STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE FIFTEENTH CIRCUIT
COUNTY OF HORRY	)	
	)	Case No. 2021-CP-26-07489
	)	
CITY OF NORTH MYRTLE BEACH,	)	
	)	
Plaintiff,	)	**FINAL ORDER**
	)	
vs.	)	
	)	
SUN TRS OCEAN CLUB LLC, SUN TRS CAROLINA PINES LLC, and SUN CAROLINA PINES RV LLC,	)	
	)	
Defendants.	)	

Plaintiff City of North Myrtle Beach seeks a declaration from this Court that Defendants ownership and use of its property at 1814 N. Ocean Boulevard in North Myrtle Beach, South Carolina (the "Property") as a cabana house violates two sections of the City's Zoning Ordinance and asks this Court for an order that Defendants' ownership and use of the Property as a cabana house to "immediately cease and desist." In response, Defendants contend that the applicable sections of the Zoning Ordinance, as interpreted and applied by the City, violate the dormant Commerce Clause of the U.S. Constitution, and request the Court to declare those portions of those sections unconstitutional and permanently enjoin their continued enforcement.[1]

The applicable sections of the Zoning Ordinance at issue purport to restrict the ownership and operation of beachfront cabana houses to homeowners' associations established for projects in North Myrtle Beach, and confine access to such cabana houses exclusively to persons owning

[1] Defendants also filed counterclaims under the Fourteenth Amendment Due Process and Equal Protection Clauses and asserted a counterclaim for Inverse Condemnation/Regulatory Taking of the Property based on the City's claim for relief. Defendants voluntarily withdrew their Fourteenth Amendment challenges and, for the reasons set forth herein, the Court need not address the Defendants' Regulatory Taking claim because the Court finds that the City is not entitled to the relief sought.

or renting homes or units in those projects. Defendants contend that these restrictions discriminate against interstate commerce on their face, in their effect, and in their purpose.

FINDINGS OF FACT

1. Defendants are wholly owned subsidiaries of Sun Communities, Inc., a publicly traded Real Estate Investment Trust that, through its subsidiaries, develops and operates manufactured housing communities, recreational vehicle resorts, and marinas. As of September 30, 2022, Sun Communities, Inc. and its subsidiaries own and operate 671 communities in the United States and internationally, consisting of over 180,000 developed sites and over 48,000 wet slips and dry storage lots. (*See* Defs' Ex. 53).

2. Defendant Sun TRS Ocean Club, LLC ("Sun") has an agreement with Defendant Sun Carolina Pines RV LLC ("RV Resort"), whereby it permits the RV Resort to use the Property (and the cabana house) as a private beach club for guests staying at the RV Resort in Conway (the "Beach Club"). The Property also honors individual memberships to the Beach Club issued under previous ownership, some of whom do not reside in North Myrtle Beach. (*See* Defs' Ex. 9).

3. Approximately 69% of the guests who have made reservations at the RV Resort since its opening on July 1, 2019, are from outside South Carolina. The RV Resort has entertained more than 90,000 reservations since the beginning of operations, and provides an array of on-site amenities (including a waterpark, arcade, miniature golf, etc.), standalone cottages for short- and long-term renting, a general store, a restaurant, and importantly, access to the South Carolina coastline. (*See* Defs' Ex. 5). There are currently 829 guest sites at the RV Resort, which includes 162 annual sites where guests rent and reside on an annual basis.

4. The primary attraction of the RV Resort in Conway is its proximity to the beach. In addition to the on-site amenities, the RV Resort provides shuttle transportation as part of an

all-inclusive package that departs throughout the day to public beach access points, as well as a variety of locations, including shopping destinations and other tourist attractions in the area.

5. The Beach Club, along with other cabana houses in the City owned by Barefoot Resort Residential Owners Association, Inc. ("Barefoot"), the Links Golf and Racquet Club Homeowners Association, Inc. (the "Links"), and Tidewater Plantation Community Association, Inc. ("Tidewater"), all provide private access to the beach. As the City explained at trial, the cabana house special exception was created to "direct investment away from the coastline"—i.e., cabana houses allow the coastline to remain unimpeded by high-rises and the associated traffic, while also providing beach access to "projects" within the City not located on the beachfront.

6. Tourism is the largest economic driver in the Grand Strand and, more specifically, North Myrtle Beach. The economic impact of tourism to the area is substantial. In 2022, 17.2 million visitors traveled to the Grand Strand and, out of that number, Destination NMB (an affiliate of the North Myrtle Beach Chamber of Commerce) estimated between three (3) and five (5) million people visited the City of North Myrtle Beach. Importantly, lodging accommodations and short-term "transient" rentals dominate the real estate market in North Myrtle Beach.

7. The City funds the marketing of its tourism industry through the collection of state accommodation taxes. The accommodations tax is levied on overnight accommodation for things such as hotels, motels, short-term rentals, and other resorts (such as campgrounds and RV parks). After collection, a portion of the money raised through the state accommodation tax is then returned to the local area where the tax was originally assessed to be utilized for marketing the area's tourism. The accommodation taxes raised in the local area through lodging and short-term rentals help fund Destination NMB in its mission to bring more tourism to the area.

8. There are two distinct provisions in the Zoning Ordinance at issue in this case. The first provision, found in section 23-2 defines a "cabana house" as:

> A structure utilizing single-family design and development standards in close proximity to the oceanfront **to be used by projects in North Myrtle Beach** not located near the ocean. The use of the cabana house shall be limited to drop-off and parking area, bathing, changing clothes and similar uses. Additionally, it can be used as an occasional guest quarters and similar residential uses. A cabana house shall be owned and maintained **by a homeowner's association** with a maintenance agreement submitted and approved by the planning department.

North Myrtle Beach, S.C., Code § 23-2 (emphasis added).

9. The R-4 Resort Residential District Zoning Ordinance permits mixed uses of dwellings, hotels, motels, inns, accessory uses for each of the preceding, and for resort accommodations. *See* North Myrtle Beach, S.C., Code § 23-22(2). It also has a provision providing for special exceptions. *Id*. Regarding the special exception for cabana houses (which was enacted in 1996), section 23-22 provides, in relevant part: "**That a homeowner's association shall have been established for the project** and a maintenance agreement has been submitted to the planning department." North Myrtle Beach, S.C., Code § 23-22(4)(d)(1) (emphasis added).

10. Similar geographic limitations for property ownership and use pertaining to a "cabana house" do not exist anywhere else in the R-4 Resort Residential District. Under the City's interpretation of section 23-2, for a cabana house to be permitted, its use must be "exclusively" limited to a project (and its guests) within the City.

11. Under applicable South Carolina law, homeowners' associations must register their governing documents in the county where the property owned by its members is located. *See* S.C. Code Ann. § 27-30-130(A)(1). Therefore, any homeowners' association with a cabana house in North Myrtle Beach must necessarily be a local homeowners' association under the City's interpretation of its Zoning Ordinance and must be registered in Horry County. Homeowners'

associations for projects outside the city limits cannot own or use the cabana house under the Zoning Ordinance's literal terms.[2]

12. On or around March 28, 2005, Pan, LLC acquired the Property in an undeveloped state with the intention of building a high-rise condominium project. Pan, LLC's efforts were blocked by the adjoining neighbors, Sea Cloisters I & II Homeowners' Associations ("Sea Cloisters"), based on a December 31, 1979 deed restriction that limits the use of the Property to a "clubhouse for recreational purposes."

13. The Restrictive Covenants for the Property provide, in relevant part: "Said property shall be used only for recreational purposes and the improvement of said properly shall be limited to a clubhouse for recreational purposes." The Restrictive Covenants are silent about who is authorized to own and use the Property, or where they must reside. (Defs' Ex. 16).

14. In May 2007, Pan, LLC applied to the City's Board of Zoning Appeals for a special exception to construct an oceanfront cabana house on the Property for the use of Seabrook Plantation, located in the City. When Pan, LLC's Special Exception Application was submitted, the Property was zoned, as it is now, in the R-4 Resort Residential District.

15. According to the City, the municipal interests furthered by the residency requirement imposed by sections 23-2 and 23-22 include: "responsiveness," "quality of life," and "preservation of local property values." However, the City has not conducted any study or analysis as to how these interests are furthered by the residency restrictions.

16. The City's witnesses testified at trial that "economic considerations" (including the preservation of property values) were factors in the development of the cabana house special

[2] The City's Director of Planning and Development, Jim Wood, testified at trial, in a seeming reversal of the City's past interpretation, that the homeowners' association did not necessarily have to be located within City limits; however, on cross-examination he was unable to explain how, in a practical sense, that would occur based on a plain reading of the Zoning Ordinance.

exception and all agreed, at one point or another, that the restrictions encouraged investment in the City rather than in projects outside of the City.

17. On June 18, 2007, the City's then-zoning administrator, Paul Blust, informed Pan, LLC via a letter that its Special Exception Application had been approved. The Board of Zoning Appeals found that the proposed use of the building was consistent with the limitations set forth in the Zoning Ordinance. (Defs' Ex. 4). The City did not require or specify that Pan, LLC deed the property to Seabrook Plantation's homeowners' association as a condition of operations.

18. The City testified at trial that, although the Zoning Ordinance is silent on the issue, any subsequent owner of the Property should have applied for a new special exception after it purchased the Property. The City acknowledges, however, that it has not required reapplication by any subsequent owner of this or any other cabana house located in the City.[3]

19. After receiving approval for a cabana house, Pan, LLC constructed the Beach Club. At the time of construction, Pan, LLC did not have, nor did it create a homeowners' association to own the Property.

20. Following construction of the Beach Club, the Property was conveyed several times to other limited liability companies. The special exception for the Property was never rescinded. None of these prior owners of the Property were homeowners' associations, nor was the Beach Club ever used exclusively by a "project" located in the City.

21. Immediately prior to Sun's purchase, the Property and Beach Club were being operated as a private, for-profit membership club by NMB Ocean Club Partners, LLC, with no restrictions on the residency of its members. NMB Ocean Club Partners, LLC also obtained two

[3] Prior to trial, the City's former Zoning Administrator, Mr. Blust, testified in his deposition that it was not necessary for subsequent owners to reapply for a special exception once granted by the City. (Court Ex. 3, Blust Dep. Tr. 48:13-22).

separate business licenses from the City to operate the Beach Club in 2017 and 2019, respectively. In May 2018, NMB Ocean Club Partners, LLC attended a Technical Review Committee meeting to seek guidance from City officials on how to convert the private beach club to a restaurant. (Defs' Ex. 32).[4] The City never issued a cease-and-desist letter to NMB Ocean Club Partners, LLC regarding its ownership and operation of the Beach Club, from August 2017 to May 2019.

22. In late 2018, NMB Ocean Club Partners, LLC approached Defendants, inquiring as to whether they would have an interest in acquiring the Property for use by the RV Resort's guests. On February 15, 2019, Sun entered into a Real Estate Purchase and Sale Agreement with NMB Ocean Club Partners, LLC (the "Purchase Agreement"). (Defs' Ex. 9).

23. Pursuant to the Purchase Agreement, NMB Ocean Club Partners, LLC warranted "to the best of Seller's knowledge" that the Property and Beach Club complied in all respects with all applicable ordinances pertaining to zoning and there were no existing facts or conditions which would result in the issuance of any zoning violations with respect to the Property. (*Id.*)

24. Prior to closing the sale of the Property and during the due diligence period, Sun, through its lawyers, requested a zoning letter from the City, inquiring about the current zoning and use of the Property and whether the Property or the Beach Club were subject to any violations of the Zoning Ordinance. On March 19, 2019, Mr. Blust, as then-Zoning Administrator for the City, sent Sun a letter (the "Zoning Letter") stating that the Beach Club was "permitted as a cabana house and has been legally used as such since construction. As of the date of this letter, there are no known zoning violations on the property." (*See* Defs' Ex. 2). Mr. Blust testified that he did not check to see if the Property or the Beach Club were owned by a homeowners' association or

[4] While the minutes from the Technical Review Committee Meeting contain a statement from the Zoning Department that a private beach club is not permitted in the R-4 District, Mace Watts, the managing member for the club owner and an attendee at the meeting, testified at trial that this was never communicated to him by the City at any time.

whether the Beach Club was being used by a "project" within the City. Rather, he visually inspected the Property from his vehicle, thought it was not in use, and concluded that because it was not in use on the day he was there, it was not in violation of the Zoning Ordinance.

25. The seller of the Property and Sun both testified that while they were generally aware of the Zoning Ordinance, they nonetheless were led to believe that Sun's intended ownership and use of the Property was consistent with the City's interpretation of its Zoning Ordinance, due to the statements in the Zoning Letter and the City's knowing acquiescence to almost 12 years of ownership by entities that were not homeowners' associations for "projects" within the City.[5]

26. On May 3, 2019, NMB Ocean Club Partners, LLC conveyed the Property along with the Beach Club to Sun via a general warranty deed, which was recorded with the Horry County Register of Deeds on May 10, 2019. Sun purchased the Property for approximately $2.5 million to use the Beach Club as an amenity for the RV Resort's guests.

27. Between May 3, 2019, and September 2, 2021, the RV Resort operated the Beach Club for its guests, without any complaints from the City, shuttling its guests from Conway to and from the facility.

28. On September 2, 2021, after receipt of a complaint from Sea Cloisters, the City sent a cease-and-desist letter (the "Cease-and-Desist Letter") to Sun asserting for the first time that its ownership and use of the Property and the Beach Club, along with the related shuttle services to and from the RV Resort, were violative of the Zoning Ordinance. The Cease-and-Desist Letter alleged that Defendants were operating the Property and Beach Club in violation of sections 23-2

[5] Jon Colman, head of acquisitions for Sun Communities, Inc., testified that had he been informed by the City that it did not believe that a private beach club was permitted in the R-4 District, or that it must be owned by a homeowners' association established for a project in North Myrtle Beach, he would have stopped the transaction and sought a meeting with the City to determine if Defendants could own and operate the Beach Club for guests of the RV Resort in Conway.

and 23-22 of the Zoning Ordinance because, *inter alia*, the Beach Club was not owned and maintained by a homeowners' association for a project in North Myrtle Beach. (Defs' Ex. 29).

29. Several of the City's witnesses (residents of Sea Cloisters) testified regarding their objections to the operation of the Beach Club by the Defendants from May 3, 2019, through September 2, 2021. Specifically, those witnesses objected to Defendants hosting weddings and a child's birthday party at the Beach Club, occasionally serving food and beverage (including alcohol) on the premises, and allegedly violating lighting and noise ordinances as promulgated by the City. The City contends that those purported "commercial uses" of the Beach Club violated the Zoning Ordinance. They also testified that Beach Club users occasionally trespassed on Sea Cloisters' property, parked in their parking lots, and got into an altercation with a Sea Cloisters property owner in the Summer of 2021.

CONCLUSIONS OF LAW

Notwithstanding anecdotal complaints about past use of the Beach Club by Defendants, there are two critical issues that control the outcome of this litigation:

(1) Whether the applicable sections of the Zoning Ordinance have a substantial effect on interstate commerce, so as to implicate the dormant Commerce Clause; and

(2) Whether the residency requirement set forth in sections 23-2 and 23-22, which require that a homeowners' association established for a project in North Myrtle Beach must own and exclusively operate a cabana house, is violative of the dormant Commerce Clause.

I. Substantial Effect on Interstate Commerce

The threshold question regarding whether the applicable sections of the Zoning Ordinance have a substantial effect on interstate commerce is to determine what is being regulated. The City contends that restrictions on the use of a cabana house is the regulation at issue, and because a

cabana house cannot be used for commercial purposes and Defendants' cabana house was used as a free-of-charge amenity, sections 23-2 and 23-22 do not have any effect on interstate commerce.

However, as Defendants pointed out repeatedly at trial, they are not disputing the constitutional validity of the operational conditions set forth in sections 23-2 and 23-22 of the Zoning Ordinance. Instead, Defendants are challenging the ownership restrictions for cabana houses in the City, that require the cabana house to be owned and operated by a homeowners' association established for the exclusive use of a project located in North Myrtle Beach. Accordingly, the proper analysis of whether those sections substantially effect interstate commerce must be focused on "who may own or use" a cabana house within the R-4 District, not "how it may be used."

"The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979). The Supreme Court has identified three broad categories of activity that Congress may regulate under its commerce power: *First*, Congress may regulate the use of the channels of interstate commerce; *second*, Congress has the authority to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce; and *third*, Congress's commerce power includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially effect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

Between 1936 and 1995, the United States Supreme Court did not find any federal laws unconstitutional as exceeding the scope of Congress's commerce power. Then in *Lopez*, the Court declared unconstitutional the Gun-Free School Zones Act of 1990, which made it a federal crime to have a gun within 1,000 feet of a school. *Id*. at 551. The Court ruled that the relationship

between school safety (a noneconomic activity) and interstate commerce was too attenuated to uphold the law as a valid exercise of Congress's commerce power. *Id*. at 567-68. The Court followed the *Lopez* decision with its ruling in *United States v. Morrison* in 2000, in which the Court declared unconstitutional the civil damages provision of the Violence Against Women Act, which created a federal cause of action for victims of gender-motivated violence. 529 U.S. 598, 601 (2000). In *Morrison*, the Court expounded on the *Lopez* decision holding that Congress cannot regulate noneconomic activity by simply finding such activity has a substantial effect on interstate commerce when looked at cumulatively. *Id* at 617-18.

Then, in 2005, the Court upheld Congress's Controlled Substances Act as a proper exercise of its power under the Commerce Clause, holding Congress had the authority to prohibit the local cultivation and use of marijuana despite state law to the contrary. *Gonzales v. Raich*, 545 U.S. 1 (2005). In so holding, the Court reaffirmed its decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), and upheld the application of the Controlled Substances Act to the growth of marijuana for intrastate personal use, noting that the regulated economic activities related to the production and consumption of a commodity for which there is an established—albeit illegal—interstate market. *Raich*, 545 U.S. at 19. The majority in *Raich* distinguished the case from *Lopez* and *Morrison* explaining that those cases dealt with statutes regulating noneconomic activity and, as a result, fell entirely outside of Congress's commerce power. *Id.* at 23-26.[6]

The lesson from *Lopez, Morrison*, and *Raich* is that the substantial effect on interstate commerce analysis is predicated on whether the local activity being regulated is economic or noneconomic in nature. In matters dealing with the regulation of local economic activities, like

[6] The Court cautioned parties about relying too heavily on *Lopez* and *Morrison*, and explained that the respondents in *Raich*, "[i]n their myopic focus, . . . overlook[ed] the larger context of modern-era Commerce Clause jurisprudence preserved by those cases" and, even in the respondents' narrow analysis, "read those cases far too broadly." *Id*. at 23.

the applicable sections of the Zoning Ordinance at issue, the long-standing principles of *Wickard* apply, and Congress's commerce power "extends to those activities intrastate which so effect interstate commerce . . . as to make the regulation of them appropriate means to the effective execution of granted power to regulate 'interstate commerce.'" *Wickard*, 317 U.S. at 124. Accordingly, local economic activity, viewed in the aggregate along with similarly situated entities engaged in the same activity, which has a substantial cumulative economic effect on interstate commerce falls within the ambit of the dormant Commerce Clause.

This distinction is highlighted in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997), where the Supreme Court held that an otherwise generally applicable state property tax violated the dormant Commerce Clause because its exemption for property owned by charitable institutions excluded organizations operated principally for the benefit of nonresidents. *Id*. at 571-595. The appellant in *Camps Newfound* was the operator of a non-profit outdoor church camp that brought an action challenging the constitutionality of Maine's property tax exemption statute for charitable institutions. The town argued that the dormant Commerce Clause jurisprudence was inapplicable to the case because interstate commerce was not implicated, due to the non-profit nature of the campground. *Id*. at 572.

The Court disagreed and explained that even though the camp did not make a profit, it unquestionably "engaged in commerce," not only as a purchaser of goods, but also as a provider of goods and services. The Court noted that the camp marketed those services, together with an opportunity to enjoy the natural beauty of an inland lake in Maine, to campers who were attracted to the facility from other states. *Id*. at 572-73. The Court emphasized that the record reflected the camp operator advertised for campers in out-of-state periodicals and that its recruiting efforts were

successful; 95 percent of its campers came from out-of-state, and the attendance of these campers necessarily generated transportation of persons across state lines. *Id*. at 573.

The Supreme Court explained that summer camps were comparable to hotels that offer their guests goods and services to be consumed locally. To bolster its analysis, the Supreme Court cited *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964),[7] for the proposition that interstate commerce is substantially affected by the activities of hotels that solicit patronage through national advertising media. *Id*. Accordingly, the Supreme Court stated that discrimination "that limits the access of nonresidents to summer camps creates a similar impediment . . . [e]ven when business activities are purely local; if 'it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.'" *Id*. at 573-74 (quoting *Heart of Atlanta*, 379 U.S. at 258). The Supreme Court held that the services the camp operator provided to its principally out-of-state campers clearly had a substantial effect on interstate commerce, as did state restrictions on making those services available to nonresidents. *Id*. at 574.[8]

The guidance with respect to effect on interstate commerce in *Camps Newfound* is directly applicable to this case. The RV Resort advertises its product, including the Beach Club, nationally through its website and social media platforms, and those efforts have proven successful; 69% of the RV Resort's guests are from out-of-state. Likewise, the RV Resort markets its various other amenities, together with an opportunity to enjoy the natural beauty of the South Carolina coastline, to guests throughout the country. The RV Resort engages in commerce, as a purchaser of goods

[7] In that case, the Supreme Court held that commerce was substantially affected by private race discrimination that limited access to the hotel and thereby impeded interstate commerce in the form of travel. *Heart of Atlanta*, 379 U.S. at 244.

[8] The Supreme Court's analysis in *Camps Newfound* focused exclusively on the operations of the campground at issue to determine whether the dormant Commerce Clause was implicated. The Court did not need to resort to a market analysis of other campgrounds because it was clear from its review of the campground and the tax exemption statute that both had a substantial effect on interstate commerce.

and as a provider of services and transports its guests throughout the local area whether to the Beach Club or to other various other locations, including locations in North Carolina, via its shuttle service. And, like *Camps Newfound*, the attendance of the RV Resort's guests necessarily generates the transportation of persons across state lines as part of interstate commerce.

This apt comparison between the case at bar and *Camps Newfound* is bolstered by analyzing the ownership and use of the other cabana houses in the City. Tidewater's homeowners' association utilizes its cabana house to host gatherings of property owners at what it considers to be its "most popular amenity" and promoted the cabana house on its website. Barefoot's association also markets its cabana house and other community amenities on its website and holds community-sponsored events at its cabana house where neighbors gather. The Links' cabana house is open not only to owners of the timeshares in the community but also to its guests and short-term renters as well, regardless of where they reside.[9] Further, as the City admitted, there is no prohibition on the use of a cabana house by short-term "transient" renters, and there are no restrictions on cabana house owners advertising their amenity to the public.

The RV Resort is comparable to hotels or short-term rental providers that offer their guests goods and services that are consumed locally. These platforms, which comprise a significant part of the tourism economy in the Grand Strand, clearly have a substantial effect on interstate commerce, as does the residency requirement's restrictions on making those services available to nonresidents. *Cf. C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994). Likewise, the services that the RV Resort provides, which includes access to the Beach Club to its principally out-of-state guests, along with the residency requirement prohibiting ownership of a cabana house by Sun, also have a substantial effect on interstate commerce.

[9] The limits on the use of the cabana house to just owners in certain communities are creations of those specific associations, and not mandated by the City.

II. Dormant Commerce Clause

The Commerce Clause grants Congress the power to regulate interstate and foreign commerce. U.S. Const. art. I, § 8, cl.3. "Although the [Commerce] Clause is framed as a positive grant of power to Congress," the Supreme Court has "long held that this Clause also prohibits state laws that unduly restrict interstate commerce." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. ___, 139 S.Ct. 2449, 2459 (2019). "This negative command prevents a State [or local government] from jeopardizing the welfare of the Nation as a whole by placing burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005).

"The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38, (2008) (internal quotations and citations omitted). "'The common thread among those cases in which the Court has found a dormant Commerce Clause violation is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.'" *Amisub of S.C., Inc. v. S.C. Dep't of Health & Env't Control*, 424 S.C. 80, 88, 817 S.E.2d 633, 637 (Ct. App. 2018) (quoting *McBurney v. Young*, 569 U.S. 221, 235 (2013)).

In addition to state laws, the dormant Commerce Clause applies equally to local and municipal laws. "[A] State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State rather than through the State itself." *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353, 361 (1992). The dormant Commerce Clause "invalidate[s] *local laws*

that impose commercial barriers or discriminate against an article of commerce by reason of its origins or destination out of State." *C & A Carbone, Inc.*, 511 U.S. at 390 (emphasis added).

In conducting the discrimination inquiry, the Court is required to focus on discrimination against interstate commerce—not just the discrimination against the *specific parties* before it. *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013). Focusing only on discrimination against individual entities "improperly narrows the scope of the judicial inquiry and has the baneful effect of precluding certain meritorious claims. For while the burden on a single firm may have but a negligible impact on interstate commerce, the effect of the law as a whole and in the aggregate may be substantial." *Id*.

Discrimination in this context "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Colon Health Ctrs.*, 733 F.3d at 542-43. A law that is found to discriminate against interstate commerce "puts it on death's doorstep," and can only survive if it advances a legitimate local purpose that cannot be adequately served by any reasonable nondiscriminatory alternatives. *Hignell-Stark v. City of New Orleans*, 46 F.4th 317, 328 (5th Cir. 2022).[10]

Laws challenged under the dormant Commerce Clause are examined using a two-step analysis. However, the antidiscrimination principle lies at the "very core" of the Supreme Court's dormant Commerce Clause jurisprudence, regardless of which step of analysis is at play. *Nat'l Pork Producers Council v. Ross*, 143 S.Ct. 1142, 1153 (2023). The first step, and the only step relevant to this case, is when the regulation directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests. In

[10] To date, only one such U.S. Supreme Court case has been able to meet this exceedingly high standard. *See Maine v. Taylor*, 477 U.S. 131 (1986) (holding Maine's ban on the importation of out-of-state bait fish was constitutional, even though the law discriminated against interstate commerce on its face, because Maine had no other means to prevent the spread of parasites to its unique, native fish species).

such cases, the Supreme Court has "generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Unless "demonstrably justified by a factor unrelated to economic protectionism, a 'discriminatory law is virtually *per se* invalid.'" *Brown v. Hovatter*, 561 F.3d 357, 363 (quoting *Davis*, 553 U.S. at 338).[11]

A. The Zoning Ordinance's "Residency Requirement" on the Ownership and Access of a Cabana House Plainly Discriminates Against Interstate Commerce.

Section 23-2 defines a "cabana house," in part, as a "structure utilizing single-family design and development standards in close proximity to the oceanfront to be used by projects in North Myrtle Beach not located near the ocean." Section 23-22(4)(d) requires that a "homeowner's association shall have been established" for that same project. The City has posited that this geographic restriction advances the City's municipal interest of "quality of life," "responsiveness," and "preservation of property values." Whatever the City's "ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State [or the City] unless there is some reason, apart from their origin, to treat them differently." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978).

Sections 23-2 and 23-22 essentially create a residency requirement for ownership of a cabana house in the R-4 District in that they exclude the ownership and utilization of cabana houses from entities located anywhere outside of the City's limits. The fact that the applicable sections

[11] The second step of the analysis under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), only applies where a statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental. Lower courts regularly misconstrue the requisite analysis under the dormant Commerce Clause. If the Court finds that a law or regulation discriminates against interstate commerce, then the analysis ends, and the Court must shift the burden to the government to show no reasonably nondiscriminatory alternatives exist to achieve its policy goals. *See, e.g., Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (2022). The City offered no argument at trial that the *Pike* test applies here.

of the Zoning Ordinance apply equally to in-state "projects," like the RV Resort, does not change the analysis, for "[i]t is immaterial that [a South Carolina "project" from outside the City] is subjected to the same proscription as that moving in interstate commerce." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.4 (1951). The City's employees at trial did not offer any justification for its different treatment of "projects" located outside of the City, except to suggest that "transient" individuals represent a greater burden to the City's "quality of life." But "transient" individuals renting properties within the City limits are permissible, which is precisely the discrimination that the dormant Commerce Clause prohibits.

Both the City Manager and Destination NMB testified that the economic bloodline of the City is tourism. Accordingly, the City has "erect[ed] an economic barrier protecting a major local industry against competition from without the state" by enacting the applicable sections of the Zoning Ordinance which "plainly discriminate[] against interstate commerce." *Dean Milk*, 340 U.S. at 354. Through sections 23-2 and 23-22, the City ensures that only local residents can benefit economically from ownership of a cabana house on the City's coastline in the R-4 District.

The City's geographic restriction discriminates on its face against non-local projects.[12] The City does not just make it more difficult for non-local entities to compete in the market for visitors who want private beach access through a cabana house in the R-4 District; it forbids them from participating altogether. And the City will not grant a special exception to own a cabana house, unless the cabana house is owned and operated exclusively by a homeowners' association for a project in the City. The upshot is that only residents of the City may participate in the market to own and use a cabana house in the R-4 Resort Residential District.

The City's representatives testified on multiple occasions that an RV Resort is

[12] Indeed, Mr. Wood testified at trial that the restriction against non-local projects from ownership of a cabana house in the R-4 district is exclusionary "on its face."

encompassed by the term "project." Hotels, residential developments that consist of short-term rental properties located in the City, and RV Resorts located outside of the City that participate in the short-term vacation rental market, are "substantially similar." *Davis*, 553 U.S. at 342 (explaining that the only form of discrimination that implicates the dormant Commerce Clause is discrimination between "substantially similar entities"). All are private entities, not public entities carrying out traditional government functions. *See id.* at 341-43. And all seek to compete in the highly competitive market for recreational access to the South Carolina coastline. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997). Non-local projects want to offer the same beach access services to the same customers in the same locations as projects located within the City. The only difference between them, and the one emphasized by the residency requirement, is that one group does not reside in North Myrtle Beach. Accordingly, the residency requirement set forth in sections 23-2 and 23-22 directly discriminates against interstate commerce.

A recently decided case out of the Fifth Circuit Court of Appeals is particularly instructive on the nature of the restrictions before the Court here. In *Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (5th Cir. 2022), homeowners who sought to operate short term rentals ("STRs") and the company providing services for STR owners brought a Section 1983 claim against the City of New Orleans, alleging, *inter alia*, violations of the dormant Commerce Clause, based on the city's ordinance requiring licenses to operate STRs. In 2016, the city decided to offer licenses[13] to property owners to rent their homes for less than thirty (30) days. *Id*. at 321. One year into the initial licensing regime, the city commissioned a study to reevaluate its STR policies and found that the rapid proliferation of STRs brought nuisances to the city. *Id*. Specifically, it discovered that STRs in residential neighborhoods "had lowered residents' quality of life." *Id*. The study

[13] The license in *Hignell-Stark* is akin to the special exception permit at issue in this case.

also determined that expansion of STRs into residential neighborhoods led to "a loss of neighborhood character," and it collected "anecdotal evidence" that the increasing STR market had made housing less affordable to residents. *Id.* Because of the study, the city revised its STR licensing regime in 2019 and imposed a local residency requirement for STRs in residential neighborhoods. *Id.* The policy provided that no person could obtain a license to own an STR unless the property was also "the owner's primary residence." *Id.*

On appeal, the Fifth Circuit analyzed the district court's ruling that, although the residency requirement in the new licensing regime discriminated against interstate commerce, the policy was constitutional because the burden it imposed was not "clearly excessive in relation to the putative local benefits." *Id.* at 322 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The Fifth Circuit disagreed, explaining that the *Pike* test did not apply to an ordinance that discriminated by its very terms between local and non-local market participants. *Id.* at 325.

The Fifth Circuit further explained that because the residency requirement in the new licensing regime discriminated against interstate commerce, it was in "big trouble because 'a discriminatory law is virtually *per se* invalid.'" *Id.* (quoting *Davis*, 553 U.S. at 338). The Fifth Circuit held that the residency requirement discriminated on its face against non-local property owners because it forbade them from participating in the STR market in residential neighborhoods altogether[14] and even though the city did not adopt the residency requirement to protect its residents from interstate competition, "the dormant Commerce Clause prohibits more than laws with protectionist purposes. It also prohibits laws that discriminate against interstate commerce

[14] In *Hignell-Stark*, the Fifth Circuit rejected the city's argument that the ordinance allowed out-of-staters to own short-term rentals in **nonresidential** neighborhoods because "even if the residency requirement merely imposes a discriminatory burden on interstate commerce, it still qualifies as discriminatory." 46 F.4th at 327. The City here has made the same unavailing argument with respect to beachfront cabana houses in other areas outside of the R-4 District.

on their face." *Id*. at 325-327 (citation omitted). According to the Fifth Circuit, "'the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory.'" *Id*. at 327 (quoting *Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or.*, 511 U.S. 93, 100 (1994)).

The same is true here. The City's residency requirement with respect to the exclusive ownership of cabana houses to homeowners' associations for "projects" located in the City cannot be saved. Regardless of the "purpose of, or justification for" the restriction, it has "no bearing on whether it is facially discriminatory." *Id*. at 327. Because the residency requirement at issue directly discriminates against interstate commerce on its face—by forbidding non-local homeowners' associations for projects from participating in the market to utilize a cabana house in the City within the R-4 District—it is *per se* invalid.

Additionally, section 23-2 provides that a cabana house must be owned by a local homeowners' association. Section 23-22(4)(d)(1) provides, in relevant part, that a homeowners' association must be established for the local project utilizing the cabana house. Accordingly, the homeowners' association requirement is inextricably linked to the project's geographic restriction and violates the dormant Commerce Clause in the same way.

Under South Carolina's Homeowners' Association Act, a homeowners' association governing documents must be recorded in the Register of Deeds office in the county where the property owned by the association is located. S.C. Code Ann. § 27-30-130(A)(1). In its effect, the homeowners' association requirement in both sections 23-2 and 23-22 of the Zoning Ordinance violates the dormant Commerce Clause because it requires the ownership of the cabana house and the administration of the "project" using the cabana house to be located and registered in Horry County (pursuant to the statutes) because the subject property and associated project must be located in North Myrtle Beach. This precludes a non-local homeowners' association from owning

a cabana house or establishing a "project" outside the City to access a cabana house, and plainly discriminates against interstate commerce in both its practical and legal effect.

Moreover, in response to Interrogatories propounded by Defendants regarding the purpose behind the geographical ownership restrictions set forth in Sections 23-2 and 23-22 of the Zoning Ordinance, the City stated: "This requirement operates to encourage and support local, private developments and their corresponding homeowner's associations (as opposed to non-local, corporate enterprises) by providing them with a private beach club and access point to the beach. It also encourages investment in the City rather than in projects outside of the City." This candid explanation of the purpose behind the residency requirement, coupled with the City's repeated testimony at trial acknowledging the explanation is telling. The City admits that one of the purposes behind these restrictions is economic protectionism—to incentivize investment in the City while restricting or outright prohibiting ownership and use from outside the City. *Dean Milk*, 340 U.S. at 354. Incentivizing local commerce at the expense of interstate commerce is one of the chief evils the Commerce Clause seeks to prevent and renders the challenged portions of the Zoning Ordinance unconstitutional. *See Carbone,* 511 U.S. at 390.

The City acknowledges an economic interest in ensuring that visitors to the City decide to stay in accommodations located in the City. If the City were to allow the RV Resort in Conway to have access to a cabana house, it would eliminate an important reason for tourists to stay within the City limits. The result is that the City is unable to collect the accommodation taxes that would have been paid by those seeking lodging within the City. Consequently, the residency requirement limiting ownership of a cabana house promotes financial investment within the City, to the exclusion of non-local entities. Avoiding this sort of "economic Balkanization" is one of the central purposes of the dormant Commerce Clause. *Hughes*, 441 U.S. at 325.

B. The City Cannot Withstand its Constitutional Burden.

The conclusion that the residency requirement for ownership of a cabana house discriminates against interstate commerce puts it "on death's doorstep." *Hignell-Stark*, 46 F.4th at 328. The restrictions can "survive only if [they] advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id*.

The City offered three separate interests that are served by the restrictions in sections 23-2 and 23-22: (1) responsiveness, (2) quality of life, and (3) preservation of property values. Defendants did not dispute that these are legitimate interests; however, all can be adequately served by reasonable nondiscriminatory alternatives; therefore, none of them can justify the restrictions.

First, the City claims that the homeowners' association ownership requirement is necessary to address its "responsiveness" concerns. The City claims that it has a more successful track record dealing with homeowners' associations and believes they are more responsive to the City's concerns, addressing issues more quickly than other forms of entities. Granted, the City has not conducted any studies to back up this assertion, but believes its anecdotal impressions are sufficient. While the homeowners' association ownership requirement might help the City achieve its responsiveness goal, the Court needs to look no further than the Zoning Ordinance's penalty provision found in section 23-7 to find reasonable nondiscriminatory alternatives available to the City to ensure responsiveness. Section 23-7 provides that violations of the conditions and safeguards established in connection with special exceptions, like cabana houses, shall constitute a misdemeanor, and any person who violates the Zoning Ordinance shall, upon conviction thereof, be fined in an amount not exceeding $500.00, imprisonment for a period not exceeding 30 days, or both. Each day such violation continues shall be considered a separate offense. Accordingly, this enforcement mechanism could be utilized to ensure owners of cabana houses are responsive

to requests from the City. The City could also increase the penalties imposed on cabana house owners who fail to respond to the City when an issue arises. This would create a stronger incentive to quickly respond to the City when called upon and would also help the City fund any increase in its enforcement efforts.[15]

Second, the City argued that limiting the ownership of cabana houses to homeowners' associations for projects in North Myrtle Beach preserves "quality of life." Specifically, the City testified that quality of life in the community is advanced when projects are developed in a safe and efficient manner and that requiring a cabana house to be used exclusively by a project within the City helps take pressure off the oceanfront by directing investment elsewhere in the City.

The City's legitimate concerns about quality of life are achievable by enforcement of the remaining provisions in section 23-22, which govern the use of approved cabana houses. For example, section 23-22(4)(d)(4) requires that use of a cabana house must be "in substantial harmony with the area in which it is to be located." Additionally, the use of a cabana house may "not be injurious to the adjoining property" or "discourage or negate the use of surrounding property for use(s) permitted by right." North Myrtle Beach, S.C. Code § 23-22(4)(d)(5)-(6). And again, as stated above, enforcement of these provisions, through Section 23-7, would not only incentivize cabana house owners and users to adhere to the requirements set forth in Section 23-22, but would also fund increased enforcement. The City has not shown that these interests can only be served by requiring Defendants to cease and desist owning and operating the Beach Club.

Third, the City claims preservation of property values is another interest served by the discriminatory residency requirement for cabana houses. However, as discussed in detail above,

[15] Notwithstanding the City's arguments that these enforcement tools would not be meaningful to a large corporation like Sun Communities, Inc., Defendants' witnesses testified otherwise. Having never availed itself of these enforcement tools, the City cannot be heard to claim that they would be ineffective.

increased enforcement of the other provisions already identified in section 23-22 through the enforcement mechanism provided for in section 23-7 present a clear reasonable alternative method for achieving the City's interest in preserving property values.

Through these provisions already in existence, reasonable nondiscriminatory alternative measures exist to advance the City's legitimate local interests regarding the ownership of cabana houses, without resorting to discriminating against interstate commerce in violation of the dormant Commerce Clause. Although the City's position is that there are no other alternatives to achieve its interests other than prohibiting non-local ownership of a cabana house, common sense says otherwise, and the City cannot carry its burden under the requisite strict scrutiny analysis.

CONCLUSION

Based on the foregoing, the Court finds that the residency requirement in sections 23-2 and 23-22 of the City's Zoning Ordinance discriminates against interstate commerce in violation of the U.S. Constitution's dormant Commerce Clause and is, therefore, unconstitutional. By their explicit terms, sections 23-2 and 23-22 impose an unconstitutional burden on interstate commerce without any justification. The City cannot escape the plain language of these provisions, and the requirement that a cabana house located in the R-4 Resort Residential District must be owned by a homeowners' association for a project located in the City discriminates against interstate commerce on its face, in its effect, and in its purpose. Accordingly, the City is permanently enjoined from enforcing those restrictions against Defendants as well as against any other current or future owners of cabana houses in the R-4 Resort Residential District

Additionally, the Court finds that all other provisions of the City's Zoning Ordinance are constitutional and fully enforceable. The Court also acknowledges that Defendants have

knowingly violated the remaining portions of the City's Zoning Ordinance on numerous occasions as stated herein above.

However, this court lacks the time and resources to enforce the day-to-day disputes between a cabana house and neighboring homeowners' associations. These matters are better addressed by local authorities. Otherwise, cities across this state would be encouraged to turn to circuit courts to handle day-to-day issues, bypassing the local authorities and municipal courts and preventing them from doing the job they are better suited to perform. Otherwise, the responsibilities of cities to fund and equip local law enforcement with the capacity to enforce local ordinances would be passed on to the circuit courts. South Carolina Circuit Courts are occupied with substantial civil and criminal dockets. Circuit courts resources are better utilized and preserved for these dockets and enforcement of local ordinances, such as those mentioned in this case, are better left to the local authorities.

Furthermore, the Court would like to extend its appreciation of the professionalism, civility, and advocacy each attorney exhibited on behalf of their clients throughout this trial. While it sometimes appears that general respect and civility among lawyers is in decline, the same is not true in this case. It was a pleasure working with each of these attorneys as they set an example for all other attorneys to follow.

IT IS SO ORDERED.

Horry Common Pleas

Case Caption: North Myrtle Beach City of VS Sun TRS Ocean Club LLC , defendant, et al

Case Number: 2021CP2607489

Type: Order/Other

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157