr. Robert Castles ("Castles"), testified that Article 11 did not include any exception in the parking requirements for PDs. (R. p. 696, line 23–p. 697, line 5).

Despite the clear directive under the Zoning Ordinance to follow the parking requirements, Respondents did not follow Article 11 when reviewing the Application. Article 11 sets forth the following requirements for each use that shares the parking lot:

| Use | Parking Requirement | Parking Needed |
|---|---|---|
| Marina | One space per three wet slips, plus one space per five dry slips, plus one space per employee based on the largest shift | 22 parking spaces |
| 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 | Marina store: 10 parking spaces |
| Restaurant, standard | One space per 100 sq. ft. of gross floor area plus one space per 150 sq. ft. of outdoor seating area | Gulfstream: 76 parking spaces<br><br>Palmetto (restaurant): 62 parking spaces |
| Total | | 170 parking spaces |

(R. pp. 1023–1026). Castles confirmed the above categories set forth the parking requirements applicable to Gulfstream, 3.0, and the marina. (R. p. 688, line 21–p. 691, line 17).

The undisputed evidence presented at trial shows that approval of 3.0 violated these parking requirements. Castles testified as to the parking needed for each use in the parking lot.

For the marina, Castles testified that the marina had 67 slips, so it required 22 parking spaces under Article 11 (67/3 = 22). (R. p. 6953, lines 15–25); (R. p. 1460 (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. (R. p. 419, lines 8-19; p. 689, line 16–p. 690, line 21). Richardson conceded that gross floor area includes unheated, as well as heated, square footage. (R. p. 419, lines 13–19). 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). (R. p. 694, lines 12-25; p. 695, lines 4–8). 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). (R. p. 695, lines 1–11). Accordingly, the total required for Gulfstream is 76 parking spaces. (R. p. 695, lines 12–14).

For 3.0, Castles testified that it had 1,966 square feet for the marina store, requiring 10 parking spaces (1,966/200 = 10). (R. p. 692, lines 11–19). For gross floor area, Castles testified that 3.0 had 4,421 square feet, which requires 44 parking spaces (4,421/100 = 44). (R. p. 691, line 22–p. 693, line 13). 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). (R. p. 693, lines 14–19). Thus, 3.0 required 72 parking spaces under Article 11. (R. p. 693, lines 20–25).

Under Article 11, Gulfstream, the marina, and 3.0 require a total of 170 parking spaces, but only 62 spaces exist in the lot. (R. p. 696, lines 1–8). There is a shortage of **108 parking spaces** in the parking lot as a result of approval of 3.0. (R. p. 696, lines 9–12). Said another way, only 36% of the required parking is met with the approval of 3.0.

It is undisputed that Respondents did not evaluate Gulfstream or the marina's parking needs when reviewing 3.0. (R. p. 1218); (R. p. 447, line 4–p. 448, line 19; p. 454, lines 15–19; p. 578, lines 12–p. 579, line 4). Simply put, Respondents did not undertake the shared parking analysis required by the Zoning Ordinance either. (R. p. 448, lines 2–10).

If the County had engaged in an intellectually honest evaluation of the Application, it would have been immediately obvious that Palmetto sought approval of a grossly larger structure than what existed before. Instead, the County relied on the heated square footage parameter, which allowed Respondents to turn a blind eye to obvious differences in the sizes of the structures. The comparison between heated square footage of the old building and 3.0 is a totally

disingenuous and arbitrary point of comparison for trying to determine the purported "impact" of 3.0. The former marina store and restaurant was 4,603 square feet total. (R. p. 1467). Moreover, the former marina store and restaurant had only 1,957 square feet for the restaurant area. (R. p. 1467). Even Richardson testified that the former marina store and restaurant was a 1 ½ story building. (R. p. 420, lines 15–p. 421, line 1). In comparison, 3.0 had more than 5,000 square feet of **unheated** square footage. (R. pp. 1270; 1317–1318, 1474, 1516, 1561). The comparison between the old building and 3.0 looks like this:

| | Old Building | 3.0 |
|---|---|---|
| Floors | 1 ½ stories | 3 stories |
| Heated Square Footage | 4,603 | 4,596 |
| Unheated Square Footage | N/A | 5,326 |
| Total Square Footage | 4,603 | 9,922 |

(*See* R. pp. 1318, 1467; *see also* R. p. 1270 (showing even more square footage for deck area)).

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


(R. p. 1219).


(R. pp. 1279, 1343).

### B. The Application Did Not Comply with Zoning Ordinance Requirements.

The County failed to conduct an objective evaluation of the Application, relying instead on the arbitrary parameters set by Goggans, Johnson, and Richardson from the outset. Like with review of the merits of the Application, Respondents similarly overlooked deficiencies in the Application itself.

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." (R. p. 1071).

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. 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. (R. p. 1220). The Planning Commission held a hearing on the application for 2.0 in December of 2017. (R. pp. 1240, 1242–1245). The County approved the major amendment on February 27, 2018. (R. p. 1161). Then, in August 2018, less than twelve months after the Planning Commission recommendation, Palmetto filed the Application for Version 3.0. (R. pp. 1250, 1286). Just like for 2.0, the Application was to "Amend a Planned Development" and sought a "Change of Building Configuration." (R. pp. 1250); (R. p. 395, lines 1–5).

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." (R. p. 1073). All individuals within 400 feet of the property subject to the application are required to receive letter by mail of the proposed rezoning. (*Id.*). Palmetto did not submit the required list to the County.

(R. pp. 1250–1261). 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 manager and did not mail notice to each individual owner of the Marlin Quay condominiums. (R. pp. 1265–1267). Instead, the County relied on the Marlin Quay Homeowners Association manager, Nancy Gardner, to notify homeowners, and only sent a notice to Ms. Gardner, who then only sent a notice via email to the homeowners. (R. pp. 1262–1264). Richardson admitted that notice was not sent in the mail to the individual owners in the Marlin Quay condominiums. (R. p. 499, line 15–p. 500, line 11).

## V. The County Approved the Application and Gulfstream Sued.

On January 8, 2019, the County approved the major amendment to the PD (the "Ordinance"). (R. pp. 1370–1371). Following the approval, Gulfstream sued due to the devastating impact the approval will have on Gulfstream. Kirk offered undisputed testimony that approval of 3.0 will most certainly cause Gulfstream harm. (R. p. 338, lines 19–24). Kirk believed the impact of approval of 3.0 would be "devastating." (R. p. 339, line 17–p. 340, line 11). Kirk testified that Gulfstream will not survive as a restaurant as a result of 3.0 and will have to close its doors. (R. p. 359, line 18–p. 360, line 20).

Similarly, Mr. James Moring ("Moring"), an expert real estate broker, testified that parking is the most important factor when considering purchasing a restaurant. (R. p. 630, lines 14–23). Moring testified that if he were trying to sell Gulfstream's property, he would not have a willing buyer because of the parking issue and there would be no market for Gulfstream once 3.0 is constructed. (R. p. 630, line 24–p. 631, line 11).

Gulfstream also offered the testimony of an expert real estate appraiser, Mr. George Knight ("Knight"). Knight offered an opinion regarding a reduction in the value of Gulfstream's property resulting from the loss of its easement parking. (R. p. 717, lines 6–19). Knight testified

that Gulfstream will suffer a loss in the value of its property from $1,850,000 to $89,900, for a loss of $1,760,100. (R. p. 718, line 16–p. 719, line 13); (R. pp. 1374–1375). This testimony was unrebutted by Respondents at trial.

## STANDARD OF REVIEW[2]

As a general matter, in an action at law tried without a jury, an appellate court's scope of review is for correction of errors of law. *Wilson v. Gandis*, 430 S.C. 282, 291, 844 S.E.2d 631, 636 (2020) (internal citation omitted). "The Court will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings." *Id.* "Of course, [the appellate court] review[s] de novo the trial court's legal conclusions in an action at law." *Id.*

## ARGUMENT

### I. The Trial Court Erred in Denying Appellant's Substantive Due Process Claims Under the South Carolina and U.S. Constitutions.

#### A. The Trial Court Erred in Applying the "Shocks the Conscience" Standard.

The trial court committed a reversible legal error by holding Gulfstream to the "shocks the conscience" standard of review for a legislative decision. "The standard for reviewing all substantive due process challenges to state statutes or municipal ordinances, including economic and social welfare legislation, is whether the ordinance bears a reasonable relationship to any legitimate interest of government." *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 96, 596 S.E.2d 917, 923 (2004). In *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 737 S.E.2d 601 (2013), this Court 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, 737 S.E.2d at 610. Moreover, "in the context of a zoning action involving property, it must be clear that the state's action has no foundation in

[2] Appellant includes additional standards of review for each specific count below.

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)).

Instead of applying this rational basis standard, the trial court erroneously required Gulfstream to prove Respondents' conduct "shocks the conscience." The trial court simply applied the wrong test. There is a different test for substantive due process violations under the United States Constitution for executive acts or legislative acts, "[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)). The trial court applied the executive acts test. It was required to apply the legislative acts test. 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 trial court erroneously required Gulfstream to meet the "shocks the conscience" standard for its substantive due process claim. The trial court stated that "[t]he [government] 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." (R. pp. 43, 45). This is the wrong standard for this case. This case is about a legislative act affecting property rights—the passing of the 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 trial court should be reversed.

### B. The Trial Court Erred in Not Finding that the Rezoning Deprived Appellant of a Property Right.

The trial court erroneously concluded that Gulfstream has not been deprived of its property interest by approval of 3.0.[3] Although the trial court recognized that Gulfstream has a property right to the easement, the trial court failed to acknowledge the undisputed evidence that Gulfstream's rights to the easement will be destroyed by the approval of 3.0. The trial court also ignored Gulfstream's rights to the PD zoning and its restaurant, which will be deprived by the approval of 3.0.

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 &

[3] For the reasons set forth below, Gulfstream also challenges the Court's finding in the facts that Gulfstream was not granted a specific number of spots, merely the right of ingress and egress. The easement entitles Gulfstream to use of the parking lot at night.

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. (R. pp. 1180–1182). Gulfstream has been using its property as a restaurant since 1985 and incurs expenses for that use each year, as testified to by Kirk. (R. p. 330, lines 13-18; p. 361 line 23–p. 362, line 12). Therefore, Gulfstream has more than a unilateral expectation to continue using its property as a restaurant.

The undisputed evidence regarding the impact of the approval of 3.0 on Gulfstream's property rights shows it was deprived by the passage of 3.0. Kirk testified that Gulfstream uses the entire parking lot for its guests at night. (R. p. 334, lines 6–16; p. 335, line 22–p. 336, line 11; p. 351, lines 17–25). Gulfstream has a right under the easement to primary access to the entire parking lot at night. (R. pp. 1183, 1203). Kirk further testified that Gulfstream has an average of 350 guests at night, and Gulfstream needs access to the entire parking lot to service those guests. (R. p. 335, line 22–p. 336, line 11). Kirk, Castles, and Moring testified that that there is nowhere else to park in the surrounding area. (R. p. 346, lines 13–15; p. 697, line 24–p. 698, line 12; p. 628 line 17–p. 630, line 7). Therefore, approval of 3.0 will deprive Gulfstream of its rights to the easement.

Kirk also testified that both restaurants cannot survive on the parking lot, and Gulfstream will have to close. (R. p. 360, lines 10–20). Moring further testified that there will not be adequate parking for Gulfstream as a result of the approval of 3.0, and 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. (R. p. 629, line 20–p. 631, line 11).

The Order does not recognize this undisputed evidence of the destruction of both Gulfstream's rights to the easement, to its PD zoning, and to the restaurant itself resulting from approval of 3.0. The trial court's conclusion that Respondents have not deprived Gulfstream of its property interest is entirely without evidence and should be reversed.

### C. The Trial Court Erred in Not Finding the Rezoning Arbitrary and Capricious.

#### *i. The Approval of 3.0 Violates the County's Own Code, Common Sense, and is Not Rational as a Matter of Law.*

Where an ordinance is unreasonable, South Carolina has long recognized the Court's power to declare it invalid. *See Henderson v. City of Greenwood*, 172 S.C. 16, 172 S.E. 689, 691 (1934) (noting that although the municipality argued the ordinance came within its police powers, 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."). When an ordinance is unreasonable, the Court has the power to declare the ordinance unconstitutional, null, and void. *Id.* at 692.

Respondents made a completely irrational decision to approve 3.0, as the decision blatantly ignores the County's Zoning Ordinance, creates a situation that poses a direct threat to public safety, and defies common sense.

To begin, Respondents entirely ignored their own Zoning Ordinance in approving 3.0. 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 meet the parking requirements in Article 11 of

the Zoning Ordinance. The number of spaces needed for the entire PD vastly outnumbers the meager parking lot almost 3 to 1 (170:62).

It is undisputed that Respondents did not complete any parking calculations for Gulfstream and the marina when reviewing the Application, but certainly knew both uses required parking loads (spaces needed/required). (R. pp. 1317–1344, 1470–1599). Richardson and Johnson testified that they did not conduct the analysis under Article 11 regarding Gulfstream's required parking. (R. p. 447, line 4–p. 448, line 19; p. 454, lines 15–19; p. 578, lines 12–p. 579, line 4). Respondents' refusal to consider Article 11 is per se irrational, 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." (R. p. 1023).

The reason Respondents did not complete the parking calculations under Article 11 is because everyone agreed that approval of 3.0 violates those requirements and this was Mr. Goggans's client. Under Article 11, Gulfstream, the marina, and 3.0 require a total of 170 parking spaces, but only 62 spaces exist in the lot. (R. p. 6964, lines 1–8). There is a shortage of 108 parking spaces in the parking lot as a result of approval of 3.0. (R. p. 696, lines 9–12). Said another way, only 36% of the required parking is met with the approval of 3.0. The evidence of this blatant ordinance violation is undisputed.

Respondents also made the nonsensical decision to permit a building more than twice the size of the old building by relying on a misleading "parameter" of only looking at heated square footage when comparing the buildings. The former marina store and restaurant was 4,603 square feet total. (R. p. 1467). Moreover, the former marina store and restaurant had only 1,957 square

feet for the restaurant area. (R. p. 1467). Even Richardson testified that the former marina store and restaurant was a 1 ½ story building. (R. p. 420, lines 15–p. 421, line 1) (see also R. p. 349, line 4–p. 350, line 17). Respondents, in reviewing 3.0, compared the total square footage of the original building of 4,603 to only heated square footage for 3.0. (R. pp. 1270; 1317–1318, 1474, 1516, 1561). 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 usable unheated square footage. (R. pp. 1270; 1317–1318, 1474, 1516, 1561). Agreeing to this parameter permitted the County to approve a building that was grossly larger than what was there before, which undeniably will have an impact on the parking situation in the PD.

The trial court similarly 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 Castles agreed. (R. p. 454, lines 21–22; p. 456, line 12–p. 457, line 20; p. 567, lines 1–2; p. 697, lines 6–9). Even the Zoning Ordinance states that the parking requirements are for purposes of "improving the public health, safety and general welfare of the community." (R. p. 1023). By all accounts, approval of 3.0 will turn an already "substandard" parking situation into pure folly. Kirk testified that there have already been accidents in front of the restaurant due to a paucity of available parking. (R. p. 345, lines 5–21). Multiple members of the public raised safety concerns at the public meetings for approval of 3.0. (R. pp. 1357–1359, 1366–1369). The trial court ignored this evidence in finding that approval of the Ordinance did not result in a violation of substantive due process.

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

Instead of recognizing the arbitrary and capricious nature of the decision, the trial court credited Respondents' 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." (R. p. 1023 (emphasis added)). Richardson admitted that "all districts" includes PDs. (R. p. 457, line 21–p. 458, line 5). 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**." (R. p. 1023) (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 trial court to interpret the language otherwise. Richardson admitted the Zoning Ordinance says the parking rules are requirements and she does not say they are "guides." (R. p. 457, lines 21–23; p. 459, lines 11–17; p. 465, line 10–21). Therefore, it is an error of law for the trial court to have construed Article 11 as a guide instead of a requirement.

The Order finds that Gulfstream did not present expert testimony on the issue of PDs not being an exception to Article 11, but that is inaccurate. Castles, an expert in civil engineering, testified that his job is to interpret and apply zoning ordinances. (R. p. 604, lines 2–5). He testified that there are no exceptions to the parking requirements in the Zoning Ordinance. (R. p. 696, line 23–p. 697, line 5). Richardson testified that the PD sections of the Zoning Ordinance were silent on parking requirements. (R. p. 440, line 22–p. 442, line 2). Meaning, the rules regarding parking can only be found in Article 11.

Finally, the County's own words are the best evidence that the County knew, at all times, that the Article 11 parking requirements governed—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. (R. pp. 1214, 1218, 1461–1466). The Staff Report for 3.0 included parking calculations for the parking requirements, as did the discussion at the public meeting for 3.0. (R. pp. 1241, 1318). Richardson and Boyd admitted that at no point during the discussions regarding parking requirements did they inform Palmetto that Article 11 merely served as a "guide." (R. p. 431, lines 7–25; p. 433, line 13–p. 434 line 13; p. 443, line 24–p. 444 line 7; p. 589, lines 19–21; p. 591, lines 3–7).

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 trial court's decision should be reversed.

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

The trial court erroneously found that the decision to approve 3.0 was not completely baseless because approval of the Application required 3.0 to have the same seating capacity as the old building and the County limited the heated square footage of 3.0. But these parameters have no basis whatsoever in the Zoning Ordinance.

With respect to making seat count a requirement, Respondents admitted that the Zoning Ordinance says nothing about counting seats. (R. p. 435, lines 17–p. 436, line 1). The Ordinance calls for counting gross floor area when figuring parking requirements. (R. pp. 1023–1026). Limiting seats has nothing to do with the number of people who can visit the restaurant. Johnson admitted that there were thousands of square feet of unheated square footage in deck

space and outdoor area designed to accommodate patrons to stand, have a drink, eat, and watch the sunset. (R. p. 597, line 23–p. 598, line 9; p. 593 lines 10–18). Johnson admitted that the new building had an occupancy limit of 350 people, meaning 240 people can be in the restaurant but not in a seat. (R. p. 697, line 23–p. 598, line 9; p. 5931 lines 10–18). Additionally, Respondents did not even verify how many seats 3.0 would have. (R. p. 467, lines 13–25).

On the rationale that the County limited the heated square footage, the concept is purely made up. Richardson admitted that the distinction regarding heated versus unheated square feet (when figuring parking loads) can be found nowhere in the Zoning Ordinance. (R. p. 424, line 4–p. 425, line 1). Instead, the Zoning Ordinance talks about gross floor area and outdoor seating area for the parking calculations, as admitted by Johnson. (R. pp. 1023–1026) (including the requirements for "Restaurant, standard"); (R. p. 425, line 22–p. 426 line 14). Heated square feet is simply a construct Goggans devised to sidestep the actual parking ordinance and argue that the new building was roughly the same "size" as the old one.

There is nothing more arbitrary than enacting an Ordinance based on characteristics that have no foundation in the County Zoning Ordinance. County officials are not permitted to make decisions based on rules not set forth in the County Ordinance, as it allows for arbitrary and discriminatory enforcement, which happened here. This Court 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. Respondents reviewed and approved 3.0 based on standards the County created out of thin air, resulting in an arbitrary and capricious decision by Respondents. Under the law, Respondents cannot make decisions based on characteristics and calculations, like limiting seats

and heated square footage, that 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).

In addition, the County's proffered reasons for approval of 3.0, of bringing the building into compliance with FEMA, ADA, and building codes, could have been accomplished without allowing Palmetto to build a 3-story, nearly 10,000 square foot building in place of the 4,600 square foot marina store and restaurant. Respondents 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, 3-story building with an entire extra story addition that includes outdoor seating. Moreover, if FEMA, the ADA, and building codes applied to 3.0, why doesn't Article 11 apply? Respondents' proffered reasons for approving the major amendment are not rationally related to the approval of 3.0.

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

The trial court acknowledged that Gulfstream's expert calculated that Gulfstream needed 76 parking spaces under the Ordinance, but the trial court did not acknowledge that the marina required 22 spaces and 3.0 required 72 spaces under Article 11. The trial court overlooked that the 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 unrebutted, and this violation of the Zoning Ordinance should be acknowledged.

Instead of recognizing that approval of 3.0 does not comply with Section 1102.3, the trial court noted 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. Said another way, 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 first rule in nonconforming use cases is that you cannot expand or increase the nonconformity or rebuilt once removed. (R. p. 854).

The trial court also found that the PD was not required to follow the Zoning Ordinance because it was enacted before the Zoning Ordinance was written. This overlooks the fact 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, thereby bringing the approval of the Ordinance under the purview of the Zoning Ordinance.

For the reasons set forth above, the trial court's decision on Gulfstream's claim for violation of its substantive due process rights should be reversed.

## II. The Trial Court Erred in Failing to Declare the Approval of the Major Amendment to the PD Void and Respondent Goggans' Involvement Unlawful.

"[T]here is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application, and when the planning commission and the city council of a municipality have acted after reviewing all of the facts, the court should not disturb the finding unless such action is arbitrary, unreasonable, or in clear abuse of its discretion, or unless it has acted illegally and in excess of its lawfully delegated authority." *Harbit v. City of Charleston*, 382 S.C. 383, 391, 675 S.E.2d 776, 780 (Ct. App. 2009) (internal citation omitted).

For Goggans's involvement, the Order finds there was no evidence that he was involved in 2.0 or 3.0, and finds 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. There findings are clearly erroneous. Goggans was "heavily involved" with the development of the plans for 1.0 and was "heavily

involved" with interfacing with the County. (R. p. 651, lines 4–9). Goggans had multiple emails, phone calls, and face to face meetings with County staff, including Johnson and Richardson. (R. p. 651, lines 10–18; p. 403, lines 2–13). Goggans viewed Johnson and Richardson as "friends," who were "usually helpful in [his] efforts." (R. p. 1212).

Goggans's negotiations with the County for 1.0 had a critical impact on the decisions related to 3.0. Goggans's negotiations and interactions with County staff included negotiation of parking requirements for Palmetto's building. (R. p. 652, lines 9–13). Goggans, Johnson, and Richardson established the "parameters" for review of Palmetto's building, including parking. (R. p. 652, lines 17–25–p. 655, line 17). Those parameters included the agreement that County staff would interpret the parking requirements for 1.0 based on heated square footage of the building and seating count and would not consider unheated square footage. (R. p. 654, line 14–p. 655, line 1). Johnson and Richardson also decided that the parking calculations did not need to include evaluation of the parking needs of the other uses of the parking lot. (R. p. 655, lines 10–17). Goggans's negotiations with Richardson and Johnson were so successful that he asked Palmetto for an additional $72,000 for the "favorable outcomes" he achieved. (R. pp. 1216–1217). These parameters were established during the negotiations for 1.0 and were not reevaluated for 2.0 or 3.0 (R. p. 652, line 14–p. 655, line 1; p. 66, lines 3–6; p. 671, lines 7–22). Meaning, such parameters, as created by Goggans, remained in the review of 2.0 and 3.0.

Additionally, Goggans's firm, SGA Architecture, remained the architects for the project. (R. pp. 1268–131269, 1281–1285, 1297–1300). Goggans also remained on the Council while 3.0 was pending, and Goggans had power over Johnson and Richardson's budget, raises, and promotions. (R. p. 392, lines 3–12; p. 558, lines 1–18). Goggans appointed the member of the Planning Commission who moved for approval of 3.0. (R. p. 1349; p. 648, lines 9-21). 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's 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 finding Goggans did not interfere should be reversed on this ground.

The Order also decides that there is no evidence that Goggans convinced or influenced Richardson and Johnson to overlook the Zoning Ordinance. But the trial court does not acknowledge the key evidence presented by Gulfstream on this point. There are multiple emails showing 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." (R. p. 1214). Richardson herself told Goggans that "any deck area that is to be used for outdoor seating or a bar area must meet parking requirements." (R. p. 1461; *see also* R. pp. 1218, 1463–1466) (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. (R. pp. 1216-17). 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's role should not be disregarded. Goggans should be held liable for this conduct, and the decision regarding his involvement should be reversed.[4]

[4] Gulfstream addresses the Order's findings in the declaratory judgment section regarding substantive due process in Section I and will address compliance with the Zoning Ordinance's procedural and notice requirements in Section IV of this Brief.

## III. The Trial Court Erred in Denying Appellant's Takings and Inverse Condemnation Claims Under the South Carolina and U.S. Constitutions.

### A. The Trial Court Applied the Wrong Standard to Appellant's Inverse Condemnation Claim.

"Whether the plaintiff has established a claim for inverse condemnation is a matter for the court to determine." *Ray v. City of Rock Hill*, 434 S.C. 39, 45, 862 S.E.2d 259, 263 (2021) (internal citations omitted). "[I]n the regulatory taking context, the issue of whether a taking occurred is a question of law for the Court." *Dunes W. Golf Club, LLC*, 401 S.C. at 314, 737 S.E.2d at 619. "The question of whether a taking has occurred is a question of law that this Court reviews de novo." *Braden's Folly, LLC v. City of Folly Beach*, 439 S.C. 171, 886 S.E.2d 674 (2023).

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: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Braden's Folley, LLC*, 439 S.C. at 193, 886 S.E.2d at 686 (internal quotation marks omitted). The extent of diminution in value is one factor for consideration in determining whether the governmental action constitutes a taking. *Dunes West Golf Club, LLC*, 401 S.C. at 315, 737 S.E.2d at 621.

Importantly, this Court 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, 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 trial court mistakenly applied the non-regulatory taking elements to the inverse condemnation section of its order, whereas it should have applied the two-element test as previously stated, and then applied the *Penn Central* test to determine whether the second element—whether the conduct effects a taking—was satisfied. *Id.* at 658. Because the wrong legal standard was applied, the Order should be reversed.

### B. The Trial Court Erred in Determining that a *Per Se* Taking Has not Occurred and that Appellant Has Not Met the *Penn Central* Test.

#### *i. A Per Se Taking has Occurred.*

The trial court erroneously ignored the undisputed evidence that approval of 3.0 deprives Gulfstream of its rights to the easement and to the value of the restaurant. The trial court found 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 unrebutted evidence presented by Gulfstream on this issue. The trial court fails to 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 $89,900 as a result of the approval of 3.0, as testified to by Gulfstream's expert appraiser, Knight. (R. p. 718, line 16–p. 719, line 13); (R. pp. 1374–1375). Respondents did not offer any other evidence to the contrary, and thus, Knight's

valuation of the property is the only evidence in the record regarding what it will be worth as a result of 3.0. The trial court also ignored the evidence explained above in Section I(B)(i) regarding how the approval of 3.0 guts Gulfstream's right to the easement. 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. As a result, a *per se* taking of all beneficial use did occur, and the trial court's decision should be reversed.

***ii. Approval of 3.0 Results in a Regulatory Taking.***

For the *Penn Central* test, for the character of the government action, the trial court erroneously concluded 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. Moreover, the Respondents did not offer any explanation regarding why these rules applies to 3.0 but, for some reason, Article 11 of the Zoning Ordinance does not.

With respect to the economic impact of the Ordinance on Gulfstream, the undisputed evidence is that the impact will be devastating. Moring testified that there will not be adequate parking for Gulfstream as a result of the approval of 3.0, and 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. (R. p. 629, line 20–p. 631, line 11). Knight testified that Gulfstream will suffer a loss in the value of its property of $1,760,100. (R. p. 717, line 16–p. 719, line 13); (R. pp. 1374–1375).

Instead of acknowledging this unrebutted evidence, 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 the fact that Gulfstream did have

entitlement to 62 spaces at night. (R. pp. 1183, 1203). This is a fundamental aspect of the easement, which is crucial to Gulfstream's survival. Gulfstream's rights to the parking lot at night will be destroyed by approval of 3.0.

The Order also notes that there could be walk-up traffic, but this is immaterial because adequate parking is still required and 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. (R. p. 629, line 20–p. 630, line 23) (*see also* R. p. 352, lines 8–13). 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.

The trial court also made several incorrect findings for purposes of discrediting Knight's testimony. For example, on cross-examination, Knight was asked questions regarding a potential rezoning of the property to residential use. But 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. (R. p. 755, lines 17–p. 756, line 8). But most importantly, 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. (R. p. 413, lines 1–4). Knight also did not testify that he never visited the property, and instead, testified that he conducted an onsite inspection of the property. (R. p. 720, lines 9–13). The cover letter to Knight's expert appraisal report states that he inspected Gulfstream's property on November 25, 2019, as part of his appraisal assignment. (R. p. 1375). The Court's mis-recollection of Knight's testimony resulted 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. (R. pp. 1183–1211). Gulfstream also has an investment-backed expectation in continuing to use its property as a restaurant, which Kirk testified will not be able to continue as a result of the Ordinance. Gulfstream has been using its property as a restaurant since 1985 and incurs expenses for that use each year. (R. p. 330, lines 13–18; p. 361, line 23–p. 362, line 12). Therefore, Gulfstream has more than a unilateral expectation to continue using its property as a restaurant and its entitlement to the easement. 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.

## IV. The Trial Court Erred in Denying Appellant's Procedural Due Process Claims Under the South Carolina and U.S. Constitutions.

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, the Application failed to comply with the County's own rules, and the Ordinance should be set aside for that reason and for a violation of procedural due process.

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. (R. p. 1072).

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. (R. pp. 1250–1261). 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. (R. pp. 1286, 1347). 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.

In addition, 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." (R. p. 1073). 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. (R. pp. 1250–1261). 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. (R. pp. 1265–1267). Instead, the County relied on the Marlin Quay Homeowners Association manager, Nancy Gardner, to notify homeowners, and only sent a notice to Ms. Gardner, who then only sent a notice via email to the homeowners. (R. pp. 1262–1264). Richardson admitted that notice was not sent in the mail to the individual owners in the Marlin Quay condominiums. (R. p. 499, line 15–p. 500, line 11).

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. (R. p. 1282). Even for the sign posted regarding the Planning Commission public hearing, the sign did not include the date and time for the hearing. (R. p. 1165). All of these deficiencies add up to failure to provide adequate notice and opportunity to be heard.

The trial court credited 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. (R. pp. 1250–1261, 1286, 1297–1300). 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? The

answer is because the County planned to rubber stamp the approval regardless of what Palmetto wanted to do. This resulted in violation of the County's Zoning Ordinance and procedural due process, and constitutes grounds on which to set aside the decision.

## V. The Trial Court Erred in Denying Appellant's Claim for Attorneys' Fees and Granting Respondents' Motion for Costs.

The trial court concluded that because Gulfstream did not obtain beneficial results, it is not entitled to attorneys' fees. But because the trial court's decision is subject to reversal, so is its decision regarding fees. Similarly, the trial court awarded costs to Respondents, but that order should be overturned as well with the reversal of the Order.

## CONCLUSION

For the reasons set forth above, Appellant respectfully requests that the trial court's Order, the order denying Gulfstream's motion to alter and amend, and the order awarding costs be reversed.

Respectfully submitted,

*s/ Sean M. Foerster*

Sean M. Foerster (SC Bar# 77466)
Local Counsel
ROGERS TOWNSEND LLC
1221 Main Street, 14th Floor (29201)
Post Office Box 100200
Columbia, South Carolina 29202-3200
(803)771-7900
sean.foerster@rogerstownsend.com

Simon H. Bloom (GA Bar# 064298)
Andrea J. Pearson (GA Bar# 409604)
Admitted Pro Hac Vice
BLOOM PARHAM, LLP
977 Ponce de Leon Avenue NE
Atlanta, Georgia 30306
(404) 577-7710
sbloom@bloom-law.com
apearson@bloom-law.com

Counsel for Appellant The Gulfstream Café, Inc.

December 4, 2023

RECEIVED
Dec 04 2023
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

---

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

---

Case No. 2019-CP-22-00212
Appellate Case No. 2023-000646

---

The Gulfstream Café, Inc. ..... Appellant,

v.

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

---

**CERTIFICATE OF COUNSEL**

---

The undersigned attorney hereby certifies that the Final Brief of the Appellant complies with Rule 211(b), SCACR.

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

December 4, 2023