RECEIVED
Apr 03 2024
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Case No. 2019-CP-22-00212
Appellate Case No. 2023-00646

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

v.

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

CORRECTED RECORD ON APPEAL (VOLUME IX)

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.

Henrietta Golding (SC Bar No. 2173)
Taylor K. Voegel (SC Bar No. 04770)
Burr & Forman LLP
2411 Oak Street, Suite 206 (29577)
P.O. Box 336
Myrtle Beach, SC 29578
(843) 444-1107
hgolding@burr.com
tvoegel@burr.com

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

1501
1501
1509
1517
1523
35

ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Holly Richardson

Holly Richardson

Holly Richardson

Holly,

Holly,

Holly,

Attached is the whole package as

Thanks,
Beth

Thanks,
Beth

Thanks,
Beth

Beth Hast Hauck, AIA

Beth Hast Hauck, AIA

Beth Hast Hauck, AIA

To: Luis Soloduk

To: Luis Soloduk

To: Luis Soloduk

Thank you for your quick response

Holly

Holly

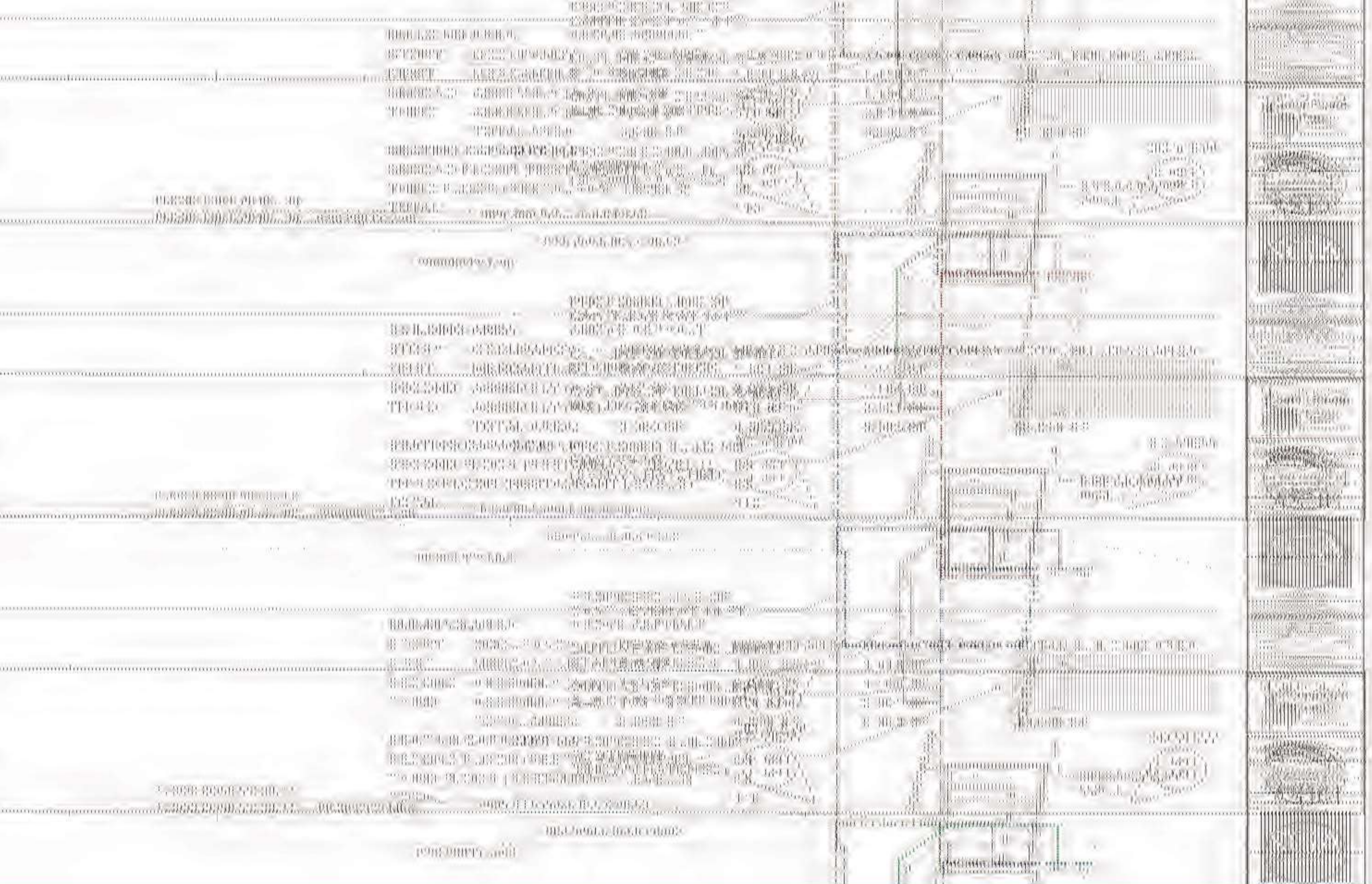
Holly

28

DEFS 00125

ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

DEFS 00126



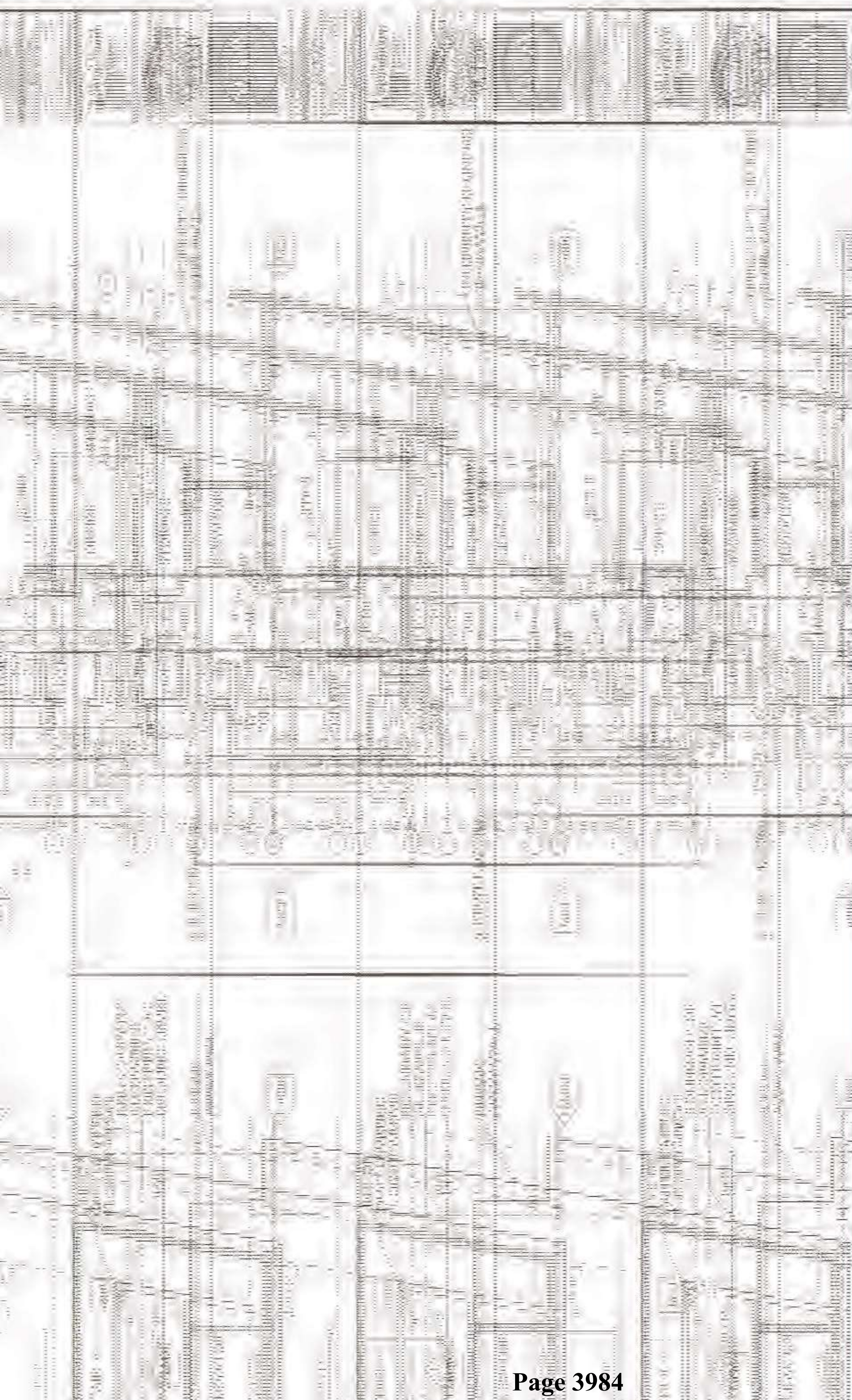
ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

DEFS 00127

ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

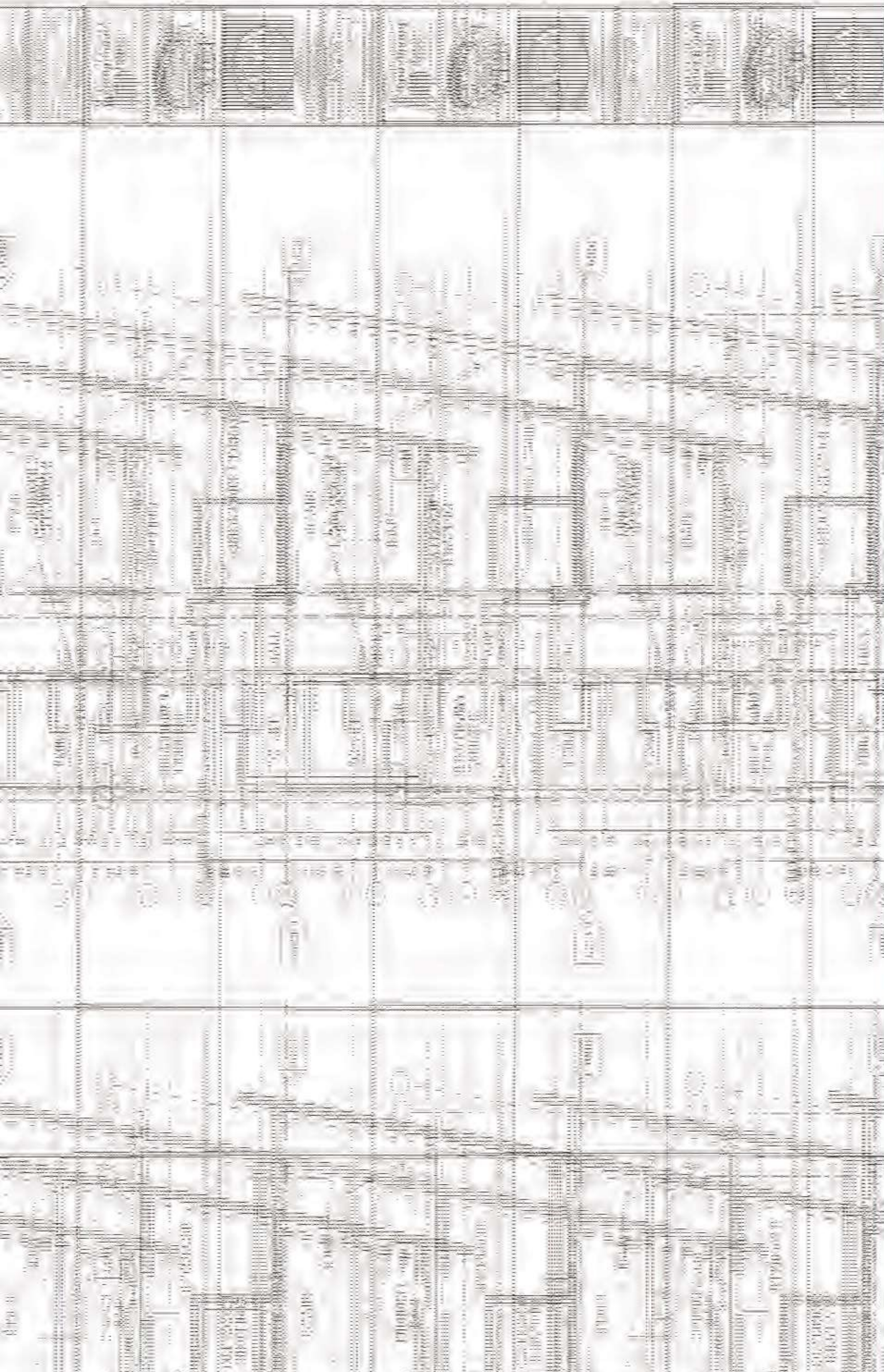
DEFS 00128

ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212



ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2202212

DEFS 00130



ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2202112

DEFS 00131

DEFS 00132

ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2202012

ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

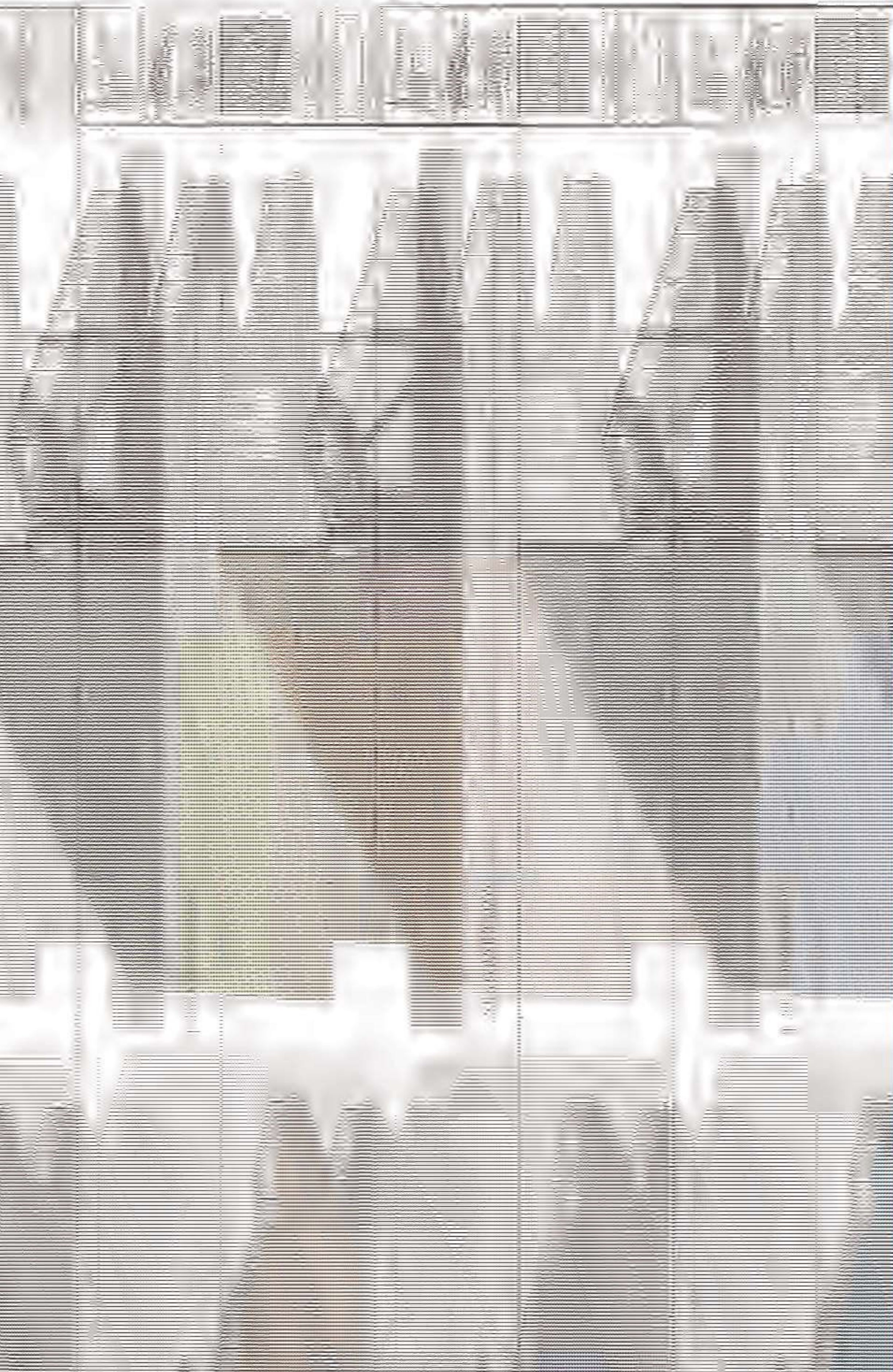
ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

DEFS 00134

ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

DEFS 00136



ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

DEFS 00137

Boyd Johnson

From: Boyd Johnson
Sent: Tuesday, June 11, 2019 6:46 PM
To: Holly Richardson
Subject: MQ

Let's talk about the procedural problems the Gulf S lawyer is alleging.

Boyd Johnson
Director, Planning and Code Enforcement
Georgetown County, SC
Office (843) 545-3162

ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

39

Holly Richardson | Holly Richardson | Holly Richardson

Thank you.
Heather

Heather

ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

DEFS 00138

43

Page 3994

DEFS 00058

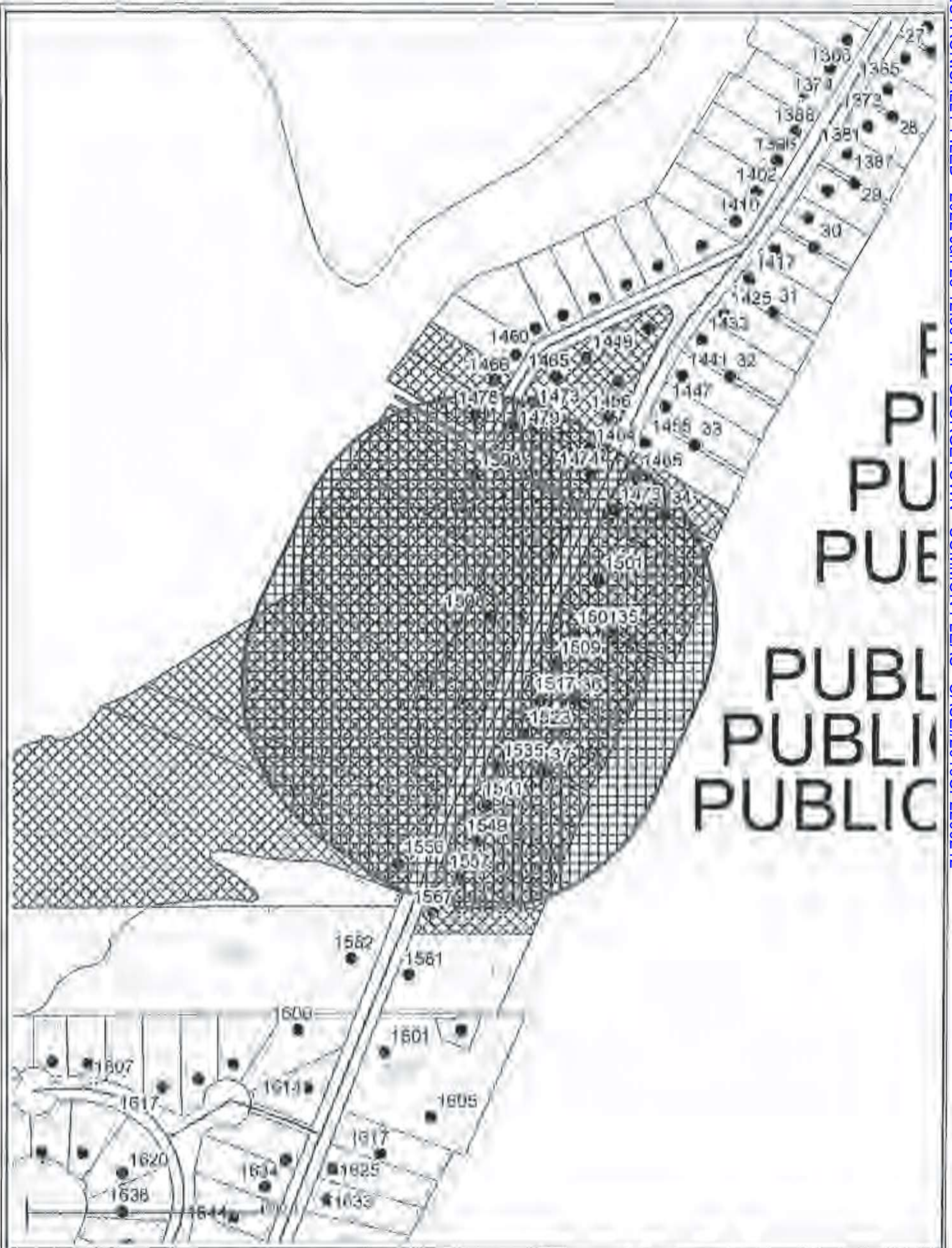
ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

[illegible]	41-0125-010-00-03		41-0125-010-00-00			WACCAMAW DR									[illegible]	[illegible]-05 20:00:00		[illegible] BLK B GARDEN CITY	
15	D-031	41-0125-012-00-00	18811.68857422	41-0125-012-00-00	1523	SOUTH WACCAMAW DR	KUPERMAN PAUL B	KUPERMAN JENNIFER D	133 GREEN LAKE DRIVE		MYRTLE BEACH	SC	29572	1	[illegible]-255	2017-04-01 20:00:00	900000	38 BLK B GARDEN CITY	N800
16	1-[illegible]	41-0125-025-04-00	17713.[illegible]	41-0125-025-04-00	154[illegible]	SOUTH WACCAMAW DR	OGDEN SHERRIL R CO-TRUSTEE	OGDEN PHILLIP R CO-TRUSTEE	790 OLD LATHEMTOWN ROAD		CANTON	GA	30115	1	2052-235	2017-12-28 19:00:00	1090000	LOT 2 BLK F SOUTH POINT	N500
17	S-076	41-0129-005-02-00	17592.[illegible]	41-0129-005-02-00	1549	SOUTH WACCAMAW DR	DEBERRY JOHN S		PO BOX [illegible]		FLORENCE	SC	29503	1	[illegible]	2006-12-[illegible] 15:00:00	5	3 BLK F SOUTH POINT	[illegible]
18		41-0129-005-05-00	15274.[illegible]	41-0129-005-02-00	1537	SOUTH WACCAMAW DR	YOUNG STEPHEN F	BATTS SARAH F	[illegible] STONYBROOK RD		ROCKY MOUNT	NC	27804	1	[illegible]-[illegible]	2016-11-14 [illegible]		4 BLK F SOUTH POINT	[illegible]
19	6-438	41-0129-005-03-00	23834.[illegible]	41-0129-005-03-00	1535	SOUTH WACCAMAW DR	GULFSTREAM CAFE INC THE		225 ALBEMARLE RD		CHARLESTON	SC	29407	1	254-779	[illegible]-24 [illegible]	189612	LOTS A & B PLAT 6-438	R15[illegible]
20	6-438	41-0129-005-00-00	[illegible]	41-0129-005-00-00		SOUTH WACCAMAW DR	PALMETTO INDUSTRIAL DEVELOP LLC		611 WEST PALMETTO STREET		FLORENCE	SC	29501	4.5	3421-274	2014-05-19 20:00:00	E	BLK D SOUTH POINT	[illegible]
21	106-214	41-0129-032-61-02	102775.03720215	41-0129-032-61-00		BASIN DR	PALMETTO INDUSTRIAL DEVELOP LLC		611 WEST PALMETTO STREET		FLORENCE	SC	29501	1	3421-267	2014-05-19 20:00:00	[illegible]	YACHT BASIN [illegible]	[illegible]
22	9-214	41-0129-002-00-00	25953.29794494	41-0129-002-00-00	1505	SOUTH WACCAMAW DR	PALMETTO INDUSTRIAL DEVELOP LLC		611 WEST PALMETTO STREET		FLORENCE	SC	29501	1	3421-267	2014-05-19 20:00:00	[illegible]	LTS 3, 4 & 5, BLK C SOUTH POINT AREA TRACTS	N2[illegible]
23		41-0129-[illegible]	109[illegible].11877441	41-0129-052-00-[illegible]	1308	BASIN DR	MARLIN QUAY HOMEOWNERS ASSN		SOUTH WACCAMAW DR		GARDEN CITY	SC	29576	1	205-270	1982-10-31 19:00:00		MARLIN QUAY COMMON AREA	E451

Page 3995

DEFS 00059

ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212



ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

DEFS 00060

ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Judy Blankenship

From:	Tiffany Coleman
Sent:	Monday, September 24, 2018 2:52 PM
To:	NancyG@surfsiderealty.com
Cc:	Holly Richardson; Judy Blankenship; Boyd Johnson
Subject:	Georgetown County Planning Commission: Application to Amend the Marlin Quay PD
Attachments:	Marlin Quay AMPD 9-18-21424.pdf

Hello Nancy:

Please find attached a notice for property owners regarding an amendment to the Marlin Quay PD. We are available to answer any questions.

Thank you,

Tiffany Coleman
Associate Planner Georgetown County
129 Screven St.
Georgetown,SC 29440
Phone: 843-545-3158
E:mail: tcoleman@gtcounty.org

ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Tiffany Coleman

From: Tiffany Coleman
Sent: Wednesday, October 10, 2018 4:27 PM
To: Judy Blankenship
Subject: FW: Notice of Public Hearing, Thursday Oct. 18, 2018 - Amendment of Marlin Quay Planned Development

FYI...

Tiffany Coleman
Associate Planner Georgetown County
129 Screven St.
Georgetown,SC 29440
Phone: 843-545-3158
E:mail: tcoleman@gtcounty.org

From: Nancy Gardner [mailto:NancyG@surfsiderealty.com]
Sent: Wednesday, October 10, 2018 4:24 PM
To: Constance Lowery <lhdolldoc@hotmail.com>; Tiffany Coleman <tcoleman@gtcounty.org>
Cc: Holly Richardson <hrichardson@gtcounty.org>; Boyd Johnson <bjohnson@gtcounty.org>
Subject: RE: Notice of Public Hearing, Thursday Oct. 18, 2018 - Amendment of Marlin Quay Planned Development

I did send the notice you sent the Association to all owners whose email address the management office had on record. I believe this is how Ms. Lowery received her notice and talking about. We did not receive any plans or diagram of the proposed building to forward to all.

From: Constance Lowery [mailto:lhdolldoc@hotmail.com]
Sent: Wednesday, October 10, 2018 4:01 PM
To: tcoleman@gtcounty.org
Cc: Holly Richardson; Boyd Johnson; Nancy Gardner
Subject: Notice of Public Hearing, Thursday Oct. 18, 2018 - Amendment of Marlin Quay Planned Development

Dear Ms. Coleman:

I believe you are the Georgetown County Associate Planner to be contacted with any questions in regard to the above Notice.

I note that you forwarded the Notice to Nancy Gardner (Surfside) of the above meeting. I also note that you forwarded to Chris Sanders, Marlin Quay Homeowner, by e-mail, the Application to Amend a Planned Development (PD) submitted by Attorney Stacy for Palmetto Industrial Development, LLC. While I see signatures of Mr. Stacy and Dr. Lawhon, on page 3 of that Application, no dates appear. Preliminary red-lined drawings were included, but no hard information as to the elevations or number of floors of the planned building was included. I am most interested in knowing of this latter information.

Page 3 of the Application calls for " Adjacent Property Owners Information (required)". I own two units within 400 feet of the subject property, and did not receive this Notice in the US mail. I submit that paragraphs 1 and 2 (page 3) have not properly been executed. I believe that the many owners within 400 feet of the subject property (Marlin Quay condos and homeowners on S. Waccamaw Drive) are entitled to receive this Notice of Public Hearing by US Mail, as outlined in the Application, not a two-stepped, or three-stepped blanket process of e-mail.

I welcome your explanation of these discrepancies. Thank you for your time

Yours truly,

Constance A. Lowery
Owner of Condos 501 and 205 at Marlin Quay
Mailing address: 1181 Crooked Oak Drive, Pawleys Island, SC 29585
Telephone: 607-229-6044
October 10, 2018

Sent from Mail for Windows 10

ELECTRONICALLY FILED - 2022 Jan 25 12:36 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2019-CP-22-00212

The Gulfstream Café, Inc.,

Plaintiff,

vs.

Georgetown County, Georgetown County Council, John Thomas, Ron Charlton, Lillie Johnson, Austin Beard, Steve Goggans, and Louis Morant, individually and in their official capacity as Georgetown County Councilmembers,

Defendants.

DEFENDANTS' PRE-TRIAL BRIEF
Rule 16(c), SCRCP

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

I. STATEMENT OF THE FACTS

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

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

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

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

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

In November 2016, Plaintiff filed a lawsuit against Palmetto and Lawhon alleging interference with its easement rights. This captioned action is *The Gulfstream Café, Inc. v. J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC*, C.A. No. 2016-CP-22-00961.[2] Initially, for construction of the new building, Palmetto submitted to the Georgetown County Planning Department (the "Planning Department") an application for a minor amendment to the Marlin Quay PD ("Version 1"). Due to Plaintiff's opposition to Version 1 being classified as a minor amendment, in November 2017, Palmetto submitted an application for a major amendment to the Marlin Quay PD. This application is known as Version 2. The Georgetown County Planning Commission ("Planning Commission") recommended approval of the amendment to the PD. The

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

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

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

Because the Marlin Quay PD permitted the proposed structure to be outside the footprint of the former building in certain limited areas, Palmetto submitted an application ("Version 3") to amend the existing PD on August 27, 2018.[4] Keeping with common practices, the Planning Department generated a list of property owners from the Georgetown County Geographic Information System ("GIS") within 400 feet of Version 3. In accordance with the generated list, the Planning Department mailed notice to property owners listed in the GIS within 400 feet of the property. With the knowledge that the GIS list of property owners included the Marlin Quay Homeowners' Association, but not the individual unit owners of the Marlin Quay Condominiums,

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

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

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

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

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

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

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

former building. This amendment also continued the requirements of the PD regarding the heated square footage[5] for the new structure; sixty-two (62) parking spaces, including three (3) compact spaces underneath the new structure; and a total seating capacity not to exceed 110 persons.

II. FACTS IN CONTROVERSY

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

III. LEGAL ISSUES INVOLVED

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

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

---

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

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

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

function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations." *Id.*

A. Plaintiff's Causes of Action

1. Declaratory Judgment

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

Plaintiff attacks Ordinance 2018-40 on the following grounds:

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

Each of these alleged deficiencies is addressed below.

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

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

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

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

The South Carolina Supreme Court has stated: "[I]n the context of a zoning action involving property, it must be clear that the state's action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'" *Dunes*, 401 S.C. at 297, 737 S.E.2d at 610 (quoting *Sylvia Dev. Corp. v. Calvert Cnty.,* 48 F.3d 810, 827 (4th Cir. 1995)). "The State's deprivation of the property interest must fall so far beyond the outer boundaries of legitimate governmental authority that no process could remedy the deficiency. . . . Every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no

room for reasonable doubt that it violates some provision of the Constitution." *Id.* at 296, 737 S.E.2d at 609 (quoting *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 663 (2011)).

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

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

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

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

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

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

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

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

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

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

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

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

Section 1702.1 of the Zoning Ordinance provides:

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Government regulation effectuates a *per se* taking in two scenarios: (1) where an owner is required to suffer a permanent physical invasion of property, however minor. . . ; or (2) 'where [a] regulation denies all economically beneficial or productive use of land.'" *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 313, 737 S.E.2d 601, 619 (2013) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992)).

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

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

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

5. Inverse Condemnation

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

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

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

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

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

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

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

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

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

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

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

B. <u>Defendants' Defenses</u>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In its action against Palmetto and Lawhon, Plaintiff alleged that "[o]n or around the second week of November 2016, [Palmetto and Lawhon] initiated a construction project involving the Marlin Quay Marina, and [] completely obstructed access to the Parking Lot by [Plaintiff]." C.A., No. 2016-CP-22-00961, Compl. ¶ 25. Plaintiff further alleged that the "construction project where the Plans call for improvements [] will permanently interfere with Plaintiff's rights to use the Parking Lot." C.A., No. 2016-CP-22-00961, Compl. ¶ 28. After a jury trial, the jury found for Plaintiff, awarding just $1,000 in damages. The circuit court issued an injunction.

The court's order stated in full:

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

(Emphasis added). Accordingly, at issue in the 2016 action was Plaintiff's challenge of Palmetto's construction of a building currently at issue in this suit. As evidenced by the circuit court's issuance of an injunction concerning the construction of the building and its effect on the Parking Lot, the issue of whether the building would infringe on Plaintiff's property rights was actually adjudicated and directly determined by the trial court. Because Plaintiff sought injunctive relief and asserted the construction of that building would "permanently interfere with Plaintiff's rights to use of the Parking Lot," the court's holding regarding the building's permitted construction was necessary to support that judgment. Plaintiff alleges here that the building, as approved by the County, will result in damages due to shared use of the Parking Lot. However, this issue was already determined and ruled upon by the circuit court in its injunction, and the court held that a building may be constructed so long as it does not exceed the footprint of the former building, and that version is the version approved by the County—2018-40—and at issue in this case. As such, Plaintiff is estopped from complaining of any alleged damage resulting from the passage of Ordinance 2018-40, which merely approved an amendment that actually conformed with the trial court's prior order.

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

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

4. Plaintiff has Suffered No Damages.

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

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

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

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

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

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

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

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

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

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

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

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

IV. <u>LIST OF EXHIBITS & WITNESSES</u>

A. List of Exhibits (Defendants)

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

3. Georgetown Times Notice of Public Hearing for Version 3 Application

4. Coastal Observer Notice of Public Hearing for Version 2 Application

5. Coastal Observer Notice of Public Hearing for Version 3 Application

6. Emails between Planning Department staff and Georgetown Times/Coastal Observer re: Notice of Public Hearing

7. Picture of Sign Posted at Marlin Quay PD for Version 3 Application

8. Version 2 Application

9. Version 2 Staff Report

10. Version 2 Planning Commission Meeting Minutes

11. Version 2 County Council Meeting Minutes

12. Version 2 Approval by County Council

13. Notice of Public Hearing set for December 21, 2017 regarding Version 2

14. Version 3 Application

15. Version 3 Staff Report

16. Version 3 Planning Commission Staff Report

17. Version 3 Planning Commission Meeting Minutes

18. Version 3 County Council Meetings Agenda

19. Version 3 Approval by County Council

20. Final Plans submitted to the Planning Commission

21. Notice of Public Hearing set for October 18, 2018 regarding Version 3

22. October 2018 Sign-In Sheet for Public Comments at the Planning Commission Meeting regarding Version 3

23. December 11, 2018 Sign-In Sheet for Public Comments at County Council Meeting regarding Version 3

24. List of Property Owners adjacent to Marlin Quay PD and Map

25. Tiffany Coleman's email to Nancy Gardner at Surfside Realty dated December 14, 2017, attaching Notice of Amendment to PD (Version 2)

26. Email dated December 15, 2017 from Judy Blankenship regarding the posting of the Planning Commission Packet on the County's website

27. Email from Constance Lowery to Tiffany Coleman dated December 16, 2017, confirming receipt of Notice of Hearing regarding Proposed Amendment to PD (Version 2)

28. Tiffany Coleman's email to Nancy Gardner at Surfside Realty dated September 24, 2018, attaching Notice of Amendment to PD (Version 3)

29. Email from Nancy Gardner to Marlin Quay Condominium Unit Owners dated September 25, 2018, sending Notice of Proposed Amendment (Version 3)

30. Email from Nancy Gardner to Constance Lowery and Tiffany Coleman dated October 10, 2018, sending Notice to HOA to all owners whose email address the management office had on record (Version 3)

31. Emails dated October 12, 2018 from Judy Blankenship regarding the posting of the Planning Commission Packet on the County's website

32. Plaintiff's states and federal tax records and tax returns for the years 2010—2020

33. Plaintiff's 2018—2021 Property Tax Receipts and Invoices

34. George Knight's notes

35. George Knight's Appraisal Report dated April 24, 2020

36. George Knight's Restricted Appraisal Report dated March 11, 2020

37. Travis Avant's Appraisal Review Report dated February 16, 2022

38. Complaint, the Court's Amended Order Granting Temporary Injunction, Plaintiff's Motion to Alter or Amend the Judgment dated June 22, 2018, and the Court's Order Granting Plaintiff's Motion to Alter or Amend the Judgment dated July 27, 2018 from Case No. 2016-CP-22-00961

B. List of Witnesses (Defendants)

1. Holly Richardson

2. Boyd Johnson

3. Judy Blankenship

4. Tiffany Coleman

5. Nancy Gardner, Representative from Surfside Realty

6. Steve Goggans

7. Louis Morant

8. Travis Avant, ASA, ARM-RP, R/W-AC, Expert

9. J. Mark Lawhon

V. EVIDENTIARY ISSUES

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

1. Any evidence or mention of evidence related to Steve Goggans' involvement with the South Carolina Ethics Commission, including but not limited to, the September 16, 2019 Consent Order which Steve Goggans entered into, the transcript of the Board of Zoning Appeals hearing on February 2, 2017, and any evidence Mr. Goggans made an appearance at the Georgetown County Planning Commission meeting in 2017, or the emails or letters from Mr. Goggans to Mark Lawhon in 2016 and 2017;

2. Any pictures of renderings, other evidence, or mention of the former Marlin Quay Restaurant and Store building that previously occupied the property at issue;

3. Any evidence or mention that the marina store and restaurant should operate only during the daytime hours or that the former marina store and restaurant only operated during the daytime hours in the past;

4. Any evidence or mention of the differences between the construction of Version 2 and Version 3 buildings, including but not limited to, the type of material

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

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

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

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

8. Any statements or evidence that Palmetto's building plans or applications were declared "illegal" or "unlawful" by any court.

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

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

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

VII. STATUS OF SETTLEMENT NEGOTIATIONS

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

[*Signature on Following Page*]

BURR & FORMAN LLP

s/Henrietta U. Golding
Henrietta U. Golding, SC Bar #2173
2411 N. Oak Street, Suite 206 (29577)
Post Office Box 336
Myrtle Beach, SC 29578-0336
Ph: 843.444.1107
Fax: 843.443.9137
Email: hgolding@burr.com

Attorney for the Defendants

Myrtle Beach, South Carolina

March 16, 2022

STATE OF SOUTH CAROLINA **COUNTY OF GEORGETOWN** The Gulfstream Café, Inc., Plaintiff, vs. Georgetown County, Georgetown County Council, John Thomas, Ron Charlton, Lillie Johnson, Austin Beard, Steve Goggans, and Louis Morant, individually and in their official capacity as Georgetown County Councilmembers, Defendants.	))))))))))))))))))	**IN THE COURT OF COMMON PLEAS** **FIFTEENTH JUDICIAL CIRCUIT** **COUNTY OF GEORGETOWN** Civil Action No. 2019-CP-22-00212 **PLAINTIFF THE GULFSTREAM CAFÉ, INC.'S PRE-TRIAL BRIEF**

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

I. Statement of Facts of the Case.

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

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

Defendant Steve Goggans was involved in efforts by Palmetto to obtain the County's approval for a new structure on the site of the marina store and restaurant ("Version 1.0"). Palmetto ultimately abandoned its plans to build Version 1.0. Then, in November 2017, Palmetto submitted an "Application to Amend a Planned Development" for Marlin Quay seeking a "Change of Building Location" to obtain approval of Palmetto's plans for its new restaurant ("Version 2.0"). The application packet for Version 2.0 included architectural site plans, building elevations, and design plans showing seating layouts. The County approved the major amendment on February 27, 2018.

Palmetto's plan for Version 2.0 was challenged by Gulfstream in the action captioned The Gulfstream Café, Inc. v. J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC, C.A. No. 2016-CP-22-00961. Gulfstream prevailed in that action, as the jury found in favor of Gulfstream on its claim for interference with its easement. Accordingly, the Court issued a permanent injunction barring Palmetto from constructing a building on any portion of the property subject to the Gulfstream Easement (the "Injunction"). Version 2.0 was prohibited by this Injunction.

On August 27, 2018, Palmetto submitted another "Application to Amend a Planned Development" (the "Application") also requesting a "Change of Building Configuration" and a "Site Plan Amendment." Palmetto submitted the Application even though it had been less than twelve months from the hearing by the Planning Commission held in December 2017 on the application for Version 2.0. The Application sought approval of a different building layout, "Version 3.0." The County Staff Report on the Application stated that "[a] court has ordered that the site plan approved in February 2018 by Council cannot be built."

The Application for Version 3.0 did not provide building elevations or design plans showing the proposed seating layout at the time of initial application. Palmetto did not provide supplemental information until October 12, 2018, when counsel for Palmetto, Dan Stacy, provided building plans for the Application to the County. Mr. Stacy provided this information less than a week before the Planning Commission Meeting on the Application, held on October 18, 2018.

The Application required that "[a] list of all persons (and related Tax Map Numbers) to Whom Envelopes were addressed to Must Also Accompany the Application." The Marlin Quay condominiums are within 400 feet of Palmetto's property, and the County's Zoning Code required that the owners of the condominiums receive mailed notice of the Application. The County only mailed notice to the Marlin Quay Homeowners Association and did not mail notice to each individual owner of the Marlin Quay condominiums. Instead, the County sent notice via e-mail to the manager of the Marlin Quay Homeowners Association, Nancy Gardner, asking her to provide notice. Homeowners who received notice by this method only received notice via email, not by mail.

At the time of the Application, the County was aware that multiple entities, including Gulfstream, utilized the parking lot. The Staff Report recognized that Palmetto's new restaurant would require 51 of the 62 parking spaces for the site, and that Gulfstream and the marina used the parking lot, but the County did not evaluate the parking needs of Gulfstream or the marina. The County did not do any evaluation under the parking regulations of the County's Zoning Code regarding how many parking spaces were required for Gulfstream or the marina when considering the Application.

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

II. Statement of Facts in Controversy.

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

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

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

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

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

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

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

Gulfstream will present evidence indicating that Defendant Goggans used his influence and relationships with County planning staff to obtain favorable outcomes for Palmetto, including related to parking and how to calculate the permissible square footage for Version 1.0. Gulfstream contends this influence has infected the entire process for the applications related to approval of Palmetto's building, including Version 3.0.

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

Gulfstream has presented an appraisal indicating that after the loss of the easement parking, the only use of Gulfstream's property will be for vacant land. Gulfstream's appraisal states that the grant of the Application will result in a loss in the value of Gulfstream's property in the amount of $1,760,100.

III. The Legal Issues Involved.

Plaintiff has pled the following Causes of Action:

A. Declaratory Judgment regarding violations of the County's Ordinances and violations of Gulfstream's constitutional rights

B. Violation of Substantive Due Process Rights – Article I Section 3 of the South Carolina Constitution

C. Relief Under 42 U.S.C. § 1983 for Violation of Right to Substantive Due Process – United States Constitution

D. Violation of Right to Procedural Due Process – Article I Section 3 South Carolina Constitution

E. Relief Under 42 U.S.C. § 1983 for Violation of Right to Procedural Due Process – United States Constitution

F. Violation of South Carolina's Taking Clause – Article I, Section 13 of the South Carolina Constitution

G. Inverse Condemnation

H. Attorneys' Fees

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

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

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

---

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

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

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

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

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

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

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

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

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

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

IV. Exhibits and Witness Lists.

Possible Witnesses:

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

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

Possible Exhibits:

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

(a) Any and all documents produced in discovery by any party or non-party;

(b) All pleadings, discovery responses served in the case, and any motions, responses, or supporting exhibits;

(c) Demonstrative evidence generated by or for Plaintiff or their counsel, including without limitation any charts, images, or other visual depictions;

(d) Documentary or physical evidence that may be listed herein by Defendants;

(e) Any and all documents that may be used for impeachment purposes;

(f) Any and all documents produced by Defendants in response to FOIA requests related to this matter.

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

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

V. Unusual Problems Relating to Evidence.

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

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

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

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

VII. Settlement Negotiations.

Settlement negotiations have been attempted and proven unsuccessful.

Respectfully submitted,

/s/ Sean M. Foerster
Sean M. Foerster (SC Bar # 77466)
ROGERS TOWNSEND & THOMAS, PC
220 Executive Center Drive (29210)
Post Office Box 100200
Columbia, South Carolina 29202-3200
(803)771-7900
sean.foerster@rtt-law.com

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

/s/ Andrea J. Pearson
Andrea J. Pearson (GA Bar # 409604)
Admitted Pro Hac Vice
BLOOM PARHAM, LLP
977 Ponce de Leon Ave. NE
Atlanta, Georgia 30306

(404) 577-7710 Tel.
apearson@bloom-law.com

Myrtle Beach, South Carolina
March 16, 2022

Attorneys for Plaintiff

ATTACHMENT A

PLAINTIFF'S TRIAL EXHIBIT LIST

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

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

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

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

ELECTRONICALLY FILED - 2022 Aug 24 4:56 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2019-CP-22-00212

The Gulfstream Café, Inc.,	)	
	)	
Plaintiff,	)	**DEFENDANTS' MOTION IN LIMINE**
	)	
vs.	)	
	)	
Georgetown County, Georgetown County Council, John Thomas, Ron Charlton, Lillie Johnson, Austin Beard, Steve Goggans, and Louis Morant, individually and in their official capacity as Georgetown County Councilmembers,	)	
	)	
Defendants.	)	

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

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

2. **Legislative Immunity.** Any questions of Defendant Goggans soliciting information subject to legislative immunity as well as not permitting any references to County Council deliberations at any time before the jury, including opening statements and closing arguments;

3. **Old Building.** Any picture of renderings, other evidence, or mention of the initial Marlin Quay Restaurant and Store building that was demolished in November 2016 (Plaintiff's Exhibit 11);

4. **Business Operation Hours.** Any evidence or mention that the marina store and restaurant should operate only during the daytime hours or that the former marina store and restaurant only operated during the daytime hours in the past (Plaintiff's Exhibits 2 and 3);

5. **"Violation of Easements."** Any evidence or mention that the County allegedly "violated the easement" between Plaintiff and Palmetto Industrial Development, LLC ("Palmetto");

6. **Deaths, Wrecks, or Accidents.** Any evidence or mention of any alleged deaths, wrecks, accidents, or dangerous traffic near the parking lot at issue in this civil action, including, but not limited to, references contained in Plaintiff's Exhibit 44 (December 11, 2018 Georgetown County Council Meeting Minutes, including statements by Jef Kirk, Clete Skipper, Rob Boros, Chris Causey, and Micah Sawyer);

7. **Declarations of Illegality.** Any statements or evidence that Ordinance 2018-03 (relating to "MQ2" or "Version 2") was declared "illegal" or "unlawful" by any court;

8. **Aerial Photograph.** Plaintiff's Exhibit 68 produced by Plaintiff after discovery ended on September 23, 2021;

ELECTRONICALLY FILED - 2022 Aug 24 4:56 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

9. **Palmetto's Current Status.** Any evidence, testimony, argument, or mention about any issue of whether Palmetto Industrial Development, LLC (property owner) is violating the current zoning ordinances or any part thereof;

10. **Additional Expert Witness.** Additional expert witness, Jody Bishop, who was disclosed on Friday, August 12, 2022, two weeks prior to the start of trial and after the close of discovery;

11. **The Exclusion of Undisclosed Witnesses.** In Plaintiff's Pre-Trial Brief, it identified Jef Kirk, Linda Barnaba, and Theresa Floyd as witnesses. They were not identified as witnesses in Plaintiff's Answers to Defendants' Interrogatories;

12. **Experts' Written Material.** Written reports, findings, and "work files" of Plaintiff's named experts, including Jake Knight, Jim Moring, and Robert Castles, as well as Jody Bishop, including Plaintiff's Exhibits 47 (George "Jake" Knight's Appraisal Report), 70 (Jake Knight's Work File), 72 (Jake Knight's Appraisal), 73 (Jim Moring's "Work File"), and 74 (Robert Castles' "Work File");

13. **Jury Verdict Form.** Plaintiff's Exhibit 18, a copy of the jury's completed Verdict Form in civil action number 2016-CP-22-00961, captioned *The Gulfstream Café, Inc. v. J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC*;

14. **Incomplete Electronic Communication.** Plaintiff's Exhibit 38, an email from Boyd Johnson to Holly Richardson attaching a document that was provided to the Planning Commission, but that attachment is not included in Plaintiff's exhibit;

15. **Letter Containing Notations and Impressions.** Plaintiff's Exhibit 60, a copy of letter from Plaintiff's counsel to County Council on which Holly Richardson made handwritten notes on the letter;

ELECTRONICALLY FILED - 2022 Aug 24 4:56 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

ELECTRONICALLY FILED - 2022 Aug 24 4:56 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Aug 24 4:56 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

BURR & FORMAN LLP

_s/Henrietta U. Golding____
Henrietta U. Golding, S.C. Bar # 2173
2411 Oak Street, Suite 206 (29577)
Post Office Box 336
Myrtle Beach, SC 29578
Phone: (843) 444-1107
Fax: (843) 443-9137
Email: hgolding@burr.com

Attorney for Defendants

Myrtle Beach, South Carolina

August 24, 2022

ELECTRONICALLY FILED - 2022 Aug 24 4:56 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN) CIVIL ACTION NO. 2019-CP-22-00212

The Gulfstream Café, Inc.,

Plaintiff,

vs.

Georgetown County, Georgetown County Council, John Thomas, Ron Charlton, Lillie Johnson, Austin Beard, Steve Goggans, and Louis Morant, individually and in their official capacity as Georgetown County Councilmembers,

Defendants.

DEFENDANTS' PRE-TRIAL BRIEF
Rule 16(c), SCRCP

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

I. STATEMENT OF THE FACTS

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

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

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

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

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

Initially, for construction of the new building, Palmetto submitted to the Georgetown County Planning Department (the "Planning Department") an application for a minor amendment to the Marlin Quay PD ("MQ1"). Due to Plaintiff's opposition to MQ1 being classified as a minor amendment, in November 2017, Palmetto submitted an application for a major amendment to the Marlin Quay PD. This application is known as MQ2. The Georgetown County Planning Commission ("Planning Commission") recommended approval of the amendment to the PD. The Defendant County Council[2] approved the proposed amendment ("Ordinance Number 2018-03") on February 27, 2018. As a result of the amendment, the Marlin Quay PD permitted the Marlin

---

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

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

In November 2016, Plaintiff filed a lawsuit against Palmetto and Lawhon alleging interference with its Parking Lot easement rights. This captioned action is *The Gulfstream Café, Inc. v. J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC*, C.A. No. 2016-CP-22-00961.[3] In June 2018, the trial against Lawhon and Palmetto concluded, and circuit court issued a permanent injunction which permitted the construction of a new Marina Store and Restaurant building, but specified the new structure must be within the footprint of the former building as shown on a 1985 plat. The Order noted that "[t]he Court is specifically not talking about height, only the outside boundaries."

Because the Marlin Quay PD permitted the proposed building to be outside the footprint of the former building in certain limited areas, Palmetto submitted an application ("MQ3") to amend the existing PD on August 27, 2018.[4] Keeping with common practices, the Planning Department generated a list of property owners from the Georgetown County Geographic Information System ("GIS") within 400 feet of the property. In accordance with the generated list, the Planning Department mailed notice to property owners listed in the GIS within 400 feet of the property. With the knowledge that the GIS list of property owners included the Marlin Quay Homeowners' Association, but not the individual unit owners of the Marlin Quay Condominiums,

---

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

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

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

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

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

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

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

former building. This amendment also continued the requirements of the PD regarding the heated square footage[5] for the new structure; sixty-two (62) parking spaces, including three (3) compact spaces underneath the new structure; and a total seating capacity not to exceed 110 persons.

II. FACTS IN CONTROVERSY

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

III. LEGAL ISSUES INVOLVED

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

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

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

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

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

function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations." *Id*.

A. Plaintiff's Causes of Action

1. Declaratory Judgment

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

Plaintiff attacks Ordinance 2018-40 on the following grounds:

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

Each of these alleged deficiencies is addressed below.

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

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

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

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

The South Carolina Supreme Court has stated: "[I]n the context of a zoning action involving property, it must be clear that the state's action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'" *Dunes*, 401 S.C. at 297, 737 S.E.2d at 610 (quoting *Sylvia Dev. Corp. v. Calvert Cnty.,* 48 F.3d 810, 827 (4th Cir. 1995)). "The State's deprivation of the property interest must fall so far beyond the outer boundaries of legitimate governmental authority that no process could remedy the deficiency. . . . Every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no

room for reasonable doubt that it violates some provision of the Constitution." *Id.* at 296, 737 S.E.2d at 609 (quoting *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 663 (2011)).

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 1702.1 of the Zoning Ordinance provides:

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

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

b. The MQ3 Application was not untimely or incomplete.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Government regulation effectuates a *per se* taking in two scenarios: (1) where an owner is required to suffer a permanent physical invasion of property, however minor. . . ; or (2) 'where [a] regulation denies all economically beneficial or productive use of land.'" *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 313, 737 S.E.2d 601, 619 (2013) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992)).

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

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

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

5. Inverse Condemnation

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

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

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

---

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

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

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

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

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

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

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

B. <u>Defendants' Defenses</u>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In its action against Palmetto and Lawhon, Plaintiff alleged that "[o]n or around the second week of November 2016, [Palmetto and Lawhon] initiated a construction project involving the Marlin Quay Marina, and [] completely obstructed access to the Parking Lot by [Plaintiff]." C.A., No. 2016-CP-22-00961, Compl. ¶ 25. Plaintiff further alleged that the "construction project where the Plans call for improvements [] will permanently interfere with Plaintiff's rights to use the

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

The court's order stated in relevant part:

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

(Emphasis added). Accordingly, at issue in the 2016 action was Plaintiff's challenge of Palmetto's construction of a building currently at issue in this suit. As evidenced by the circuit court's issuance of an injunction concerning the construction of the building and its effect on the Parking Lot, the issue of whether the building would infringe on Plaintiff's property rights was actually adjudicated and directly determined by the trial court. Because Plaintiff sought injunctive relief and asserted the construction of that building would "permanently interfere with Plaintiff's rights to use of the Parking Lot," the court's holding regarding the building's permitted construction was necessary to support that judgment. Plaintiff alleges here that the building, as approved by the County, will result in damages due to shared use of the Parking Lot. However, this issue was already determined and ruled upon by the circuit court in its injunction, and the court held that a building may be constructed so long as it does not exceed the footprint of the former building, and the conforming application (MQ3), was approved by the County in its adoption of Ordinance 2018-40. As such, Plaintiff is estopped from complaining of any alleged damage resulting from the passage of

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

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

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

4. Plaintiff has Suffered No Damages.

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

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

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

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

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

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

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

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

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

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

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

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

IV. LIST OF EXHIBITS & WITNESSES

A. List of Exhibits (Defendants)

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

21. 9/24/18 Email from Tiffany Coleman to Nancy Gardner attaching Notice of Public Hearing for Planning Commission Meeting on 10/18/18

22. 9/24/18 Email from Tiffany Coleman to Mark Nappier and Marlin Quay Board Members attaching Notice of Public Hearing for Planning Commission Meeting on 10/18/18

23. 9/25/18 Email from Nancy Gardner to Marlin Quay Unit Owners attaching Notice of Public Hearing for Planning Commission Meeting on 10/18/18

24. 10/12/18 Email from Nancy Gardner to Marlin Quay Unit Owners attaching design documents and Application

25. Planning Commission Staff Report for 10/18/18

26. 10/12/18 Ticket from Judy Blankenship for posting of 10/18/18 Planning Commission Meeting Packet on County's Website

27. Public Sign-In Sheet for Planning Commission Hearing on 10/18/18

28. County Planning Commission Minutes for 10/18/18 Public Hearing

29. Agenda and Minutes of County Council 11/13/18 Meeting (*First Reading*)

30. Agenda and Minutes of County Council 12/11/18 Meeting (*Second Reading*)

31. Agenda and Minutes of County Council 1/8/19 Meeting (*Third Reading*)

32. Ordinance No. 2018-40, adopted 1/8/19

33. Sign-In Sheet for County Council Meeting on 12/11/18

34. The Gulfstream Café, Inc.'s Tax Returns for Years 2010-2020

35. The Gulfstream Café, Inc.'s 2018-2021 Property Tax Receipts and Invoices

36. Travis Avant's Appraisal Review Report dated February 16, 2022

37. Plaintiff's Motion to Alter or Amend the Judgment filed June 22, 2018, *The Gulfstream Café, Inc. v. J. Mark Lawhon, et al.,* Civil Action No. 2016-CP-22-00961

38. Order Granting Plaintiff's Motion to Alter or Amend the Judgment dated July 27, 2018, *The Gulfstream Café, Inc. v. J. Mark Lawhon, et al.,* Civil Action No. 2016-CP-22-00961

B. List of Witnesses (Defendants)

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

V. EVIDENTIARY ISSUES

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

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

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

VII. STATUS OF SETTLEMENT NEGOTIATIONS

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

[*Signature on Following Page*]

BURR & FORMAN LLP

s/Henrietta U. Golding
Henrietta U. Golding, SC Bar #2173
2411 N. Oak Street, Suite 206 (29577)
Post Office Box 336
Myrtle Beach, SC 29578-0336
Ph: 843.444.1107
Fax: 843.443.9137
Email: hgolding@burr.com

Attorney for the Defendants

Myrtle Beach, South Carolina

August 24 2022

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF GEORGETOWN	)	**COUNTY OF GEORGETOWN**
	)	Civil Action No. 2019-CP-22-00212
The Gulfstream Café, Inc.,	)	
Plaintiff,	)	
vs.	)	
Georgetown County, Georgetown County Council; and Steve Goggans, individually and in his official capacity as Georgetown County Councilmember;	)	**PLAINTIFF THE GULFSTREAM CAFÉ, INC.'S AMENDED PRE-TRIAL BRIEF**
Defendants.	)	

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

I. Statement of Facts of the Case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The Legal Issues Involved.

Plaintiff has pled the following Causes of Action:

A. Declaratory Judgment seeking declaration that rezoning approval is invalid nunc pro tunc. Rezoning approval of Version 3.0 violates the County's Ordinances, South Carolina and United States Constitutions.

B. Violation of Substantive Due Process Rights – Article I Section 3 of the South Carolina Constitution

C. Relief Under 42 U.S.C. § 1983 for Violation of Right to Substantive Due Process – United States Constitution

D. Violation of Right to Procedural Due Process – Article I Section 3 South Carolina Constitution

E. Relief Under 42 U.S.C. § 1983 for Violation of Right to Procedural Due Process – United States Constitution

F. Violation of South Carolina's Taking Clause – Article I, Section 13 of the South Carolina Constitution

G. Inverse Condemnation

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

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

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

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

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

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

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

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

For Gulfstream's substantive due process claim, in Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280 (2013), the Supreme Court of South Carolina explained that "[i]n order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." Id. at 296. Moreover, "in the context of a zoning action involving property, it must be clear that the state's action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." Id. at 297 (quoting Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 827 (4th Cir. 1995)). The County arbitrarily and irrationally exercised its power by approving the Application, which had no substantial relation to the public health, public morals, public safety, and public welfare.

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

III. Exhibits and Witness Lists.

Possible Witnesses:

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

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

Possible Exhibits:

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

(a) Any and all documents produced in discovery by any party or non-party;

(b) All pleadings, discovery responses served in the case, and any motions, responses, or supporting exhibits;

(c) Demonstrative evidence generated by or for Plaintiff or their counsel, including without limitation any charts, images, or other visual depictions;

(d) Documentary or physical evidence that may be listed herein by Defendants;

(e) Any and all documents that may be used for impeachment purposes;

(f) Any and all documents produced by Defendants in response to FOIA requests related to this matter.

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

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

IV. Unusual Problems Relating to Evidence.

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

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

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

VI. Settlement Negotiations.

Settlement negotiations have been attempted and proven unsuccessful.

Respectfully submitted,

/s/ Sean M. Foerster
Sean M. Foerster (SC Bar # 77466)
ROGERS TOWNSEND & THOMAS, PC
220 Executive Center Drive (29210)
Post Office Box 100200
Columbia, South Carolina 29202-3200
(803)771-7900
sean.foerster@rtt-law.com

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

/s/ Andrea J. Pearson
Andrea J. Pearson (GA Bar # 409604)
Admitted Pro Hac Vice
BLOOM PARHAM, LLP
977 Ponce de Leon Ave. NE
Atlanta, Georgia 30306
(404) 577-7710 Tel.
apearson@bloom-law.com

Myrtle Beach, South Carolina
August 26, 2022

Attorneys for Plaintiff

ATTACHMENT A

PLAINTIFF'S TRIAL EXHIBIT LIST

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Aug 26 3:49 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	DOCKET NO.: 2019-CP-22-00212
The Gulfstream Café, Inc., Plaintiff, vs. Georgetown County; Georgetown County Council; and Steve Goggans, individually and in his official capacity as Georgetown County Councilmember; Defendants.	PLAINTIFF THE GULFSTREAM CAFÉ, INC.'S MOTIONS *IN LIMINE*

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

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

I. MOTION IN LIMINE STANDARD

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

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

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

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

1. Timing of Bringing this Lawsuit:

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

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

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

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

ELECTRONICALLY FILED - 2022 Aug 26 3:49 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

ELECTRONICALLY FILED - 2022 Aug 26 3:49 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

3. **Wealth or Monetary Worth**:

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

4. **Gulfstream's Tax Returns**:

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Aug 26 3:49 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

III. CONCLUSION

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

Respectfully submitted,

s/ Sean M. Foerster

Sean M. Foerster (SC Bar# 77466)
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

s/ Simon H. Bloom

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

s/ Andrea J. Pearson

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

Attorneys for Plaintiff the Gulfstream Café, Inc.

August 26, 2022

ELECTRONICALLY FILED - 2022 Aug 26 3:49 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2019-CP-22-00212

The Gulfstream Café, Inc.,	)	
	)	
Plaintiff,	)	**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION IN LIMINE**
	)	
vs.	)	
	)	
Georgetown County, Georgetown County Council, and Steve Goggans, individually and in his official capacity as Georgetown County Councilmember,	)	
	)	
Defendants.	)	

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

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

FACTS

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

In 2016 and 2017, Steve Goggans was principal architect for the Marlin Quay new building. Also, he served as a Georgetown County Councilmember. In 2016, Palmetto completed an application with the County for a minor amendment[2] ("MQ1") to the PD. This minor amendment passed, and Plaintiff appealed its passage to the Georgetown County Board of Zoning Appeals ("the Board").

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

---

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

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

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

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

---

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

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

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ARGUMENT

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

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

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

---

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

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

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

---

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

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

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

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

---

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

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

---

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

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

---

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

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

13. The jury verdict form is inadmissible hearsay.

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

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

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

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

---

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

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

CONCLUSION

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

[*Signature on Following Page*]

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

BURR & FORMAN LLP

_s/Henrietta U. Golding_____
Henrietta U. Golding, S.C. Bar # 2173
2411 Oak Street, Suite 206 (29577)
Post Office Box 336
Myrtle Beach, SC 29578
Phone: (843) 444-1107
Fax: (843) 443-9137
Email: hgolding@burr.com

Myrtle Beach, South Carolina

August 29, 2022

Attorney for Defendants

ELECTRONICALLY FILED - 2022 Aug 29 8:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2019-CP-22-00212

The Gulfstream Café, Inc.,

Plaintiff,

vs.

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

Defendants.

DEFENDANTS' SUPPLEMENT TO THEIR PRE-TRIAL BRIEF

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

1. <u>Declaratory Judgment Claim – Approval of Palmetto's Application for Major Amendment is "Invalid"</u> (First Cause of Action)[1]

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8. Attorneys' Fees (Eighth Cause of Action)

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

BURR & FORMAN LLP

s/Henrietta U. Golding
Henrietta U. Golding, S.C. Bar # 2173
2411 Oak Street, Suite 206 (29577)
Post Office Box 336
Myrtle Beach, SC 29578
Phone: (843) 444-1107
Fax: (843) 443-9137
Email: hgolding@burr.com

Myrtle Beach, South Carolina

August 29, 2022

Attorney for Defendants

ELECTRONICALLY FILED - 2022 Sep 01 11:42 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

RECEIPT FOR EXHIBITS

Case Number: 2019-CP-22-00212 Judge: R. Griffin

Plaintiff: Gulfstream Cafe, Inc. Plaintiff Attorney: S. Bloom, S. Foerster, A. Pearson

Defendant: Georgetown County, et al. Defendant Attorney: H. Golding, T. Voegel

Date Started: August 29, 2022 Date Ended:

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

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

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

GEORGETOWN COUNTY CLERK OF COURT

By: [signature]

RECEIPT FOR EXHIBITS

Case Number: 2019-CP-22-00212 Judge: R. Griffin

Plaintiff: Gulfstream Cafe, Inc. Plaintiff Attorney: S. Bloom, S. Foerster, A. Pearson

Defendant: Georgetown County, et al. Defendant Attorney: H. Golding, T. Voegel

Date Started: August 29, 2022 Date Ended:

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

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

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

GEORGETOWN COUNTY CLERK OF COURT

By: Amber Gates

ELECTRONICALLY FILED - 2022 Sep 01 11:42 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Sep 01 11:42 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

RECEIPT FOR EXHIBITS

Case Number: 2019-CP-22-00212 Judge: R. Griffin

Plaintiff: Gulfstream Cafe, Inc. Plaintiff Attorney: S. Bloom, S. Foerster, A. Pearson

Defendant: Georgetown County, et al. Defendant Attorney: H. Golding, T. Voegel

Date Started: August 29, 2022 Date Ended:

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

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

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

GEORGETOWN COUNTY CLERK OF COURT

By: [signature]

RECEIPT FOR EXHIBITS

Case Number: 2019-CP-22-00212

Judge: R. Griffin

Plaintiff: Gulfstream Cafe, Inc.

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

Defendant: Georgetown County, et al.

Defendant Attorney: H. Golding, T. Voegel

Date Started: August 29, 2022

Date Ended:

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

P / D / CT* Number			Description	COC USE:
1	P76	E	05/03/16 Email Richardson to Goggans	
2	P77	E	06/15/16 Emaill Johnson to Coggans, Richardson, Johnson	
3	P78	E	Letter Goggins	
4	P79	E	08/04/15 Email Richardson to Ochal, Johnson and Blankenship	
5	P80	E	07/20/15 Email Victoria to Hollingsworth, Lawhon, et al.	
6	P81		12/06/16 Email Bryant to Redman, et al. (NOT ID OR E)	
7	P82	E	12/07/16 Email Bryant to Redman	
8	P83		09/22/16 Letter Goggans to Lawhon (NOT ID OR E)	
9	P84	E	11/13/18 County Council Agenda Packet	
10	P85	E	12/11/18 County Council Agenda Packet	
11	P86	E	01/08/19 County Council Agenda Packet	
12	P87		USPAP 20-21 Edition, Standard 3 (NOT ID OR E)	
13	P88		USPAP 20-21 Edition, Standard 4 (NOT ID OR E)	
14	P89		USPAP 20-21 Record Keeping Rule (NOT ID OR E)	
15	P90		USPAP 20-21 Scope of Work Rule (NOT ID OR E)	
16	P91		USPAP 20-21 Standard 1 (NOT ID OR E)	
17	P92		USPAP 20-21 Edition, Standard 2 (NOT ID OR E)	
18	P93	E	Aerial Photo Marlin Quay	
19				
20				
21				
22				
23				
24				
25				

Received this 1st day of September, 2022.

Page 4 of 5

~~HORRY~~ Georgetown COUNTY CLERK OF COURT

By: Amber Gott

ELECTRONICALLY FILED - 2022 Sep 01 11:42 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Sep 01 11:42 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

RECEIPT FOR EXHIBITS

Case Number: 2019-CP-22-00212 Judge: R. Griffin

Plaintiff: Gulfstream Cafe, Inc. Plaintiff Attorney: S. Bloom, S. Foerster, A. Pearson

Defendant: Georgetown County, et al. Defendant Attorney: H. Golding, T. Voegel

Date Started: August 29, 2022 Date Ended:

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

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

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

GEORGETOWN COUNTY CLERK OF COURT

By:

2019-CP-22-00212

Witness Form for Non-Jury Trial

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

Plaintiff's Witnesses
Jeff Kirk
James Moring
Robert Castles
George Knight

Defendant's Witnesses
Holly Richardson
Boyd Johnson
Steve Goggans
Judy Blakenship

ELECTRONICALLY FILED - 2022 Sep 01 11:42 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2019-CP-22-00212

The Gulfstream Café, Inc.,

Plaintiff,

vs.

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

Defendants.

DEFENDANTS' POST-TRIAL BRIEF

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

INTRODUCTION

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

FACTS

The Marlin Quay Planned Development

In 1982, Georgetown County created a Planned Development[1] ("PD") named Marlin Quay. Under South Carolina law, local governments are empowered to create PDs in order to provide for more flexibility in land developments, among other objectives. S.C. Code Ann. § 6-29-740. According to Holly Richardson, Georgetown County's Director of Planning and Code Enforcement, Georgetown County currently contains over one hundred PDs, and each PD stands alone as its own zoning ordinance. Marlin Quay PD was one of the earliest in Georgetown County.

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

As depicted in the Preliminary Master Plan, which accompanies the 1982 ordinance creating the Marlin Quay PD, three areas for parking are shown, including thirteen spaces[2] for the Gulfstream Café, sixty parking spaces between the Marina Store and Restaurant and the

---

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

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

MQ1 or 1.0 (Minor Amendment) Application

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Appeals ("the Board").[3] At the behest of Palmetto's attorney, Mr. Goggans appeared in his capacity as architect for the project and testified at the Board's hearing held February 2, 2017. At the time of his testimony, Mr. Goggans was unaware that his appearance in his capacity as architect constituted a violation of his ethical obligations as a councilmember. Several months later, Plaintiff filed a complaint with the South Carolina Ethics Commission ("the Commission"). By Consent Order[4] dated September 16, 2019, Mr. Goggans received a written warning and paid a civil penalty of $700.00.

MQ2 or 2.0 (Major Amendment) Application

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

---

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Neither Plaintiff nor any other third party challenged the passage of this Ordinance, MQ2./2.0.[6] Consequently, as of February 27, 2018, the Marlin Quay PD was amended, without challenge, in order to rebuild the Marina Store and Restaurant, subject to the aforementioned specific requirements.

Lawsuit by Plaintiff Against Palmetto

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

MQ3 or 3.0 (Major Amendment) Application

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

---

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

---

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

not exceed a forty-seven-foot height limit. Stated differently, the passage of Ordinance 2018-40 did not change the heated square footage (beyond reducing the total by two square feet), the sixty-two parking spaces, or the seating capacity of 110, all of which were enacted as part of the PD in February 2018 through the passage of Ordinance 2018-03. Plaintiff initiated this litigation on March 8, 2019.[9]

Current Litigation

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

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

---

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

LEGAL STANDARD AND BURDEN OF PROOF

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

LEGAL ANALYSIS

I. Declaratory Judgment Act

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

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

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

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

Assuming, *arguendo*, that Plaintiff complied with Section 15-53-80 of the Declaratory Judgment Act and pleading requirements, Plaintiff's claim still fails because Defendants complied with the 2018 Zoning Ordinance and applicable statutory law in the passage of Ordinance 2018-40.[12]

---

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

[12] Although South Carolina courts have reviewed the validity of municipal action in terms of whether the action complied with the municipality's own codes, *see, e.g., Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), Plaintiff did not cite to any authority that recognizes a court's ability to substitute its judgment for that of the municipality's so as to decide if a municipality's action was "good" or "bad," as Plaintiff urged this Court to do at trial. *See id.* at 555, 590 S.E.2d at 351 ("In reviewing the discretionary decision of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives."); *Rush*, 246 S.C. at 276, 143 S.E.2d at 531 ("There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application . . . ."). *See also Bear Enters. v. Cnty. of Greenville*, 319 S.C. 137, 141-42, 459 S.E.2d 883, 886 (Ct. App. 1995) ("Of course, *if the court finds a violation of constitutional rights*, it may invalidate the ordinance. A court may not, however, substitute its judgment for that of the local zoning ordinance.") (emphasis added). *Cf.*

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

II. Substantive Due Process

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

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

[of invalidating zoning restrictions] affecting other property owners as well as the public." *Rush*, 246 S.C. at 281, 143 S.E.2d at 533.[14]

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

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

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

---

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

Mr. Kirk testified that the Parking Lot, which had experienced an overburdening of parking for many years, would become dangerous. However, even though Mr. Kirk testified safety, due to the volume of traffic in the Parking Lot, had been a concern for many years, Plaintiff provided no evidence, but rather, only speculation, that the passage of Ordinance 2018-40—which limited the seating capacity to the same seating capacity[16] as the former building—would result in bodily injury or death.[17] Plaintiff hired no safety expert, had no testimony from law enforcement, nor provided any other safety analysis or study to support the notion that now, all of the sudden, the Parking Lot would lead to physical harm because County Council approved an ordinance permitting a replacement building that would be compliant with flood regulations as well as other safety requirements. Ms. Richardson and Mr. Johnson testified that consideration was given for

---

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

III. Procedural Due Process

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

IV. Takings

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

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

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

---

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

a. Character of the Government Action

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

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

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

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

b. Economic Impact of the Ordinance on Plaintiff

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

---

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

---

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

c. Interference with Investment-Backed Expectations

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

V. Inverse Condemnation

Plaintiff's last claim[22] is one of inverse condemnation. "An inverse condemnation occurs when a governmental agency commits a taking of private property without exercising its formal powers of eminent domain." *Ray v. City of Rock Hill*, 434 S.C. 39, 45, 862 S.E.2d 259, 262 (2021) (quoting *Hawkins v. City of Greenville*, 358 S.C. 280, 290, 594 S.E.2d 577, 562 (Ct. App. 2004)) (internal quotation marks omitted). In order to establish a cause of action for inverse condemnation, Plaintiff must prove: (1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for public use; and (4) the taking has some degree of permanence. *Id*.

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

---

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

VI. Failure to Timely Challenge and Collateral Estoppel

a. Failure to Timely Challenge

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

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

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

b. Collateral Estoppel

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

In its action against Palmetto and Mr. Lawhon, Plaintiff alleged that "[o]n or around the second week of November 2016, [Palmetto and Lawhon] initiated a construction project involving the Marlin Quay Marina, and [] completely obstructed access to the Parking Lot by [Plaintiff]." C.A., No. 2016-CP-22-00961, Compl. ¶ 25. Plaintiff further alleged that the "construction project where the Plans call for improvements [] will permanently interfere with *Plaintiff's right's to use the Parking Lot*." *Id*. at ¶ 28 (emphasis added). After a jury trial, the jury found for Plaintiff, awarding just $1,000.00 in damages.[23] The court issued an injunction, which stated:

> Based on the case law of this state, the facts as presented at this trial, and the jury's verdict, a permanent restraining order is issued with the following terms. The Defendants are enjoined from preventing the Plaintiff from enjoying the right granted to it in the recorded nonexclusive joint easement. The Defendants are restrained and may not expand the outside boundaries

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

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

(Order, July 27, 2018.)[24] Accordingly, at issue in the 2016 action was Plaintiff's challenge of Palmetto's construction of a building currently at issue. As evidenced by the court's issuance of an injunction concerning the construction of the building and its effect on the Parking Lot, the issue of whether the building would infringe on Plaintiff's property rights was actually adjudicated and directly determined by the trial court. Because Plaintiff sought injunctive relief and asserted the construction of that building would "permanently interfere with Plaintiff's right to use of the Parking Lot," the court's holding regarding the building's permitted construction was necessary to support that judgment.

Stated differently, Plaintiff alleges here that the building, as approved by the County, will result in damages due to shared use of the Parking Lot. However, this issue was already determined and ruled upon by the circuit court in its injunction, and the court held that a building may be constructed, so long as it does not exceed the footprint of the former building, and that version is the version approved by the County—Ordinance 2018-40—and at issue in this case. As such, Plaintiff is estopped from complaining of any alleged damage resulting from the passage of

---

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

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Sep 15 6:12 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

CONCLUSION

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

BURR & FORMAN LLP

s/Henrietta U. Golding
Henrietta U. Golding, S.C. Bar # 2173
Taylor K. Voegel, S.C. Bar #104770
2411 Oak Street, Suite 206 (29577)
Post Office Box 336
Myrtle Beach, SC 29578
Phone: (843) 444-1107
Fax: (843) 443-9137
Email: hgolding@burr.com
tvoegel@burr.com

Myrtle Beach, South Carolina

September 15, 2022

Attorneys for Defendants

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

INTRODUCTION

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

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

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

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

"In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." Dunes W. Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 296, 737 S.E.2d 601 (2013). Moreover, "in the context of a zoning action involving property, it must be clear that the state's action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." Id. at 297 (quoting Sylvia Dev. Corp. v. Calvert Cnty., Md., 48 F.3d 810, 827 (4th Cir. 1995)). The burden of proving the invalidity of a zoning ordinance is on the party

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

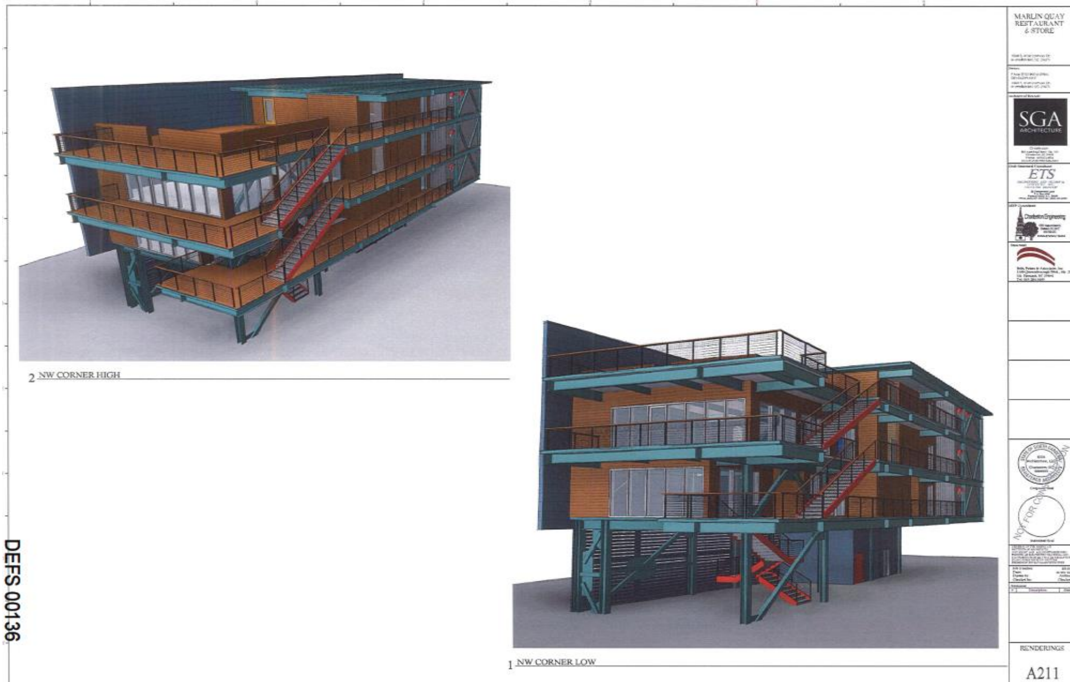
(See P-80, P-35, see also P-24, showing even more square footage for deck area). Ignoring the true square footage of the new building allowed the County to ignore parking requirements.

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

[space intentionally left blank]

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

(P-11).



(P-24, P-35).

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

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

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

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

Under the Zoning Ordinance, "action shall not be initiated for a zoning amendment affecting the same parcel or parcels of property or any part thereof, and requesting the same change in district classification by a property owner or owners of more often than once every twelve (12) months measured from the date of original recommendation by the Planning Commission." (D-1 § 1702.1).

Palmetto sought the same change in district classification in less than twelve months from the Planning Commission recommendation for 2.0, in violation of the Zoning Ordinance. Richardson testified that the district classification for Marlin Quay was a PD. In November 2017, Palmetto submitted an "Application to Amend a Planned Development" for Marlin Quay seeking a "Change of Building Location" to obtain approval of 2.0. (P-12). The Planning Commission held a hearing on the application for 2.0 in December of 2017. (P-15). The County approved the major amendment on February 27, 2018. (D-9).

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

Section 1702.201 of the Zoning Ordinance provides that applications for all amendments must be submitted, in proper form, at least forty-five (45) days prior to a Planning Commission meeting in order to be heard at that meeting. (D-1 Section § 1702.1).

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

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

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

The Zoning Ordinance requires that "[a] list of all property owners, as reflected by the tax records, to whom the letters are addressed must accompany the application." (D-1 § 1702.206). All individuals within 400 feet of the property subject to the application are required to receive letter by mail of the proposed rezoning. (Id.).

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

D. Defendants Did Not Comply with Article 11.

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

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

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

For procedural due process, at a minimum, "the Constitution requires notice and some opportunity to be heard." Mallette v. Arlington Cnty. Employees' Supplemental Ret. Sys. II, 91 F.3d 630, 640 (4th Cir. 1996). "Above that threshold," due process is "flexible and calls for such procedural protections as the particular situation demands." Id. (internal quotation marks omitted).

Here, because of the deficiencies in the materials submitted with the application, and the failure to timely supplement the application with substantive information about the 3.0 proposal, those in opposition to the application did not have the facts they needed to adequately prepare for the hearing. See Mallette, 91 F.3d at 641 (reversing the grant of summary judgment to the defendant where the plaintiff received a misleading notice and did not receive unfavorable evidence against her until she arrived at the hearing). Moreover, because Palmetto failed to provide notice to all property owners located within 400 feet of the property, adjacent owners did not even receive the notice required by the Zoning Ordinance. See also Mallette, 91 F.3d at 641 (noting that the County "failed to provide to Mallette that measure of process which it had itself determined to be appropriate."). In fact, an owner in the Marlin Quay condominiums complained prior to approval of 3.0 that she had not received mail notice as required by the Zoning Ordinance,

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

As for the second question, a regulatory taking can occur multiple ways. A *per se*/categorical taking can occur where the regulation denies the owner all economically beneficial or productive use of the land. Dunes West Golf Club, LLC, 401 S.C. at 313 (internal quotation marks omitted). If there has been no categorical taking, then the plaintiff's claims are analyzed under the test set forth in Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), which evaluates: "the character of the government action, the economic impact of the regulation on the claimant, and the extent to which the regulation has interfered with distinct investment-backed expectations." Dunes West Golf Club, LLC, 401 S.C.

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

at 315. The extent of diminution in value is one factor for consideration in determining whether the governmental action constitutes a taking. Id. at 317.

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

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

B. Gulfstream Meets the Penn Central Test.

Even if Gulfstream did not prove a depravation of all economically beneficial use of its property, Gulfstream proved a regulatory taking under the Penn Central test. With respect to the character of the government action, Gulfstream has shown above that approving 3.0 **did not** advance the public health, safety, and welfare, and was not based on legitimate land use considerations. The grant of the application disadvantaged Gulfstream in a constitutionally significant way because Gulfstream will not be able to operate its restaurant as a result of the application. The grant of the application will cause Gulfstream to suffer a loss in the value of Gulfstream's property in *the amount of $1,760,100*, as testified to by Knight. (P-47, P-47(a)-(g)). Gulfstream's property will only have the nominal value attributable to raw land after the grant of the application.

Finally, Gulfstream has legitimate investment-backed expectations to use the parking lot and to continue operating as a restaurant. Gulfstream is required to operate as a restaurant under the PD, and Kirk testified that Gulfstream expects to operate as a restaurant, that is what they do. (P-1). "Continuation of the existing use of the property is the property owner's 'primary expectation' when considering an owner's investment-backed expectations for the property," Dunes West Golf Club, LLC, 401 S.C. at 319 (internal quotation marks omitted), and that expectation will be destroyed as a result of the County's conduct.

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

V. Defendants' Defenses Fail[2].

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

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

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

Under South Carolina law, a party is precluded from relitigating an issue that was decided in a previous action. Kunst v. Loree, 404 S.C. 649, 653, 746 S.E.2d 360 (Ct. App. 2013). Defendants, as the party asserting collateral estoppel, must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Defendants did not, and could not, prove these three elements at trial.

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

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

---

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

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

C. Goggans is Personally Liable to Gulfstream[4].

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

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

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

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

D. Defendants' Standing Argument Has Been Waived.

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

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

E. Election of Remedies.

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

---

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

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

CONCLUSION

As set forth above, Gulfstream respectfully requests that the Court find in Gulfstream's favor and enter an order accordingly[6].

Respectfully submitted,

/s/Sean M. Foerster
Sean M. Foerster (SC Bar # 77466)
ROGERS TOWNSEND & THOMAS, PC
1221 Main Street, 14th Floor
Colombia, South Carolina 29201
Tel: (803) 771-7900
sean.foerster@rtt-law.com

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

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

September 15, 2022

Attorneys for Plaintiff The Gulfstream Café, Inc.

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

ELECTRONICALLY FILED - 2022 Sep 15 6:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

Defendants Georgetown County ("the County"), Georgetown County Council ("County Council"), and Steve Goggans (collectively hereinafter "Defendants") submit this Reply to Plaintiff The Gulfstream Café, Inc.'s ("Plaintiff") Post-Trial Brief.

INTRODUCTION

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

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

REPLY ARGUMENT

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

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

---

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

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

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

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

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

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

---

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

regulations, Americans with Disabilities Act ("ADA") regulations, and other fire[4] and building codes.

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

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

---

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

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

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

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

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

---

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

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

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

---

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

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

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

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

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

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

---

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

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

CONCLUSION

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

[*Signature on Following Page*]

---

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

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

BURR & FORMAN LLP

_s/Henrietta U. Golding____
Henrietta U. Golding, S.C. Bar # 2173
Taylor K. Voegel, S.C. Bar #104770
2411 Oak Street, Suite 206 (29577)
Post Office Box 336
Myrtle Beach, SC 29578
Phone: (843) 444-1107
Fax: (843) 443-9137
Email: hgolding@burr.com
tvoegel@burr.com

Attorneys for Defendants

Myrtle Beach, South Carolina

September 27, 2022

ELECTRONICALLY FILED - 2022 Sep 27 5:21 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

INTRODUCTION

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

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

ELECTRONICALLY FILED - 2022 Sep 27 5:21 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

FACTUAL BACKGROUND

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

ARGUMENT AND CITATION OF AUTHORITY

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

Gulfstream seeks a declaration that the major amendment is invalid. Gulfstream proved the invalidity of the major amendment because the County, without question, arbitrarily and capriciously approved 3.0.[3] The County put on blinders with respect to the obvious size differences between the old building and 3.0, permitting a 13,000 square foot building where a 4,600 square foot building previously stood. Instead of comparing the actual size differences between the buildings, the County only looked at heated square footage of 3.0, ignoring more than 5,000 square feet of unheated square footage for 3.0. (P-24, P-35, P-84, P-85, P-86). Defendants also ignored Article 11 of the Zoning Ordinance by failing to consider the parking needs of Gulfstream and the marina. When the parking calculations under Article 11 are done, as Castles testified, 170 parking spaces are required for all of the uses of the parking lot, and only 62 are provided. The County approved a major amendment that results in a parking shortage of **108 parking spaces**.

---

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

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

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

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

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

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

ELECTRONICALLY FILED - 2022 Sep 27 5:21 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2022 Sep 27 5:21 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

ELECTRONICALLY FILED - 2022 Sep 27 5:21 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

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

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

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

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

misinformation to Council for its consideration of the application. (P-84, P-85, P-86). As a result, the fact that a staff report was prepared for the application, the fact that the Planning Commission reviewed it, and the fact that the County Councilmembers held public readings does not alter the conclusion that Goggans unlawfully prejudiced the proceedings. The application was unlawfully prejudiced from the beginning because the County Council and Planning Commission relied on legally defective and arbitrary "parameters" Goggans established years earlier. The fact that he formally recused himself from the hearings does not change his culpability. Moreover, his firm, SGA Architecture, was still the architect on the plans for 3.0 and interacted with Richardson and Johnson with respect to the application. (P-35, P-84, P-85, P-86, P-24, P-25, P-27, P-28, P-29). It was not necessary for Goggans to be personally involved, as everyone knew who his firm was and that he had previously represented Palmetto with respect to building's approval.

Goggans's conduct was inappropriate, as it involved a blatant conflict of interest on his behalf to represent Palmetto, while at the same time, acting as a County Councilmember who held influence over Richardson's and Johnson's jobs. Defendants argue that this conduct did not violate South Carolina Code Section 8-13-740(a)(4) because Richardson's and Johnson's conduct was ministerial, such that an exception applies. Defendants rely on State Ethics Opinion SEC AOO2007-006 (Jan. 17, 2007), but that opinion is distinguishable from the circumstances here. To begin, that opinion dealt with the question of whether a Councilmember's business associate—not the Councilmember himself—may submit land development plans to the planning department for consideration. In the opinion, the Commission recognized that ministerial actions involve information gathering, procedural questions, or requests for information. Id. Discretionary matters would include presenting evidence, testimony, or argument concerning a person's position on a contested issue. Id. That is exactly what Goggans, Richardson, and Johnson did. Goggans

ELECTRONICALLY FILED - 2022 Sep 27 5:21 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

presented argument in favor of his client's position to establish favorable parameters for the project, and planning staff (Johnson and Richardson), not the Planning Commission, made decisions on those arguments. (P-8). Accordingly, the ethics opinion relied on by Defendants does not apply in this case.

Defendants also argue that Kurschner v. City of Camden Planning Commission, 376 S.C. 165, 170-71, 656 S.E.2d 346, 349 (2008), supports their position, but that case is also distinguishable. First, it relates to whether a planning commission member impermissibly voted at a planning commission meeting where she had been elected to the House of Representatives but had not taken an oath of office. The decision related to whether she had impermissibly held two offices and had nothing to do with a conflict of interest like that at issue here. Second, unlike in Kurschner, Goggans's participation did prejudice the vote on 3.0, because the misinformation related to the arbitrary parameters established by Goggans skewed the presentation of evidence to the County Council.

B. Defendants' Approval of the Major Amendment is Not Rationally Related to a Legitimate Government Interest.

Gulfstream demonstrated in its Post-Trial Brief how the approval of the major amendment made absolutely no sense and was an arbitrary and irrational exercise of governmental power. The County offers several reasons to justify the decision, including that the old building was in poor condition, the new building had to comply with FEMA, the ADA, and fire codes, and the new building would no longer encroach on the Marlin Quay Condominiums' property. But, as explained in Gulfstream's Post-Trial Brief, those reasons are not rationally related to the approval of 3.0. The County could have achieved these goals without approving a massive structure that would overburden the parking lot, fail to comply with the County's parking regulations, and risk

ELECTRONICALLY FILED - 2022 Sep 27 5:21 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

the public health, safety, and welfare. Accordingly, approval of 3.0 was not rationally related to the purported governmental interests in approving the application.

Defendants contend that Gulfstream did not show that the parking lot will be dangerous because it did not put forward a public safety expert or law enforcement expert. Again, all the Court must do here is apply its common sense. Kirk testified that the parking lot is already dangerous, and accidents have already occurred. Castles testified that parking is necessary for the public health, safety, and welfare. Members of the public presented concerns regarding safety to Council at the public hearings on the application. (P-44). Even the County's own Zoning Ordinance provides that the parking regulations were enacted to improve the public health, safety, and welfare of the community. (D-1 § 1100). It is not speculation to conclude that locating a building that is (at a minimum) twice the size of the former building without adequate parking conditions will increase the likelihood of accidents and create a danger to the public safety.

The County repeatedly points out that it limited 3.0 to 110 seats. The only basis the County has to conclude that the former restaurant had 110 seats is information from the applicant, P-35 at DEFS 00157, and Richardson conceded the County did nothing to verify this information. Kirk and Castles testified that the seating capacity in reality was smaller. The County also points out that fire code capacity is not applicable to zoning matters. Regardless of whether the fire code capacity of 350 people was technically applicable in zoning matters, Johnson testified he knew of the fire code limit, and it certainly should not have been ignored in reviewing the application. This is yet again another example of the County clinging to arbitrary characteristics like seating capacity of 110 when, in reality, 3.0 can hold up to 350 people under the fire code.

III. <u>Procedural Due Process.</u>

Defendants argue that Gulfstream participated in the public hearing process, so no violation of its procedural due process rights occurred. As pointed out in Gulfstream's Post-Trial brief,

ELECTRONICALLY FILED - 2022 Sep 27 5:21 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

although Gulfstream did attend hearings, a meaningful opportunity to be heard was not provided due to the irregularities in the application process. The application was not in proper form and did not contain sufficient information for members of the public, including Gulfstream, to evaluate it. (P-20; D-1 § 1702.1). The building plans were submitted less than a week before the Planning Commission meeting, which did not give Gulfstream or others an adequate opportunity to review them in advance of the hearing. (P-26, P-29, P-37). With respect to the mailed notice to the individual owners of the Marlin Quay condominiums, this did impact the proceedings with respect to Gulfstream, as if more homeowners knew about the proceedings, there would have been a greater opportunity for individuals to come out in opposition the application.[4] (P-26).

IV. Inverse Condemnation/Takings.[5]

With respect to Gulfstream's *per se* takings claim, Gulfstream proved that its property will only have value attributable to raw land as a result of approval of 3.0. In addition, Gulfstream can only use its property for a restaurant, and it will be deprived of that use as a result of approval of 3.0. Thus, approval of 3.0 deprives Gulfstream of all economically beneficial use of its property.

Defendants argue that Gulfstream only showed that its customers may have greater difficulty parking. This mischaracterizes the evidence Gulfstream presented at trial. Kirk testified that Gulfstream's customers will leave and not come back if there is no parking. Kirk knows this because he sees it with his own eyes. According to Kirk, Gulfstream needs all of the parking at night to serve its restaurant. Kirk testified that Gulfstream will not be able to survive if it has to

---

[4] Gulfstream's Post-Trial Brief sets forth in more detail how the application process violated the County's Zoning Ordinance.

[5] Gulfstream analyzes its takings and inverse condemnation claims together. Defendants contend that there are four elements to Gulfstream's inverse condemnation claim, but the elements that the taking be for public use and the taking have a degree of permanence do not apply to regulatory inverse condemnation claims. See Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76 (2005).

ELECTRONICALLY FILED - 2022 Sep 27 5:21 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

share its parking with another restaurant at night. Kirk testified that Gulfstream will not be able to operate without adequate parking and will have to close its doors as a result of the approval of 3.0. Moring testified that parking is a primary factor in determining the marketability of a restaurant, Gulfstream will not have adequate parking as a result of approval of 3.0, and Gulfstream will not have a willing buyer for its restaurant due to approval of 3.0. Castles testified that there is a substantial shortage of parking in the parking lot and 3.0 will overburden the parking lot. Moreover, the fact that there is a possibility that customers can visit Gulfstream by other means does not overcome the testimony that parking is critical to Gulfstream's operations. Even if some customers get to the restaurant by walking, Kirk testified that Gulfstream is a destination restaurant and that customers primarily travel there by car. All of this testimony stands as wholly undisputed.

Contrary to Defendants' claims, Gulfstream's expert did not agree that Gulfstream's property could be used for residential purposes. Knight testified that in order to conclude that the property could be used for residential, he would have to undertake an analysis of whether there is a reasonable likelihood that the County would approve the rezoning. He testified that he had not done that analysis here, so could not say that the property could be rezoned and used as housing. Defendants presented no evidence to rebut Knight's testimony, which proved a reduction in value from $1,850,000 to $89,000, for a loss of $1,760,100. (P-47, P47(a)-(g)). Knight's opinion is that the property has no value other than for vacant land, which constitutes a deprivation of all economically beneficial use of the property. Therefore, Gulfstream proved that a *per se* taking has occurred.

Even if no *per se* taking occurred, Gulfstream met the <u>Penn Central</u> 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.

ELECTRONICALLY FILED - 2022 Sep 27 5:21 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

The governmental action factor weighs in favor of Gulfstream. As explained above, there was no rational relationship between any legitimate governmental interest and the approval of 3.0. The County's proffered reasons for approval—of bringing the old building into compliance with various regulations and not having the building straddle the property line—have no rational relationship to allowing the massive building the County actually approved. In fact, if bringing 3.0 into compliance with County and other regulations was the County's reason for approving 3.0, it would have not approved a building that blatantly violates Article 11 of the Zoning Ordinance.

Defendants cite to Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 737 S.E.2d 601 (2013), in support of their argument that the character of the government action favors their position, but Dunes is distinguishable. In Dunes, the Court noted that the ordinance at issue did not eliminate all development potential, there still existed some permitted uses that would allow further development of the property, and the plaintiffs were not prevented from selling the property. Dunes West Golf Club, LLC, 401 S.C. at 316, 737 S.E.2d at 620. In contrast, Richardson testified that Gulfstream can only be used as a restaurant under the PD. (P-1). As a result, since Gulfstream will not be able to operate as a result of approval of 3.0, and there is no other permitted use of the property other than as a restaurant, the County's conduct deprived Gulfstream of all possible use of the property. Further, multiple witnesses testified that approval of 3.0 effectively deprived Gulfstream of use of the parking lot, essentially eliminating Gulfstream's easement rights. Also, unlike in Dunes, Moring testified that the marketability of Gulfstream's property has been destroyed as a result of approval of 3.0, such that Gulfstream cannot sell its property if it wanted to. Thus, the character of the governmental action weights in favor of Gulfstream.

ELECTRONICALLY FILED - 2022 Sep 27 5:21 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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. Here, Gulfstream's property value will be reduced from $1,850,000 to $89,000. Dunes West Golf Club, LLC, 401 S.C. at 317, 737 S.E.2d at 621. This represents greater than a 95% reduction in value, which is certainly constitutionally significant.

Defendants take issue with Knight's assumption that Gulfstream will effectively be deprived of its ability to park in the parking lot as a result of approval of 3.0, but this assumption was verified and supported by the testimony of Kirk, Moring, and Castles throughout the trial, without any evidence to the contrary. Gulfstream's easement allows it to use the parking lot primarily in the evening, Gulfstream uses all of the parking at night, and Kirk testified that Gulfstream will not be able to survive without this parking. (P-2, P-3). Accordingly, Knight's extraordinary assumption is not an assumption, but instead is the reality of what will happen as a result of the approval of 3.0.

With respect to the potential to rezone as residential, as explained above, it cannot be assumed that the County would permit any such rezoning, and any evidence to the contrary is speculation. The economic impact of the major amendment factor favors Gulfstream.

The final factor, interference with investment backed expectations, clearly favors Gulfstream. As conceded by Defendants, continuation of the existing use of the property is a property owner's primary expectation when considering an investment-backed expectation for the property. (Defendants' Post-Trial Brief at 34). Gulfstream certainly has investment-backed

ELECTRONICALLY FILED - 2022 Sep 27 5:21 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

expectations to continue using its property as a restaurant and the parking lot consistent with its easement rights.

Defendants contend that because parking has always been a problem, Gulfstream does not have an investment-backed expectation of adequate parking. Gulfstream certainly has an investment-backed expectation in continuation of the status quo related to its parking lot, consistent with its easement rights, and an expectation the County will not approval a major amendment that will make the parking situation *considerably worse*. This final factor favors Gulfstream, and the Court should find that a regulatory taking has occurred.

V. The Defendants' Defenses Fail.

A. Gulfstream Timely Challenged 3.0.

Defendants' argument that Gulfstream did not timely challenge 3.0 is fundamentally flawed. South Carolina Code Section 6-29-760 says that the challenge may be made sixty "after the decision of the governing body." The decision challenged in this case is the County's decision to approve 3.0, and Gulfstream timely filed its challenge to that decision.

Moreover, Gulfstream did challenge 2.0 in court, and the Court found 2.0 could not be built. This finding by the Court necessitated 3.0, and important changes with respect to the footprint of the building had to be made, such that a totally different building layout was approved for 3.0. That the County imposed the same arbitrary restrictions on 3.0 that it imposed on 2.0 does not mean that 2.0 and 3.0 are the same.

B. Defendants Did Not Meet Their Burden to Prove Collateral Estoppel.

Defendants have not met any element of collateral estoppel. This litigation concerns whether the County's approval of 3.0 violates the Zoning Ordinance and Gulfstream's constitutional rights. Those issues were not, and could not, have been actually litigated and determined in the action with Palmetto because the application for 3.0 had not even been submitted

ELECTRONICALLY FILED - 2022 Sep 27 5:21 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

at that time. The construction project at issue in the case with Palmetto was 2.0, and 3.0 is a totally different building with a different footprint and layout. (P-12, P-20, P-29). The action with Palmetto did not challenge the construction of the building currently at issue. The action with Palmetto could not have involved the violations of the Zoning Ordinance that occurred with respect to 3.0 either, because those violations were specific to the approval process for 3.0. Finally, the Court's injunction order is not in evidence in this case and should not be considered by the Court. Even if the injunction order was in evidence, it does not even implicitly decide whether 3.0 violates Gulfstream's constitutional rights or the Zoning Ordinance. Thus, this defense fails.

CONCLUSION

As set forth above, Gulfstream respectfully requests that the Court find in Gulfstream's favor and enter an order accordingly.

Respectfully submitted,

/s/Sean M. Foerster

Sean M. Foerster (SC Bar # 77466)
ROGERS TOWNSEND & THOMAS, PC
1221 Main Street, 14th Floor
Colombia, South Carolina 29201
Tel: (803) 771-7900
sean.foerster@rtt-law.com

/s/ Simon H. Bloom

Simon H. Bloom (GA Bar# 064298)
Admitted Pro Hac Vice
BLOOM PARHAM, LLP
977 Ponce de Leon Avenue NE
Atlanta, Georgia 30306
Tel: (404) 577-7710
sbloom@bloom-law.com

/s/Andrea J. Pearson

Andrea J. Pearson (GA Bar #409604)
Admitted Pro Hac Vice

ELECTRONICALLY FILED - 2022 Sep 27 5:21 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

BLOOM PARHAM, LLP
977 Ponce de Leon Avenue NE
Atlanta, Georgia 30306
Tel: (404) 577-7710
apearson@bloom-law.com

September 27, 2022

Attorneys for Plaintiff The Gulfstream Café, Inc.

ELECTRONICALLY FILED - 2022 Sep 27 5:21 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)))	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2019-CP-22-00212
The Gulfstream Café, Inc., Plaintiff, vs. Georgetown County, Georgetown County Council, John Thomas, Ron Charlton, Lillie Johnson, Austin Beard, Steve Goggans, and Louis Morant, individually and in their official capacity as Georgetown County Councilmembers, Defendants.	)	**DEFENDANTS' ITEMIZED STATEMENT OF COSTS**

Description	**Date Incurred**	**Cost**	**Authority**
Defendants' Motion to Dismiss from the Complaint Counts II, III, IV, V, and VIII (Rule 12(b)(6), SCRCP)	April 11, 2019	$31.74	Rule 54(e)(2), SCRCP
Defendants' Motion to Compel Plaintiff's Discovery Responses	July 1, 2019	$31.74	Rule 54(e)(2), SCRCP
Defendants' Motion to Compel Plaintiff to Produce a 30(b)(6) Designee in Georgetown County	December 18, 2019	$31.74	Rule 54(e)(2), SCRCP
Deposition and Deposition Transcript of 30(b)(6), SCRCP of the Gulfstream Café, Inc.	March 1, 2021	$1,127.75	S.C. Code Ann. § 15-37-40
Defendants' Motion for a Protective Order	March 5, 2021	$31.74	Rule 54(e)(2), SCRCP
Defendants' Second Motion for a Protective Order	March 9, 2021	$31.74	Rule 54(e)(2), SCRCP

Deposition Transcripts of Boyd Johnson and Tiffany Coleman	March 22, 2021	$1,562.00	S.C. Code Ann. § 15-37-40
Deposition Transcript of John Thomas, taken March 1, 2021	March 24, 2021	$631.50	S.C. Code Ann. § 15-37-40
Deposition Transcripts of Holly Richardson and Judy Blankenship	March 24, 2021	$1,033.00	S.C. Code Ann. § 15-37-40
Defendants' Motion to Amend Answer to Complaint	June 28, 2021	$31.74	Rule 54(e)(2), SCRCP
Defendants' Motion for Protective Order	September 9, 2021	$31.74	Rule 54(e)(2), SCRCP
Deposition Transcripts of Austin Beard and Lillie Johnson	September 15, 2021	$466.01	S.C. Code Ann. § 15-37-40
Deposition Transcripts of John Thomas, taken September 8, 2021, Ron Charlton, and Louis Morant	September 15, 2021	$736.62	S.C. Code Ann. § 15-37-40
Consent Motion for Protective Order for Deposition of Travis Lee Avant	September 17, 2021	$31.74	Rule 54(e)(2), SCRCP
Consent Motion for Protective Order for Deposition of Travis Lee Avant	September 20, 2021	$31.74	Rule 54(e)(2), SCRCP
Defendants' Motion for Protective Order	October 5, 2021	$31.74	Rule 54(e)(2), SCRCP
Deposition Transcript of Travis Avant, taken September 27, 2021	October 13, 2021	$1,053.50	S.C. Code Ann. § 15-37-40
Defendants' Motion for Summary Judgment	October 22, 2021	$31.74	Rule 54(e)(2), SCRCP
Deposition Transcript of Steve Goggans	November 30, 2021	$1,095.50	S.C. Code Ann. § 15-37-40
Consent Motion to Dismiss Defendants John Thomas, Ron Charlton, Lillie Johnson, Austin Beard, and Louis Morant, individually and in their official capacity as Georgetown County Councilmembers	December 13, 2021	$31.74	Rule 54(e)(2), SCRCP
Deposition Exhibits for Depositions of Holly	January 20, 2022	$50.00	S.C. Code Ann. § 15-37-40

Richardson and Judy Blankenship			
Deposition Transcript of Travis Avant, taken March 16, 2022	March 28, 2022	$897.04	S.C. Code Ann. § 15-37-40
Defendants' Motion in Limine	August 24, 2022	$31.74	Rule 54(e)(2), SCRCP
Total	**$9,065.54**		

[*Signature on Following Page*]

I, Taylor K. Voegel, do swear that the foregoing costs are correct and were necessarily incurred in this action.

Taylor K. Voegel,
Attorney for Defendants

Subscribed and sworn before me
this 13th day of February, 2023.

Notary Public for the State of South Carolina

My Commission Expires: April 16, 2029
(Seal)

ELECTRONICALLY FILED - 2023 Feb 13 5:53 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2019-CP-22-00212

The Gulfstream Café, Inc.,

Plaintiff,

vs.

Georgetown County, Georgetown County Council, John Thomas, Ron Charlton, Lillie Johnson, Austin Beard, Steve Goggans, and Louis Morant, individually and in their official capacity as Georgetown County Councilmembers,

Defendants.

DEFENDANTS' MOTION FOR COSTS

Defendants Georgetown County ("the County"), Georgetown County Council ("County Council"), and Steve Goggans (collectively hereinafter "Defendants"), by and through their undersigned counsel, hereby submit this motion for costs against Plaintiff The Gulfstream Café, Inc. ("Plaintiff") pursuant to Rule 54, SCRCP, South Carolina Code Sections 15-37-10, et seq., and South Carolina Code Section 15-53-100.

This action came before the Honorable R. Kirk Griffin for a bench trial beginning August 29, 2022. Plaintiff alleged causes of action against the Defendants for: (1) Declaratory Judgment; (2) Violation of Substantive Due Process Rights pursuant to Article I, Section 3 of the South Carolina Constitution; (3) Relief Under 42 U.S.C. § 1983 for Violation of Substantive Due Process Rights pursuant to the United States Constitution; (4) Violation of Right to Procedural Due Process pursuant to Article I, Section 3 of the South Carolina Constitution; (5) Relief Under 42 U.S.C. § 1983 for Violation of Right to Procedural Due Process pursuant to the United States Constitution; (6) Violation of South Carolina's Takings Clause pursuant to Article I, Section 13 of the South

Carolina Constitution; (7) Inverse Condemnation; and (8) Attorneys' Fees pursuant to 28 [sic] U.S.C. § 1988. By Order dated February 3, 2023, the Court entered judgment in favor of the Defendants on all causes of action.

Rule 54(d), SCRCP provides in part, "Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ." Specifically, Rule 54(e)(2), SCRCP provides that "[a]ll filing and recording fees charged by the clerk of the court in which the action was pending . . . are taxable."

South Carolina Code Section 15-37-20 states, "No costs shall be allowed to any party unless he succeed, in whole or in part, in his claim or defense, unless otherwise directed by the judge hearing the cause." Section 15-37-40 provides:

> The clerk shall insert in the entry of judgment, on the application of the prevailing party . . . the sum of the allowances for costs and disbursements as provided by law . . . including the fees of officers allowed by law, the fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees and the expense of printing the papers for any hearing when required by a rule of the court . . . .

Furthermore, South Carolina Code Section 15-53-100 permits the court to "make such award of costs as may seem equitable and just" for any proceeding under the Uniform Declaratory Judgments Act. S.C. Code Ann. § 15-53-10.

Accordingly, Defendants are the prevailing parties on every cause of action, and an award of costs to Defendants as set forth in the undersigned's accompanying affidavit would be equitable and just.

[*Signature on Following Page*]

ELECTRONICALLY FILED - 2023 Feb 13 5:53 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

BURR & FORMAN LLP

_s/Taylor K. Voegel_____
Henrietta U. Golding, S.C. Bar # 2173
Taylor K. Voegel, S.C. Bar # 104770
2411 Oak Street, Suite 206 (29577)
Post Office Box 336
Myrtle Beach, SC 29578
Phone: (843) 444-1107
Fax: (843) 443-9137
Email: hgolding@burr.com
tvoegel@burr.com

Attorneys for Defendants

Myrtle Beach, South Carolina

February 13, 2023

ELECTRONICALLY FILED - 2023 Feb 13 5:53 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Feb 13 5:53 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN) CIVIL ACTION NO. 2019-CP-22-00212

The Gulfstream Café, Inc.,

Plaintiff,

vs.

Georgetown County, Georgetown County Council, John Thomas, Ron Charlton, Lillie Johnson, Austin Beard, Steve Goggans, and Louis Morant, individually and in their official capacity as Georgetown County Councilmembers,

Defendants.

DEFENDANTS' ITEMIZED STATEMENT OF COSTS

Description	Date Incurred	Cost	Authority
Defendants' Motion to Dismiss from the Complaint Counts II, III, IV, V, and VIII (Rule 12(b)(6), SCRCP)	April 11, 2019	$31.74	Rule 54(e)(2), SCRCP
Defendants' Motion to Compel Plaintiff's Discovery Responses	July 1, 2019	$31.74	Rule 54(e)(2), SCRCP
Defendants' Motion to Compel Plaintiff to Produce a 30(b)(6) Designee in Georgetown County	December 18, 2019	$31.74	Rule 54(e)(2), SCRCP
Deposition and Deposition Transcript of 30(b)(6), SCRCP of the Gulfstream Café, Inc.	March 1, 2021	$1,127.75	S.C. Code Ann. § 15-37-40
Defendants' Motion for a Protective Order	March 5, 2021	$31.74	Rule 54(e)(2), SCRCP
Defendants' Second Motion for a Protective Order	March 9, 2021	$31.74	Rule 54(e)(2), SCRCP

ELECTRONICALLY FILED - 2023 Feb 13 5:53 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Deposition Transcripts of Boyd Johnson and Tiffany Coleman	March 22, 2021	$1,562.00	S.C. Code Ann. § 15-37-40
Deposition Transcript of John Thomas, taken March 1, 2021	March 24, 2021	$631.50	S.C. Code Ann. § 15-37-40
Deposition Transcripts of Holly Richardson and Judy Blankenship	March 24, 2021	$1,033.00	S.C. Code Ann. § 15-37-40
Defendants' Motion to Amend Answer to Complaint	June 28, 2021	$31.74	Rule 54(e)(2), SCRCP
Defendants' Motion for Protective Order	September 9, 2021	$31.74	Rule 54(e)(2), SCRCP
Deposition Transcripts of Austin Beard and Lillie Johnson	September 15, 2021	$466.01	S.C. Code Ann. § 15-37-40
Deposition Transcripts of John Thomas, taken September 8, 2021, Ron Charlton, and Louis Morant	September 15, 2021	$736.62	S.C. Code Ann. § 15-37-40
Consent Motion for Protective Order for Deposition of Travis Lee Avant	September 17, 2021	$31.74	Rule 54(e)(2), SCRCP
Consent Motion for Protective Order for Deposition of Travis Lee Avant	September 20, 2021	$31.74	Rule 54(e)(2), SCRCP
Defendants' Motion for Protective Order	October 5, 2021	$31.74	Rule 54(e)(2), SCRCP
Deposition Transcript of Travis Avant, taken September 27, 2021	October 13, 2021	$1,053.50	S.C. Code Ann. § 15-37-40
Defendants' Motion for Summary Judgment	October 22, 2021	$31.74	Rule 54(e)(2), SCRCP
Deposition Transcript of Steve Goggans	November 30, 2021	$1,095.50	S.C. Code Ann. § 15-37-40
Consent Motion to Dismiss Defendants John Thomas, Ron Charlton, Lillie Johnson, Austin Beard, and Louis Morant, individually and in their official capacity as Georgetown County Councilmembers	December 13, 2021	$31.74	Rule 54(e)(2), SCRCP
Deposition Exhibits for Depositions of Holly	January 20, 2022	$50.00	S.C. Code Ann. § 15-37-40

Richardson and Judy Blankenship			
Deposition Transcript of Travis Avant, taken March 16, 2022	March 28, 2022	$897.04	S.C. Code Ann. § 15-37-40
Defendants' Motion in Limine	August 24, 2022	$31.74	Rule 54(e)(2), SCRCP
Total	**$9,065.54**		

[*Signature on Following Page*]

ELECTRONICALLY FILED - 2023 Feb 13 5:53 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

I, Taylor K. Voegel, do swear that the foregoing costs are correct and were necessarily incurred in this action.

Taylor K. Voegel,
Attorney for Defendants

Subscribed and sworn before me
this 13th day of February, 2023.

Notary Public for the State of South Carolina

My Commission Expires: April 16, 2029
(Seal)

ELECTRONICALLY FILED - 2023 Feb 13 5:53 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	DOCKET NO.: 2019-CP-22-00212
The Gulfstream Café, Inc., Plaintiff, vs. Georgetown County; Georgetown County Council; and Steve Goggans, individually and in his official capacity as Georgetown County Councilmember; Defendants.	MOTION TO ALTER OR AMEND JUDGMENT

TO: HENRIETTA U. GOLDING, ESQUIRE, AS COUNSEL FOR DEFENDANTS:

Plaintiff The Gulfstream Café, Inc. (hereinafter "Gulfstream") hereby moves this Court pursuant to Rule 59(e), SCRCP, to alter or amend the Order entered on February 3, 2023.

INTRODUCTION

This matter came before the Court for a bench trial, which was held on August 29, 2022, to September 1, 2022. During the trial, the parties put on multiple witnesses and introduced a voluminous record of evidence, all of which support a finding for Gulfstream. Gulfstream appreciates the time the Court has devoted to its ruling in its Order entered on February 3, 2023 (the "Order"), but Gulfstream respectfully contends that the Order overlooks key evidence proffered by Gulfstream, misapplies certain legal standards, and draws the wrong conclusions regarding the proffered explanations provided by Defendants for their conduct in this case. Accordingly, Gulfstream requests that the Court alter and amend its judgment to find in favor of Gulfstream, not Defendants, and reverse the Order and find for Gulfstream.

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

I. Factual Findings[1]

The Order makes multiple factual findings which overlook evidence presented by Gulfstream that impact the outcome of the Court's decision.

Critically, the Order finds that Gulfstream was not guaranteed a specific number of parking spots by the Easement, merely the right of ingress and egress. This finding overlooks that the Easement grants Gulfstream the right to use all 62 of the parking spaces at night. (Exhibits P-2, P-3.) Misconstruing the rights granted by the Easement impacts the remainder of the Court's decision, as it downplays the importance of the Easement to Gulfstream's survival as a restaurant and the impact approval of 3.0 has on Gulfstream and the Easement.

The Order finds that Gulfstream did not challenge the passing of 2.0. But Gulfstream did challenge 2.0 by filing the injunction action against Palmetto, which resulted in a finding that 2.0 could not be built.

The Order finds that the application for 3.0 included envelopes to be used for mailing notices to property owners within 400 feet. The envelopes were not introduced into the record, and no one testified to who the envelopes were actually addressed. In any event, the evidence confirmed that the envelopes were not sent to the individual property owners of the Marlin Quay Condominiums. Instead, the notice was only sent to the Homeowners' Association, not the individual owners themselves. (Ex. P-21, P-22.) There was no evidence whatsoever that Palmetto

[1] Gulfstream takes issue with additional factual findings, but they are addressed later in this Motion for Reconsideration. Those factual findings include the finding that: (1) Richardson and Johnson testified that in a PD, zoning regulations are guides, but not requirements; (2) repairs to 3.0 consisted of complying with flood requirements with FEMA, the ADA, and other building codes, and that 3.0 would remedy encroachment; (3) Goggans was not involved in the submission of 2.0, and (4) Goggans was not involved in the filing, voting, or approval process for 3.0.

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

or the County sent notice to the individual owners of the Marlin Quay Condominiums. The evidence presented, which was undisputed, showed the opposite.

The Order finds that the only changes between 2.0 and 3.0 were to keep the footprint of the building inside the old footprint and the roof would not exceed 47 feet. The Order then accepts the Defendants' characterization of what factors are important when comparing the buildings, including heated square footage, 62 parking spaces, and 110 seating capacity. But the factual finding that 2.0 and 3.0 were otherwise the same is simply not accurate. Comparing the plans for 2.0 and 3.0 shows dramatically different structures, which used different building materials and had entirely different layouts. (Compare Ex. P-12 with Ex. P-24.) Moreover, as explained below, the characteristics emphasized by the County have no foundation whatsoever in the Zoning Ordinance and should not be considered as relevant for determining whether 3.0 should have been approved.

II. Declaratory Judgment

With respect to Gulfstream's declaratory judgment claim, the Order concludes that Gulfstream did not overcome the presumption that a legislative enactment is constitutional. The Order bases this conclusion on its findings that there was no evidence that Ordinance No. 2018-40 (the "Ordinance") was so unreasonable as to destroy constitutional rights, the approval process followed the requirement of public readings and voting, the decision was not arbitrary and capricious, and the County Council voted on the Ordinance without Goggans partaking in the votes or public readings. These findings mirror and incorporate the Court's decisions regarding Gulfstream's substantive due process and procedural due process claims, so Gulfstream will address them in more detail in Sections III and IV, respectively.

For Goggans' involvement, the Order finds that there was no evidence that he was involved in 2.0 or 3.0, and there was no evidence that Goggans participated in or influenced in any way the new plans contained in the 2.0 or 3.0 amendments. The Order acknowledges that Goggans was involved with 1.0, but the Order overlooks how that involvement critically impacted the County's decisions with respect to 2.0 and 3.0. Gulfstream introduced key emails and correspondence demonstrating that Richardson and Johnson were "friends" of Goggans and were "usually helpful in [his] efforts." (Ex. P-6.) Goggans, while serving on County Council, met with Richardson and Johnson multiple times regarding the project, which Richardson testified was highly unusual for a Councilmember to do. For 2.0 and 3.0, Goggans' firm, SGA, remained the architects for the project, and Richardson and Johnson testified that they were aware that Goggans owned SGA. (P-24, P-25, P-26, P-27, P-28, P-30.) Goggans remained on the Council while 3.0 was pending, and Richardson and Johnson testified that Goggans had power over their hiring, firing, budget, raises, and promotions. It is not as if these relationships suddenly disappeared during the review and approval process for 3.0 and the slate was magically wiped clean of Goggans' involvement. Therefore, the decision on 3.0 decidedly was influenced by Goggans, and the approval process for 3.0 was irreparably tarnished, and the Order should be reconsidered on this ground.

Moreover, Goggans bragged to his client that he negotiated "favorable outcomes" for Palmetto with Richardson and Johnson, which outcomes permeated the entire process for approval of 2.0 and 3.0. The "favorable outcomes" were the only factors the County (arbitrarily) deemed relevant to the approval of the new building. (Ex. P-8.) Those parameters included: (1) comparing only heated square footage to heated square footage when determining whether the new building could be approved; (2) ignoring thousands of square feet of unheated deck space that was to be occupied by patrons; and (3) ignoring Article 11, the parking section of the Zoning Ordinance,

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

altogether. (Ex. P-8.) Goggans testified that the County stuck to these "favorable outcomes" as the parameters for approval of both 2.0 and 3.0. Therefore, Goggans' initial influence pervaded the subsequent decisions on 2.0 and 3.0, and even the Court's decision here. This influence cannot be overlooked, and the Court should reconsider its Order.

The Order also decides that there is no evidence that Goggans convinced or influenced Richardson and Johnson to overlook the Zoning Ordinance. But the Order does not acknowledge the key evidence presented by Gulfstream on this point. There are multiple email examples that show that throughout the negotiations with Goggans regarding the project, all parties believed that the parking regulations must be complied with. For example, Goggans and his own team prepared parking calculations based on the buildings proposed square footage, including conceding that "[w]e did not include the decks in this analysis, which may require an additional 2 or 3 spaces." (Ex. P-7.) Richardson herself told Goggans that "any deck area that is to be used for outdoor seating or a bar area must meet parking requirements." (Ex. P-76); see also (Ex. P-10, P-77, P-78, P-79) (including additional discussions between the County and Goggans stating that parking requirements had to be met and preparing parking calculations). Despite these acknowledgments that the parking requirements in the Zoning Ordinance had to be met, Goggans negotiated a "favorable outcome" that the admittedly substandard existing parking would comply with zoning requirements. (Ex. P-8.) This evidence shows that Goggans convinced Johnson and Richardson to ignore the Zoning Ordinance in order to obtain approval of his client's project, and Goggans' role should not be disregarded by the Court. Goggans should be held liable for this conduct, and the decision regarding his involvement should be altered and amended.[2]

---

[2] Gulfstream will address the Order's findings regarding compliance with the Zoning Ordinance's procedural and notice requirements in Section IV of this Motion.

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

III. Substantive Due Process

For Gulfstream's substantive due process claim, in Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 737 S.E.2d 601 (2013), the Supreme Court of South Carolina explained that "[i]n order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." Id. at 296. Moreover, "in the context of a zoning action involving property, it must be clear that the state's action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." Id. at 297, 737 S.E.2d at 610 (quoting Sylvia Dev. Corp. v. Calvert Cnty., 48 F.3d 810, 827 (4th Cir. 1995)).

The Order should not have included the "shocks the conscience" question, and instead, should have applied a rational basis review. The analysis a court uses when determining whether a substantive due process violation under the United States Constitution has occurred depends upon "whether the claimed violation is by executive act or legislative enactment, [because] different methods of judicial analysis are appropriate." Hawkins v. Freeman, 195 F.3d 732, 738–39 (4th Cir. 1999) (citing Cnty. of Sacramento v. Lewis, 523 U.S. 833, 845 (1998)). For executive acts, such as the government's decision to revoke parole and reincarnate an individual, the court must determine whether the challenged conduct "shocks the conscience." Id. at 738–39, 740. For legislative acts, such as the government enacting a statute, the court's analysis "does not involve any threshold 'conscience-shocking' inquiry," but instead involves a separate two-step process. Id. at 739; see Colon Health Centers of Am., LLC v. Hazel, 733 F.3d 535, 548 (4th Cir. 2013). The two-step process is (1) to determine whether the claimed violation involves a fundamental right or liberty, then (2) if the asserted interest is "fundamental," the challenged legislation is

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

entitled to strict scrutiny judicial review, and if the interest is not "fundamental," it is entitled only to the protection of rational-basis judicial review. Hawkins, 195 F.3d at 739.

Here, the Order includes in its analysis of whether a substantive due process claim occurred the "shocks the conscious" standard. The Order states that "[t]h conduct must be such that it is intended to injure in some way unjustifiable by any government interest and is the sort of official action that most likely rises to the level of shocking the conscience." (Order at 8.) This is the wrong standard for this case. This case is about a legislative act effecting property rights—the passing of an ordinance—and not an executive act. Therefore, the only analysis required is a rational basis review of whether the government's decision was arbitrary and capricious. Because the Order applied the wrong legal standard, the Order should be altered and amended on this ground.

A. Approval of 3.0 Deprived Gulfstream of its Property Interests.

The Order does acknowledge that Gulfstream has a property interest in the Easement. But the Order finds that Gulfstream will not be deprived of that interest because Gulfstream will still have the right to ingress and egress over the parking lot. The Order overlooks that the approval of the Ordinance eviscerates Gulfstream's right to the Easement, and that Gulfstream has a property right in its restaurant that will also be destroyed.

The evidence is undisputed regarding the devastating impact approval of 3.0 will have on Gulfstream's rights to the Easement and to Gulfstream's property. Mr. Kirk testified that Gulfstream uses the entire parking lot for its guests at night. Gulfstream has a right under the Easement to primary access to the entire parking lot at night. (Ex. P-2.) Mr. Kirk further testified that Gulfstream has an average of 350 guests at night, and that Gulfstream needs access to the entire parking lot to service those guests. Mr. Kirk, Mr. Moring, and Mr. Castles testified that

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

there is nowhere else in the area to park. Mr. Kirk testified that if people come to Gulfstream and cannot find a place to park, they will leave and never come back. Mr. Kirk testified that both restaurants cannot survive on the parking lot, and Gulfstream will have to close. Mr. Moring further testified that there is no parking in the immediate area, there is no street parking, and there will not be adequate parking for Gulfstream as a result of the approval of 3.0. Mr. Moring testified that approval of 3.0 will have a devastating impact on Gulfstream's marketability and that no one will want to buy the restaurant due to lack of parking.

The Order does not recognize this evidence of the destruction of both Gulfstream's rights to the Easement and to its restaurant itself resulting from approval of 3.0. The Court should reevaluate its failure to recognize the loss of these interests resulting from the passage of the Ordinance.

B. The Decision to Approval 3.0 was Arbitrary, Capricious, and Without Rational Basis.

i. Approval of 3.0 Will Create a Public Safety Issue.

The Order ignores the undeniable public safety issue created by the approval of 3.0. Richardson and Johnson testified as planning experts that parking is a public safety issue and Mr. Castles agreed. Even the Zoning Ordinance states that the parking requirements are for purposes of "improving the public health, safety and general welfare of the community." (Ex. D-1 at § 1100.)

By all accounts, approval of 3.0 will make a "substandard" parking situation untenable. Mr. Kirk testified that there have already been accidents in front of the restaurant due to a paucity of available parking. The County ignored its own rules regarding parking, neglecting to do the required shared parking analysis from Article 11 for consideration of Gulfstream and the marina's

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

parking needs. The County put on blinders with respect to the size differences between the old restaurant and 3.0, allowing the County to approve 3.0 to replace the snack bar:

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

(Ex. P-24, P-35, P-11.) There is nothing more arbitrary and capricious than approval of an Ordinance that will create a danger to the public health, safety, and welfare, but that is exactly what the County did. What's more, the County approved 3.0 in violation of its own Zoning Ordinance, which in itself is grounds for finding the decision arbitrary and capricious.

ii. The Zoning Ordinance is Not a Guideline, it is a Requirement.

Instead of recognizing the arbitrary and capricious nature of the decision, the Order credits Defendants' argument that for PDs, the provisions in the Zoning Ordinance related to parking are not requirements. This conclusion is based on Richardson and Johnson's testimony that a PD is a zoning variance, and the Zoning Ordinance is just a guideline for PDs. But regardless of this testimony, that is simply not what the Zoning Ordinance says. The Zoning Ordinance clearly provides in Article 11 that "[a]reas suitable for parking or storing automobiles in off-street locations shall hereafter be required in all districts at the time of initial construction or conversion in use of any principal building which produces or proposes to produce an increase in dwelling units, guest rooms, floor area, seating or bed capacity." (Ex. D-1 at § 1101.) Richardson admitted that "all districts" includes PDs. The intent section of Article 11 similarly provides that "[i]t is the intent of this section to establish standards for the provision of off-street parking facilities **throughout the unincorporated area of Georgetown County**." (Ex. D-1 at § 1100) (emphasis added). Again, this includes no exceptions, and Article 11 applies to all districts and throughout the County. There is no room for Richardson, Johnson, or the Court to interpret the language otherwise.

Although the Order finds that Gulfstream did not present expert testimony to rebut Richardson and Johnson, that is inaccurate. Mr. Castles, an expert in civil engineering, testified that his job is to interpret and apply zoning ordinances every day. He testified that there are no

exceptions to the parking requirements in the Zoning Ordinance. Richardson testified that the PD sections of the Zoning Ordinance were silent on parking requirements. Therefore, the rules regarding parking can only be found in Article 11.

Finally, the best evidence that the County itself knew, at all times, that these parking requirements governed is in their words written and spoken in real time when the project was being "negotiated." Richardson, Johnson, Goggans, and his team made repeated references to the parking rules as requirements and repeated negotiations with Goggans related to compliance with those regulations. (Ex. P-7, P-0, P-76, P-77, P-78, P-79.) The Staff Report for 3.0 included parking calculations, as did the discussion at the public meeting for 2.0. (Ex. P-15 at 4, P-35.) If Article 11 was inapplicable, why did everyone involved with this project rely on it so heavily at every turn?

It is undisputed that the approval of 3.0 did not comply with Article 11. Because compliance with Article 11 is mandatory based on the plain language of the Zoning Ordinance, and approval of 3.0 violates Article 11, the Court should reconsider its decision on the arbitrariness of approval of the Ordinance.

iii. Richardson and Johnson Ignored the Shared Parking Calculation Requirement for Purposes of Approving 3.0.

The Order finds that Richardson and Johnson testified that they did not calculate the parking based on the Zoning Ordinance, but that is not correct. In the early negotiations with Goggans, the County did do parking calculations based on the Zoning Ordinance. (Ex. P-7, P-0, P-76, P-77, P-78, P-79.) Even in the Staff Report for 3.0 includes a parking requirement analysis. (Ex. P-35.)

What Richardson and Johnson actually testified to is that they did not evaluate whether the approval of the Ordinance met the shared parking requirements under Section 1102.3, which

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

requires consideration of Gulfstream and the marina's parking needs. Why not? Because, as Johnson testified, the County knew that the PD would not comply with the Zoning Ordinance. Despite this knowledge, the County approved a building that resulted in a parking shortage of **108 parking spaces** according to Gulfstream's expert, Mr. Castles. Richardson walked through the parking calculations and admitted that approval of 3.0 did not meet Article 11's shared parking requirements.

Moreover, if one believes Richardson and Johnson that the regulations served as a guide, Richardson and Johnson completely ignored the guidance provided. They knew that Article 11 is designed to protect the public health, safety, and welfare. Yet Johnson and Richardson consciously decided to disregard those rules. That is the epitome of an arbitrary decision, and the Court should reconsider its ruling on this point.

iv. The County's Purported Grounds for Approving 3.0 Are Completely Baseless and Not Rationally Related to the Decision.

The Court explains that the decision to approve 3.0 was not completely baseless because the Ordinance required 3.0 to have the same seating capacity as the old building and the County limited the heated square footage of 3.0. In reality, the County had no idea what the seating capacity of the old building was. Richardson testified that the County did nothing to verify the number of seats in the old building and had no actual knowledge of how many seats the old building actually had.

With respect to making seat count a requirement, Boyd admitted that the Zoning Ordinance says nothing about counting seats. The Ordinance calls for counting gross floor area when figuring car count and parking requirements. Limiting seats has nothing to do with the number of people who can visit the restaurant, as Johnson admitted that there were thousands of square feet of unheated square footage in deck space and outdoor area where patrons can stand, have a drink,

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

and watch the sunset. Johnson admitted that the new building had an occupancy limit of 350 people, so 240 more people can be in the restaurant but not in a seat.

Richardson also admitted that the distinction regarding heated versus unheated square feet can be found nowhere in the Zoning Ordinance. Instead, the Zoning Ordinance talks about gross floor area and outdoor seating area for the parking calculations, as admitted by Johnson. (D-1 at § 1102.1) (including the requirements for "Restaurant, standard").

There is nothing more arbitrary than enacting an Ordinance based on characteristics that have no foundation in the County code. County officials are not permitted to make decisions based on rules not set forth in County Ordinance, as it allows for arbitrary and discriminatory enforcement, as happened here. The Court should revisit this conclusion in its Order.

The County's proffered reasons for approval of 3.0 of bringing 3.0 into compliance with FEMA, ADA, and building codes could have been accomplished without allowing Palmetto to build a 4-story, 13,000 square foot building in place of the 4,600 square foot ship store and restaurant. Defendants could have required Palmetto to build a new building that did not straddle the property line and was raised up to comply with flood regulations without allowing a massive, 4-story building with an entire extra story addition that includes outdoor seating. Accordingly, Defendants' proffered reasons for approving the major amendment are not rationally related to the approval of 3.0.

v. Approving a Building that Will Result in a Dramatic Increase on Parking Demand was Not Rational.

The Court acknowledges that Gulfstream's expert calculated that Gulfstream needed 76 parking spaces under the Ordinance, but the Court does not acknowledge that the marina required 22 spaces and 3.0 required 76 spaces under Article 11. The Order overlooks that the shared parking requirements of Section 1102.3 are not met by the Ordinance. Gulfstream's evidence with respect

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

to the number of parking spaces required under Section 1102.3 was unrebutted, and the Order should acknowledge this violation.

Instead of recognizing that approval of 3.0 does not comply with Section 1102.3, the Order finds that even before 3.0, the parking lot was non-conforming and the PD was created before the Zoning Ordinance was written. But the fact that the parking lot was nonconforming before the approval of 3.0 does not justify approval of a building that will dramatically increase non-conformity. The fact that the parking lot situation was bad before does not justify making that situation radically worse through the approval of 3.0. The number one rule of nonconforming use cases is that you cannot expand or increase the nonconformity or rebuilt once removed. (D-1 at § 400.)

The Court also notes that there is no evidence the PD was required to follow the Zoning Ordinance because it was enacted before the Zoning Ordinance was written. This overlooks that Article 11 is mandatory across all zoning districts. Moreover, the amendment to the PD through the Ordinance occurred after the Zoning Ordinance was written, clearly bringing the approval of the Ordinance under the purview of the Zoning Ordinance.

For the reasons set forth above, the Order's decision on substantive due process should be altered and amended, and the Court should find for Gulfstream.

IV. Procedural Due Process

A procedural due process claim requires three elements: (1) a life, liberty, or property interest; (2) deprivation of that interest caused by state action; and (3) procedures that were constitutionally inadequate. Sansotta v. Town of Nags Head, 724 F.3d 533, 540 (4th Cir. 2013). Regarding the procedure itself, at a minimum, "the [United States] Constitution requires notice and some opportunity to be heard." Mallette v. Arlington Cnty. Employees' Supplemental

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Retirement Sys. II, 91 F.3d 630, 640 (4th Cir. 1996). "Above that threshold," due process is "flexible and calls for such procedural protections as the particular situation demands." Id. (internal quotation marks omitted). The Supreme Court of South Carolina has held that under its constitution, for proceedings before a local governing body: "Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007).

The Order credits Richardson's testimony that the application was complete and that the incomplete sections were not required based on the type of change the applicant was seeking. It is undisputed that the application did not include any building plans or parking calculations, and those were submitted by Palmetto within a week of the Planning Commission meeting. (Ex. P-20, P-29, P-30.) How can the application be complete enough for the County to evaluate a proposed change in site plan and building configuration—which was the change sought by Palmetto—without knowing what kind of building Palmetto was looking to build? (Ex. P-27, P-28, P-29, P-30) (submitting the plans shortly before the Planning Commission meeting). Because the County planned to rubber stamp the approval regardless of what Palmetto wanted to do.

Moreover, how are Gulfstream and neighboring property owners supposed to evaluate the plans in time to prepare for the hearing or know if they even want to oppose the building if the plans are only provided within a week of the meeting? (Ex. P-26) (showing email from concerned neighbor and noting that "no hard information as to the elevations or numbers of floors of the planned building was included. I am most interested in knowing of this latter information."). This certainly deprived Gulfstream of a meaningful opportunity to be heard and violated the Zoning

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Ordinance rules regarding submitting the application in proper form at least 45-days prior to the Planning Commission meeting. (Ex. D-1 at § 1702.1.)

Palmetto did not provide the County with the required list of individual property owners within 400 feet of the property, and those individuals did not receive mailed notice. (Ex. P-20.) The County only mailed notice to the Marlin Quay Homeowners Association and did not mail notice to each individual owner of the Marlin Quay condominiums. (Ex. P-22.) Instead, the County relied on the Marlin Quay Homeowners Association manager, Nancy Gardner, to notify homeowners. (Ex. P-21.) Moreover, this notice was not provided by mail as required by the Ordinance, and instead was only emailed. (Id.). Richardson admitted that notice was not sent in the mail to the individual owners in the Marlin Quay condominiums. This violates Section 1702.206 and procedural due process.

The Order does not include a ruling on Gulfstream's argument regarding compliance with the County's 12-month "penalty box" requirement in the Zoning Ordinance. (D-1 § 1702.1.) For the reasons set forth in Gulfstream's Post-Trial Brief, the decision should be reversed on this ground, and the Order should be altered and amended to include a finding on this issue.

V. Takings/Inverse Condemnation

For Gulfstream's taking and inverse condemnation claims, a violation of the takings clause can occur multiple ways. A taking can occur through a *per se* taking in two scenarios: (1) where an owner is required to suffer a permanent physical invasion of property, or (2) where the regulation denies the owner all economically beneficial or productive use of the land. Dunes W. Golf Club, LLC, 401 S.C. at 313, 737 S.E.2d at 619 (internal quotation marks omitted).

For alleged regulatory takings that do not result in the loss of all economically beneficial use, a plaintiff's claims are analyzed under the test set forth in Penn Central Transportation Co. v.

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

New York City, 438 U.S. 104 (1978), which evaluates: "the character of the government action, the economic impact of the regulation on the claimant, and the extent to which the regulation has interfered with distinct investment-backed expectations." Dunes West Golf Club, LLC, 401 S.C. at 315, 737 S.E.2d at 619. The extent of diminution in value is one factor for consideration in determining whether the governmental action constitutes a taking. Id. at 317, 737 S.E.2d at 621.

Importantly, the Supreme Court of South Carolina has clarified that for regulatory takings, only two elements are required: (1) affirmative conduct of a government entity and (2) the conduct effects a taking. Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76, 79-80 (2005) (holding that the elements of whether the "taking is for public use" and the "taking has some degree of permanence" do not apply to regulatory takings claims). The elements that the taking be for a "public use" and have "some degree of permanence" do not apply to regulatory inverse condemnation claims. Id.

Here, the Order mistakenly applied the non-regulatory taking elements to the inverse condemnation section of its order, whereas it should have applied the two-element test as previously stated, and then applied the Penn Central test to determine whether the second element—whether the conduct effects a taking—was satisfied. Id. at 658, 620 S.E.2d at 80. Because the wrong legal standard was applied, the Order should be altered and amended on this ground.

A. A *Per Se* Taking has Occurred.

Approval of 3.0 deprives Gulfstream of its rights to the Easement and to the value of its restaurant. The Court finds that Gulfstream has not been deprived of all economically beneficial or productive use of its land and still retains a non-exclusive easement to the parking lot. This conclusion overlooks unrebutted evidence presented by Gulfstream on this issue. The Order does

not recognize that Gulfstream has been deprived of all economically beneficial use of its land because its physical property will be worth a nominal amount of $89,500 as a result of the approval of 3.0, as testified to by Gulfstream's expert appraiser, Mr. Knight. (Ex. P-47.) The Order also overlooks the evidence explained above in Section III(A) regarding how the approval of 3.0 guts Gulfstream's right to the Easement. Mr. Kirk testified that Gulfstream needs all of the parking spaces at night and that two restaurants will not survive competing for parking in the parking lot. Customers will not have the ability to use the lot because they will not be able to find parking, as testified by Mr. Kirk, and they will turn around and leave and never come back. As a result, a *per se* taking of all beneficial use did occur, and the Court's decisions should be altered.

B. Approval of 3.0 Results in a Regulatory Taking.

For the Penn Central test, the Court concludes that the County had a legitimate public purpose for enacting the Ordinance, including compliance with FEMA, ADA, fire, and building codes. But, again, these reasons were not legitimate reasons for enacting 3.0, as the building could have complied with these regulations and still been similar in size to the old restaurant.

The Order reiterates its conclusion that Gulfstream did not have entitlement to a certain number of parking spaces, but only a non-exclusive right to ingress and egress. This overlooks that Gulfstream did have entitlement to 62 spaces at night. The Order's misapprehension of Gulfstream's rights should be re-evaluated, since the right to those 62 parking spaces will be destroyed by the passage of 3.0.

The Order also notes that there could be walk up traffic, but Mr. Moring testified there will not be enough parking in the parking lot for Gulfstream due to 3.0's approval and that anyone looking to buy the restaurant will know that. Therefore, according to Gulfstream's expert restaurant broker, the walk up traffic would not be sufficient to keep Gulfstream marketable after

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

the passage of 3.0. Mr. Knight testified that approval of 3.0 will result in a reduction in value of Gulfstream's property from $1,850,000 to $89,900, resulting in a loss of $1,760,100. This evidence is undisputed and unrebutted. Because the Order does not recognize these depravations, the Order should be reconsidered.

The Order also includes several incorrect findings, which the Court considers for purposes of discrediting Mr. Knight's testimony. For example, Mr. Knight did not testify that if Gulfstream's property were rezoned for commercial use it would be extremely valuable. Instead, on cross-examination, Mr. Knight was asked questions regarding potential rezoning to residential, not commercial, but Mr. Knight clarified upon redirect examination that he cannot come to any conclusions regarding the value of Gulfstream as a residential property without conducting an analysis of the reasonable probability that the property would be rezoned, which he had not done, and no one has done. Moreover, Mr. Knight's testimony about the value of Gulfstream as residential is irrelevant, because Richardson testified that the only permitted use for Gulfstream's property under the PD is as a restaurant. Mr. Knight also did not testify that he never visited the property, and instead, he testified that he conducted an onsite inspection of the property. The cover letter to his expert appraisal report states that he inspected Gulfstream's property on November 25, 2019, as part of this appraisal assignment. (Ex. P-47.) The Court's mis-recollection of Mr. Knight's testimony results in an erroneous decision on the takings question.

Finally, Gulfstream does have an investment backed expectation in the use of 62 spaces in the Easement at night. (Ex. P-2, P-3.) Gulfstream also has an investment-backed expectation in continuing to use its property as a restaurant, which Mr. Kirk testified will not be able to continue as a result of the Ordinance. Based on this evidence of legitimate investment-backed expectations,

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

which must be considered in the Penn Central analysis, the regulatory taking of Gulfstream's property should be recognized.

VI. Attorneys' Fees

Because Gulfstream is entitled to recover on its federal constitutional claims, the Court should reconsider its decision that Gulfstream should not receive its attorneys' fees in this case.

CONCLUSION

The Order erroneously concludes that Gulfstream is not entitled to declaratory judgment or to recover for violations of its substantive and procedural due process rights or for takings/inverse condemnation. For the reasons set forth above, the Order should be altered and amended to reverse the decision in its entirety and to find in favor of Gulfstream. Plaintiff's counsel certifies that consultation with Defendants' counsel prior to filing this motion would serve no useful purpose.

[signature block on the following page]

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Feb 13 3:33 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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

s/ Simon H. Bloom
Simon H. Bloom (GA Bar# 064298)
Admitted Pro Hac Vice
BLOOM PARHAM, LLP
977 Ponce de Leon Avenue NE
Atlanta, Georgia 30306
(404) 577-7710
sbloom@bloom-law.com

s/ Andrea J. Pearson
Andrea J. Pearson (GA Bar# 409604)
BLOOM PARHAM, LLP
Admitted Pro Hac Vice
977 Ponce de Leon Avenue NE
Atlanta, Georgia 30306
(404) 577-7710
apearson@bloom-law.com

Attorneys for Plaintiff the Gulfstream Café, Inc.

February 13, 2023

ELECTRONICALLY FILED - 2023 Mar 03 4:13 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2019-CP-22-00212

The Gulfstream Café, Inc.,	)	
	)	
Plaintiff,	)	**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT**
	)	
vs.	)	
	)	
Georgetown County, Georgetown County Council, and Steve Goggans, individually and in his official capacity as Georgetown County Councilmember,	)	
	)	
Defendants.	)	

Defendants Georgetown County ("the County"), Georgetown County Council ("County Council"), and Steve Goggans (collectively hereinafter "Defendants") submit this Response to Plaintiff The Gulfstream Café, Inc.'s ("Plaintiff") Motion to Alter or Amend ("Motion").

INTRODUCTION

After four days of trial before the Honorable R. Kirk Griffin, post-trial briefs and replies, and careful consideration of the evidence, arguments, issues, facts, and applicable law, this Court entered a thorough and detailed analysis of the issues before it and found Plaintiff did not meet its burden on any cause of action by Order dated on February 3, 2023 ("Order"). On February 13, 2023, Plaintiff filed a Motion to Alter or Amend, setting forth a list of issues the Court should reconsider. For the reasons set forth below, Plaintiff's Motion should be denied, as the Court did not misunderstand, fail to consider, or fail to rule upon any argument or issue.

LEGAL STANDARD

"A party *may* wish to file [a Rule 59(e), SCRCP] motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the

party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised but not rule on, in order to preserve it for appellate review." *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original).

ARGUMENT

In its Order, the Court analyzed all facts and legal issues properly. Plaintiff made its positions clear at the trial, and the Court gave great consideration to Plaintiff's arguments and the evidence presented therein. Further, the Court did not fail to rule on any issue or argument raised by Plaintiff. Plaintiff's Motion can be summarized as insisting the Court did not give the weight to certain evidence as Plaintiff wanted. Therefore, Plaintiff's Motion should be denied.

I. The Court properly considered the parking lot easement and did correctly acknowledge the Plaintiff's easement rights.

Despite the fact that the Court cited the exact language of the parking lot easement on the second page of its Order, Plaintiff contends the Court did not consider that the easement provides it "the right to use all 62 of the parking spaces at night." (Pl.'s Mot. to Alter or Amend at 2.) However, Plaintiff, in its Motion, misrepresents the easement. The easement, both the 1986 and 1990 versions, contains the following language: "It is *anticipated* by the parties that while they will *each have joint and non-exclusive use* ***at all times*** *of the area covered by this easement* that Grantor will utilize the premises primarily during the daytime [regular business hours of Grantor] and the Grantee will utilize the premises primarily in the evening [regular business hours of Grantee]." (Pl.'s Exs. 2 & 3 (emphasis added) (bracketed language added in 1990 version).)

Moreover, Plaintiff sued the County. Holly Richardson, Georgetown County's Director of Planning and Code Enforcement, testified the Planning Department, when reviewing applications for amendments, does not consider easements between private parties when evaluating an

ELECTRONICALLY FILED - 2023 Mar 03 4:13 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Mar 03 4:13 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

application. If Plaintiff alleges an easement is being violated, its remedy is not to sue the County for passage of an application for a major amendment to a planned development ("PD").

II. The Court properly found that Plaintiff failed to challenge the passing of 2.0.

There was no appeal of the Version 2.0 application to the Board of Zoning Appeals. Further, even if Plaintiff's filing of a lawsuit in November 2016, against Mark Lawhon and Palmetto Industrial Development LLC, could remotely constitute a "challenge" as anticipated by South Carolina Code Section 6-29-760(D), Plaintiff did not initiate such action specific to 2.0 within the timeframe required by Section 6-29-760(D); rather, it filed its lawsuit nearly a year and a half prior to 2.0's passage.

III. The Court properly considered the notice requirements.

Plaintiff repeats the misleading statement that individual owners at Marlin Quay Condominiums were not "sent notice" by "Palmetto or the County." (Pl.'s Mot. to Alter or Amend at 2-3.) As the Court noted, Palmetto delivered envelopes addressed to the required property owners and attached them to the application, and therefore, the notice requirements were met. (Order at 11.) Further, the notice was publicly posted by the County, and the Marlin Quay unit owners received emails regarding the notice. As Richardson testified, a tax list of the property owners affected by the 3.0 application was obtained by reviewing the County's tax records using the County's Geographic Information System ("GIS"), which populated only the Marlin Quay condominium and not each individual unit owner. *See* S.C. Code Ann. § 6-29-760(D) (providing there can be no challenge to the adequacy of notice if there has been substantial compliance with the notice requirements of established procedures); GEORGETOWN COUNTY, S.C., ZONING ORDINANCES art. XVII, § 1702.207 ("Failure to strictly comply with the notification requirements contained in Sections 1702.206 and 1702.207 shall not render the rezoning of the property

invalid."). The Court, after acknowledging Plaintiff's argument that "other owners within the area did not receive proper notice," correctly held that Plaintiff had "no standing to complain about the notice of other individuals not a party to this lawsuit." (Order at 11.) And, Plaintiff did not allege it did not receive proper notice. (*Id.*) Accordingly, the Court did not misapprehend or overlook any arguments or evidence.

IV. The Court did not misapprehend any argument related to the differences in the 2.0 and 3.0 building structure.

Plaintiff states the Court failed to consider differences in building materials and differing layouts between the proposed building in 2.0 and 3.0, but Plaintiff fails to demonstrate how those considerations would have made any impact on the analysis of the legal claims. *Cf. McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). Any differences required to be considered are set out in the Zoning Ordinance. The Court did not overlook the differences between 2.0 and 3.0, but rather, considered the height, heated square footage, parking spaces, and seating capacity, which does have foundation in the Zoning Ordinance, contrary to Plaintiff's assertion. *See* GEORGETOWN COUNTY, S.C., ZONING ORDINANCES art. XI, § 1101 ("Areas suitable for parking . . . shall hereafter be required in all districts at the time of initial construction or conversion in use . . . which produces or proposes to produce an increase in dwelling units, guest rooms, floor area, seating or bed capacity.").

V. The Court did not misunderstand Plaintiff's arguments as to its alleged entitlement to a Declaratory Judgment in its favor.

Plaintiff states the Court overlooked how Goggans' involvement in the 1.0 amendment "critically impacted the County's decisions with respect to 2.0 and 3.0." (Pl.'s Mot. to Alter or Amend at 4.) Specifically, Plaintiff argues the Court did not consider Goggans was "friendly" with Richardson and Boyd Johnson, the former Director of the Georgetown County Planning and

ELECTRONICALLY FILED - 2023 Mar 03 4:13 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Mar 03 4:13 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Zoning Department, Richardson and Johnson knew Goggans owned SGA, he remained on the Council while 3.0 was pending,[1] he had power to hire, fire, budget, raise, and promote Richardson and Johnson, he "bragged" to his client that he negotiated "favorable outcomes," and Plaintiff introduced emails allegedly reflecting an acknowledgment that the parking regulations had to be followed. (Pl.'s Mot. to Alter or Amend at 3-5.)

Plaintiff's assertions relating to Goggans' alleged influence over Richardson and Johnson are fatal for several reasons. First, Plaintiff's view of the relationship between Goggans, Richardson, and Johnson as leading to a disregard of allegedly applicable parking regulations entirely ignores the fact that the 3.0 application was approved by the Planning Commission after a public hearing, and County Council after three public readings—all with the recusal of Goggans from the process but with significant input from Plaintiff and its attorneys as to its parking concerns. Second, PDs are designed to be flexible and "may provide for variations from other ordinances . . . ." S.C. Code Ann. § 6-29-740. Then, as the Court noted, Goggans did not remain involved in the application process or approval for 2.0 or 3.0, and Richardson and Johnson testified "they did not feel pressure or influence from Goggans in the 2.0 or 3.0 process." (Order at 7.)

Further, nothing Plaintiff cited rebuts that Article XI of the Georgetown Zoning Ordinance was not required to be followed in the context of a PD—and specifically in the context of an application for amendment to a PD that was not "at the time of initial construction or [for] conversion in use." GEORGETOWN COUNTY, S.C., ZONING ORDINANCES art. XI, § 1101 ("Areas suitable for parking . . . shall hereafter be required in all districts at the time of initial construction or conversion in use . . . ."). Richardson's email further supports her testimony: if the deck area

[1] Defendants take issue with Plaintiff's characterization of Richardson's testimony that it was "highly unusual" for a councilmember to meet with the Planning Department as that was not Richard's testimony.

ELECTRONICALLY FILED - 2023 Mar 03 4:13 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

was to be used for outdoor *seating*, then the number of seats would affect parking. (Pl.'s Ex. 76.) Johnson and Richardson both testified the number of seats and the heated square footage from the previous building to the proposed 3.0 would remain the same, and therefore, parking requirements were not changed. This reasoning is the antithesis of arbitrary or capricious decision-making, and rather, is a sound logic that maintains the protection of the constitutional presumption. The Court did not overlook or misunderstand any evidence or issues as to Goggans' alleged involvement, and denial of Plaintiff's claim for a declaratory judgment was proper.

VI. The Court did not overlook or misapprehend any argument or evidence regarding Plaintiff's Substantive Due Process claims.

Mistakenly, Plaintiff asserts the Court used a "shocks the conscience" analysis instead of a rational basis review. Not only did the Court conduct a rational basis review, but Plaintiff is incorrect that the Court improperly referenced "shocking the conscience" language.

In *Siena Corp. v. Mayor & City Council of Rockville Maryland*, the Fourth Circuit Court of Appeals, in deciding whether an amendment to a zoning ordinance violated the claimants' substantive due process rights, noted that, "State deprivation of a protected property interest violates substantive due process only if it is 'so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies.' . . . The state action must be 'conscience shocking, in a constitutional sense.'" 873 F.3d 456, 63-64 (4th Cir. 2017) (citations omitted). The Court acknowledge the conscience-shocking language and proceeded to conduct a rational basis analysis. The Court did not apply incorrect law.

Plaintiff also argues the Court overlooked "the evidence of the destruction of both [Plaintiff's] rights to the Easement and to its restaurant itself from approval of 3.0" because

Plaintiff's expert and manager testified the restaurant's business will suffer due to decreased parking. (Pl.'s Mot. to Alter or Amend at 7-8.) Plaintiff further asserts the passage of Ordinance 2018-40 was arbitrary, capricious, and without rational basis because lack of parking would create a safety issue, as one non-safety expert testified. (Pl.'s Mot. to Alter or Amend at 8.) Plaintiff also argues Article XI is a requirement and not a guidance, and the passage of Ordinance 2018-40 was not rationally related to any governmental interest because seating in the old building was allegedly not evaluated, and parking per Article XI was not implemented. (Pl.'s Mot. to Alter or Amend at 10-14.) As the Order held, the passage of Ordinance 2018-40 does not deprive Plaintiff of its non-exclusive right of ingress and egress over the parking lot, the Ordinance is rationally related to a legitimate government interest that actually *advanced* the health, safety, and welfare of the community by approving a building that would comply with FEMA, the ADA, and building and fire codes, and the County imposed regulations such as limiting the seating capacity and the amount of heated square footage similar to that of the former building. (Order at 9-10.)

Further, Plaintiff did not present any evidence from a zoning or planning expert—and despite Plaintiff's inferences to the contrary, Robert Castles, a civil engineer, was not qualified as such—to support the notion that the parking regulations were mandatory for PDs or that the seating capacity was unchanged. *See S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (citations omitted) (noting arguments of counsel are not evidence); (Order at 10 ("According to the State of South Carolina, PDs are variations to Zoning ordinances that 'constitute zoning ordinance amendments.'") (citing S.C. Code Ann. § 6-29-740, which also provides, "Planned development districts may provide for variations from other ordinances and regulations of other established zoning districts. . . .").) And, as previously noted, the application for this amendment to a PD was not an application for initial construction or for a conversion in

ELECTRONICALLY FILED - 2023 Mar 03 4:13 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

use, and the County made certain neither the heated square footage nor seating capacity would increase. *See* GEORGETOWN COUNTY, S.C., ZONING ORDINANCES art. XI, § 1101 ("Areas suitable for parking . . . shall hereafter be required in all districts at the time of initial construction or conversion in use . . . which produces or proposes to produce an increase in dwelling units, guest rooms, floor area, seating or bed capacity.").[2] Thus, the Court did not overlook any fact or err in holding that Plaintiff's substantive due process rights were not violated by the passage of Ordinance 2018-40.

Plaintiff asserts, "County officials are not permitted to make decisions based on rules not set forth in County Ordinance, [sic] as it allows for arbitrary and discriminatory enforcement, as happened here," but Plaintiff cites to no law whatsoever to support that contention. Indeed, the law provides great deference to local municipalities' discretion to approve amendments to zoning laws, which the Court recognized in its Order. (Order at 6 (citing *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965) ("[The power to invalidate an ordinance should be] exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations.")).)

Plaintiff's arguments regarding Richardson and Johnson's testimony not only ignore other significant portions of their testimony, but paints the Court a picture that its selective points are the only facts the Court should consider. Plaintiff would like the Court to give no weight to, and

---

[2] Plaintiff also asks the Court to give great weight to emails between Richardson, Johnson, and Goggans as supposed evidence that all parties considered the parking requirements of Article XI to be mandatory, but such an argument is inapposite and contradicted by the testimony at trial. Richardson and Johnson both testified they considered Article XI to be a guideline, and such emails—as well as the inclusion of this calculation in the analysis in the Staff Report—prove as much. As the Court noted, "By Plaintiff's own calculations, the parking lot was non-conforming prior to any amendments to the Marina Store and Restaurant." (Order at 10.) Thus, Plaintiff is fine with deviating from the parking requirements of Article XI—so long as Plaintiff is the only one to benefit from such variance.

ELECTRONICALLY FILED - 2023 Mar 03 4:13 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

indeed, makes no mention of, the fact that both the County Planning Commission and County Council—without the involvement of Goggans—considered the proposal of 3.0, including all of the very same arguments and assertions Plaintiff makes to the Court now, along with other public members' opposition and support, and voted to approve this amendment.

By the continual insistence that Article XI calculations should apply to this original planned development, Plaintiff essentially conveys it would not be satisfied unless it were the only entity permitted to use the parking lot according to its own rationale. (Pl.'s Mot. to Alter or Amend at 13) ("Gulfstream needed 76 parking spaces under the Ordinance, but . . . the marina required 22 spaces and 3.0 required 76 spaces under Article 11."). If the Order did not recognize the flexibility this State's legislature has provided for planned developments, the entirety of the Marlin Quay PD would be out of compliance. Regardless, neither the law nor testimony supports the mandatory application of Article XI to a PD. *See* S.C. Code Ann. § 6-29-740 ("Planned development districts *may provide for variations from other ordinances and the regulations of other established zoning districts* concerning use, setbacks, lot size, density, bulk, and other requirements to accommodate flexibility in the arrangement of uses for the general purpose of promoting and protecting the public health, safety, and general welfare.") (emphasis added). For those same reasons, the County's consideration of heated square footage and seating capacity were logical and rational and had foundation in the Zoning Ordinance. *See* GEORGETOWN COUNTY, S.C., ZONING ORDINANCES art. XI, § 1101 ("Areas suitable for parking . . . shall hereafter be required in all districts at the time of initial construction or conversion in use . . . which produces or proposes to produce an increase

ELECTRONICALLY FILED - 2023 Mar 03 4:13 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

in dwelling units, guest rooms, floor area, seating or bed capacity."). Such considerations were not arbitrary or capricious.[3]

The Court did not misunderstand or fail to rule on any argument made by Plaintiff. To be clear: Plaintiff's arguments require the Court to pick apart the reasoning of the Planning Department and insert its judgment for that of the local municipality, all the while entirely disregarding the remainder of the legislative process, which included a hearing before the Planning Commission and three readings before County Council—with Goggans' removal from those processes. Ultimately, Plaintiff disagrees with the weight the Court gave to its arguments and evidence. The Court's Order thoroughly summarized the evidence presented related to the parking calculations, seating restrictions, and rational relation of furthering the public health, safety, and welfare by approving plans for a building that would be code-compliant. Accordingly, Plaintiff's Motion to Alter or Amend as it relates to the Court's analysis of Plaintiff's substantive due process claims should be denied.

VII. The Court did not overlook or misapprehend any argument or evidence regarding Plaintiff's Procedural Due Process claims.

Plaintiff next contends it did not have enough notice to review the 3.0 application. This argument ignores the context in which the 3.0 application was presented, which was to conform with the boundary line specified by the Court in a separate action. The plans may have been supplemented, but the application was provided within the required timeframe. There is no

[3] Plaintiff also asserts that the County did nothing to go behind the information provided to verify the number of seats in the previous building, but Richardson testified that would be impossible given that the store was demolished by the time the application was reviewed, and the Planning Department relied on the information the applicant provided to it. Plaintiff also insists compliance with current local, state, and federal laws could have been completed without building a larger building, but Plaintiff cited to no authority that places the burden of designing proposed buildings on the County Planning Department, the County Planning Commission, or County Council.

ELECTRONICALLY FILED - 2023 Mar 03 4:13 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

evidence the County "planned to rubber stamp the approval regardless of what Palmetto wanted to do." (Pl.'s Mot. to Alter or Amend at 15.) *See Thompson*, 357 S.C. at 105, 590 S.E.2d at 513 (citations omitted) (noting arguments of counsel are not evidence).

Moreover, it is elementary Plaintiff cannot complain about lack of notice to another. *See State v. Chavis*, 261 S.C. 408, 411, 200 S.E.2d 390, 391 (1973) ("It is elementary that one has no standing to challenge the constitutionality of a statute unless *his* rights have been invaded and injuriously affected.") (emphasis added); *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (citing the elements of standing, including that a plaintiff must have suffered an injury in fact and that there must be a causal connection between the injury and the conduct complained of) (citation omitted); *Oasis Goodtime Emporium I, Inc. v. City of Doraville*, 773 S.E.2d 728, 734 (Ga. 2015) (rejecting claimant's argument that because it was affected by the passage of a bill, it had an interest in ensuring compliance with notice procedures and holding claimant received notice and lacked standing to attack the lack of notice to another party); *In re Single Cnty. Ditch*, 361 N.E.2d 1353, 1356 (Ohio Ct. App. 1976) ("An appellant landowner has no standing . . . to complain of lack of notice (to other landowners) . . . when the record does not support a conclusion that the appellant did not receive notice . . . ."). In the same breath, Plaintiff complains that neither it nor neighboring property owners had an opportunity to "evaluate the plans in time to prepare for the hearing" while also arguing, "This certainly deprive Gulfstream of a meaningful opportunity to be heard . . . ." (Pl.'s Mot. to Alter or Amend at 15.)

However, Plaintiff fails to articulate what would have been more meaningful about having updated plans prior to the time its attorneys spoke before these public bodies and wrote letters to these bodies numerous times. As the Court noted, Plaintiff's attorneys were present and expressed

ELECTRONICALLY FILED - 2023 Mar 03 4:13 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

their opposition to the 3.0 amendment at the hearing before the Planning Commission and the three readings before County Council. (Order at 5.)

Lastly, Plaintiff contends the Court did not address whether Section 1702.1 was violated. First and foremost, the Court correctly provided the law for alleged violations of procedural due process, which require a showing that *Plaintiff* did not receive notice, an opportunity to be heard in a meaningful way, and/or judicial review. (Order at 10.) Any alleged failure of the County to follow a subsection that does not affect Plaintiff's notice, opportunity to be heard, or opportunity to receive judicial review is irrelevant, and a mere technicality does not in and of itself give rise to a claim for violation of procedural due process.

Notwithstanding, the 3.0 application did not violate Section 1702.1, which provides in part that an applicant may not seek a zoning amendment "affecting the same parcel or parcels of property or any part thereof, *and requesting the same change in district classification* by a property owner or owners of more often than once every twelve (12) months . . . ." GEORGETOWN COUNTY, S.C., ZONING ORDINANCES art. XI, § 1702.1. Neither 2.0 nor 3.0 sought a change in district classification; the district classification of the affected property was a PD prior to the applications, and Palmetto did not seek change the property from the PD classification. The Court did not fail to rule on the issue of Plaintiff's procedural due process claim because Section 1702.1 has nothing to do with the elements of procedural due process.

VIII. The Court did not overlook or misapprehend any argument or evidence regarding Plaintiff's Takings or Inverse Condemnation Claims.

Plaintiff's complaint about the Court's takings and inverse condemnation analyses is an incorrect reading of the plain language of the Court's Order. Plaintiff, combining in its Motion the claims of takings and inverse condemnation, alleges the "Order mistakenly applied the non-regulatory taking elements to the inverse condemnation section of its order, whereas it should have

ELECTRONICALLY FILED - 2023 Mar 03 4:13 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Mar 03 4:13 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

applied the two-element test as previously stated, and then applied the *Penn Central* test to determine whether the second element—whether the conduct effects a taking—was satisfied." (Pl.'s Mot. to Alter or Amend at 17.) Essentially, Plaintiff appears to assert that the Court should have performed an identical analysis to the inverse condemnation claim as it did when reviewing the takings cause of action. Plaintiff cites to *Byrd v. City of Hartsville* for support that the Court should have only determined whether there was affirmative conduct of the County and whether the conduct effects a taking—as determined by a *Penn Central* analysis—because Plaintiff has alleged a regulatory taking. 365 S.C. 650, 620 S.E.2d 76 (2005). Plaintiff contends the Court's consideration of two elements cited for inverse condemnation—whether the taking is for public use and whether the taking has some degree of permanence—was erroneous pursuant to *Byrd*. However, even if Plaintiff is correct, Plaintiff's claim that a taking was committed is no different than Plaintiff's claim for inverse condemnation, and the Court thoroughly analyzed Plaintiff's takings claim as well as Plaintiff's requested analysis of its inverse condemnation claim.[4]

Regardless, the analysis Plaintiff requests for its inverse condemnation claim—which it alleges is not a physical appropriation but a regulatory one—was performed by the Court within

---

[4] The distinction the Supreme Court of South Carolina made as to when a taking versus inverse condemnation is the appropriate claim is as follows: "While the government typically takes property through an eminent-domain proceeding, a taking may occur without such a proceeding. That is called 'inverse condemnation.'" *Byrd*, 365 S.C. at 656, 620 S.E.2d at 79 (citation omitted). The *Byrd* Court went on to state, "Whether physical or regulatory, this Court has held that there are four elements to inverse condemnation: (1) affirmative conduct of a government entity; (2) the conduct effects a taking; (3) the taking is for public use; and (4) the taking has some degree of permanence." *Id.* at 657, 620 S.E.2d at 79. The Court proceeded to "remove the element 'some degree of permanence,'" because it conflicted with the "principle that the government must compensate for even a temporary taking," and the Court held that the element that the taking must be for public use does not apply to regulatory-taking cases. *Id.* at 657, 620 S.E.2d at 79-80 (citations omitted). However, as evidenced by later cases involving inverse condemnation claims, the Supreme Court of South Carolina may not have abandoned the permanence requirement. *See, e.g., Ray v. City of Rock Hill*, 434 S.C. 39, 45, 862 S.E.2d 259, 262 (2021) (citations omitted).

its analysis of Plaintiff's takings claim, and therefore, the result would have been the same. Specifically, the Court restated in its analysis of the inverse condemnation that the passing of Ordinance 2018-40 was not a taking. (Order at 15.) The Court did not overlook or misapprehend any issue or argument. *Cf. McCall*, 294 S.C. at 4, 362 S.E.2d at 28 ("[W]hatever doesn't make any difference, doesn't matter.").

Plaintiff further disagrees with the Court's finding that Plaintiff has not been deprived of all economically beneficial use of its land. Plaintiff argues testimony supports the finding that customers who cannot find parking will leave and "never come back." (Pl.'s Mot. to Alter or Amend at 8.) Despite this hyperbolic statement that may not have actually been in evidence, the Court considered Plaintiff's experts' testimony as to the diminution in value if there was no parking, but found that evidence to be outweighed by the fact that Plaintiff's expert, George Knight, agreed the property would be extremely valuable if rezoned.[5] The Court also noted that hundreds of condominiums within walking-distance of Plaintiff would not utilize the parking lot. (Order at 13-14.) As the Court noted, "Not all damages that are suffered by a property owner are compensable." (Order at 13 (citing *Dunes W. Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280, 315, S.E.2d 601, 620 (2013).

[5] Plaintiff suggests Knight testified as to the value of the property were rezoned as residential rather than commercial. Despite the possible scrivener's error, the point remains that Plaintiff's own expert conceded the property could be extremely valuable if rezoned, and Plaintiff's expert was an appraiser who was qualified to testify to such without conducting a full analysis and preparing a full report given his familiarity with the property and its location and surroundings. Any alleged "mis-recollection" of Knight's testimony would not result in an erroneous decision as to Plaintiff's takings claim as Plaintiff was not deprived of all economically beneficial use, a legitimate public purpose was furthered by the passage of Ordinance 2018-40, Plaintiff's non-exclusive right of ingress and egress to the parking lot remained, Plaintiff's property and restaurant would still be valuable, and the passage of Ordinance 2018-40 would not interfere with Plaintiff's investment-backed expectations. (Order at 12-14.)

ELECTRONICALLY FILED - 2023 Mar 03 4:13 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Plaintiff's contentions that the building should have been smaller and that Plaintiff was entitled to all sixty-two parking spaces at night are beyond the scope of what governmental entities are responsible for when determining zoning amendments. Plaintiff cannot expect local planning departments to hire architects to conduct sketches of buildings to make them as small as possible while still complying with state and federal laws and building and fire codes. Further, if Plaintiff believes a party to an easement is violating the easement, the County is not responsible for ensuring compliance with easements between private parties, and the remedy is not a suit against the County for an alleged taking. As the Court found, Plaintiff is not prevented from using the parking lot per its *non-exclusive easement* to do so or from operating its business as a restaurant as a result of the passage of Ordinance 2018-40. (Order at 12 (emphasis added).)

Simply because the Court did not find Plaintiff's evidence and arguments sufficient to meet the burden of each cause of action does not mean the Court failed to consider or comprehend any fact or issue for its determination, and amendment of the Order on such grounds would be improper.[6]

CONCLUSION

The Court did not misunderstand, fail to fully consider, or fail to rule on an argument or issue. Plaintiff made its positions clear at trial, and the Court gave great consideration to all of Plaintiff's and Defendants' arguments. Accordingly, the Court should deny Plaintiff's Motion to Alter or Amend pursuant to Rule 59(e), SCRCP.

[*Signature on Following Page*]

[6] Plaintiff is not entitled to attorneys' fees because it is not entitled to recover under any federal constitutional claim.

ELECTRONICALLY FILED - 2023 Mar 03 4:13 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

BURR & FORMAN LLP

Myrtle Beach, South Carolina

March 3, 2023

_s/Henrietta U. Golding____
Henrietta U. Golding, S.C. Bar # 2173
Taylor K. Voegel, S.C. Bar #104770
2411 Oak Street, Suite 206 (29577)
Post Office Box 336
Myrtle Beach, SC 29578
Phone: (843) 444-1107
Fax: (843) 443-9137
Email: hgolding@burr.com
tvoegel@burr.com

Attorneys for Defendants

ELECTRONICALLY FILED - 2023 Mar 03 4:13 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Mar 13 3:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	DOCKET NO.: 2019-CP-22-00212
The Gulfstream Café, Inc., Plaintiff, vs. Georgetown County; Georgetown County Council; and Steve Goggans, individually and in his official capacity as Georgetown County Councilmember; Defendants.	REPLY IN SUPPORT OF MOTION TO ALTER OR AMEND

TO: HENRIETTA U. GOLDING, ESQUIRE, AS COUNSEL FOR DEFENDANTS:

Plaintiff The Gulfstream Café, Inc. (hereinafter "Gulfstream") hereby submits this Reply in Support of its Motion to Alter or Amend the order entered on February 3, 2023 (the "Order").

ARGUMENT

I. The Shared Parking Analysis Applies in these Precise Circumstances, and the County Turned a Blind Eye to It.

Defendants ask the Court to ignore that the Easement provides for an orderly arrangement for how the parties are to share the parking lot. The Easement provides that Gulfstream is to use the parking lot at night and Palmetto is to use the parking lot during the day. (Pl.'s Exs. 2 & 3). In addition, Article XI provides for a formula when there are shared and mixed uses of a parking lot, to determine if the appropriate amount of parking is provided for the different uses of the parking lot. (Defs.' Ex. 1 § 1102.3). Richardson and Johnson testified that they did not conduct this shared parking analysis. Gulfstream is not simply complaining about the Defendants' failure to enforce the Easement between private parties. Gulfstream proved at trial that Article XI set forth exactly how the County was to evaluate whether sufficient parking existed when there were

{00659981.DOCX / }

multiple uses of the parking lot, and the County willfully ignored the Zoning Ordinance. Whether this was a "guide" or a requirement does not change that the County could have, and should have, followed its own Zoning Ordinance to determine if the parking lot would be overburdened by 3.0. The County's failure was a violation of its own Zoning Ordinance and was arbitrary and capricious.

II. <u>The Court Did Not Base its Decision on Plaintiffs' Purported Failure to Challenge 2.0.</u>

Defendants mischaracterize the Court's Order by claiming that the Court found Gulfstream failed to timely challenge 2.0 under South Carolina Code Section 6-29-760(D). The Court's Order did not deny Gulfstream's claims on that ground. In fact, the Court already ruled on that issue on summary judgment in Gulfstream's favor.

III. <u>Defendants Did Not Meet the Notice Requirements in the Zoning Ordinance.</u>

With respect to notice, Defendants contend that Palmetto delivered envelopes addressed to the "required" property owners. But the evidence introduced at trial failed to include any identification of who the envelopes were addressed to. The envelopes were not in evidence, and no one from Palmetto testified as to who was named on the envelopes. The only evidence at trial was with respect to the notice by the County, and it is undisputed the County only sent notice to the Marlin Quay HOA, not the individual owners of the condominiums. (Pl.'s Ex. 22). Therefore, Defendants again failed to comply with their own Zoning Ordinance. (Defs.' Ex. 1 § 1702.206). This was not a "strict compliance" issue. It was a complete lack of compliance.

IV. <u>Differences in 2.0 and 3.0 were Significant, and 3.0 Should have Been Considered on its Merits.</u>

The differences between 2.0 and 3.0 do not matter to Defendants because it was a foregone conclusion that 3.0 was going to be approved. The Application for 3.0 was an application for an entirely new building with a completely different layout and different building type. The request

ELECTRONICALLY FILED - 2023 Mar 13 3:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

for 3.0 was a "Site Plan" amendment and "Change in Building Configuration." (Pl.'s Ex. 20). The Site Plan and Building Configuration were different for 2.0 than for 3.0. Therefore, if Defendants were approaching 3.0 objectively, they would have evaluated the Application for 3.0 on its own merits and without consideration of 2.0. But that is not what Defendants did. Instead, they prejudiced the Application by couching it in terms of what Defendants did for 2.0 and rubberstamped the approval of 3.0.

V. <u>Declaratory Judgment Should Have Been Issued and the Amendment Declared Invalid.</u>

Defendants try to avoid the impact of Goggans' influence by claiming that 3.0 was approved by the Planning Commission and County Council held three public meetings on 3.0. Beyond Goggans' influence over Richardson and Johnson, however, he also had influence over the Planning Commission. Goggans' appointed member of the Planning Commission was the person who moved to approve 3.0. (Pl.'s Ex. 37). Moreover, Richardson and Johnson fed the County Council the misleading characteristics of 3.0 which they developed with Goggans: seating capacity and heated square footage. Those characteristics permeated the staff's recommendation to the County Council and ultimate decision, as those factors were emphasized as the important information for consideration of 3.0. (Pl.'s Ex. 35).

Defendants also reiterate their argument that Article XI did not apply for the additional reason that Palmetto's construction of 3.0 was not "at the time of initial construction." This argument defies common sense. Palmetto completely razed the marina store and restaurant. 3.0 is a brand-new building. To contend that building the entirely new 3.0 was not "initial construction" is nonsensical. Moreover, Article XI also states that it applies when there is an increase in "dwelling units, guest rooms, floor area, seating or bed capacity." It is undisputed that

ELECTRONICALLY FILED - 2023 Mar 13 3:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

3.0 represented an increase in floor area from the marina store and snack bar. Defendants' contention on this point must be rejected.

Furthermore, as Richardson and Johnson admitted at trial, nothing in the Zoning Ordinance provides any requirement regarding seat number or heated square footage. Any decision with respect to parking based on those characteristics was entirely arbitrary, particularly where the Zoning Ordinance spelled out exactly what characteristics the County *was* supposed to consider, but those were entirely ignored.

VI. Defendants Violated Gulfstream's Substantive Due Process Rights.

Defendants use a quote from Siena Corporation v. Mayor & City Council of Rockville Maryland, 873 F.3d 456 (4th Cir. 2017), to support their incorrect statement that the "shocks the conscious" standard applies here. The Court in Siena Corporation, unfortunately, like Defendants here, failed to notice the nuance of when a "shocks the conscious" standard applies.

The relevant quote found in Siena Corporation is a quote from Huggins v. Prince George's County, 683 F.3d 525 (4th Cir. 2012), which in turn quotes County of Sacramento v. Lewis, 523 U.S. 833 (1998). Both Huggins and Lewis use the "shocks the conscious" language because they deal with plaintiffs alleging that government *executive* acts violated their substantive due process rights. In fact, the entire quote—which Siena Corporation only quotes the end of—is as follows: "[T]he substantive component of the Due Process Clause is violated by *executive action* only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." Huggins, 683 F.3d at 535 (quoting Lewis, 523 U.S. at 847) (emphasis added).

In Siena Corporation, the Court classified the government's decision as legislative, but conducted a "shocks the conscious" analysis with a discussion about why the decision was not

ELECTRONICALLY FILED - 2023 Mar 13 3:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

arbitrary. Siena Corp., 873 F.3d at 464. If the Court in Siena Corporation would have quoted the entirety of the line from Huggins and Lewis, it would have noticed the "shocks the conscious" analysis would not apply to legislative acts.

Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999), as quoted in Plaintiff's motion for reconsideration, clearly explains the duality of an executive act and legislative act requiring different judicial analysis:

> Depending upon whether the claimed violation is by *executive act or legislative* enactment, different methods of judicial analysis are appropriate. See Lewis . . . . This is so because there are different "criteria" for determining whether executive acts and legislative enactments are "fatally arbitrary," an essential element of any substantive due process claim. Id.
>
> *In executive act cases*, the issue of fatal arbitrariness should be addressed as a "threshold question," asking whether the challenged conduct was "so egregious, so outrageous, that it may fairly be said to *shock the contemporary conscience*." Id. . . . .
>
> If the claimed violation *is by legislative enactment* (either facially or as applied), analysis proceeds by a different two-step process that *does not involve any threshold "conscience-shocking" inquiry.*

Hawkins, 195 F.3d at 738–39 (citing Lewis, 523 U.S. at 845) (emphasis added).[1]

Therefore, because Defendants' action here is legislative, the Court must analyze Plaintiff's substantive due process claim under a rational basis level of review—not a "shocks the conscious" review—pursuant to established caselaw originating in the Supreme Court case of Lewis, and as clearly explained in Hawkins.

Defendants take issue with Gulfstream's position that overburdening the parking lot created a safety issue, but the evidence is undisputed from Mr. Kirk that accidents have already

[1] Hawkins has been favorably cited most recently in Callahan v. N. Carolina Dep't of Pub. Safety, 18 F.4th 142, 149 n.5 (4th Cir. 2021).

ELECTRONICALLY FILED - 2023 Mar 13 3:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

occurred at the parking lot, Richardson and Johnson agreed that parking is an issue of the public welfare, and numerous people spoke at the public meetings regarding their safety concerns. (Pl.'s Exs. 44, 45). Gulfstream's argument is not based on unsupported speculation, as Defendants attempt to argue, but instead is demonstrated through the undisputed evidence in this case.

With respect to Castles' testimony, he does not have to be qualified as a zoning or planning expert to testify to his interpretation of the Zoning Ordinance based on his experience and expertise as a civil engineer. Moreover, it does not require expert testimony from Castles, Richardson, or Johnson to read the clear words on the page of the Zoning Ordinance that make consideration of Article XI mandatory.

The South Carolina Supreme Court has held that when "exercising discretion, a local board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary." Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997). That is the opposite of what happened here. Defendants reviewed and approved 3.0 based on standards the County created out of thin air, resulting in an arbitrary and capricious decision by Defendants. Under the law, Defendants cannot make decisions based on characteristics and calculations, like limiting seats and heated square footage, which have no foundation in the Zoning Ordinance. See id. at 237 (finding the denial of building permits for billboards to be arbitrary where the board and council failed to apply any of the specific criteria in the ordinance when making the decision to deny the permits and instead improperly considered other factors).

Defendants again point out that if flexibility were not allowed in PDs, then the entire Marlin Quay PD would be out of compliance. The fact that the Marlin Quay PD was previously out of compliance does not justify the County's decision to allow it to become *more* out of compliance.

ELECTRONICALLY FILED - 2023 Mar 13 3:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Defendants ultimate position is that because parking was insufficient before, it does not matter if that concern is compounded exponentially. This position entirely ignores the principles of good planning practice and the public health, safety, and welfare. It should not be credited by the Court.

Moreover, Gulfstream is not trying to place the burden of designing 3.0 on the Defendants. Gulfstream is, however, placing the burden of evaluating whether 3.0 complies with the Zoning Ordinance on Defendants. Defendants utterly failed at this task. Defendants should have gone back to Palmetto and required them to redesign the building such that it complied with FEMA, ADA, and building codes (Defendants' purported rationale for approving 3.0), while at the same time not overburdening the parking lot by actually requiring Palmetto to conform to the size of the old marina store and snack bar. Instead, Defendants approved a building that was at least twice the size of the old building and will create a hazardous parking situation that will destroy Gulfstream's rights to the parking lot.

VII. Gulfstream's Procedural Due Process Rights were Violated.

With respect to providing adequate information to evaluate the Application, Defendants contend that having the building plans in advance of the public meetings was somehow unnecessary. The fundamental question before the County was whether to approve a Site Plan amendment and Change in Building Configuration. It is almost incomprehensible that Defendants take the position that building plans are unnecessary to answer that question. The better question is how did Richardson prepare a staff report without even knowing what the type, size, and layout of the building was that Palmetto was proposing? Because as with everything else, the County took Palmetto's word for it and filled in the blanks at the last minute in advance of the public meetings for the Application. (Pl.'s Exs. 24, 27, 28, 29, 30). This process did not give Gulfstream, or anyone else, adequate time to evaluate and prepare for the hearings in opposition to 3.0.

ELECTRONICALLY FILED - 2023 Mar 13 3:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Mar 13 3:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Gulfstream pointed to numerous failures of the County, such as allowing another amendment application within less than twelve months, that violated both the Zoning Ordinance and amounted to a procedural due process violation. These failures should result in the approval being declared invalid because the County violated the Zoning Ordinance and because they violated Gulfstream's procedural due process rights.

Defendants contend that the twelve-month penalty box rule did not apply because the Application for 3.0 did not request a change in district classification because it did not request a change from the PD zoning classification. Richardson admitted, however, that a major amendment to a PD must follow all the same procedures as a rezoning. This means that a change in a PD is essentially seeking a rezoning, because it is changing the PD itself. Therefore, the County should not have allowed the Application for 3.0 to proceed, because it violated Section 1702.1 of the Zoning Ordinance.

VIII. Gulfstream Proved a Takings/Inverse Condemnation Claim.

Regardless of the precise elements of a taking/inverse condemnation claim,[2] Gulfstream proved that its property has been taken by the approval of 3.0 without just compensation. Gulfstream presented evidence from Mr. Kirk that customers will leave and never come back if they cannot find parking, a marketing expert testified that approval of 3.0 has devastating impact on the marketability of Gulfstream's property, and Gulfstream's appraiser testified that the property will only have nominal value due to the loss of easement parking. This evidence is unrebutted. There is no contrary evidence in the record to refute these facts. There was no basis

[2] Defendants essentially acknowledge that Gulfstream is correct that the Supreme Court of South Carolina eliminated the "taking for public use" and "some degree of permanence" elements. See Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005).

in the record for the Order to decline to find Gulfstream is entitled to compensation for the taking resulting from approval of 3.0.

With respect to Gulfstream's appraiser's statement about the value of the property if rezoned, the expert immediately upon redirect examination clarified that his statement was mere speculation because he had not done the required analysis of the likelihood of rezoning. That analysis must be done before an appraiser can testify as to any value of the property if rezoned.[3] Mr. Knight had not done that analysis, and neither has any other expert or witness in this case. To consider any statement by Mr. Knight to the contrary is error.

---

[3] "[T]he owner is to be given, by way of compensation for his land, its fair price for any use for which it has a commercial value of its own in the immediate present or in reasonable anticipation in the near future…[t]he uses which may be considered must be so reasonably probable as to have an effect on the present market value of the land; a purely imaginative or speculative value cannot be considered." Carolina Power & Light Co. v. Copeland, 258 S.C. 206, 215, 188 S.E.2d 188, 192 (1972)(quoting 27 Am. Jur. (2d) Eminent Domain § 280 (1966))."[I]t is not sufficient to show that the potential is a mere possibility." Id. "It must be shown that the potential is reasonably probable." Id.

ELECTRONICALLY FILED - 2023 Mar 13 3:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

CONCLUSION

For the reasons set forth above, the Order should be altered and amended to reverse the decision in its entirety. The Order should be altered and amended to find in favor of Gulfstream.

Respectfully submitted,

s/ Sean M. Foerster
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

s/ Simon H. Bloom
Simon H. Bloom (GA Bar# 064298)
Admitted Pro Hac Vice
BLOOM PARHAM, LLP
977 Ponce de Leon Avenue NE
Atlanta, Georgia 30306
(404) 577-7710
sbloom@bloom-law.com

s/ Andrea J. Pearson
Andrea J. Pearson (GA Bar# 409604)
BLOOM PARHAM, LLP
Admitted Pro Hac Vice
977 Ponce de Leon Avenue NE
Atlanta, Georgia 30306
(404) 577-7710
apearson@bloom-law.com

Attorneys for Plaintiff the Gulfstream Café, Inc.

ELECTRONICALLY FILED - 2023 Mar 13 3:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Mar 15 4:01 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	DOCKET NO.: 2019-CP-22-00212
The Gulfstream Café, Inc., Plaintiff, vs. Georgetown County; Georgetown County Council; and Steve Goggans, individually and in his official capacity as Georgetown County Councilmember; Defendants.	PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR COSTS

TO: HENRIETTA U. GOLDING, ESQUIRE, AND TAYLOR K. VOEGEL, ESQUIRE, AS COUNSEL FOR DEFENDANTS:

Plaintiff The Gulfstream Café, Inc. (hereinafter "Gulfstream") hereby responds to Defendants' Motion for Costs and respectfully requests that the Court deny the motion for the following reasons:

Relevant Facts

Following a bench trial that took place from August 29 to September 1, 2022, the Court entered an Order on February 3, 2023, finding in favor of Defendants on all causes of action.

On February 13, 2023, Gulfstream timely filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRCP, seeking the Court's reconsideration of its trial order.

Later that same day, Defendants filed a Motion for Costs pursuant to Rule 54, SCRCP, S.C. Code Ann. § 15-37-40, and S.C. Code Ann. § 15-53-100. Defendants supported the motion with an Itemized Statement of Costs attested to by their counsel and listing motion filing fees, deposition transcript costs, deposition exhibit costs, and the cost of their deposition of Gulfstream. This itemization cited to only Rule 54(e)(2), SCRCP, and S.C. Code Ann. § 15-37-40 as the supporting authority for each of these costs.

Legal Standard for Taxation of Costs

"Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs…" Rule 54(d), SCRCP. The plain language of the rule grants the Court the authority to award costs to a

party, but in no way requires the Court to do so and it remains within the discretion of the Court to deny such an award.

Further, the party seeking costs "must point to a specific statute or rule of court to support each of his claims for costs, fees, and disbursements." *Black v. Roche Biomedical Labs., Div. of Hoffman-Laroche*, 315 S.C. 223, 228, 433 S.E.2d 21, 24 (Ct. App. 1993). "[C]osts have always been regarded in this state as in the nature of penalties; hence statutes allowing them are strictly construed..." *Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 318, 422 S.E.2d 128, 131 (1992)(internal citation and quotation marks omitted).

Arguments

The Court must deny Defendants' request for recovery of their costs for depositions, deposition transcripts, and deposition exhibits and must limit their recovery of motion filing fees to $10 per motion.

1. Defendants are not entitled to recover their costs for depositions, deposition transcripts, and deposition exhibits.

Defendants seek to recover the costs of the following items pursuant to S.C. Code Ann. § 15-37-40: 14 deposition transcripts, the "Deposition … of Rule 30(b)(6), SCRCP, of the Gulfstream Café, Inc.", and the "Deposition Exhibits" for the depositions of Holly Richardson and Judy Blankenship.

However, S.C. Code Ann. § 15-37-40 provides for recovery of only the following specific fees and expenses:

- "the fees of officers allowed by law";
- "the fees of witnesses";
- "the reasonable compensation of commissioners in taking depositions";
- "the fees of referees"; and
- "the expense of printing the papers for any hearing when required by a rule of the court."

S.C. Code Ann. § 15-37-40 is silent as to court reporter's fees for depositions, deposition transcript costs, and deposition exhibit costs. Further, court reporters are not "commissioners"—the procedures for examining witnesses by commission under former S.C. Code §§ 19-15-10 to 19-15-110 were repealed in 1985 when the General Assembly promulgated the South Carolina Rules of Civil Procedure.

ELECTRONICALLY FILED - 2023 Mar 15 4:01 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

The South Carolina Court of Appeals has noted that it "doubt[s] the applicability of this provision to present day deposition practice." *Black,* 315 S.C. at 229 n.7, 433 S.E.2d at 25 n.7.

Under the required strict reading of S.C. Code Ann. § 15-37-40, Defendants are not entitled to recover their costs for depositions, deposition transcripts, and deposition exhibits.

2. Defendants' Recovery of Motion Filing Fees is Limited by Statute.

Defendants also seek to recover the filing fees for 13 motions in the amount of $31.74 each pursuant to Rule 54(e)(2), SCRCP.

Although Rule 54(e)(2) provides that "[t]axable costs shall include … [a]ll filing and recording fees charged by the clerk of the court in which the action was pending…", this rule does not apply to taxation of costs "when express provision therefor is made … in a statute…" Rule 54(d), SCRCP.

S.C. Code Ann. § 15-37-90 expressly provides for costs on a motion, and states that "[c]osts may be allowed on a motion, in the discretion of the court or judge, not exceeding ten dollars, and may be absolute or directed to abide the event of the action."

Therefore, while Gulfstream concedes that Defendants are generally entitled to recover their filing fees under Rule 54(e)(2) if they prevail on the pending Motion to Alter or Amend Judgment and any subsequent appeal, their recovery of filing fees specifically for motions is capped at $10 per motion pursuant to S.C. Code Ann. § 15-37-90.

Conclusion

For the reasons set forth herein, the Court must deny Defendants' Motion for Costs to the extent that it requests their costs for depositions, deposition transcripts, and deposition exhibits, and the Court must limit their recovery of motion filing fees to $10 per motion.

Respectfully submitted,

s/ Sean M. Foerster

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

ELECTRONICALLY FILED - 2023 Mar 15 4:01 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

s/ Simon H. Bloom
Simon H. Bloom (GA Bar# 064298)
Admitted Pro Hac Vice
BLOOM PARHAM, LLP
977 Ponce de Leon Avenue NE
Atlanta, Georgia 30306
(404) 577-7710
sbloom@bloom-law.com

s/ Andrea J. Pearson
Andrea J. Pearson (GA Bar# 409604)
BLOOM PARHAM, LLP
Admitted Pro Hac Vice
977 Ponce de Leon Avenue NE
Atlanta, Georgia 30306
(404) 577-7710
apearson@bloom-law.com

Attorneys for Plaintiff the Gulfstream Café, Inc.

March 15, 2023

ELECTRONICALLY FILED - 2023 Mar 15 4:01 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable R. Kirk Griffin, Circuit Court Judge

Case No. 2019-CP-22-00212

The Gulfstream Café, Inc. ....Appellant,

v.

Georgetown County; Georgetown County Council;
and Steve Goggans, individually and in his official
capacity as Georgetown County Councilmember................................ Respondents.

NOTICE OF APPEAL

Appellant The Gulfstream Café, Inc., appeals the order of The Honorable R. Kirk Griffin entered on February 3, 2023, and the order of The Honorable R. Kirk Griffin denying Appellant's Motion to Alter or Amend entered on April 3, 2023. Appellant received written notice of the entry of these orders on February 3, 2023, and April 3, 2023, respectively.

Appellant files this appeal with the South Carolina Supreme Court because the appealed orders of the Circuit Court ruled that Respondents' enactment of a county ordinance did not violate Appellant's right to substantive and procedural due process under both the United States Constitution and the South Carolina Constitution and did not violate the Takings Clause under the South Carolina Constitution. As such, the ruling involves a challenge on state and federal grounds to the constitutionality of a county ordinance where the principal issue is one of the constitutionality of the ordinance as contemplated by Rule 203(d)(1)(A)(ii), SCACR.

April 24, 2023

[signature block on the following page]

ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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.

Other Counsel of Record:

Henrietta Golding (SC Bar # 2173)
Taylor K. Voegel (SC Bar # 04770)
Burr & Forman LLP
2411 Oak Street, Suite 206 (29577)
P.O. Box 336
Myrtle Beach, SC 29578
(843) 444-1107
hgolding@burr.com
tvoegel@burr.com

Counsel for Respondents

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	FIFTEENTH JUDICIAL CIRCUIT
The Gulfstream Café, Inc.,	)	CIVIL ACTION NO: 2019-CP-22-00212
Plaintiff,	)	
vs.	)	**ORDER**
Georgetown County, Georgetown County Council, and Steve Goggans, individually and in his official capacity as Georgetown County Councilmember,	)	
Defendant.	)	

This matter came before the Court for a bench trial which began on August 29, 2022, and concluded on September 1, 2022. The Plaintiff was represented by Simon H. Bloom, Esquire, Sean M. Forester, Esquire, and Andrea J. Pearson, Esquire. Defendants were represented by Henrietta U. Golding, Esquire and Taylor K. Vogel, Esquire. Having carefully considered the pleadings, testimony, evidence, arguments, and post-trial briefs, for the reasons set forth below, the Court finds in favor of the Defendants on all causes of action.

FINDINGS OF FACT

In 1982, Georgetown County created a Planned Development (PD) named Marlin Quay located on South Waccamaw Drive in Garden City, South Carolina. This PD is home to the Marlin Quay Condominiums, Gulfstream Café, and the Marlin Quay Marina Store and Restaurant. In the initial PD, three areas for parking were created. 13 spaces for Gulfstream Café, 60 shared spaces for Gulfstream Café and the Marlin Quay Marina Store and Restaurant, and separate parking for the condominiums. The PD has been amended over time. In 1986, Gulfstream Café was purchased by Jerry Greenbaum; at the time, the parking lot was authorized for use by the Marlin Quay Marina

Store and Restaurant, the Marina boat slips, the Gulfstream Café, and the condominiums. The uses have not changed since the Plaintiff purchased the café.

Plaintiff was granted a non-exclusive easement in 1986 for ingress and egress of the parking lot. With this easement, the Plaintiff was guaranteed "joint and non-exclusive use of the area covered by the easement." The 1990 easement specifically gave Gulfstream:

> A non-exclusive perpetual easement appurtenant to the premises hereinafter described for the full and free right of ingress and egress on, over and across the following described property, together with the rights of vehicular parking on and vehicular and pedestrian access to, all in accordance with all governmental rules, regulations, ordinances or laws, the premises of the hereinafter described, and also for the purpose of maintenance, repair, alteration and/or improvements to hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use at all times of the area covered by this easement that the Marina will utilize the premises primarily during the daytime regular business hours and Gulfstream will utilize the premises primarily in the evening regular business hours.

Plaintiff was not guaranteed a specific number of parking spots, merely the right of ingress and egress.

In 2014, Palmetto Industrial Development, LLC became the owner of the parking lot and the easement remained with Gulfstream. Today, Plaintiff has a property interest that is a non-exclusive right of ingress and egress of the parking lot with 62 spaces. In addition, Plaintiff owns 17 of their own parking spaces exclusively for Gulfstream and 6 additional parking spaces underneath the restaurant. The parking lot is located in the Marlin Quay PD with Gulfstream and

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Marlin Quay Marina Store and Restaurant. The Marlin Quay PD was one of the first PDs in Georgetown County. Holly Richardson and Boyd Johnson testified that in a PD, zoning regulations are guides, but not requirements.

In 2016, Palmetto hired SGA Architecture, LLC to rebuild the Marina Store and Restaurant; repairs consisted of complying with flood requirements with FEMA, the ADA, and other fire and building codes. Further, the old building encroached on the Marlin Quay Condominiums and the new building would remedy the encroachment. The old building was 1.5 stories tall, with 4,603 heated square feet, and a 2-story outdoor deck. The new building plans were for a 4-story building, with 4,596 heated square feet, and a 3-story outdoor deck with total combined unheated space of 5,326 square feet.

Steve Goggans founded SGA Architecture. Additionally, Goggans was elected to the Georgetown County Council in 2014, however he did not seek re-election in 2022. Goggans was the principal architect for the initial rebuild of the Marina Store and Restaurant. In 2016, Palmetto submitted the first zoning amendment (referred to as 1.0) request to the Georgetown County Planning and Zoning Department as a minor amendment. The minor amendment was accepted and in November 2016 Palmetto demolished the old Marina Store and Restaurant.

Plaintiff appealed the granting of the minor amendment and claimed it should have been a major amendment. Goggans appeared on behalf of Palmetto at the appeal hearing on February 2, 2017. At the time, Goggans was still a member of the Georgetown County Council. Later that year, Plaintiff filed a complaint with the South Carolina Ethics Commission about Goggans' involvement in the minor amendment and the appeals hearing; on September 16, 2019, Goggans received a written warning and paid a civil fine for his actions in the 1.0 amendment process. After

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

this, Goggans stepped back from his involvement with the projects for Palmetto and was no longer the lead architect on the project.

After the appeal hearing in February of 2017, Palmetto submitted an amended application for a major amendment instead of a minor amendment (referred to as 2.0). Goggans was not involved in the submission of the 2.0 application. Amendment 2.0 was filed on November 3, 2017. On December 21, 2017, the Georgetown County Planning Commission heard the reading of the 2.0 application; Plaintiff's representatives appeared and opposed the amendment. After the hearing, the Commission recommended approval of the 2.0 application.

The 2.0 amendment was presented for public reading on three separate occasions: January 9, 2018, February 13, 2018, and February 27, 2018. Goggans recused himself at all three readings. Representatives of the Plaintiff spoke in opposition to the 2.0 amendment at all three readings. After the third reading, the County Council voted to approve the amendment. Goggans was not part of the vote. The approved 2.0 amendment included: Heated square footage not to exceed 4,598; 62 parking spaces already in place in addition to three compact spaces underneath the new Marina Store and Restaurant; the building would not exceed 45 feet at the middle of the roof; and the total seating capacity would not exceed 110 seats. Plaintiff did not challenge the passing of this ordinance. As of February 27, 2018, the 2.0 application was approved without challenge.

In November 2016, Plaintiff filed a lawsuit against Palmetto over the use of the easement and alleged that their rights had been interfered with. In June 2018, the Plaintiff was awarded a $1,000 jury verdict. Additionally, The Honorable Judge Steven John ordered that Palmetto was not to expand the boundaries of the old Marina Store and Restaurant as those set forth in the 1985 plat records. Subsequently, Palmetto filed another major amendment to comply with this order

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

(referred to as 3.0). Goggans was not involved in the filing of the amendment or in the voting and approval process of 3.0.

The 3.0 amendment was filed August 27, 2018. Palmetto submitted the application, filing fee, and stamped envelopes to be used for mailing the notices to property owners within a 400-foot radius of the Marina Store and Restaurant. A hearing before the Georgetown Planning Commission was set for October 18, 2018. The Planning and Zoning Department sent out public notice to The Coastal Observer and The Georgetown Times. Prior to the hearing in October 2018, a Staff Report was prepared that detailed the square footage of the proposed amendment and the old building.

After the hearing, the Commission voted to recommend approval to the County Council. The proposed 3.0 amendment was read to the public on three occasions: November 13, 2018, December 11, 2018, and January 8, 2019. Plaintiff's representatives opposed the 3.0 amendment at the hearing and all three public readings. At the end of the reading on January 8, 2019, the County Council voted to approve the 3.0 amendment. The only changes made between 2.0 and 3.0 were to keep the footprint of the building inside the old footprint and that the roof not exceed 47 feet. There was no change in heated square footage, the 62 parking spaces, or the 110 person seating capacity that were present in the 2.0 approval. Upon approval of the 3.0 amendment, Ordinance 2018-40 was passed to amend the PD to allow construction of 3.0.

PLAINTIFF'S CAUSES OF ACTION

The following causes of action are at issue:

1. Declaratory Judgment to invalidate approval of Palmetto's Application for Major Amendment;

2. Violation of Substantive Due Process Rights under Article I Section 3 of the South Carolina Constitution;

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

3. Relief Under 42 U.S.C. § 1983 for Violation of Right to Substantive Due Process under the United States Constitution;

4. Violation of Right to Procedural Due Process under Article I Section 3 of the South Carolina Constitution;

5. Relief Under 42 U.S.C. § 1983 for Violation of Right to Procedural Due Process under the United States Constitution;

6. Violation of South Carolina's Taking Clause under Article I Section 13 of the South Carolina Constitution;

7. Inverse Condemnation; and

8. Attorneys' Fees.

DECLARATORY JUDGMENT

The courts have the "power to invalidate an ordinance where it is so unreasonable as to impair or destroy constitutional rights." *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965). This power should be "exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations." *Id.*

However, a municipal ordinance is presumed to be constitutional. *Town of Scranton v. Willoughby*, 603 S.C. 421, 422, 412 S.E.2d 424, 425 (1992). "Every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly so as to leave no room for reasonable doubt that it violates some provision of the Constitution." *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 296, 737 s.e.2D 601, 609 (2013) (quoting *McMaster v. Columbia Bd. Of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 663 (2011)) (internal quotation marks omitted).

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

The burden of proving a zoning ordinance to be invalid is on the party who brings the action; to attack it, they must show the arbitrary and capricious nature of the ordinance through clear and convincing evidence. *Dunes*, 401 S.C. at 298, 737 S.E.2d at 610 (quoting *Willoughby*, 306 S.C. at 422, 412 S.E.2d at 425) (internal quotation marks omitted).

Here, Plaintiff's have not overcome the presumption that the legislative enactment was constitutional. There is no evidence that Ordinance 2018-40 was so unreasonable as to impair or destroy constitutional rights. The approval process of 3.0 followed the requirements of public readings and the voting process. The decision was not arbitrary or capricious; the county council voted on this amendment without Goggans partaking in any of the votes or the public readings.

Plaintiff contends that Goggans' actions in the 1.0 amendment "infected" the 2.0 and 3.0 amendments. While Goggans was involved in the creation of 1.0, there is no evidence that he was involved in 2.0 or 3.0. Goggans was reprimanded for his actions with 1.0. After that, Goggans recused himself from all three public readings and the voting process of both 2.0 and 3.0. There is no evidence that Goggans participated in or influenced in any way the new plans contained in the 2.0 or 3.0 amendments. Plaintiff further argues that Goggans convinced or influenced Holly Richardson and Boyd Johnson to overlook Zoning ordinances, but there is no evidence of this. Richardson and Johnson testified that they did not feel pressure or influence from Goggans in the 2.0 or 3.0 process.

Plaintiff also argues that proper notice of the 2.0 and 3.0 amendments were not given. However, Plaintiff's representatives were present at each reading of the amendments and the meetings for the proposed amendment. Plaintiff made their concerns with the amendments known. The Defendants provided notice through the procedures set by the county: stamped envelopes, posting signs, and listings in the local papers.

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

There is no evidence that Goggans influenced the process of 3.0 or that the decision was made without reason. Plaintiff's claim for declaratory judgment fails.

SUBSTANTIVE DUE PROCESS

Substantive Due Process claims require a claimant to prove (1) that the claimant had a property or property interest; (2) that the state deprived the claimant of the property or property interest; (3) and that the state's action falls so far beyond the outer limits of legitimate governmental authority that no process could cure the deficiency. *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3rd 322, 328 (4th Cir. 2005) (citation omitted) (internal quotation marks omitted). The conduct must be such that it intended to injure in some way unjustifiable by any government interest and is the sort of official action that most likely rises to the level of shocking the conscience. *Cnty. Of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998).

In order for the claimant to prove a denial of substantive due process, a claimant must show that he was "arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 96, 569 S.E.2d 917, 922 (2004) (citation omitted). "In the context of a zoning action involving property, it must be clear that the state's action "has no foundation in reason and is mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Dunes*, 401 S.C. at 297, 737 S.E.2d at 610 (citation omitted).

When reviewing a challenge to a municipal ordinance in South Carolina, a court must consider whether the ordinance bears a "reasonable relationship to *any* legitimate interest of government." *McMaster*, 395 S.C. at 505, 719 S.E.2d at 663 (citation omitted) (emphasis in original). "In order to successfully assault a city's zoning decision, a citizen must establish that

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

the decision was arbitrary and unreasonable." *Knowles v. City of Aiken*, 305 S.C. 219, 222, 407 S.E.2d 639, 642 (citation and internal quotation marks omitted).

Plaintiff does have a property interest here. The Plaintiff has a non-exclusive easement granting the right of ingress and egress over the parking lot shared with the Marina Store and Restaurant.

The State has not deprived Plaintiff of their property interest in the parking lot. Plaintiff still retains the right of ingress and egress over the parking lot that was originally granted in the non-exclusive easement. Planned developments, like the Marlin Quay Marina PD, create distinct areas of zoning with separate zoning ordinances. Plaintiff argued that the zoning code was a requirement that had to be followed in the PD, but Richardson and Johnson testified opposite; that a PD is a zoning variance, where the code is a guideline, and not a requirement. Plaintiff did not offer any experts on zoning or planning and did not offer any evidence that said otherwise.

Richardson and Johnson testified that they did not calculate the parking based off of the Zoning ordinance, but that they did require the Marina restaurant to maintain the same number of seats inside the restaurant in order to maintain the same level of patron traffic to the parking lot. The decisions made by the County in regards to the amendments were not completely baseless; they required the Marina Store and Restaurant to have the same seating capacity in the new building that they had in the old building and they limited the heated square footage. Additionally, the approval of the amendments was not without reason, it allowed the property to comply with FEMA and ADA regulations as well as other up to date building codes in addition to fixing the encroachment onto the neighboring property.

Plaintiff spent time conducting calculations of the parking space needs for the parking lot. Plaintiff calculated that Gulfstream would need 76 parking spaces based on the Zoning ordinance.

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Prior to the passing of Ordinance 2018-40, the parking lot only contained 68 parking spaces. By Plaintiff's own calculations, the parking lot was non-conforming prior to any amendments to the Marina Store and Restaurant. There is no evidence that the PD was required to follow Zoning ordinances in regards to parking because the PD was created long before the Article 11 Zoning ordinance was written. According to the State of South Carolina, PDs are variations to Zoning ordinances that "constitute zoning ordinance amendments." S.C. Code Ann. § 6-29-740. Plaintiff was not deprived of his property interest in the parking lot. Plaintiff still maintains a non-exclusive right of ingress and egress over the parking lot.

The state's action does not fall so far beyond the outer limits of legitimate governmental authority that no process could cure the deficiency. The state's actions were rationally related to a legitimate government purpose. According to Richardson and Johnson, the old building could not be rebuilt in the new build due to the existing flood regulations, FEMA, the ADA, and building and fire codes. Those new regulations promote the health, safety, and welfare of the community. The county did impose some requirements on the new building: same seating capacity as the original building and a limitation on the amount of heated square footage. These requirements were not arbitrary or capricious, they do not shock the conscience. Plaintiff's claim for Substantive Due Process fails.

PROCEDURAL DUE PROCESS

Procedural Due Process claims require (1) notice, (2) the opportunity to be heard in a meaningful way, and (3) judicial review. *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 570 (Ct. App. 2002) (citing *Grannis v. Ordean*, 234 U.S. 385 (1914)); *Kurschner*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (citing S.C. Const. Art. 1, § 22; *Stono River Env't Prot. Ass'n v. S.C. Dep't of Health & Env't Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991)).

Plaintiff did not present evidence suggesting that they received no notice, no opportunity to be heard, or no judicial review. Plaintiff was present at every stage of the hearing and approval process for all three amendments. Plaintiff voiced their opposition to the passage of Ordinance 2018-40 at all the readings of the proposed amendment. Plaintiff alleges that the other owners within the area did not receive proper notice. Plaintiff has no standing to complain about the notice of other individuals not party to this lawsuit. However, Plaintiff did not allege they themselves never received proper notice. Further, their presence at all stages of the process would indicate otherwise.

Plaintiff alleges that there were deficiencies in the application thus they did not have the opportunity to be meaningfully heard without those missing items. However, there is no evidence of that. Richardson testified that the application and form for the amendment were complete when turned in. She testified that any of the sections which were not completed were the sections that were not required based on the type of change the applicant was seeking. She further testified that the envelopes were not still attached to the application because they were used to send out the notices. The application was submitted in a timely fashion, giving at least 45 days before the Planning Commission meeting. Richardson and Judy Blankenship testified that Palmetto delivered envelopes address to the required property owners and attached them to the application as to provide notice to those within 400 feet of the property. Blankenship testified that the applicant is not required to provide the letters, just the envelopes, and that the Planning and Zoning Department provide the letters and map of the zoning changes. The notice requirements were substantially complied with. Plaintiff's claim for Procedural Due Process fails.

TAKINGS CLAUSE VIOLATION

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

For a regulatory taking claim, there are two questions that must be answered: (1) has there been an affirmative government action and (2) does that action result in a taking; *See Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76 (2005). A per se taking occurs where either (1) an owner is required to suffer a permanent physical invasion of property or (2) a regulation denies all economically beneficial or productive use of land. *Dunes*, 401 S.C. at 313, 737 S.E.2d at 619 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-16 (1992)).

Here, the actions by the Planning and Zoning Commission do constitute affirmative government action. The actions of the commission were to correct property lines and bring the building into compliance with numerous codes. The approval of Ordinance 2018-40 was affirmative government action.

Turning to the issue of the taking, plaintiff has not alleged a physical invasion, but has alleged that the passing of Ordinance 2018-40 equates a taking. In this case, there has not been a per se taking because the plaintiff has not been deprived of all economically beneficial or productive use of the land. Plaintiff still retains the non-exclusive easement for ingress and egress over the parking lot. Customers and patrons of Plaintiff still have the ability to use the parking lot. Plaintiff presented no evidence that all economically beneficial use of the land has been deprived, merely that customers may experience difficulty when parking in the parking lot.

Where there is not a per se taking, the claims of a taking are analyzed under a test set forth in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed.2d 631 (1978). This test evaluates "the character of the government action, the economic impact of the regulation on the claimant, and the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.*

Government regulation by its very nature involves some effect on rights for the benefit of the public good. *Dunes*, 401 S.C. at 315, 737 S.E.2d at 620. In *Dunes*, the Court noted how the Town provided a legitimate public purpose by enacting the ordinance, that the Town did not eliminate all development potential, that the claimant still had a right to sell, and that the Town did not exploit the property for its own use or economic advantage. *Id*, at 316-17, 737 S.E.2d at 620-21. Here, the government action was the passing of Ordinance 2018-40. The county had a legitimate public purpose by enacting Ordinance 2018-40. It provided a safer facility for patrons in the county that was up to newest FEMA and ADA regulations, amongst other building and fire codes.

Not all damages that are suffered by a property owner are compensable. *Dunes*, 401 S.C. at 315, 737 S.E.2d at 620. Where a comparison of the property value before and after the regulatory action happens, that comparison is "by no means conclusive." *Id.* at 317, S.E.2d at 621 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 790 (1987)). A diminution in property value alone cannot establish a taking. *Dunes*, 401 S.C. at 317, 737 S.E.2d at 621 (quoting *Penn Central*, 438 U.S. at 131).

The Plaintiff presented James Mooring, a real estate expert, who testified that the customers and the restaurant may experience some difficulty in parking in the lot and some loss of traffic of customers in the restaurant. Additionally, he testified that the value of Gulfstream would decrease and that the effect of Ordinance 2018-40 would be devastating to Gulfstream's marketability. Plaintiff also presented George Knight, a real estate appraiser, who testified that prior to the passage of Ordinance 2018-40, Gulfstream was appraised at 1.85 Million dollars, but that after the passage of the ordinance, Gulfstream would only be worth $89,500.

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Ordinance 2018-40 does not restrict Plaintiff's use of the property. Plaintiff was never entitled to a certain number of parking spaces, but a non-exclusive right of ingress and egress over the parking lot. Plaintiff's appraiser Knight even agreed that his opinion was based on the assumption that there would be no parking available to the Plaintiff. Plaintiff's property is located on an inlet, surrounded by hundreds of condominiums with the opportunity for walk-in traffic that would not utilize the parking lot. Plaintiff's expert Knight even testified that if the property were rezoned for commercial use, it could be extremely valuable. Plaintiff's expert did not visit the property nor was the property ever listed online; Plaintiff never received any offer on the property from a buyer. Defendant presented evidence and testimony on cross-examination of Knight that the property would be highly sought after as it is a marsh-front inlet property across from the beach.

"For government regulation to constitute a taking, the property owner must objectively demonstrate the existence [of] investment-backed expectations." *Dunes*, at 401 S.C. at 320, 737 S.E.2d at 622. When considering what the owner's investment-backed expectations are for the property, the continuation of use is the primary expectation. *Id* at 319, 737 S.E.2d at 622 (quoting *Carolina Chloride*, 394 S.C. at 173, 714 S.E.2d at 878) (internal quotation marks omitted).

Plaintiff does have an investment backed expectation in the use of the non-exclusive easement. Ordinance 2018-40 does not interfere with that easement as Plaintiff still retains a non-exclusive right of ingress and egress. Plaintiff's own witnesses testified that parking has always been a problem. Plaintiff cannot have an investment-backed expectation of full use of the parking lot where the easement does not grant that. The Plaintiff's claim for takings fails.

INVERSE CONDEMNATION

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Inverse Condemnation occurs when a governmental agency "commits a taking of private property without exercising its formal powers of eminent domain." *Ray v. City of Rock Hill*, 434 S.C. 39, 45, 862 S.E.2d 259, 262 (2021) (quoting *Hawkins v. City of Greenville*, 358 S.C. 280, 290, 594 S.E.2d 577, 562 (Ct. App. 2004)) (internal quotation marks omitted). A cause of action for inverse condemnation requires the Plaintiff to prove: (1) an affirmative, positive, aggressive act by the governmental agency; (2) a taking; (3) that the taking be for public use; and (4) that the taking have a degree of permanence. *Id.*

As referenced above, there is affirmative action on behalf of the governmental agency. However, also noted above, the passing of Ordinance 2018-40 is not a taking. The Plaintiff's claim of inverse condemnation fails there. Further, there is no evidence of a public use. The parking lot is utilized by private entities for their customers. Additionally, because there is no taking, there is no degree of permanence. Plaintiff's claim for Inverse Condemnation fails.

ATTORNEY'S FEES

In general, attorney's fees are not recoverable unless authorized by a contract or statute. *Baron Data Sys., Inc. v. Loter,* 297 S.C. 382, 377 S.E.2d 296 (1989); *Hegler v. Gulf Ins. Co.,* 270 S.C. 548, 243 S.E.2d 443 (1978); *Collins v. Collins,* 239 S.C. 170, 122 S.E.2d 1 (1961). *Blumberg v. Nealco, Inc.,* 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). In the Summons and Complaint, the Plaintiff claims entitlement to attorney's fees under 28 U.S.C § 1988.

In South Carolina, the standard for determining the amount of reasonable attorney's fees is as follows: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services. *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313, (1991).

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Here, the Plaintiff has not obtained beneficial results. As such, the Plaintiff is not entitled to attorney's fees.

CONCLUSION

Based upon the foregoing, the Court finds in favor of the Defendant on all causes of action.

IT IS SO ORDERED.

September 3, 2023
Sumter, SC

____
R. Kirk Griffin, Circuit Court Judge

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Georgetown Common Pleas

Case Caption: The Gulfstream Caf? Inc VS Georgetown County , defendant, et al

Case Number: 2019CP2200212

Type: Order/Other

So Ordered

s/ R. Kirk Griffin 2768

Electronically signed on 2023-02-03 13:46:14 page 17 of 17

ELECTRONICALLY FILED - 2023 Apr 03 2:28 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN) FIFTEENTH JUDICIAL CIRCUIT

The Gulfstream Café, Inc,

Plaintiff,

v.

Georgetown County, Georgetown County Council, and Steve Goggans, individually and in his official capacity as Georgetown County Councilmember,

Defendants

ORDER
C/A NO. 2019-CP-22-00212

This matter is before the Court pursuant to Rule 59 (e) SCRCP. The Defendants seek an Order of this Court amending or altering its Order of February 3, 2023.

Pursuant to Rule 59 (f) SCRCP, this Court determines that the motion to alter or amend may be decided on briefs filed by the parties.

Having duly considered the motion to alter or amend of the Plaintiffs, this Court has determined that its original Order dated February 3, 2023, is fully supported by the law and the evidence and is hereby ratified and reconfirmed. The motion to alter or amend the earlier Order is therefore DENIED.

AND IT IS SO ORDERED.

Sumter, South Carolina

April 3, 2023

____
R. Kirk Griffin
Judge, Third Judicial Circuit

ELECTRONICALLY FILED - 2023 Apr 03 2:28 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Georgetown Common Pleas

Case Caption: The Gulfstream Caf? Inc VS Georgetown County , defendant, et al

Case Number: 2019CP2200212

Type: Order/Other

So Ordered

s/ R. Kirk Griffin 2768

Electronically signed on 2023-04-03 14:22:57 page 2 of 2

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
The Honorable R. Kirk Griffin, Circuit Court Judge

Case No. 2019-CP-22-00212

The Gulfstream Café, Inc. .... Appellant,

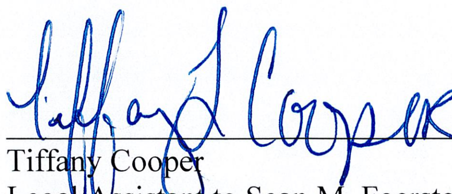
v.

Georgetown County; Georgetown County Council;
and Steve Goggans, individually and in his official
capacity as Georgetown County Councilmember................................ Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondents Georgetown County, Georgetown County Council, and Steve Goggans, individually and in his official capacity as Georgetown County Councilmember, by depositing a copy in the U.S. Mail, postage prepaid, on April 24, 2023, addressed to their following attorneys of record:

Henrietta U. Golding, Esquire
Taylor K. Voegel, Esquire
Burr & Forman LLP
Post Office Box 336
Myrtle Beach, SC 29578



Tiffany Cooper
Legal Assistant to Sean M. Foerster, Esquire
ROGERS TOWNSEND LLC

ELECTRONICALLY FILED - 2023 Apr 24 9:49 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable R. Kirk Griffin, Circuit Court Judge

Case No. 2019-CP-22-00212
Appellate Case No. 2023-00646

The Gulfstream Café, Inc. .... Appellant,

v.

Georgetown County; Georgetown County Council;
and Steve Goggans, individually and in his official
capacity as Georgetown County Councilmember............................... Respondents.

AMENDED NOTICE OF APPEAL

Appellant The Gulfstream Café, Inc., appeals the order of The Honorable R. Kirk Griffin entered on February 3, 2023, and the order of The Honorable R. Kirk Griffin denying Appellant's Motion to Alter or Amend entered on April 3, 2023. Appellant received written notice of the entry of these orders on February 3, 2023, and April 3, 2023, respectively.

Appellant also appeals the order of The Honorable R. Kirk Griffin entered on May 26, 2023, awarding costs to the Respondents. Appellant received written notice of the entry of this order on May 26, 2023.

Appellant files this appeal with the South Carolina Supreme Court because the appealed orders of the Circuit Court ruled that Respondents' enactment of a county ordinance did not violate Appellant's right to substantive and procedural due process under both the United States Constitution and the South Carolina Constitution and did not violate the Takings Clause under the South Carolina Constitution. As such, the ruling involves a challenge on state and federal grounds to the constitutionality of a county ordinance where the principal issue is one of the constitutionality of the ordinance as contemplated by Rule 203(d)(1)(A)(ii), SCACR.

June 7, 2023

[signature block on the following page]

ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

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.

Other Counsel of Record:

Henrietta Golding (SC Bar # 2173)
Taylor K. Voegel (SC Bar # 04770)
Burr & Forman LLP
2411 Oak Street, Suite 206 (29577)
P.O. Box 336
Myrtle Beach, SC 29578
(843) 444-1107
hgolding@burr.com
tvoegel@burr.com

Counsel for Respondents

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
The Gulfstream Café, Inc.,	)	CIVIL ACTION NO: 2019-CP-22-00212
	)	
Plaintiff,	)	
vs.	)	**ORDER**
	)	
Georgetown County, Georgetown County Council, and Steve Goggans, individually and in his official capacity as Georgetown County Councilmember,	)	
	)	
Defendant.	)	

This matter came before the Court for a bench trial which began on August 29, 2022, and concluded on September 1, 2022. The Plaintiff was represented by Simon H. Bloom, Esquire, Sean M. Forester, Esquire, and Andrea J. Pearson, Esquire. Defendants were represented by Henrietta U. Golding, Esquire and Taylor K. Vogel, Esquire. Having carefully considered the pleadings, testimony, evidence, arguments, and post-trial briefs, for the reasons set forth below, the Court finds in favor of the Defendants on all causes of action.

FINDINGS OF FACT

In 1982, Georgetown County created a Planned Development (PD) named Marlin Quay located on South Waccamaw Drive in Garden City, South Carolina. This PD is home to the Marlin Quay Condominiums, Gulfstream Café, and the Marlin Quay Marina Store and Restaurant. In the initial PD, three areas for parking were created. 13 spaces for Gulfstream Café, 60 shared spaces for Gulfstream Café and the Marlin Quay Marina Store and Restaurant, and separate parking for the condominiums. The PD has been amended over time. In 1986, Gulfstream Café was purchased by Jerry Greenbaum; at the time, the parking lot was authorized for use by the Marlin Quay Marina

Store and Restaurant, the Marina boat slips, the Gulfstream Café, and the condominiums. The uses have not changed since the Plaintiff purchased the café.

Plaintiff was granted a non-exclusive easement in 1986 for ingress and egress of the parking lot. With this easement, the Plaintiff was guaranteed "joint and non-exclusive use of the area covered by the easement." The 1990 easement specifically gave Gulfstream:

> A non-exclusive perpetual easement appurtenant to the premises hereinafter described for the full and free right of ingress and egress on, over and across the following described property, together with the rights of vehicular parking on and vehicular and pedestrian access to, all in accordance with all governmental rules, regulations, ordinances or laws, the premises of the hereinafter described, and also for the purpose of maintenance, repair, alteration and/or improvements to hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use at all times of the area covered by this easement that the Marina will utilize the premises primarily during the daytime regular business hours and Gulfstream will utilize the premises primarily in the evening regular business hours.

Plaintiff was not guaranteed a specific number of parking spots, merely the right of ingress and egress.

In 2014, Palmetto Industrial Development, LLC became the owner of the parking lot and the easement remained with Gulfstream. Today, Plaintiff has a property interest that is a non-exclusive right of ingress and egress of the parking lot with 62 spaces. In addition, Plaintiff owns 17 of their own parking spaces exclusively for Gulfstream and 6 additional parking spaces underneath the restaurant. The parking lot is located in the Marlin Quay PD with Gulfstream and

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Marlin Quay Marina Store and Restaurant. The Marlin Quay PD was one of the first PDs in Georgetown County. Holly Richardson and Boyd Johnson testified that in a PD, zoning regulations are guides, but not requirements.

In 2016, Palmetto hired SGA Architecture, LLC to rebuild the Marina Store and Restaurant; repairs consisted of complying with flood requirements with FEMA, the ADA, and other fire and building codes. Further, the old building encroached on the Marlin Quay Condominiums and the new building would remedy the encroachment. The old building was 1.5 stories tall, with 4,603 heated square feet, and a 2-story outdoor deck. The new building plans were for a 4-story building, with 4,596 heated square feet, and a 3-story outdoor deck with total combined unheated space of 5,326 square feet.

Steve Goggans founded SGA Architecture. Additionally, Goggans was elected to the Georgetown County Council in 2014, however he did not seek re-election in 2022. Goggans was the principal architect for the initial rebuild of the Marina Store and Restaurant. In 2016, Palmetto submitted the first zoning amendment (referred to as 1.0) request to the Georgetown County Planning and Zoning Department as a minor amendment. The minor amendment was accepted and in November 2016 Palmetto demolished the old Marina Store and Restaurant.

Plaintiff appealed the granting of the minor amendment and claimed it should have been a major amendment. Goggans appeared on behalf of Palmetto at the appeal hearing on February 2, 2017. At the time, Goggans was still a member of the Georgetown County Council. Later that year, Plaintiff filed a complaint with the South Carolina Ethics Commission about Goggans' involvement in the minor amendment and the appeals hearing; on September 16, 2019, Goggans received a written warning and paid a civil fine for his actions in the 1.0 amendment process. After

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

this, Goggans stepped back from his involvement with the projects for Palmetto and was no longer the lead architect on the project.

After the appeal hearing in February of 2017, Palmetto submitted an amended application for a major amendment instead of a minor amendment (referred to as 2.0). Goggans was not involved in the submission of the 2.0 application. Amendment 2.0 was filed on November 3, 2017. On December 21, 2017, the Georgetown County Planning Commission heard the reading of the 2.0 application; Plaintiff's representatives appeared and opposed the amendment. After the hearing, the Commission recommended approval of the 2.0 application.

The 2.0 amendment was presented for public reading on three separate occasions: January 9, 2018, February 13, 2018, and February 27, 2018. Goggans recused himself at all three readings. Representatives of the Plaintiff spoke in opposition to the 2.0 amendment at all three readings. After the third reading, the County Council voted to approve the amendment. Goggans was not part of the vote. The approved 2.0 amendment included: Heated square footage not to exceed 4,598; 62 parking spaces already in place in addition to three compact spaces underneath the new Marina Store and Restaurant; the building would not exceed 45 feet at the middle of the roof; and the total seating capacity would not exceed 110 seats. Plaintiff did not challenge the passing of this ordinance. As of February 27, 2018, the 2.0 application was approved without challenge.

In November 2016, Plaintiff filed a lawsuit against Palmetto over the use of the easement and alleged that their rights had been interfered with. In June 2018, the Plaintiff was awarded a $1,000 jury verdict. Additionally, The Honorable Judge Steven John ordered that Palmetto was not to expand the boundaries of the old Marina Store and Restaurant as those set forth in the 1985 plat records. Subsequently, Palmetto filed another major amendment to comply with this order

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

(referred to as 3.0). Goggans was not involved in the filing of the amendment or in the voting and approval process of 3.0.

The 3.0 amendment was filed August 27, 2018. Palmetto submitted the application, filing fee, and stamped envelopes to be used for mailing the notices to property owners within a 400-foot radius of the Marina Store and Restaurant. A hearing before the Georgetown Planning Commission was set for October 18, 2018. The Planning and Zoning Department sent out public notice to The Coastal Observer and The Georgetown Times. Prior to the hearing in October 2018, a Staff Report was prepared that detailed the square footage of the proposed amendment and the old building.

After the hearing, the Commission voted to recommend approval to the County Council. The proposed 3.0 amendment was read to the public on three occasions: November 13, 2018, December 11, 2018, and January 8, 2019. Plaintiff's representatives opposed the 3.0 amendment at the hearing and all three public readings. At the end of the reading on January 8, 2019, the County Council voted to approve the 3.0 amendment. The only changes made between 2.0 and 3.0 were to keep the footprint of the building inside the old footprint and that the roof not exceed 47 feet. There was no change in heated square footage, the 62 parking spaces, or the 110 person seating capacity that were present in the 2.0 approval. Upon approval of the 3.0 amendment, Ordinance 2018-40 was passed to amend the PD to allow construction of 3.0.

PLAINTIFF'S CAUSES OF ACTION

The following causes of action are at issue:

1. Declaratory Judgment to invalidate approval of Palmetto's Application for Major Amendment;

2. Violation of Substantive Due Process Rights under Article I Section 3 of the South Carolina Constitution;

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

3. Relief Under 42 U.S.C. § 1983 for Violation of Right to Substantive Due Process under the United States Constitution;

4. Violation of Right to Procedural Due Process under Article I Section 3 of the South Carolina Constitution;

5. Relief Under 42 U.S.C. § 1983 for Violation of Right to Procedural Due Process under the United States Constitution;

6. Violation of South Carolina's Taking Clause under Article I Section 13 of the South Carolina Constitution;

7. Inverse Condemnation; and

8. Attorneys' Fees.

DECLARATORY JUDGMENT

The courts have the "power to invalidate an ordinance where it is so unreasonable as to impair or destroy constitutional rights." *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965). This power should be "exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations." *Id.*

However, a municipal ordinance is presumed to be constitutional. *Town of Scranton v. Willoughby*, 603 S.C. 421, 422, 412 S.E.2d 424, 425 (1992). "Every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly so as to leave no room for reasonable doubt that it violates some provision of the Constitution." *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 296, 737 s.e.2D 601, 609 (2013) (quoting *McMaster v. Columbia Bd. Of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 663 (2011)) (internal quotation marks omitted).

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

The burden of proving a zoning ordinance to be invalid is on the party who brings the action; to attack it, they must show the arbitrary and capricious nature of the ordinance through clear and convincing evidence. *Dunes*, 401 S.C. at 298, 737 S.E.2d at 610 (quoting *Willoughby*, 306 S.C. at 422, 412 S.E.2d at 425) (internal quotation marks omitted).

Here, Plaintiff's have not overcome the presumption that the legislative enactment was constitutional. There is no evidence that Ordinance 2018-40 was so unreasonable as to impair or destroy constitutional rights. The approval process of 3.0 followed the requirements of public readings and the voting process. The decision was not arbitrary or capricious; the county council voted on this amendment without Goggans partaking in any of the votes or the public readings.

Plaintiff contends that Goggans' actions in the 1.0 amendment "infected" the 2.0 and 3.0 amendments. While Goggans was involved in the creation of 1.0, there is no evidence that he was involved in 2.0 or 3.0. Goggans was reprimanded for his actions with 1.0. After that, Goggans recused himself from all three public readings and the voting process of both 2.0 and 3.0. There is no evidence that Goggans participated in or influenced in any way the new plans contained in the 2.0 or 3.0 amendments. Plaintiff further argues that Goggans convinced or influenced Holly Richardson and Boyd Johnson to overlook Zoning ordinances, but there is no evidence of this. Richardson and Johnson testified that they did not feel pressure or influence from Goggans in the 2.0 or 3.0 process.

Plaintiff also argues that proper notice of the 2.0 and 3.0 amendments were not given. However, Plaintiff's representatives were present at each reading of the amendments and the meetings for the proposed amendment. Plaintiff made their concerns with the amendments known. The Defendants provided notice through the procedures set by the county: stamped envelopes, posting signs, and listings in the local papers.

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

There is no evidence that Goggans influenced the process of 3.0 or that the decision was made without reason. Plaintiff's claim for declaratory judgment fails.

SUBSTANTIVE DUE PROCESS

Substantive Due Process claims require a claimant to prove (1) that the claimant had a property or property interest; (2) that the state deprived the claimant of the property or property interest; (3) and that the state's action falls so far beyond the outer limits of legitimate governmental authority that no process could cure the deficiency. *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3rd 322, 328 (4th Cir. 2005) (citation omitted) (internal quotation marks omitted). The conduct must be such that it intended to injure in some way unjustifiable by any government interest and is the sort of official action that most likely rises to the level of shocking the conscience. *Cnty. Of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998).

In order for the claimant to prove a denial of substantive due process, a claimant must show that he was "arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 96, 569 S.E.2d 917, 922 (2004) (citation omitted). "In the context of a zoning action involving property, it must be clear that the state's action "has no foundation in reason and is mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Dunes*, 401 S.C. at 297, 737 S.E.2d at 610 (citation omitted).

When reviewing a challenge to a municipal ordinance in South Carolina, a court must consider whether the ordinance bears a "reasonable relationship to *any* legitimate interest of government." *McMaster*, 395 S.C. at 505, 719 S.E.2d at 663 (citation omitted) (emphasis in original). "In order to successfully assault a city's zoning decision, a citizen must establish that

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

the decision was arbitrary and unreasonable." *Knowles v. City of Aiken*, 305 S.C. 219, 222, 407 S.E.2d 639, 642 (citation and internal quotation marks omitted).

Plaintiff does have a property interest here. The Plaintiff has a non-exclusive easement granting the right of ingress and egress over the parking lot shared with the Marina Store and Restaurant.

The State has not deprived Plaintiff of their property interest in the parking lot. Plaintiff still retains the right of ingress and egress over the parking lot that was originally granted in the non-exclusive easement. Planned developments, like the Marlin Quay Marina PD, create distinct areas of zoning with separate zoning ordinances. Plaintiff argued that the zoning code was a requirement that had to be followed in the PD, but Richardson and Johnson testified opposite; that a PD is a zoning variance, where the code is a guideline, and not a requirement. Plaintiff did not offer any experts on zoning or planning and did not offer any evidence that said otherwise.

Richardson and Johnson testified that they did not calculate the parking based off of the Zoning ordinance, but that they did require the Marina restaurant to maintain the same number of seats inside the restaurant in order to maintain the same level of patron traffic to the parking lot. The decisions made by the County in regards to the amendments were not completely baseless; they required the Marina Store and Restaurant to have the same seating capacity in the new building that they had in the old building and they limited the heated square footage. Additionally, the approval of the amendments was not without reason, it allowed the property to comply with FEMA and ADA regulations as well as other up to date building codes in addition to fixing the encroachment onto the neighboring property.

Plaintiff spent time conducting calculations of the parking space needs for the parking lot. Plaintiff calculated that Gulfstream would need 76 parking spaces based on the Zoning ordinance.

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Prior to the passing of Ordinance 2018-40, the parking lot only contained 68 parking spaces. By Plaintiff's own calculations, the parking lot was non-conforming prior to any amendments to the Marina Store and Restaurant. There is no evidence that the PD was required to follow Zoning ordinances in regards to parking because the PD was created long before the Article 11 Zoning ordinance was written. According to the State of South Carolina, PDs are variations to Zoning ordinances that "constitute zoning ordinance amendments." S.C. Code Ann. § 6-29-740. Plaintiff was not deprived of his property interest in the parking lot. Plaintiff still maintains a non-exclusive right of ingress and egress over the parking lot.

The state's action does not fall so far beyond the outer limits of legitimate governmental authority that no process could cure the deficiency. The state's actions were rationally related to a legitimate government purpose. According to Richardson and Johnson, the old building could not be rebuilt in the new build due to the existing flood regulations, FEMA, the ADA, and building and fire codes. Those new regulations promote the health, safety, and welfare of the community. The county did impose some requirements on the new building: same seating capacity as the original building and a limitation on the amount of heated square footage. These requirements were not arbitrary or capricious, they do not shock the conscience. Plaintiff's claim for Substantive Due Process fails.

PROCEDURAL DUE PROCESS

Procedural Due Process claims require (1) notice, (2) the opportunity to be heard in a meaningful way, and (3) judicial review. *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 570 (Ct. App. 2002) (citing *Grannis v. Ordean*, 234 U.S. 385 (1914)); *Kurschner*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (citing S.C. Const. Art. 1, § 22; *Stono River Env't Prot. Ass'n v. S.C. Dep't of Health & Env't Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991)).

Plaintiff did not present evidence suggesting that they received no notice, no opportunity to be heard, or no judicial review. Plaintiff was present at every stage of the hearing and approval process for all three amendments. Plaintiff voiced their opposition to the passage of Ordinance 2018-40 at all the readings of the proposed amendment. Plaintiff alleges that the other owners within the area did not receive proper notice. Plaintiff has no standing to complain about the notice of other individuals not party to this lawsuit. However, Plaintiff did not allege they themselves never received proper notice. Further, their presence at all stages of the process would indicate otherwise.

Plaintiff alleges that there were deficiencies in the application thus they did not have the opportunity to be meaningfully heard without those missing items. However, there is no evidence of that. Richardson testified that the application and form for the amendment were complete when turned in. She testified that any of the sections which were not completed were the sections that were not required based on the type of change the applicant was seeking. She further testified that the envelopes were not still attached to the application because they were used to send out the notices. The application was submitted in a timely fashion, giving at least 45 days before the Planning Commission meeting. Richardson and Judy Blankenship testified that Palmetto delivered envelopes address to the required property owners and attached them to the application as to provide notice to those within 400 feet of the property. Blankenship testified that the applicant is not required to provide the letters, just the envelopes, and that the Planning and Zoning Department provide the letters and map of the zoning changes. The notice requirements were substantially complied with. Plaintiff's claim for Procedural Due Process fails.

TAKINGS CLAUSE VIOLATION

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

For a regulatory taking claim, there are two questions that must be answered: (1) has there been an affirmative government action and (2) does that action result in a taking; *See Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76 (2005). A per se taking occurs where either (1) an owner is required to suffer a permanent physical invasion of property or (2) a regulation denies all economically beneficial or productive use of land. *Dunes*, 401 S.C. at 313, 737 S.E.2d at 619 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-16 (1992)).

Here, the actions by the Planning and Zoning Commission do constitute affirmative government action. The actions of the commission were to correct property lines and bring the building into compliance with numerous codes. The approval of Ordinance 2018-40 was affirmative government action.

Turning to the issue of the taking, plaintiff has not alleged a physical invasion, but has alleged that the passing of Ordinance 2018-40 equates a taking. In this case, there has not been a per se taking because the plaintiff has not been deprived of all economically beneficial or productive use of the land. Plaintiff still retains the non-exclusive easement for ingress and egress over the parking lot. Customers and patrons of Plaintiff still have the ability to use the parking lot. Plaintiff presented no evidence that all economically beneficial use of the land has been deprived, merely that customers may experience difficulty when parking in the parking lot.

Where there is not a per se taking, the claims of a taking are analyzed under a test set forth in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed.2d 631 (1978). This test evaluates "the character of the government action, the economic impact of the regulation on the claimant, and the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.*

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Government regulation by its very nature involves some effect on rights for the benefit of the public good. *Dunes*, 401 S.C. at 315, 737 S.E.2d at 620. In *Dunes*, the Court noted how the Town provided a legitimate public purpose by enacting the ordinance, that the Town did not eliminate all development potential, that the claimant still had a right to sell, and that the Town did not exploit the property for its own use or economic advantage. *Id*, at 316-17, 737 S.E.2d at 620-21. Here, the government action was the passing of Ordinance 2018-40. The county had a legitimate public purpose by enacting Ordinance 2018-40. It provided a safer facility for patrons in the county that was up to newest FEMA and ADA regulations, amongst other building and fire codes.

Not all damages that are suffered by a property owner are compensable. *Dunes*, 401 S.C. at 315, 737 S.E.2d at 620. Where a comparison of the property value before and after the regulatory action happens, that comparison is "by no means conclusive." *Id.* at 317, S.E.2d at 621 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 790 (1987)). A diminution in property value alone cannot establish a taking. *Dunes*, 401 S.C. at 317, 737 S.E.2d at 621 (quoting *Penn Central*, 438 U.S. at 131).

The Plaintiff presented James Mooring, a real estate expert, who testified that the customers and the restaurant may experience some difficulty in parking in the lot and some loss of traffic of customers in the restaurant. Additionally, he testified that the value of Gulfstream would decrease and that the effect of Ordinance 2018-40 would be devastating to Gulfstream's marketability. Plaintiff also presented George Knight, a real estate appraiser, who testified that prior to the passage of Ordinance 2018-40, Gulfstream was appraised at 1.85 Million dollars, but that after the passage of the ordinance, Gulfstream would only be worth $89,500.

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Ordinance 2018-40 does not restrict Plaintiff's use of the property. Plaintiff was never entitled to a certain number of parking spaces, but a non-exclusive right of ingress and egress over the parking lot. Plaintiff's appraiser Knight even agreed that his opinion was based on the assumption that there would be no parking available to the Plaintiff. Plaintiff's property is located on an inlet, surrounded by hundreds of condominiums with the opportunity for walk-in traffic that would not utilize the parking lot. Plaintiff's expert Knight even testified that if the property were rezoned for commercial use, it could be extremely valuable. Plaintiff's expert did not visit the property nor was the property ever listed online; Plaintiff never received any offer on the property from a buyer. Defendant presented evidence and testimony on cross-examination of Knight that the property would be highly sought after as it is a marsh-front inlet property across from the beach.

"For government regulation to constitute a taking, the property owner must objectively demonstrate the existence [of] investment-backed expectations." *Dunes*, at 401 S.C. at 320, 737 S.E.2d at 622. When considering what the owner's investment-backed expectations are for the property, the continuation of use is the primary expectation. *Id* at 319, 737 S.E.2d at 622 (quoting *Carolina Chloride*, 394 S.C. at 173, 714 S.E.2d at 878) (internal quotation marks omitted).

Plaintiff does have an investment backed expectation in the use of the non-exclusive easement. Ordinance 2018-40 does not interfere with that easement as Plaintiff still retains a non-exclusive right of ingress and egress. Plaintiff's own witnesses testified that parking has always been a problem. Plaintiff cannot have an investment-backed expectation of full use of the parking lot where the easement does not grant that. The Plaintiff's claim for takings fails.

INVERSE CONDEMNATION

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Inverse Condemnation occurs when a governmental agency "commits a taking of private property without exercising its formal powers of eminent domain." *Ray v. City of Rock Hill*, 434 S.C. 39, 45, 862 S.E.2d 259, 262 (2021) (quoting *Hawkins v. City of Greenville*, 358 S.C. 280, 290, 594 S.E.2d 577, 562 (Ct. App. 2004)) (internal quotation marks omitted). A cause of action for inverse condemnation requires the Plaintiff to prove: (1) an affirmative, positive, aggressive act by the governmental agency; (2) a taking; (3) that the taking be for public use; and (4) that the taking have a degree of permanence. *Id.*

As referenced above, there is affirmative action on behalf of the governmental agency. However, also noted above, the passing of Ordinance 2018-40 is not a taking. The Plaintiff's claim of inverse condemnation fails there. Further, there is no evidence of a public use. The parking lot is utilized by private entities for their customers. Additionally, because there is no taking, there is no degree of permanence. Plaintiff's claim for Inverse Condemnation fails.

ATTORNEY'S FEES

In general, attorney's fees are not recoverable unless authorized by a contract or statute. *Baron Data Sys., Inc. v. Loter,* 297 S.C. 382, 377 S.E.2d 296 (1989); *Hegler v. Gulf Ins. Co.,* 270 S.C. 548, 243 S.E.2d 443 (1978); *Collins v. Collins,* 239 S.C. 170, 122 S.E.2d 1 (1961). *Blumberg v. Nealco, Inc.,* 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). In the Summons and Complaint, the Plaintiff claims entitlement to attorney's fees under 28 U.S.C § 1988.

In South Carolina, the standard for determining the amount of reasonable attorney's fees is as follows: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services. *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313, (1991).

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Here, the Plaintiff has not obtained beneficial results. As such, the Plaintiff is not entitled to attorney's fees.

CONCLUSION

Based upon the foregoing, the Court finds in favor of the Defendant on all causes of action.

IT IS SO ORDERED.

September 3, 2023
Sumter, SC

____
R. Kirk Griffin, Circuit Court Judge

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Feb 03 2:26 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Georgetown Common Pleas

Case Caption: The Gulfstream Caf? Inc VS Georgetown County , defendant, et al

Case Number: 2019CP2200212

Type: Order/Other

So Ordered

s/ R. Kirk Griffin 2768

Electronically signed on 2023-02-03 13:46:14 page 17 of 17

ELECTRONICALLY FILED - 2023 Apr 03 2:28 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	FIFTEENTH JUDICIAL CIRCUIT
The Gulfstream Café, Inc, Plaintiff,	)	
v.	)	ORDER C/A NO. 2019-CP-22-00212
Georgetown County, Georgetown County Council, and Steve Goggans, individually and in his official capacity as Georgetown County Councilmember, Defendants	)	

This matter is before the Court pursuant to Rule 59 (e) SCRCP. The Defendants seek an Order of this Court amending or altering its Order of February 3, 2023.

Pursuant to Rule 59 (f) SCRCP, this Court determines that the motion to alter or amend may be decided on briefs filed by the parties.

Having duly considered the motion to alter or amend of the Plaintiffs, this Court has determined that its original Order dated February 3, 2023, is fully supported by the law and the evidence and is hereby ratified and reconfirmed. The motion to alter or amend the earlier Order is therefore DENIED.

AND IT IS SO ORDERED.

Sumter, South Carolina

April 3, 2023

R. Kirk Griffin
Judge, Third Judicial Circuit

ELECTRONICALLY FILED - 2023 Apr 03 2:28 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Georgetown Common Pleas

Case Caption: The Gulfstream Caf? Inc VS Georgetown County , defendant, et al

Case Number: 2019CP2200212

Type: Order/Other

So Ordered

s/ R. Kirk Griffin 2768

Electronically signed on 2023-04-03 14:22:57 page 2 of 2

ELECTRONICALLY FILED - 2023 May 26 1:17 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN) FIFTEENTH JUDICIAL CIRCUIT

The Gulfstream Café, Inc,

Plaintiff,

v.

Georgetown County, Georgetown County Council, and Steve Goggans, individually and in his official capacity as Georgetown County Councilmember,

Defendant

ORDER
C/A NO. 2019-CP-22-00212

This matter is before the Court pursuant to Rule 54, SCRCP, South Carolina Code Sections 15-37-10, et seq., and South Carolina Code Section 15-53-100. The Defendants' seek an Order of this Court awarding costs. A bench trial was conducted in the above-referenced case during the August 29th, 2022 Term of Court. The court returned a verdict in favor of the above-referenced defendants ("the Defendants").

LEGAL STANDARD

Pursuant to Rule 54 (d) SCRCP, "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." South Carolina Code Section 15-37-20 states, "No costs shall be allowed to any party unless he succeed, in whole or in part, in his claim or defense, unless otherwise directed by the judge hearing the cause." Section 15-37-40 provides:

> The clerk shall insert in the entry of judgment, on the application of the prevailing party . . . the sum of the allowances for costs and disbursements as provided by law . . . including the fees of officers allowed by law, the

fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees and the expense of printing the papers for any hearing when required by a rule of the court . . . .

Furthermore, South Carolina Code Section 15-53-100 permits the court to "make such award of costs as may seem equitable and just" for any proceeding under the Uniform Declaratory Judgments Act. S.C. Code Ann. § 15-53-10.

ANALYSIS

The Court entered judgment in favor of the Defendants on February 3rd, 2023. The Defendants are the prevailing party in this cause of action. Defendants submitted with their motion an itemized statement of costs and an affidavit for filing fees and transcript costs. From April 11, 2019 to August 24, 2022, Defendants have incurred costs of $9,065.54. *Def. Itemized Statement of Costs 3*. Having duly considered the motion for costs by the Defendants, this Court has determined that the statement of costs is fully supported by the law and the evidence and is hereby GRANTED. Defendants are awarded $9,065.54 in costs.

AND IT IS SO ORDERED.

Sumter, South Carolina

May 26, 2023

R. Kirk Griffin
Judge, Third Judicial Circuit

ELECTRONICALLY FILED - 2023 May 26 1:17 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

Georgetown Common Pleas

Case Caption: The Gulfstream Caf? Inc VS Georgetown County , defendant, et al

Case Number: 2019CP2200212

Type: Order/Costs

So Ordered

s/ R. Kirk Griffin 2768

Electronically signed on 2023-05-26 11:23:32 page 3 of 3

ELECTRONICALLY FILED - 2023 May 26 1:17 PM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212
ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

ELECTRONICALLY FILED - 2023 Jun 07 9:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2019CP2200212

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
The Honorable R. Kirk Griffin, Circuit Court Judge

Case No. 2019-CP-22-00212
Appellate Case No. 2023-00646

The Gulfstream Café, Inc. ....Appellant,

v.

Georgetown County; Georgetown County Council;
and Steve Goggans, individually and in his official
capacity as Georgetown County Councilmember................................ Respondents.

PROOF OF SERVICE

I certify that I have served the Amended Notice of Appeal on Respondents Georgetown County, Georgetown County Council, and Steve Goggans, individually and in his official capacity as Georgetown County Councilmember, by depositing a copy in the U.S. Mail, postage prepaid, on June 7, 2023, addressed to their following attorneys of record and by email on June 7, 2023, to the following email addresses from the Attorney Information System ("AIS") for their attorneys of record:

Henrietta U. Golding, Esquire
Taylor K. Voegel, Esquire
Burr & Forman LLP
Post Office Box 336
Myrtle Beach, SC 29578
HGolding@burr.com
tvoegel@burr.com

s/ Sean M. Foerster
Sean M. Foerster (SC Bar# 77466)
Local Counsel
ROGERS TOWNSEND LLC

Certificate of Attorney

Pursuant to Rule 210(g), SCACR, I certify that this record contains all material proposed to be included by any of the parties and not any other material.

s/ Sean M. Foerster
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.