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 REPLY 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

Cases

Statutes

Other Authorities

INTRODUCTION

Appellant The Gulfstream Café, Inc.'s ("Appellant" or "Gulfstream") Brief demonstrated that Georgetown County's (the "County") approval of the major amendment to the Marlin Quay Planned Development ("PD or "PUD") to permit construction of Palmetto Industrial Development, LLC's ("Palmetto") new restaurant ("3.0"):

- Destroys Appellant's rights to an easement which gives Appellant the right to primarily use the shared parking lot at night.
- Destroys the marketability of Appellant's property and Appellant's rights to use its property as a restaurant.
- Violates the County's ordinances related to parking and fails to consider the parking needs of the other uses of the parking lot, including Appellant's parking needs.
- Approves a building that results in a parking demand of 170 spaces for all uses in the parking lot, when only 62 spaces exist, resulting in a parking shortage of 108 parking spaces.
- Permits construction of an approximately 10,000 square foot restaurant where a 4,603 square foot restaurant previously stood.
- Relies on "parameters" that County staff conjured up in concert with Defendant Steve Goggans ("Goggans"), the architect for the project and a County Councilmember at the time, which have no basis whatsoever in the County's zoning ordinance (the "Zoning Ordinance").
- Goggans's involvement in the initial planning of the restaurant shaped and molded the remainder of the approvals by the County, as County staff continued

to implement the decisions they made with Goggans, and County staff acted as the gatekeepers for the information presented to County Council when approving the major modifications.

- Entirely ignores the undisputed public safety issue created by a lack of adequate parking.
- Results in a loss of value of Appellant's property in the amount of $1,760,100, destroys its marketability, and destroys Appellant's primary expectation to use its property as a restaurant.
- Violates multiple procedural rules and deprives Appellant of reasonable notice and an opportunity to be heard.

Respondents do not meaningfully address many of these arguments in Respondents' Brief. Just like the County in reviewing the application for a major amendment for 3.0 (the "Application"), Respondents put on blinders to the realities of the impact of approval of the Application.

For example, Respondents proffer that Appellant still has rights to its easement notwithstanding the approval of 3.0, but this ignores the plain language of the easement, which gives Appellant the right to primarily use the parking lot at night. The easement set out the arrangement for use of the parking lot in a manner that would make it workable for all parties. This arrangement is eviscerated by the approval of 3.0, because the new restaurant is going to serve dinner, include night life, and have dozens of employees all competing for Gulfstream's parking spaces.

Respondents argue that they did not have to follow the parking rules from the Zoning Ordinance, which ignores that the County enacted the parking rules to ensure the parking situation is tenable and protects the public health, safety, and welfare.

Respondents argue that the County included parameters such as seating capacity and heated square footage, but this ignores that those are made up characteristics with no objective foundation or basis in the Zoning Ordinance.

Respondents contend that the new building had to comply with federal rules and local codes, which is essentially an argument that since the County made certain aspects of the building compliant, the Court should ignore other areas where 3.0 glaringly, patently, and obviously violates the County's code.

Respondents argue that because Goggans recused himself for the votes on 2.0 and 3.0, the Court should ignore that the information presented to County Council regarding 3.0 was irrevocably tarnished by Goggans's involvement at the outset of the building approval process.

Respondents point to certain testimony elicited on cross-examination, but Respondents fail to discredit the unrebutted evidence at trial that approval of 3.0 destroyed the marketability of Gulfstream's property and rendered it worth only a nominal sum.

For these reasons, the trial court's decision should be reversed. The Court should find that Respondents entirely got it wrong and the rezoning must be declared void, or if permitted, that Gulfstream is entitled to compensation for a taking of its property.

ARGUMENT

I. Respondents Violated Appellant's Substantive Due Process Rights Because Respondents' Approval of the Major Amendment was Nonsensical.

Gulfstream demonstrated at trial that the County's approval of 3.0 violated Gulfstream's substantive due process rights because it was arbitrary, capricious, and without rational basis. Respondents attempt to hide behind the high standard for setting aside a municipal ordinance in defending approval of the major amendment. Appellant acknowledges that it is a high hurdle, but the inescapable conclusion from the evidence presented is that Respondents' rezoning was arbitrary, capricious, and without rational basis.

A. The "Shocks the Conscience" Standard Does Not Apply and the Trial Court's Decision Should be Reversed.

As stated in Appellant's Brief, the Fourth Circuit in *Hawkins v. Freeman*, 195 F.3d 732 (4th Cir. 1999), explained that there are different tests for whether a legislative act or an executive act violates substantive due process. *Id.* at 738-39. 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 of determining whether a fundamental right or liberty is involved, and if not, whether the legislative act passes a rational-basis judicial review. *Id.* at 739. Because the approval of 3.0 involved a legislative act, the threshold "shocks the conscience" test does not apply.

Respondents cite *Siena Corp. v. Mayor & City Council of Rockville Maryland*, 873 F.3d 456, 63-64 (4th Cir. 2017), to argue that the trial court's analysis of the "shocks the conscience" inquiry was proper. The Fourth Circuit in *Siena Corp.* did state that "[t]he state action must be

'conscience shocking, in a constitutional sense." *Id.* at 464 (quoting *Huggins v. Prince George's Cnty.*, 683 F.3d 525, 535 (4th Cir. 2012)). But *Siena Corp*. does not stand for the proposition that the "shocks the conscience" test applies here.

To begin, the statement by the Fourth Circuit in *Siena Corp*. regarding the "shocks the conscience" requirement is dicta, as the Fourth Circuit had already found that the plaintiff did not have a property interest sufficient to support a substantive due process claim. *Id.* at 461-64. In addition, *Sienna Corp*. incorrectly quotes *Huggins v. Prince George's County*, 683 F.3d 525, 535 (4th Cir. 2012), which actually states that the substantive due process clause is violated by "*executive action* only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Id.* at 535 (emphasis added). Accordingly, the Fourth Circuit case quoted by *Sienna Corp*. recognized that the "shocks the conscience" test applies to executive acts, and *Sienna Corp*. (in dicta) misapplied it to a legislative act.

Respondents also argue that it does not matter that the trial court applied the wrong test because it went on to conduct a rational basis inquiry. But it cannot be said that the erroneous consideration of the "shocks the conscience" requirement did not taint the trial court's decision. Where the trial court applies the wrong standard, the appropriate course is to reverse and remand the decision for further consideration. *See Karl Sitte Plumbing Co. v. Darby Dev. Co.*, 295 S.C. 70, 77, 367 S.E.2d 162, 166 (Ct. App. 1988) (reversed and remanded "[b]ecause the circuit court applied the wrong standard of review"); *Nero v. S.C. DOT*, 422 S.C. 424, 427, 812 S.E.2d 735, 737 (2018) (reversed and remanded because the court of appeals applied the de novo standard instead of the substantial evidence standard); *Stoney v. Stoney*, 422 S.C. 593, 594, 813 S.E.2d 486, 487 (2017) (per curiam) (reversed and remanded because the court of appeals applied an abuse of discretion standard instead of de novo standard). That is what should happen here to

require the trial court to conduct the appropriate analysis of whether a legislative act violates the substantive due process clause.

B. The Approval of 3.0 Undisputedly Deprived Appellant of Valuable Property Rights.

With respect to Appellant's property rights, both the trial court and Respondents disregard the plain language of the easement. Both characterize it simply as a "non-exclusive easement" to the parking lot. This ignores the plain language of the easement, which provides:

> 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)). Accordingly, the easement is not simply a "non-exclusive easement" to access the parking lot. The easement sets forth the arrangement for how the parties intended to use the parking lot in order to make sharing the parking lot tenable. (R. p. 344, lines 17–p. 345, line 8). Under the easement, Appellant is entitled to utilize the parking lot primarily in the evening regular business hours of Appellant. As such, Appellant had more than a unilateral expectation to use the parking lot at night, such that the easement granted that property right to Appellant.

Approving 3.0 destroyed that right. Gulfstream's general manager, Jef Kirk ("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). 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). Palmetto's building will be open at night. (R. p. 696, lines 13–22). The trial court and Respondents' position that Appellant is not deprived of

its rights to the easement disregards the rights Appellant had to the parking lot at night, and accordingly, the trial court erred on this ground based on the plain language of the easement.

With respect to Gulfstream's ability to operate its restaurant, Gulfstream offered undisputed testimony regarding the devastating impact of approval of 3.0. Kirk testified to the very specific effects that the loss of parking caused by the new building will have on the restaurant:

> Q: What do you believe the impact of the approval of the new building at Marlin Quay will have on the parking situation at Gulfstream?
>
> A: I believe it will be devastating. I do -- you know, with my background, we do look at numbers, we do forecasts, we do budget, we look at previous sales. There are a lot of factors that we look into when it comes to scheduling, purchasing, and knowing what my guest count is is [sic] really important for my job. Knowing how many times I can turn that restaurant is really important for my job. So, not being able to have that parking, I know will be a reduction in guest count, which in turn will lead to a reduction in profit and revenue.
>
> Q: So, Mr. Kirk, with no -- I think it this is actually -- but with no building on the footprint, you've had parking problems; is that correct? Yes or no?
>
> A: Yes.
>
> Q: When you add one more person from another business trying to get parking, is that going to be good for parking or bad for parking?
>
> A: It's gonna be bad for parking.

(R. p. 339, line 17–p. 340, line 11). Kirk was asked "[c]an Gulfstream and a restaurant that is somewhere between 4 and 7,000 square feet using the same 62 spaces along with the marina all survive?" and he answered, "[n]o, not at the same time." (R. p. 359, lines 18–24). Kirk went on to explain that "our concern is that without parking, we're not going to be able to survive. We're not going to be able to operate. We're most likely gonna have to close." (R. p. 360, lines 12–15).

Similarly, Gulfstream's expert real estate broker, Jim Moring ("Moring"), testified that:

Q: Okay. And if Version 3.0 were to be built next-door, did you come to any conclusions regarding the impact on the marketability of Gulfstream if that happened?

A: I think **it'd be devastating** on the parking because there would be two restaurants, bars, next-door to each other that would be competing for the same parking spaces. So, I see where you're gonna have customers that come to Gulfstream, can't find a parking place, and there are other places to go eat, and **they're gonna leave**.

Q: Okay. And why would that fact be important for you when you're trying to sell the property?

A: Well, someone looking at the property to buy would see that the parking was not adequate. And so, I doubt that we'd be able market the property.

Q: So, is someone -- is a potential buyer going to recognize with what's going to be going in next-door Version 3.0 that there wasn't going to be adequate parking on the site?

A: I don't see how they would not, because what's there now is just barely adequate.

Q: Okay. And we talked a little bit about -- we asked you if parking was a factor that you evaluated when looking at the marketability. How would you qualify that? Is that an important factor when looking at the marketability of a restaurant?

A: **It's the most important. If you don't have parking, you don't have customers, I mean.**

Q: And is a buyer of a potential restaurant gonna care if they have customers coming to the restaurant or not?

A: If they want to make a living, they will.

Q: So, if you were trying to sell Gulfstream, once Version 3.0 is built next-door, do you think you would have a willing buyer for the restaurant?

A: **I'm not sure I'd be able to find a buyer for that restaurant.**

Q: Due to the lack of parking in the parking lot?

A: **Because the parking is already taxed. And with a new restaurant, it would be inadequate. They're probably gonna lose customers over it.**

Q: So, in your opinion, **there would be no market for the Gulfstream Restaurant once Version 3.0 is constructed; is that correct?**

A: That's correct.

(R. p. 629, line 20–p. 631, line 11) (emphasis added). Respondents offered no contrary evidence.

Accordingly, Gulfstream's general manager and brokerage expert unequivocally testified that 3.0 will have a devasting impact on Gulfstream's ability to operate its restaurant and to the marketability of the restaurant. Gulfstream's property rights will be destroyed.

Respondents point to cross-examination testimony which purportedly discounts the above testimony, but Respondents' efforts to discredit Appellant's testimony fall short. Respondents state that Kirk did not know the percentage of the modes of transportation taken by Gulfstream's customers. But the lack of knowledge of the precise percentage breakdown does not matter. Kirk testified that Gulfstream's customers use the parking lot and he currently has to help customers find parking, even before 3.0 is built. (R. p. 334, lines 6–16; p. 335, line 22–p. 336, line 11). Gulfstream is a destination restaurant, and people primarily travel to it by car. (R. p. 352, lines 1–19). None of the testimony elicited by Respondents on cross-examination regarding exact percentages refutes the undisputed evidence proffered by Gulfstream that customers travel by car to Gulfstream and the loss of parking will be devastating to Gulfstream.

Respondents also make much out of the fact that Moring had not reviewed Gulfstream's tax returns, but Respondents fail to explain how this discredits his testimony. Moreover, Moring further testified on cross examination that tax returns do not necessarily reflect a restaurants' profitability, and that parking was the most important factor in marketability of a restaurant. (R. p. 630, line 14-20; p. 636, line 25–p. 637, line 16).

In a footnote, Respondents attempt to distinguish the cases cited by Appellant for the position that Gulfstream has a property right in the continued use of its property as a restaurant

by claiming that Appellant's cases dealt with a rezoning of the property owner's property. (Respondents' Brief n. 13). Respondents contend that approval of 3.0 did not change the zoning of the Marlin Quay PD. But that is fundamentally incorrect, because that is exactly what approval of 3.0 did. The major amendment to the Marlin Quay PD equated to a rezoning of the PD, as it was required to follow the same steps as a rezoning under the Zoning Ordinance. (R. p. 394, line 21–p. 395, line 5; p. 396, line 22–p. 397, line 3). The Zoning Ordinance expressly provides that "[m]ajor changes in a PD shall require another public hearing and **shall be treated as an amendment to the Ordinance**." (R. pp. 942–943 (emphasis added)). Accordingly, this is not a valid basis to distinguish Appellant's case support.

C. Appellant Proved Approval of 3.0 was Arbitrary, Capricious, and Without Rational Basis.

Respondents do not meaningfully deal with the undisputed evidence that: (1) Respondents ignored the Zoning Ordinance's parking rules and did not even use them as a guide; (2) Respondents relied on factors such as heated square footage and seat count that Holly Richardson ("Richardson"), Boyd Johnson ("Johnson"), and Goggans invented out of whole cloth, with no foundation whatsoever in the Zoning Ordinance; (3) the plain language of the Zoning Ordinance and the Respondents' conduct and admissions show that the Zoning Ordinance required compliance with the parking rules; (4) Respondents ignored the public safety issue created by approval of 3.0; and (5) approval of 3.0 resulted in a parking shortage of 108 parking spaces under the Zoning Ordinance.

i. PDs Are Not Lawless, Rule Free Zones Where the County Can Ignore its Other Regulations.

Instead of squarely confronting these issues, Respondents fall back to the position that state law allows for flexibility in planning for PDs. Essentially, Respondents argue that PDs are lawless areas without rules where the County can basically do whatever it wants. But that is

simply not what South Carolina Code Section 6-29-740 says. It provides: "[p]lanned 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[.]" S.C. Code Ann. § 6-29-740 (emphasis added).

The statute says nothing about varying parking rules, and the statute does not make variations from other ordinances or regulations mandatory, merely permissible. Therefore, it is necessary to look to the County's Zoning Ordinance to determine if the County provided for variations in its PD section of the Zoning Ordinance to the parking rules. Critically, the County's Planned Development District section **does not** provide for variations from the parking rules. (R. pp. 940–945); (R. p. 440, line 22–p. 442, line 2). Moreover, there are no parking requirements in the Marlin Quay PD, and the only place to find the parking rules is Article 11. (R. p. 587, lines 3–16). Accordingly, based on the Zoning Ordinance and the PD, South Carolina Code Section 6-29-740 does not authorize Respondents to utterly ignore Article 11's parking rules.

ii. Article 11 Applies.

Respondents also include narrative descriptions of Richardson's and Johnson's purported testimony[1] that PDs do not have to conform to Article 11, and that Article 11 does not apply because 3.0 is not "initial construction" nor a change in use. (Respondents' Br. p. 21–22). Respondents fail to cite to any record testimony in support of these arguments. Regardless, whether Article 11 applies and whether it is mandatory is a question of law based on the plain language of the Zoning Ordinance, and Richardson and Johnson cannot interpret the Zoning

[1] Respondents fail to back up much of the purported "testimony" in support of Respondents' Brief with actual citations to the transcript. Accordingly, the Court should not consider arguments based on testimony where an actual record cite is not provided.

Ordinance any way they please simply because they work in the County's Planning and Zoning Department.

The plain language of Article 11 shows that it applies to approval of 3.0. Article 11 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)). The rules are "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). "[T]hroughout the unincorporated areas" of the County and "all districts" certainly includes PDs. Approval of 3.0 resulted in initial construction of an entirely new building because Palmetto demolished the snack bar. (R. p. 420, lines 15–22). Approval of 3.0 increased the floor area of the building as well. (*See* R. pp. 1318, 1467; *see also* R. p. 572, line 19–p. 574, line 1; p. 593, lines 6–9; p. 1270 (showing even more square footage for deck area)). Put simply, Article 11 of the Zoning Ordinance applies to the approval of 3.0, and Respondents violated the Zoning Ordinance in flat out ignoring the requirements.

iii. Respondents Provide No Evidence that the Parameters Invented by County Staff and Goggans Protected the Parking Lot.

Respondents cite to the limits placed on seating capacity and heated square footage as preventing the parking lot from being overburdened, without providing any explanation as to how those "parameters" actually protected the parking lot. Those parameters can be found nowhere in the Zoning Ordinance. (R. p. 424, line 4–p. 425, line 1; p. 435, line 17–p. 436, line 1; p. 586, lines 18–23). In contrast, Appellant demonstrated with record evidence regarding how those "parameters" failed to provide any meaningful limits on parking. (R. p. 424, line 4–p. 425, line 1; p. 466, lines 13–25; p. 593 lines 10–18; p. 597, line 23–p. 598, line 9).

iv. The County's Purported Reasons for Approval Do Not Rationally Relate to 3.0.

Respondents point to compliance with FEMA, ADA, building and fire codes as the primary "rational bases" for approving 3.0. But those reasons do not rationally relate to approval of a building that undisputedly resulted in a parking shortage of 108 parking spaces and was grossly larger than the prior marina store and snack bar. (*See, e.g.*, R. p. 572, line 19–p. 574, line 1; p. 696, lines 9–12). Respondents contend that FEMA, ADA, building and fire codes required the new building be larger to account for things like flood height, enlarged restrooms, elevator shafts, and wider exits. (Respondents' Br. p. 24) (*citing* R. p. 608, line 25–p. 612, line 2). But the testimony cited by Respondents does not explain why those rules would require over 5,000 square feet of outdoor deck space for a building that looks like this as compared to the old snack bar:

(R. p. 1219).

(R. pp. 1279, 1343). Moreover, even if the building had to be a level higher under FEMA, that does not require a change in building square footage. Respondents' *post-hoc* justifications for a larger building such as ADA, building, and fire code compliance are not even mentioned in any of the actual meetings or documents discussing 3.0. (*See* R. pp. 1317–1344, 1347–1369).

Respondents also fail to credibly explain why 3.0 had to comply with federal law and fire and building codes but not Article 11's parking regulations. In a footnote, Respondents call Appellant's argument "specious" and contend that Appellant's ignore the planning departments' purview and South Carolina Code Section 6-29-740 regarding PDs. Apparently, it is Respondents' position that the County's planning staff is permitted to pick and choose under South Carolina law which rules it wants to follow when dealing with a PD. As shown above, that is not what South Carolina Code Section 6-29-740 or the Zoning Ordinance permits.

For the reasons set forth above, the trial court erred in finding that approval of 3.0 was not arbitrary, capricious, and without rational basis.

II. Goggans's Involvement Infected the Entire Process for Approval of 3.0.

Richardson and Johnson acted as gatekeepers of the information presented to the County Councilmembers regarding 3.0. They prepared the staff report including the factual information relating to 3.0 for the County's consideration. Goggans convinced Richardson and Johnson that only certain "parameters" should be evaluated for review of the building, and that is the same information that was presented to County Council for 3.0. (R. p. 653, line 9–p. 655, line 17; p. 666, lines 3–6; p. 671, lines 7–22); (R. pp. 1470–1599). At Goggans's bidding, Richardson and Johnson presented misleading information on the building's size, comparing only heated square feet of 3.0 to total square feet for the snack bar, and not providing any information to the County Councilmembers regarding the parking needs of Gulfstream or the marina. (*See* R. p. 1318). As a result, regardless of whether or not Goggans' recused himself for the actual vote of 3.0, his fingerprints remained all over the approval due his impermissible involvement in 1.0, for which the South Carolina Ethics Commission sanctioned him. (*See e.g.*, R. p. 554, line 24–p. 555, line 18).

Respondents cite to a State Ethics Commission opinion SEC AOO2007-006 (Jan. 17, 2007), finding that a business associate of a sitting councilmember can submit land development plans to the planning department for consideration. The opinion is distinguishable for several reasons. First and foremost, Goggans entered into a consent order which unequivocally found that **he violated Section 8-13-740(a)**. (R. p. 674, lines 12–24). Therefore, an ethics opinion evaluating a different scenario and finding the councilmember did not violate Section 8-13-740 is entirely irrelevant. The opinion also dealt with the question of whether a councilmember's business associate—not the councilmember himself (as here)—may submit land development plans to the planning department for consideration. The ethics opinion is further distinguishable

because it involved submission of land development plans, whereas this case involves review and approval of a major amendment to a PD.

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.* Respondents claim over and over in Respondents' Brief that Johnson and Richardson had the power to interpret the Zoning Ordinance relating to PDs however they wanted, but then Respondents suddenly claim that all of the choices they made were ministerial. This is simply not a credible argument. Richardson and Johnson exercised discretion here, such that the exception to Section 8-13-740 does not apply.

Respondents argue that approval of 3.0 underwent multiple hearings and approvals, and Goggans recused himself for them. As explained in Appellant's Brief and above, Goggans's involvement tarnished the legislative process through the one-sided, head in the sand, push it through evaluation of 3.0 done by Johnson and Richardson, all because their decisions had been made with Goggans with respect to 1.0.

Respondents rely on dicta from *Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 656 S.E.2d 346 (2008), to contend that Appellant has not shown it was prejudiced by Goggans' influence because he was not involved in the process for 2.0 or 3.0. Unlike in *Kurschner*, Goggans's participation did prejudice the vote on 3.0. The misinformation related to the arbitrary parameters established by Goggans skewed the presentation of evidence to the County Council. Appellant presented unrebutted evidence that Goggans, along with Richardson and Johnson, created the "parameters" for the building, which the County used when approving 2.0 and 3.0. (R. p. 652, line 9–p. 655, line 17; p. 666, lines 3–6; p. 671, lines 7–22); (R. pp.

1216–1219, 1317–1344, 1370–1372). For the County to purge the approval of 3.0 of Goggans's improper influence, it would have had to objectively review 3.0, unhindered by the parameters agreed upon with Goggans, which the County did not do.

III. The Trial Court Erred in Denying Appellant's Takings and Inverse Condemnation Claims.

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

South Carolina law is clear: there are only two elements to a regulatory inverse condemnation claim: affirmative conduct and a taking. *Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76, 80 (2005); *Marlowe v. S.C. Dep't of Trans*., Appellate Case No. 2020-000614, 2023 WL 6280433, at *7 (S.C. Ct. App. Sept. 27, 2023). The trial court imposed two additional elements on Appellant's taking claim (R. p. 50), and the case should be reversed. For the reasons set forth below, the Court should find that a taking occurred.

B. Appellant Demonstrated a *Per Se* Taking.

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 v. Town of Mount Pleasant,* 401 S.C. 280, 313, 737 S.E.2d 601, 619 (2013) (internal quotation marks omitted).

Gulfstream proved a *per se* taking. Gulfstream demonstrated that it will not be able to operate its restaurant, will have its rights to its easement destroyed, and will have its property value reduced in an amount of $1,760,100 to the nominal value of $89,900 as a result of the approval of 3.0. (R. p. 718, line 16–p. 719, line 13); (R. pp. 1374–1375). Respondents did not offer an appraisal expert to counter Gulfstream's expert, Mr. George Knight ("Knight"), so

Gulfstream's evidence is the only valuation evidence in the record, mandating the conclusion that a *per se* taking has occurred.

To purportedly discredit this testimony, Respondents point to statements from Appellant's witnesses that customers may get to Gulfstream's restaurant other than by car. But the fact that some customers may visit the restaurant via methods other than by car does not rebut Gulfstream's evidence on the impact 3.0 will have on parking and Gulfstream's restaurant. 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 other ways, Kirk testified that Gulfstream is a destination restaurant and that customers primarily travel there by car. (R. p. 334, lines 6–16; p. 335, line 22–p. 336, line 11; p. 352, lines 1–19). Appellant's witnesses 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. 629, line 7).

Moreover, Gulfstream's appraiser 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. (R. p. 755, lines 17–p. 756, line 8). 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. (R. pp. 1374–1375). 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 s*e taking has occurred.

C. The County Committed a Taking Under *Penn Central*.

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.

i. The Character of the Governmental Action 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—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.

Respondents 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. *Id.* at 316, 620.

In contrast, Richardson and Johnson testified that Gulfstream can only be used as a restaurant under the PD. (R. pp. 1180–1182); (R. p. 413, lines 1–5; p. 559, lines 13–17). 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, eliminating Gulfstream's

easement rights. (R. p. 627, line 20–p. 630, line 3; p. 640, lines 14–21; p.697, line 18–p. 698, line 18). Finally, 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. (R. p. 629, line 20–p. 631, line 11). Thus, the character of the governmental action weighs in favor of Gulfstream.

ii. The Economic Impact of 3.0 on Gulfstream.

With respect to the economic impact of the approval of the major amendment, the unrebutted 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. *Dunes West Golf Club, LLC*, 401 S.C. at 317, 737 S.E.2d at 621. Here, Gulfstream's property value will be reduced from $1,850,000 to $89,000. (R. p. 718, line 16–p. 719, line 13); (R. pp. 1374–1375). This represents greater than a 95% reduction in value, which is certainly constitutionally significant.

Respondents 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. (R. p. 337, line 19–p. 340, line 11; p. 359, line 18–p. 360, line 20; p. 627, line 20–p. 630, line 3; p. 640, lines 14–21; p. 697, line 18–p. 698, line 18). 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. (R. pp. 1183–1211); (R. p. 334, lines 6–16; p. 335, line 22–p. 336, line 11; p. 351, lines 17–25). 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 the property to 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.

iii. Gulfstream Has an Investment-Backed Expectation to Continue to Use its Property and its Easement.

Gulfstream has an investment-backed expectation to continue to use its property as a restaurant and to primarily use the easement to the parking lot at night. Continuation of the existing use of the property is a property owner's primary expectation when considering an investment-backed expectation for the property. *Dunes West Golf Club, LLC*, 401 S.C. at 319 (internal quotation marks omitted). Gulfstream does have an investment-backed expectation in the use of 62 spaces in the easement at night. (R. pp. 1183–1211).[2] 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). Approval of 3.0 obliterates these expectations.

Considering the factors of the *Penn Central* Test, Gulfstream proved a taking of its property.

IV. Gulfstream's Claims Are Not Barred.[3]

The trial court correctly ruled multiple times that Gulfstream's claims were not barred for failure to timely challenge 3.0 or for collateral estoppel. The trial court denied Respondents' motion for summary judgment on failure to timely challenge 3.0. (R. pp. 26–27). The trial court denied Respondents' motion for directed verdict. (R. p. 765, line 10–p. 766, line 9; p. 772, line

[2] Gulfstream does not contend that it has an investment-backed expectation to adequate parking, but it does have an investment-backed expectation in the rights to its easement of 62 parking spaces at night and that the County will not make the parking situation *even worse*.

[3] Appellant incorporates by references its arguments regarding procedural due process and failure to follow the Zoning Ordinance's procedural rules from Appellant's Brief. Appellant notes that the majority of the arguments in these sections of Respondents' Brief are without any citation to the transcript whatsoever, so any purported testimony without a record citation should be disregarded.

18–19). Respondents' raised these defenses in their Post-Trial Brief (R. pp. 4183–4185), but the trial court rejected them. (*See generally* R. pp. 36–52 (failing to include these as grounds for decision)). Thus, the Court should similarly reject these arguments. Regardless, the defenses are baseless.

A. Gulfstream Timely Challenged 3.0.

Respondents' 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 days "after the decision of the governing body." S.C. Code Ann. § 6-29-760. The decision challenged in this case is the County's decision to approve 3.0, and Gulfstream timely filed its challenge to that decision. (R. pp. 58–171 (complaint filed March 8, 2019); R. p. 1370 (3.0 approval dated January 8, 2019)).

Moreover, Gulfstream did challenge 2.0 in court, and the Court found 2.0 could not be built. (R. p. 1317). 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. *Id.* 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. Respondents Did Not Meet Their Burden to Prove Collateral Estoppel.

Respondents have not met any element of collateral estoppel. Respondents make a host of contentions regarding what issues Palmetto and Gulfstream litigated in civil action number 2016-CP-22-00961 without pointing to one iota of admissible evidence to support their claims.

Moreover, 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. (R. p. 354, line 18–p. 358, line 14); (R. pp. 1248–1249 (verdict form dated June 11, 2018); pp. 1250–1261 (application for 3.0 filed in August 2018)). 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. (R. pp. 1220–1235, 1250–1261, 1286–1296). 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

Based on the foregoing and the arguments, the Court should reverse the trial court's decision in its entirety.

[signature on the following page]

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 Reply 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