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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2024-000144
Case No. 2021-CP-26-07489

City of North Myrtle Beach,

Appellant,

v.

Sun TRS Ocean Club, LLC, Sun TRS Carolina Pines, LLC, and Sun Carolina Pines RV, LLC,

Respondents.

INITIAL BRIEF OF APPELLANTS

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April 18, 2024
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STATEMENT OF ISSUES ON APPEAL

I. In a zoning dispute involving a special exception residential amenity known as a cabana house, whether certain municipal ordinances regulating such use and activity—which does not involve the exchange of a good ***or*** service or the production, distribution, and consumption of commodities—constitute regulation of a noneconomic activity, implicating an conclusion similar to *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), rather than an economic one, implicating a conclusion similar to *Gonzales v. Raich*, 545 U.S. 1 (2005)?

II. Whether one municipal ordinance requirement that a cabana house must be used by a project in North Myrtle Beach is "inextricably linked" with two other distinct municipal ordinance requirements that a cabana house must be (1) owned by a homeowner's association and (2) maintained by a homeowner's association and that a homeowner's association shall be established for the project, such that all three ordinance requirements must be reviewed inseparably under a Dormant Commerce Clause analysis rather than reviewed under an independent and separate Dormant Commerce Clause analysis to preserve portions of ordinances that are constitutionally valid?

III. Whether the municipality's legitimate local purposes underlying its ordinances regulating cabana houses overcome even the strictest scrutiny applied under a Dormant Commerce Clause analysis?

IV. Whether the Circuit Court's Order is vague in that it does not expressly provide which specific words of the municipal ordinances at issue are deemed unconstitutional and for which the municipality is permanently enjoined from enforcing?

STATEMENT OF THE CASE

I. NATURE OF THE ACTION AND DEFENSES THEREIN

This appeal concerns the extent of Dormant Commerce Clause authority in striking down municipal ordinances as unconstitutional under the Dormant Commerce Clause. The Supreme Court of the United States has instructed the Dormant Commerce Clause "is not a ***roving license*** for [] courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007) (emphasis added).

Without this Court's intervention, the Circuit Court's Order finding unconstitutional certain portions of zoning ordinances promulgated by Appellant, the City of North Myrtle Beach ("**City**"), portends large-scale ramifications on all zoning ordinances, not just within the City, but across the State of South Carolina and the United States. The Order incorrectly extends the Dormant Commerce Clause power and undermines decades of precedent that (1) favors the exercise of the inherent police power of a municipality to engage in zoning for the public welfare without judicial interference; (2) requires the presumption of the constitutionality of a municipality's zoning plans; (3) instructs courts not to use the Dormant Commerce Clause as a "roving license" to decide what activities are appropriate for local governments to undertake and what activities must be the province of private market competition; and (4) holds a local law does not violate the Dormant Commerce Clause and is not discriminatory where it has incidental negative effects on some out-of-state market participants and does not reduce or curtail access to interstate markets.

Respondents are entities that own and/or are affiliated with a recreational vehicle ("**RV**") resort located in Conway, South Carolina ("**RV Resort**"). Their RV Resort is located

approximately fifteen miles from the special exception cabana house they desire to use to shuttle their guests back-and-forth to the beach in North Myrtle Beach, South Carolina. The City's zoning ordinances at issue prohibit Respondents from owning this one particular type of special exception—i.e., a cabana house—found within one specific zoning district out of approximately twenty different zoning districts within the entire City—i.e., the City's R-4 Resort Residential District. Respondents challenged these ordinances under the Dormant Commerce Clause and the Circuit Court's Order found certain portions of the City's ordinances are unconstitutional under this clause. However, the City's ordinances merely regulate a noneconomic activity, which does not substantially affect interstate commerce. Further, the City's ordinances do not exclude Respondents from operating within the City or shuttling their guests to and from the City; instead, they merely regulate wherein the City that operation can be conducted, as all zoning plans generally do. This Court should therefore reverse the Circuit Court's Order, overturn the unjustified expansion of the Dormant Commerce Clause, and protect longstanding policy of upholding municipal authority and interests in exercising the inherent municipal police power to engage in zoning for the public welfare.

II. FACTUAL BACKGROUND

A. The City's Zoning Purposes, Generally

The City is a tourist destination. About 20 million visitors come to the Grand Strand annually, with about 100,000 tourists visiting the City each day during the 100 days of summer. (Tr. Vol. I, p. 259, ll. 11–16.) The City has a nine-mile beachfront with 2,100 parking spaces and well over 100 public beach access points, 14 of which have bathroom facilities. (Tr. Vol. I, p. 433, l. 8 – p. 434, l. 21.) The City has approximately 20,000 permanent residents. (Tr. Vol. I, p. 260, ll. 5–7.) The City must "strike a balance" between protecting the quality of life of residents and

fostering a healthy, safe, accessible, and vibrant tourism environment. (Tr. Vol. I, p. 262, l. 19 – p. 263, l. 2.) In order to do that, the City utilizes a zoning plan, like virtually every other municipality in the United States, but which is especially important than in a tourist town.

The City's general purposes underlying its zoning ordinances are: "to guide development in accordance with existing and future needs and to promote the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare of the community." North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-1 (1984). The City also gives reasonable consideration for the following specific purposes:

1) To provide for adequate light, air, and open space;
2) To prevent the overcrowding of land, to avoid undue concentration of population, and to lessen congestion in the streets;
3) To facilitate the creation of a convenient, attractive, and harmonious community;
4) To protect and preserve scenic, historic, or ecologically sensitive areas;
5) To regulate the density and distribution of populations and the uses of buildings, structures and land for trade, industry, residence, recreation, . . . water supply, sanitation, protection against floods, public activities, and other purposes;
6) To facilitate the adequate provision or availability of transportation, police and fire protection, water, sewage, schools, parks, and other recreational facilities, affordable housing, disaster evacuation, and other public services and requirements specified in the ordinance;
7) To secure safety from fire, flood, and other dangers; and
8) To further the public welfare in any other specified regard.

North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-1 (1984). The City's zoning ordinance recognizes that the City's "economy is dependent on the retail and service industries supported by tourism," and as such, the City's further objective is "to encourage the future growth in tourism in an orderly fashion ***without compromising the character of residential areas*** or the natural environmental assets so important to tourist attraction." North Myrtle Beach, S.C., Code

of Ordinances Ch. 23, Art. II, § 23-1 (1984) (emphasis added). The City's witnesses testified to the importance of pursuing these zoning goals as well, because without zoning, there would be "total chaos" and a "Wild, Wild West" would exist. (Tr. Vol. I, p. 261, l. 11 – p. 263, l. 2.)

B. The City's R-4 Resort Residential District

The City utilizes approximately twenty different zoning districts, ranging from residential ones to commercial ones, which regulate the intensity of use within those districts. One residential district is named the R-4 Resort Residential District, which has as its purpose:

> to provide for the orderly development of certain areas within the community where both year-round and seasonal or resort housing may be developed and where, because of proximity to the ocean, such "mixed development" would promote year-round use of public facilities, and permit housing choices in response to market demands, but not at the expense of ocean visibility and access by the community.

North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-22(1) (1984). The City elicited testimony as to the importance of these purposes as well. (Tr. Vol. I, p. 409, l. 10 – p. 411, l. 5.)

The permitted uses within the R-4 Resort Residential District are: (a) dwellings, such as single-family detached, semi-detached, patio homes, duplexes and multiplexes, and townhouses, amongst others; (b) hotels, motels, inns, and lodges; (c) accessory uses customarily incidental to dwellings; (d) accessory uses customarily included in hotels, motels, inns, and lodges; and (e) parking lots. North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-22(2) (1984). Any owner with property located in the R-4 Resort Residential District may use said property in accordance with these permitted uses by right. In other words, an owner may use property in the manner outlined without having to seek review or approval from the City's Zoning Administrator or Board of Zoning Appeals.

C. Cabana Houses as Special Exceptions in the R-4 Resort Residential District

In or around January 1996, the City promulgated ordinances to permit a new use category

called "cabana houses" as a special exception in the R-4 Resort Residential District within the City. Use of property as a special exception is different than a use permitted by right.[1] Special exceptions, including cabana houses, require approval by the Board of Zoning Appeals "[o]wing to ***their potential negative impact*** on the community and surrounding areas." North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-22(4) (1984) (emphasis added).

The City's Code of Ordinances defines a "cabana house" as:

> A structure utilizing single-family design and development standards in close proximity to the oceanfront to be used by ***projects in North Myrtle Beach*** not located near the ocean. . . . A cabana house shall be ***owned and maintained by a homeowner's association*** with a maintenance agreement submitted and approved by the planning department.

North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-2 (1984) (emphasis added). Cabana houses, as special exceptions, are subject to additional use restrictions within the City's Code of Ordinances, including:

> 1. That a ***homeowner's association shall have been established for the project*** and a maintenance agreement has been submitted to the planning department.
> . . .
> 3. That the use of the house be limited to bathing and change of clothing facilities, and occasional use as guest quarters and other similar uses.
> 4. That the special exception will be in substantial harmony with the area in which it is to be located.
> 5. That the special exception will not be injurious to the adjoining property.[2]

North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-22(4)(d) (1984) (emphasis

[1] Another category of use, known as an accessory use, is defined within the City's ordinances: "A subordinate use which is incidental to and customary in connection with the principal building or use and which is located on the same lot with such principal building or use." North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-2 (1984).

[2] These additional use requirements in subparagraphs 3., 4., and 5. will be referred to herein as "Additional Use Requirements," but they are not at issue in this appeal as the Circuit Court ruled these "are constitutional and fully enforceable." (Order of Nov. 20, 2023, p. 25.)

added). Respondents are not challenging these use restrictions, except to the extent they require a homeowner's association to be established for the project. Of note, for ***over twenty years***, these ordinances regulating cabana houses went unchallenged.

D. Respondents' Ownership and Use of the Cabana House

The land commonly referred to and designated as Lot 1, Block 18-A, Tilghman, located in the City at 1814 North Ocean Boulevard, North Myrtle Beach, South Carolina 29582 (the "**Property**"), is subject to the City's Code of Ordinances. A structure originally designed and approved as a cabana house ("**Cabana House**") is located on the Property. The Property was approved for use as a special exception cabana house in 2007 via an application from Seabrook Plantation, LLC, a developer of the Seabrook Plantation development project located within the City. (App. Trial Ex. 11.)

Sun Carolina Pines RV, LLC is the owner and operator of the RV Resort located in Conway, South Carolina. The land for its RV Resort was purchased in 2017 and a groundbreaking occurred in 2018. The RV Resort contains 829 transient sites and 159 annual sites for long-term guests. (App. Trial Ex. 87.) The RV Resort operates and maintains over 30 on-site amenities. (App. Trial Exs. 33 and 34.) The RV Resort hosts a number of events on-site and offer a restaurant/bar and food service, utilities and bathing areas, gyms, an arcade room, mini-golf, a bowling alley, indoor and outdoor pools, a water playground, and other recreational and entertainment amenities; indeed, Respondents' own witness testified they do not have to rely on the Cabana House for its business and Respondents have marketed to their guests that they "never have to leave if [they] don't want to." (Tr. Vol. II., p. 180, l. 17 – p. 181, l. 21; App. Trial Ex. 101.) The RV Resort also shuttles guests to other points of interest in the community, including the Tanger Outlets, Downtown Conway, Broadway at the Beach, and Top Golf. (Tr. Vol. II, p. 246, l. 10 – p. 247, l.

5; App. Trial Ex. 48.)

In the spring of 2019, the Property and Cabana House was sold from a prior owner to an entity affiliated with Respondents, which then assigned it to Sun TRS Ocean Club, LLC, who is the owner of the Property. (App. Trial Ex. 17; App. Trial Ex. 32) Its ownership and Respondents' collective use of the Cabana House for the benefit of the RV Resort are at issue in this action. Respondents' ownership and use of the Property was and is materially different than the ownership and use by the prior owners of the Property, including the original owner who obtained approval to use the Property for a special exception cabana house.

Respondents' use of the Cabana House does not meet any of the permitted uses under Section 23-22 of the City's Code of Ordinances as they are not a project located inside the City and they do not operate as a homeowner's association. Instead, Respondents attempted to use the Property as a cabana house, i.e., as an amenity for shuttling their RV Resort guests to and from the beach and for use of the Cabana House pool, much like it shuttles guests to other tourist destinations described above. The Cabana House is merely one of several destinations the RV Resort will shuttle its guests. However, the shuttling of guests to the Cabana House ***only*** occurred during the summer months—in other words, it never operated as a year-round amenity. Moreover, at the time of the RV Resort groundbreaking in 2018 and at all times prior to discovering the Cabana House was for sale, Respondents intended to shuttle their RV Resort guests to and from public beach access points rather than purchasing beachfront property to use as a private amenity. (Tr. Vol. II, p. 79, ll. 7–22.) Respondents never separately charged their guests for shuttle services and access to the Cabana House; indeed, Respondents used the Cabana House as a free amenity in that regard.[3] (Tr. Vol. II, p. 181, ll. 10–24.)

[3] On a number of occasions, Respondents used the Cabana House to host events for charge, which involved serving food and beverage, including alcohol. Respondents' use of the Cabana House in

Notably, Respondents admitted to knowing of the City's zoning ordinances that are at issue in this case ***prior*** to their purchase of and use of the Cabana House. (App. Trial Ex. 7.) Despite this knowledge, Respondents acquired the Cabana House, and failed to apply for authorization to own and use the Property pursuant to the special exception use for cabana houses under Section 23-22 of the City's Code of Ordinances. Respondents never applied for authorization to own and use the Property pursuant to the special exception use for cabana houses under Section 23-22 of the City's Code of Ordinances. (Tr. Vol. II, p. 176, ll. 5–10.)

In the preliminary stages of this litigation, Respondents consented to the closure of the Cabana House, pursuant to Consent Order Regarding Use of Subject Property, which was entered by the Circuit Court on January 11, 2022 ("**Consent Order**"). (Regarding Use of Subject Property.) The General Manager of the RV Resort in the fall of 2021 was terminated, and an interview process for a new General Manager occurred around the time of the entry of the Consent Order. Respondents have alleged the Cabana House is an important amenity, but the record indicates they did not even inform their incoming General Manager of the closure of the Cabana House—not at any time in the three-month interview process nor before she was hired and arrived on-site; instead, she found out on her own only after she had arrived. (Tr. Vol. II, p. 257, l. 19 – p. 259, l. 1.)

III. PROCEDURAL HISTORY

Respondents' use of the Cabana House resulted in the City receiving a lengthy complaint in July 2021, which was submitted by neighboring residential communities, Sea Cloisters I and

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this manner was conducted without a business license issued by the City for the Property and their service of alcohol on the Property was conducted without an alcohol permit issued by the South Carolina Department of Revenue. The Circuit Court's Order held that Respondents had "knowingly violated the [Additional Use Requirements] of the City's Zoning Ordinance on numerous occasions." (Order of Nov. 20, 2023, pp. 24–25.) However, these violations are not directly at issue in this appeal.

Sea Cloisters II, and outlined the aforementioned violations and more. (App. Trial Ex. 68.) In August 2021, following receipt of the aforementioned complaint, the City Manager attempted one or more phone calls and e-mails to the general manager of the RV Resort, in order to discuss the ordinance violations and attempt to resolve the issues informally. (Tr. Vol. I, p. 263, l. 4 – p. 264, l. 7.) After the City Manager's attempts to contact the RV Resort's general manager went ignored, the City Manager directed a cease and desist letter to be sent. (App. Trial Ex. 70.) On September 2, 2021, a cease and desist letter was submitted to the RV Resort. (Resp. Trial Ex. 29.) Having received no substantive response to this cease and desist letter over the next two months, the City instituted this action on November 11, 2021.[4] (Appellant's Complaint.) The City's sole cause of action was for a declaratory judgment seeking a ruling that Respondents' ownership and use of the Cabana House was in violation of the applicable zoning ordinances. Respondents answered on December 20, 2021, without alleging any counterclaims. (Respondents' Answer.) On March 14, 2022, Respondents amended their answer by alleging five separate counterclaims: (1) unconstitutionality of the City's zoning ordinances under the Commerce Clause; (2) unconstitutionality of the same under the Due Process Clause[5]; (3) unconstitutionality of the same under the Equal Protection Clause[6]; (4) a violation of 42 U.S.C. § 1983; and (5) an inverse condemnation and/or regulatory taking. (Respondents' Answer and Counterclaims.)

On August 1, 2022, Respondents filed a Motion for Partial Summary Judgment, on the basis of their Commerce Clause counterclaim, which was briefed by all parties and heard on November 16, 2022. (Motion for Partial Summary Judgment.) In a Form 4 Order of November 18,

[4] Sea Cloisters I and II also sent a similar complaint directly to the RV Resort, and did not receive a response to this complaint either. (App. Trial Ex. 69.)
[5] At trial, Respondents informed the Circuit Court that they were not going to present evidence on their Due Process Clause counterclaim. (Tr. Vol. I, p. 50, l. 18 – p. 51, l. 13.)
[6] On July 10, 2023, Respondents filed a Stipulation of Dismissal for their Equal Protection Clause counterclaim. (Stipulation of Dismissal.)

2022, the Circuit Court denied Respondents' Motion for Partial Summary Judgment. (Form 4 Order of Nov. 18, 2022.) The Form 4 Order was followed by a more fulsome Order of November 28, 2022, in which the Circuit Court did not rule upon the pure matter of law in whether the City's ordinances were facially discriminatory, but instead stated "a more comprehensive factual record is desirable to fairly determine the appropriate result." (Order of Nov. 28, 2022.)

On May 22, 2023, Respondents filed a Renewed Motion for Partial Summary Judgment, again on the basis of their Commerce Clause counterclaim, which was briefed by all parties and heard on August 9, 2023. (Respondents' Renewed Motion for Partial Summary Judgment.) In a Form 4 Order of August 11, 2023, the Circuit Court denied Respondents Renewed Motion for Partial Summary Judgment. (Form 4 Order of Aug. 11, 2023.) Again, the Circuit Court did not rule upon the pure matter of law in whether the City's ordinances were facially discriminatory.

Pursuant to an agreement between the parties, and in recognition the majority of the claims asserted in the case are non-jury matters, the Circuit Court bifurcated the trial such that all non-jury claims would be heard first by the Circuit Court. (Consent Order Regarding Motion to Bifurcate Trial.) The bench trial was conducted between October 31, 2023 and November 3, 2023. At the beginning of trial, the parties agreed to substitute one of the parties: Sun TRS Carolina Pines RV, LLC was misidentified and, with no objection by Respondents, was substituted with the real party in interest Sun Carolina Pines RV, LLC. (Tr. Vol. I, p. 15, ll. 3–16.) Following the trial, the Circuit Court took the matter under advisement and requested the parties submit proposed orders not to exceed twenty-five pages by November 13, 2023. The competing proposed orders were timely submitted. (Proposed Orders.) On November 16, 2023, the Circuit Court's law clerk indicated in an e-mail the Circuit Court was ruling in favor of Respondents. The Circuit Court's Final Order was filed on November 20, 2023, which found the pertinent City ordinances

unconstitutional under the Dormant Commerce Clause.

On November 30, 2023, the City filed a Motion and Incorporated Memorandum to Reconsider, pursuant to Rules 52(b), 59(a), and 59(e) of the South Carolina Rules of Civil Procedure. That same day, the City filed an Amended Motion and Incorporated Memorandum to Reconsider, pursuant to the same rules. (Amended Motion to Reconsider.) Respondents filed briefing in opposition, and the Circuit Court denied reconsideration, without a hearing, via a Form 4 Order on January 3, 2024. (Form 4 Order of Jan. 3, 2024.) The City filed its Notice of Appeal on February 2, 2024. The parties consented to an extension of time by which the City must file its Initial Brief and Designation of Matter to be Included in the Record on Appeal, which motion was filed on February 23, 2024 and granted on February 28, 2024, thereby extending the time by which the City must file said documents until April 18, 2024. As the issues on appeal only involve constitutional issues, no amount of money is currently at stake on appeal.

STANDARD OF REVIEW

I. POLICY CONSIDERATIONS

South Carolina courts ***must*** presume the constitutionality of municipal ordinances at the outset. *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) ("A municipal ordinance is a legislative enactment and is presumed to be constitutional.") (quoting *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1992)); *Ani Creation, Inc. v. City of Myrtle Beach Bd. of Zoning Appeals*, 440 S.C. 266, 278, 890 S.E.2d 748, 754 (2023) (same), *cert. denied sub nom. Ani Creation, Inc. v. Myrtle Beach*, 144 S. Ct. 556, 217 L. Ed. 2d 296 (2024).

This presumption is a strong one. *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965) ("There is a strong presumption in favor of the validity of municipal zoning

ordinances, and in favor of the validity of their application."). Therefore, "every presumption [must] 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." *City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (quoting *Moseley v. Welch*, 209 S.C. 19, 26–27, 39 S.E.2d 133, 137 (1946)). "[T]he power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which [must] 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***." *McMaster*, 395 S.C. at 504–05, 719 S.E.2d at 662–63 (emphasis added) (quoting *Rush*, 246 S.C. at 276, 143 S.E.2d at 531).

Courts should also be careful to avoid abuses that could arise from too strict enforcement of the Dormant Commerce Clause. The Supreme Court of the United States has held the Dormant Commerce Clause "is ***not a roving license*** for [] courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007) (emphasis added) (finding it is "not the office of the Commerce Clause to control the decision of the voters" on how their local government operates). The Supreme Court further stated that although the Commerce Clause (and its negative implications) limit the ability of localities to regulate or otherwise burden the flow of interstate commerce, "it does not elevate free trade above all other values." *Maine v. Taylor*, 477 U.S. 131, 151 (1986). "As long as a [municipality] does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens . . . ." *Id.* (internal citation omitted).

Similar to the presumption applied in South Carolina courts to local ordinances, the Supreme Court of the United States has also expressed courts "should be particularly hesitant to interfere with [local government] efforts under the guise of the Commerce Clause" when traditional local government functions are at issue. *United Haulers Ass'n, Inc.*, 550 U.S. at 343. Of course, "zoning and land use regulation remain peculiarly local government functions." John J. Delaney et al., Elements of the Planning Process—Local Legislative Body, 1 Handling the Land Use Case § 1:6 n.1 (3d ed.). As such, the Supreme Court of the United States "has consistently held that a state's power to regulate commerce is at its zenith in areas traditionally of local concern" such as zoning. *See Amisub of S.C., Inc. v. S.C. Dep't of Health & Env't Control*, 424 S.C. 80, 90, 817 S.E.2d 633, 638 (Ct. App. 2018) (citation omitted).

Lastly, Respondents are seeking, in part, a facial challenge to the ordinances. However, "[a] facial challenge to a legislative Act is, of course, ***the most difficult challenge*** to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added); *see also Doe v. State*, 421 S.C. 490, 502, 808 S.E.2d 807, 813 (2017) (applying the *Salerno* standard to a statute); *State v. Legg*, 416 S.C. 9, 15, 785 S.E.2d 369, 372 (2016) (same).

II. *DE NOVO* REVIEW

"Determining the proper interpretation of a statute is a question of law, and [an appellate court] reviews questions of law de novo." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) (citing *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007)). More specifically, an appellate court reviewing a Dormant Commerce Clause ruling review the trial court's "factual findings for clear error and its legal interpretation of the Commerce Clause de novo." *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d

560, 567 (4th Cir. 2005); *see also United States v. Presley*, 52 F.3d 64, 67 (4th Cir. 1995) (reviewing the "constitutionality of a statute *de novo*" for a challenge under the Commerce Clause and other constitutional provisions); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113, 1123 (4th Cir. 1995) ("We review a constitutional challenge to a statute *de novo*."); *United States v. Terry*, 726 F. App'x 939, 940 (4th Cir. 2018) (same).

ARGUMENT

I. THE CITY'S ORDINANCES REGARDING CABANA HOUSES MERELY REGULATE NONECONOMIC ACTIVITY, SUCH THAT THERE IS NO SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE AND THE DORMANT COMMERCE CLAUSE IS NOT IMPLICATED.

A. The Commerce Clause and Its Negative Implications, Generally

The Supreme Court of the United States has identified "three broad categories of activity that Congress may regulate under its commerce power." *United States v. Lopez*, 514 U.S. 549, 558 (1995). "First, Congress may regulate the use of the channels of interstate commerce." *Id.* "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id.* "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558–59 (internal citations omitted).

"Besides being an affirmative grant of power, the Commerce Clause also has a 'negative sweep' that restricts the power of states to regulate interstate trade." *Medigen of Kentucky, Inc. v. Pub. Serv. Comm'n of W. Virginia*, 985 F.2d 164, 165–66 (4th Cir. 1993) (citing *Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298, 309 (1992), *overruled on other grounds by S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018)). "[T]he negative implications of the Commerce Clause, often referred to as the Dormant Commerce Clause, prohibit state action that unduly

burdens interstate commerce." *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 104, 705 S.E.2d 28, 36 (2011) (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997)). There is a two-step analysis to the Dormant Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578–79 (1986).

Before turning to the two-step analysis to the Dormant Commerce Clause, there is an initial burden a party must prove in order to sustain a challenger under the Dormant Commerce Clause. This initial burden is derived from the fact that "[d]espite the broad nature of [legislative] power under the Commerce Clause, the Supreme Court has emphasized that such power is 'subject to outer limits,' and that the Clause and the Court's decisions construing the Clause do not obliterate the distinction between 'what is truly national and what is truly local.'" *United States v. Gibert*, 677 F.3d 613, 622 (4th Cir. 2012) (quoting *Lopez*, 514 U.S. at 567).

The initial determinations are (1) whether any effect on interstate commerce exists, and if so, (2) whether the effect is substantial. *See Sch. Bd. of Par. of St. Charles v. Shell Oil Co.*, 435 F. Supp. 2d 531, 539 (E.D. La. 2006) ("The initial determination that the Supreme Court in *Maryland v. Louisiana*[, 451 U.S. 725 (1981)] makes is that the transactions at issue are in fact interstate commerce."). These initial determinations of whether any effect on interstate commerce exists, and if so, whether the effect is substantial, are ones in which the moving party bears the burden.

B. The *Lopez-Morrison* Factors and Binding Precedent

The Supreme Court has "enumerated four factors for lower courts to consider in analyzing whether an activity substantially affects interstate commerce." *United States v. Buculei*, 262 F.3d 322, 328 (4th Cir. 2001) (citing *United States v. Morrison*, 529 U.S. 598 (2000)). In conducting this analysis, courts "***are bound*** to inquire" into the following matters:

> (1) whether the statute relates to an activity that has something to do with " 'commerce' or any sort of economic enterprise, however

> broadly one might define those terms";
>
> (2) whether the statute contains an "express jurisdictional element which might limit its reach" to activities having "an explicit connection with or effect on interstate commerce";
>
> (3) whether congressional findings in the statute or its legislative history support the judgment that the activity in question has a substantial effect on interstate commerce; and
>
> (4) whether the link between the activity and a substantial effect on interstate commerce is attenuated.

Id. (emphasis added) (quoting *Morrison*, 529 U.S. at 610–13); *Gibert*, 677 F.3d at 624 (same). An analysis of binding precedent is important here.

i. *Wickard*

One of the most important early cases dealing with the Commerce Clause is *Wickard v. Filburn*, 317 U.S. 111 (1942). The Supreme Court of the United States has recognized *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *Lopez*, 514 U.S. at 560. The Supreme Court considered the constitutionality of the Agricultural Adjustment Act of 1938, which regulated the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages of wheat and the concomitant fluctuation in the price of wheat. *Wickard*, 317 U.S. at 115. A farmer facing a potential penalty under the act for producing wheat in excess of the quota established for his farm sought a declaratory judgment that the act was unconstitutional under the Commerce Clause. *Id.* at 114–15. The Supreme Court rejected the argument that interstate commerce was not affected, because it reasoned that if the farmer had not produced his own wheat, he would have purchased wheat on the open market. *Id.* at 128–29. Ultimately, the Supreme Court found it important that wheat was a commodity, which fell under Congress' power under the Commerce Clause "to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices." *Id.* at 128.

ii. *Dean Milk*

Whereas the commodity of wheat was at issue in *Wickard*, the commodity of milk was at issue in *Dean Milk Co. v. City of Madison, Wisconsin*, 340 U.S. 349 (1951). A municipal ordinance prevented the selling within city limits of all pasteurized milk processed and bottled outside of a five-mile zone of the City of Madison, Wisconsin. *Id.* at 350. The complete exclusion of non-local milk distributors was of immense importance, because the Supreme Court of the United States held the ordinance "erect[ed] an economic barrier protecting a major local industry against competition from without the State." *See id.* at 354. Thus, the Supreme Court struck down the ordinance as unconstitutional given "the principle that 'one state in its dealings with another may not place itself in a position of economic isolation.'" *Id.* at 356.

iii. *Carbone*

In the more recent case of *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383 (1994), the Supreme Court considered a waste flow control ordinance, which required all solid waste to be processed at a designated transfer station before leaving the municipality and which was promulgated in order to retain the processing fees charged at the transfer station to amortize the cost of the facility. *Id.* at 386. The municipality sued a processing plant that received solid waste from outside the municipality and even outside the state and sought an injunction requiring the processing plant to send its solid waste to the designated transfer station. *Id.* at 387–89. The Supreme Court held:

> By requiring Carbone to send the nonrecyclable portion of this waste to the Route 303 transfer station at an additional cost, the flow control ordinance drives up the cost for out-of-state interests to dispose of their solid waste. Furthermore, even as to waste originant in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives out-of-state businesses of access to a local market.

Id. at 389. Thus, much like in *Dean Milk*, the Supreme Court was focused on the complete exclusion of market participation across an entire municipality.

iv. *Lopez*

In *Lopez*, the Supreme Court of the United States considered the constitutionality of the Gun-Free School Zones Act, which made it a federal offense for any individual knowingly to possess a firearm at a place the individual knew or had reasonable cause to believe was a school zone. *Lopez*, 514 U.S. at 551. The Supreme Court quickly disposed of the analysis of whether firearm possession fell within the two categories of the Commerce Clause and instead focused on whether the act regulated an activity that substantially affected interstate commerce. *Id.* at 559. The Supreme Court held the statute was a criminal one that had "nothing to do with 'commerce' or any sort of economic enterprise." *Id.* at 562. Further, it held the statute contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce" and the Government conceded that neither the statute nor its legislative history contained express findings regarding the effects upon interstate commerce of gun possession in a school zone. *Id.* Ultimately, the Supreme Court rejected the arguments that firearm possession could increase the "costs of crime," which might raise insurance rates or reduce the willingness to travel to certain areas perceived to be unsafe, and that "national productivity" would be dampened due to handicapping the educational process. *Id.* at 563–64. The Supreme Court found that if it were to accept these arguments, it would be "hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* at 564.

v. *Morrison*

Five years after *Lopez*, the Supreme Court issued its decision in *Morrison*, which considered the constitutionality of the Violence Against Women Act and its provision for a civil

remedy for victims of crimes of violence motivated by gender. *Morrison*, 529 U.S. at 605–06. The *Morrison* Court acknowledged that *Lopez* had "recently canvassed and clarified [the Supreme Court's] case law governing this third category of Commerce Clause regulation" and "provide[d] the proper framework for conducting the required analysis" of a challenged law under the Commerce Clause. *Id.* at 609. That framework is the four-factor test described above.

The Supreme Court did not adopt a categorical rule for aggregating the effects of noneconomic activity, but it clearly held that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 613. Further, the Supreme Court held there was no jurisdictional element contained within the statute at issue. In contrast to the lack of legislative history in *Lopez*, the Supreme Court did consider "numerous findings" within the legislative record "regarding the serious impact that gender-motivated violence has on victims and their families," but rejected these findings based on the promotion of similar arguments previously rejected in *Lopez*. *Id.* at 614–15. The Government argued gender-motivated crimes of violence affected interstate commerce by deterring potential victim travel across state lines and diminishing national productivity, but the *Morrison* Court found to accept these rationales would allow Congress unfettered authority to intervene in "areas of traditional state regulation." *See id.* at 615–16. The Supreme Court expounded that the "Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 617–18. The *Morrison* Court also recognized the importance of the police powers "the Founders denied the National Government and reposed in the States," and with its decision, vindicated the distinction between economic and noneconomic regulation and between national and local regulation.

vi. *Buculei*

One year after *Morrison*, the Fourth Circuit Court of Appeals considered the case of

Buculei and the constitutionality of a federal statute criminalizing inducing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct if the person knows or has reason to know such visual depiction will be transported in interstate or foreign commerce. *Buculei*, 262 F.3d at 327–28. The Fourth Circuit found the criminalization of the *production* of visual depictions important in analyzing whether the activity was economic in nature. *Id.* at 329. In so doing, the Fourth Circuit followed the long-standing decision in *Wickard*, which "stands for the proposition that when a person 'produces for their own consumption a product that is traded in interstate commerce, his conduct is economic in nature.'" *Id.* (quoting *United States v. Kallestad*, 236 F.3d 225, 228 (5th Cir. 2000) (citing *Wickard*, 317 U.S. at 114)). The Fourth Circuit also noted the jurisdictional element, which only criminalized the production when the person knows or has reason to know a depiction will be transported across state lines, as well as the ample congressional findings that the production of child pornography substantially affects interstate commerce. *Id.* The Fourth Circuit distinguished *Lopez* and *Morrison*, which argued the regulation of certain activities would substantially affect the interstate market for other activities, because in *Buculei*, Congress was "regulating the very thing (i.e., child pornography) for which an interstate market exists." *Id.* at 330. The Fourth Circuit concluded:

> The impact on interstate commerce of the wheat at issue in *Wickard* is analytically indistinguishable from the impact of child pornography under consideration here. On the other hand, the same cannot be said of the gun possession in a school zone considered in *Lopez*, or the violence against women examined in *Morrison*. (In both of which the government's contentions were that the activities in question substantially affected interstate markets for ***other*** activities. *See*[,] *e.g.*, *Morrison*, 529 U.S. at 615 (rejecting the contention that violence against women substantially affects markets for interstate travel, employment, business transactions, medical services, and consumer products).)

Id. (emphasis added).

vii. *Gonzales*

The Fourth Circuit's focus on the production aspect in *Buculei* was especially prescient in light of the Supreme Court's decision four years later in *Gonzales v. Raich*, 545 U.S. 1 (2005). The dispute involved California's legalization of the use of medical marijuana with the federal Controlled Substances Act that criminalized such use. Users and growers of marijuana for medical purposes in California sought a declaration that the Controlled Substances Act was unconstitutional as applied to them based on the Commerce Clause. *Id.* The Ninth Circuit Court of Appeals relied on *Lopez* and *Morrison* in suggesting that medical marijuana production and use was a purely local activity beyond the reach of federal power. *See id.*

Importantly, *Gonzales* did not overturn or cast doubt upon the four-factor framework outlined in *Lopez* and in *Morrison*; instead, the *Gonzales* Court distinguished between the noneconomic activity being regulated in *Lopez* and *Morrison*, with the economic activity of producing, distributing, and consuming a commodity (i.e., medical marijuana). The Supreme Court cited to Webster's Third New International Dictionary in order to define what it means to be an economic activity. The Supreme Court found that "'[e]conomics' refers to 'the production, distribution, and consumption of commodities." *Id.* at 25–26 (quoting Webster's Third New International Dictionary 720 (1966)). The Supreme Court found that *Wickard* was a much more analogous case than *Lopez* and *Morrison*: "The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market." *Id.* at 18. The Supreme Court held that because "a primary purpose of the [Controlled Substances Act] is to control the supply and demand of controlled substances in both lawful and unlawful drug markets" and because "Congress had a rational basis for concluding that leaving home-consumed marijuana

outside federal control would similarly affect price and market conditions," the act was constitutional. *Id.* at 19.

viii. *Gibert*

The final binding precedent to be examined—*United States v. Gibert*, 677 F.3d 613 (4th Cir. 2012)—came seven years after *Gonzales* and cites to *Gonzales*, leaves no doubt the four-factor framework of *Lopez* and *Morrison* remains good law. The Fourth Circuit in *Gibert* analyzed a federal animal fighting statute using the *Lopez-Morrison* factors. *Id.* at 624. The Fourth Circuit found the "very definition of 'animal fighting venture' in the statute suggests economic activity, because the animal fighting that is prohibited must be for 'purposes of sport, wagering, or entertainment.'" *Id.* The Fourth Circuit found the terms "sport," "wagering," and "entertainment" are closely aligned in the domestic culture of economics and elements of commerce, and, furthermore,

> the uncontested factual allegations [in *Gibert*] also demonstrate the economic activities inherently involved in cockfighting: individuals paid a fee to enter their birds into the derby, the owner of the winning bird won the "pot" of the collective money paid by the entrants, minus any money retained by the derby organizers, and spectators and bird owners paid an admission fee to enter the building in which the birds fought.

Id. The Fourth Circuit found this exchange of money directly due to the activity of animal fighting and its effect on interstate commerce was "visible to the naked eye," unlike the situation in *Lopez*. *Id.* at 625. The Fourth Circuit also confirmed a jurisdictional element was involved as the criminal statute required the government to prove the individual participated in an animal fighting event that had a connection with or effect on interstate commerce and there was "ample congressional findings" in the statute and in the legislative history to support the substantial effect on interstate commerce. *Id.* at 626. Regarding the fourth and final factor, the Fourth Circuit found the link between animal fighting and its effect on interstate commerce was not attenuated, because they are

"inherently commercial enterprises" and there was "no need to 'pile inference upon inference' in order to establish the link between animal fighting and interstate commerce." *Id.* Based on the foregoing, the Fourth Circuit upheld the constitutionality of the federal animal fighting statute.

C. The Regulation of Cabana Houses Constitutes a Noneconomic Activity

In light of the foregoing binding precedent, the City's ordinances regarding cabana houses merely regulate a noneconomic activity (i.e., a noncommercial, residential amenity), such that interstate commerce is not substantially affected and the Dormant Commerce Clause is not implicated. Each of the *Lopez-Morrison* factors will be addressed in turn and all favor the constitutionality of the City's ordinances.

i. The City's Ordinances Do Not Relate to "Commerce" or Any Sort of Economic Enterprise

The first *Lopez-Morrison* factor favors the City, because the City's ordinances do not relate to commerce or any sort of economic enterprise. The critical inquiry is whether the City's ordinances regulating cabana houses relate to commerce or some sort of economic enterprise. As the Supreme Court did in *Gonzales*, it is important to understand the definitions of these key terms first. "'Economics' refers to 'the production, distribution, and consumption of ***commodities***." *Gonzales*, 545 U.S. at 25–26 (emphasis added) (quoting Webster's Third New International Dictionary 720 (1966)). Similarly, "[c]ommerce" is defined as the "***exchange of goods and services***, esp[ecially] on a large scale involving transportation between cities, states, and countries." *Commerce*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added).

A cabana house is ***not*** a commodity.[7] Neither is it a good or service.[8] Instead, it is an

[7] A commodity is defined as "[a]n article of trade or commerce"; it "embraces only tangible goods, such as products or merchandise" and is also defined as an "economic good, esp[ecially] a raw material or an agricultural product." *Commodity, Black's Law Dictionary* (11th ed. 2019).

[8] A good in this context is defined as a "chattel, ware, piece of merchandise, or other product." *Good*, *Black's Law Dictionary* (11th ed. 2019). Service is defined as "[l]abor performed in the

amenity.[9] Respondents used the amenity simply to shuttle their RV Resort guests to and from the Cabana House for their guests' access to the beach and use of the pool. It is undisputed Respondents never charged any RV Resort guest for accessing the Cabana House; it was essentially always used as a free-of-charge amenity. (Tr. Vol. II, p. 181, ll. 10–24.) Respondents never directly generated any revenue from mere guest access of this free-of-charge amenity. Further, no other cabana house located within the City generated any revenue for the homeowners' associations established for those cabana houses. Thus, cabana houses are not like goods or commodities such as wheat (*Wickard*), milk (*Dean Milk*), child pornography (*Buculei*), or marijuana (*Gonzales*), that can be produced, distributed, and consumed on an open market. Neither is accessing a free-of-charge recreational facility similar to a paid service such as an animal fighting venture (*Gibert*), which involves an entry fee payment for the animal sponsor, an admission fee payment for observers, and a payout to the winner.

Further, the City's ordinances do not completely exclude Respondents' RV resort guests from accessing the City's beaches or increase their costs in accessing the beach (*Dean Milk* / *Carbone*). After all, Respondents initially intended to shuttle their RV Resort guests to and from public beach access points rather than purchasing beachfront property to use as a private amenity. (Tr. Vol. II, p. 79, ll. 7–22.) Further, while the Consent Order was in effect and when Respondents were unable to use the Cabana House for their guests, Respondents instead transported their RV Resort guests to and from public beach access points, including some within the City, all free of

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interest or under the direction of others; specif[ically], the performance of some useful act or series of acts for the benefit of another, usu[ally] for a fee . . . In this sense, service denotes an intangible commodity in the form of human effort, such as labor, skill, or advice." *Service*, *Black's Law Dictionary* (11th ed. 2019).

[9] An amenity is defined as "[s]omething tangible or intangible that increases the enjoyment of real property, such as location, view, landscaping, security, or ***access to recreational facilities***." *Amenity*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added).

charge. (Tr. Vol. II, p. 181, l. 25 – p. 182, l. 17; p. 247, ll. 15–18; p. 249, l. 6 – p. 250, l. 5.) Thus, Respondents' guests were not excluded from the City and did not bear any additional cost or burden in accessing the City's beaches.

Again, the critical inquiry is whether the City's ordinances regulating cabana houses relate to commerce or some sort of economic enterprise. The inquiry is ***not*** whether the RV Resort implicates interstate commerce or whether the RV Resort participates in the overarching tourism market for the Grand Strand area. The Circuit Court found that the RV Resort "is comparable to hotels or short-term rental providers," and that these "platforms, which comprise a significant part of the tourism economy in the Grand Strand, clearly have a substantial effect on interstate commerce . . . ." (Order of Nov. 20, 2023, p. 14.) That may be true, but the Circuit Court erred in focusing on what the specific activity being regulated is. The City's ordinances are regulating cabana houses here, and not the RV Resort, hotels, or short-term rental providers. The activity at issue here, i.e., a free-of-charge amenity, is a far cry from the interstate commerce involved with the RV Resort, hotels, or short-term rental providers. Much like the regulation of guns in a school zone (*Lopez*) or providing a civil remedy for victims of violent crimes (*Morrison*) are not directly related to the commerce, the regulation of a noncommercial amenity is not directly related to commerce either. In sum, this first factor tips in favor of finding a noneconomic activity here.

ii. The City's Ordinances Contain an Express Jurisdictional Element that Limit Their Reach such that There Is Not an Explicit Connection with or Effect on Interstate Commerce

The second *Lopez-Morrison* factor favors the City as well. In a pure Commerce Clause analysis, a court must consider whether the challenged law contains an "express jurisdictional element which might limit its reach" to activities having "an explicit connection with or effect on interstate commerce." *Buculei*, 262 F.3d at 328 (quoting *Morrison*, 529 U.S. at 610–13). In a

Dormant Commerce Clause analysis, this factor must be inverted. The test, here, is whether the City's ordinances limit their reach such that they do ***not*** have an explicit connection with or effect on interstate commerce.

Here, the City's special use exception for a cabana house is jurisdictionally limited to the R-4 Resort Residential District, which is one of approximately twenty separate zoning districts in the City. The City allows commercial recreational facilities to be owned and used in other zoning districts, including as permitted uses within the Resort Commercial District and the Highway Commercial District as well as a special exception within the Business Commercial District. North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, §§ 23-27(2)(d), 23-26(2)(h), 23-25(4)(b) (1984). The Resort Commercial District contains beachfront lots and the Highway Commercial and Business Commercial Districts contain lots in close proximity and within walking distance to the beach.

The City has ***not*** prohibited Respondents from purchasing, owning, or operating a commercial recreational facility within the Resort Commercial District, the Highway Commercial District, or the Business Commercial District, for the purposes of shuttling guests to and from the beach, nor would the City attempt such prohibition. Respondents self-selected their purchase of a property in the R-4 zoning district, which is a residential district with more regulations on ownership and use, when they could have purchased property in these other aforementioned zoning districts. They admitted to knowing of the pertinent ordinances and simply ignored them. Respondents then asked the Circuit Court for forgiveness rather than asking the City for permission in the first instance, and unfortunately, the Circuit Court granted forgiveness. Nevertheless, because Respondents have reasonable alternatives to pursue a recreational amenity in other zoning districts, they are not completely excluded from the market as in *Dean Milk*.

Neither does the City prohibit Respondents from shuttling their guests to and from the City's public parking locations and public beach access points, many of which include bathrooms, wash areas, and changing facilities. Indeed, Respondents have shuttled their guests to and from a public location within the City for beach access while the Consent Order was in effect. (Tr. Vol. II, p. 181, l. 25 – p. 182, l. 17; p. 247, ll. 15–18; p. 249, l. 6 – p. 250, l. 5.) Notably, Respondents did not charge their guests for the transportation to the public beach access points just like they did not charge for the transportation to the Cabana House or access to the Cabana House prior to the entry of the Consent Order.

Based on the foregoing, neither Respondents nor their guests are completely excluded from the market of beach access or recreational facility ownership and usage. As with all zoning plans, the City is simply using its inherent police power in zoning to regulate the manner, location, and parameters of certain land uses and activities in order to achieve its goals of avoiding the undue concentration of the population, lessening congestion, facilitating attractive and harmonious communities, regulating the uses of buildings for recreation, amongst many other important goals. *See* North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-1 (1984). Because the City has jurisdictionally limited the reach of the subject ordinances such that outsiders are not completely excluded from the market, interstate commerce is not impeded or implicated.

iii. The City's Legislative History Demonstrates the Noncommercial Purpose of Cabana House

The third factor supports the conclusion that no interstate commerce is affected. The existence of legislative history, while not required, can "enable [courts] to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye." *Lopez*, 514 U.S. at 563. Here, the City's historical records regarding the passage of the special exception use for cabana houses demonstrate

the City's intent that they be limited to noncommercial use.

In the very first historical record concerning cabana houses, the November 27, 1995 agenda for the Planning Commission included an item in New Business for a public hearing on a zoning text amendment to allow cabana houses as a special exception. That agenda item reads as follows:

> A. PUBLIC HEARING: ZTX-95-19 ZONING TEXT AMENDMENT. An amendment to the zoning ordinance text to permit as a special exception in the R-4 (Resort Residential) district, "cabana houses" designed as single family structures to be used in a limited noncommercial manner by home owners associations of large developments located in North Myrtle Beach not in close proximity to the oceanfront. Cabana houses are to be generally limited in use to drop off area, bath, change of clothing facilities, and occasional guest quarters and similar uses.

(App. Trial Ex. 6.) The key clause from this agenda item are that cabana houses should be designed as "***single family*** structures to be used in a ***limited*** ***noncommercial*** manner by home owners associations." Clearly, from the outset, cabana houses were designed not to relate to commerce or any sort of economic enterprise.

Second, in a staff report dated November 29, 1995 for City Council consideration, the following was noted:

> The specific use of the project will be limited to drop off and parking areas, bathing, changing clothes and similar uses. Additionally, it can also be used as occasional guest quarters and similar residential uses.

(App. Trial Ex. 6.) Clearly, the City wanted this special exception to be used similarly to ***residential*** uses as opposed to commercial ones. And if it were not clear already, this staff report recognizes that the reason for allowing similar residential uses is because "the design is that of single family residential" as opposed to a commercial building. In the same staff report it is noted that the public benefit for this type of special exception to be used for shuttling residents to and from the beach is "the reduction of competition for the public parking spaces by the residents of these projects." (App. Trial Ex. 6.) A corollary to this benefit is that tourists visiting from outside

the City will also have more public parking available elsewhere in the City when City residents are not having to compete for public parking spaces. Thus, the City used its zoning police power to reduce congestion and density of public parking usage, which, rather than hinder interstate tourism and travel, actually helps interstate tourism and travel. (Tr. Vol. I, p. 415, l. 5 – p. 416, l. 6.) When presented to the City Council on December 4, 1995, the minutes of the hearing demonstrate City Council directed staff to bring back the staff report in "ordinance form" and asked for more parking spaces to be required. Again, the focus on parking is prevalent. The original ordinances were adopted on or around January 1996.

An ordinance not at issue in this case regarding the City's Ocean Overlay Zone is also illustrative. Originally, the City's Ocean Overlay Zone, which is separate from the R-4 Resort Residential District but covers parts of said district, did not expressly allow cabana houses to be used for projects on the second row. The original R-4 Resort Residential District ordinances were designed for projects not in "close proximity" to the ocean. North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-2 (1984). However, in 2001, the City Council initiated an amendment to the City's Ocean Overlay Zone as stated in a staff report dated November 12, 2001:

> City Council has initiated an amendment to the zoning ordinance text to permit oceanfront cabana homes and amenities when accessory to second row multifamily projects and located directly across the street in the Oceanfront Overlay Zone.
>
> If approved, this amendment will allow more footprint on the second row. The effect of a greater footprint could be more density. However, due to the cost of oceanfront property, the applicability of oceanfront cabanas will be limited.
>
> This amendment could encourage second row development. The oceanfront building height will be limited ensuring a view of the ocean from the second row building.

(App. Trial Ex. 6.) The City clearly was interested in protecting the visibility of the ocean and avoiding high-rise hotels and condominium projects cluttering the oceanfront. In essence, the City wanted to maintain its family friendly atmosphere and avoid becoming like South Beach in Miami,

Florida. By allowing for cabana houses, second row development rather than oceanfront development would be encouraged.

This legislative history extends over twenty years ago. And it bears noting that for ***over twenty years***, these ordinances regulating cabana houses went unchallenged, which begs the question that if interstate commerce was so clearly affected, why were these ordinances not challenged earlier? The answer is simple: these ordinances do not affect interstate commerce. Based on the foregoing, the legislative history further underscores the noncommercial nature of this special exception amenity and demonstrates why the Dormant Commerce Clause is not implicated here.

iv. The Link Between Cabana Houses and Their Effect, If Any, on Interstate Commerce is Attenuated

Because of the eye-catching attenuation between the use of a cabana house and its effect, if any, of interstate commerce, the fourth *Lopez-Morrison* factor hammers the final nail in the coffin for any argument that the Dormant Commerce Clause is implicated here. As stated previously, the Circuit Court found that the RV Resort "is comparable to hotels or short-term rental providers," and that these "platforms, which comprise a significant part of the tourism economy in the Grand Strand, clearly have a substantial effect on interstate commerce . . . ." (Order of Nov. 20, 2023, p. 14.) That, of course, is the wrong analysis, because the critical inquiry is whether the activity and use of a cabana house has a substantial effect on interstate commerce. On that point, the Circuit Court stated in conclusory fashion that "the services that the RV Resort provides, which includes access to the [Cabana House] to its principally out-of-state guests, along with the residency requirement prohibiting ownership of a cabana house by [Respondents], also have a substantial effect on interstate commerce." (Order of Nov. 20, 2023, p. 14.)

The Circuit Court errs here for two reasons. First, the Cabana House is an amenity, rather

than a service, as a cabana house does not constitute any form of labor. *See Service*, *Black's Law Dictionary* (11th ed. 2019) (defining service as "[l]abor performed in the interest or under the direction of others; specif[ically], the performance of some useful act or series of acts for the benefit of another, usu[ally] for a fee . . . In this sense, service denotes an intangible commodity in the form of human effort, such as labor, skill, or advice"). Second, the Circuit Court appears to hold the only aspect of interstate commerce affected is tourism. But the Circuit Court failed to contend with the data showing tourism has not been affected generally and the RV Resort's own commerce and bottom line have not been affected specifically.

It is especially revealing to examine whether there has been any effect on Respondents' bottom line due to the closure of the Cabana House while the Consent Order was in effect. In 2021, Respondents generated $9,062,608.24 in income while the Cabana House was fully open and accessible for its RV resort guests. However, following the closure of the Cabana House due to the Consent Order entered on January 11, 2022, Respondents generated $11,154,491.29 in calendar year 2022, more than two million dollars ($2 million+) more in revenue than when the Cabana House was offered as an amenity in 2021. (App. Trial Ex. 87.) That trend continues into 2023. A comparison of year-through-September data across 2021, 2022, and 2023 is illustrated below using Respondents' year-through-September data as of the trial dates:

YTD REVENUE COMPARISON RELATIVE TO AVAILABLE SITE NIGHTS			
	YTD through September 2021	YTD through September 2022	YTD through September 2023
TOTAL USABLE RV SITES	6,399	7,506	7,482
Percent Increase		17.30%	-0.32%
TOTAL AVAILABLE SITE NIGHTS	194,103	227,682	226,947
Percent Increase		17.30%	-0.32%
TOTAL OCCUPIED SITE NIGHTS	138,381	144,830	151,954
Percent Increase		4.66%	4.92%
TOTAL RV TRANSIENT RENTAL INCOME	$6,440,595.41	$7,956,431.45	$8,420,953.44
Percent Increase		23.54%	5.84%
TOTAL RV RENTAL INCOME	$7,352,675.98	$9,007,490.14	$9,538,900.40
Percent Increase		22.51%	5.90%

What this illustration demonstrates is that Respondents generated ***more*** reservations and ***more*** income year-over-year, despite the closure of the Cabana House for nearly two years and despite a slight percentage decrease in the number of usable RV sites in 2023 as compared to 2022.[10]

In an attempt to sidestep this clear increase in reservations and revenue, Respondents asserted at trial their occupancy rate—which is calculated by the total number of reservations divided by the total number of sites available for reservation—suffered at the RV Resort following the closure of the Cabana House due to the Consent Order. In other words, Respondents attempted to argue they could have generated even more revenue given their occupancy rate slipped and they relied upon raw data like the data depicted in the following chart for that assessment:

YTD OCCUPANCY RATE USING RAW NUMBERS											
	January	February	March	April	May	June	July	August	September	YTD Average	Apr. to Sept. "Summer" Average
2021	58.66%	60.72%	68.80%	70.42%	68.33%	82.94%	90.80%	68.23%	72.09%	71.22%	75.47%
2022	50.03%	55.68%	59.63%	64.00%	57.47%	75.82%	84.78%	64.09%	60.54%	63.56%	67.78%
2023	53.52%	61.39%	70.31%	71.99%	58.05%	80.89%	84.76%	65.75%	55.71%	66.93%	69.52%

However, Respondents failed to account for the over seventeen percent (17%) increase in the number of sites available at the RV Resort by December 2021 due to their expansion of the RV Resort. When the 2021 reservations are normalized to the number of sites available in 2022, it is clear Respondents' occupancy rate, from year-through-September 2021, 2022, and 2023, steadily increased, as depicted in the below illustration:

YTD OCCUPANCY RATE WITH 2021 NORMALIZED TO 2022 AVAILABLE SITE NIGHTS											
	January	February	March	April	May	June	July	August	September	YTD Average	Apr. to Sept. "Summer" Average
2022 Total Available Site Nights	25854	23352	25854	25020	25854	25020	25854	25854	25020		
2021 Total Occupied Site Nights	12930	12088	15165	15020	15060	17691	20013	15038	15376		
Normalized 2021 Occupancy Rate	50.01%	51.76%	58.66%	60.03%	58.25%	70.71%	77.41%	58.17%	61.45%	60.72%	64.34%
2022 Occupancy Rate	50.03%	55.68%	59.63%	64.00%	57.47%	75.82%	84.78%	64.09%	60.54%	63.56%	67.78%
2023 Occupancy Rate	53.52%	61.39%	70.31%	71.99%	58.05%	80.89%	84.76%	65.75%	55.71%	66.93%	69.52%

Thus, Respondents' alleged loss in occupancy is not due to the Cabana House closure, but to the

[10] Total Available Site Nights is simply calculated by multiplying the number of Total Usable RV Sites (i.e., one space for an RV) with the total number of nights in a given period—e.g., the number of nights between January 1 and September 30 in this chart.

increase in available sites. Respondents have not demonstrated any effect on their financial wellbeing due to their inability to own and operate a cabana house, such that any effect on interstate commerce, much less their own bottom line, is extremely attenuated.

The Circuit Court's Order ignores this important data and attenuation. This Court should instead contend with the clear fact that the RV Resort's commercial activity has not been affected by the closure of the Cabana House, which demonstrates there has not and cannot be a substantial effect on interstate commerce as a whole. And if the data is not enough, this Court need not look any further than Respondents' own actions. After the Consent Order was entered, they did not inform their incoming General Manager of the closure of the Cabana House—not at any time in the three-month interview process nor before she was hired and arrived on-site; instead, she found out on her own only after she had arrived. (Tr. Vol. II, p. 257, l. 19 – p. 259, l. 1.) Respondents' own actions beg the question: If the Cabana House is such an important independent economic enterprise, or even an important part of the RV Resort's economic enterprise, then why did they not inform their incoming General Manager, who instead found out on her own after she arrived? The answer, of course, is that the Cabana House does not affect interstate commerce, much less the RV Resort's bottom line.

Based on the foregoing, this Court should hold the operation of a free amenity does not constitute a regulation of an economic activity. A cabana house is a noneconomic enterprise. Even to the extent it can be considered an economic activity, as a free amenity, it is far too attenuated to substantially effect interstate commerce, which is borne out through Respondents' own financial data and their own actions. The Circuit Court's Order must therefore be overturned.

D. Additional Persuasive Precedent Supports a Finding the Dormant Commerce Clause is Not Applicable Here, Especially in Light of the Important Context of Zoning

Respondents did not—and the Circuit Court's Order does not—provide any legal authority

in which a special exception like the one at bar, or an analogous accessory use, was held to the stricter standard of the Dormant Commerce Clause. The nature of municipal zoning is extremely important context in this case, which in-and-of-itself distinguishes this case from the cases cited by Respondents at trial and contained within the Circuit Court's Order, most of which do not concern zoning. The foregoing analysis focused on binding precedent, but the following offers an analysis of significant persuasive precedent. This persuasive precedent is especially significant in light of the zoning ordinances at issue in this case, a critical police power normally reserved to local authority, much like the suppression of crime. The foregoing precedent also supports a finding the Dormant Commerce Clause is not implicated here.

In *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987 (E.D. Cal. 2006), the plaintiff brought a constitutional challenge to a municipal zoning ordinance that prohibited the development of discount superstores containing a full service grocery department. The federal district court held:

> [The] Ordinance does not erect barriers against interstate commerce. The Ordinance prevents any retailer, whether in-state or out-of-state, from establishing the discount superstore marketing format in [the city]. This ***leaves the market open to all*** local or foreign retailers of all local or foreign products, except in the discount superstore format. The Commerce Clause does ***not*** protect the particular structure or methods of operation of a retail market. Nor does it give an interstate business the right to conduct its business in what it considers the most efficient manner, for the Constitution protects the interstate market, not particular interstate firms.
>
> ***The Ordinance does not discriminate against interstate commerce because any retailer can locate and do business in [the city]***, with any employees or managers, offering any products, except in the legislatively defined discount superstore format. ***There is no constitutional right to do business in a retailer's optimally profitable store configuration***, if the resulting operation burdens environmental, traffic-pattern, economic-viability, and land-use-planning interests of the host municipality. There is no suggestion any out-of-state retailer cannot successfully do business marketing

> out-of-state goods in [the city] if it is not permitted to do so as a discount superstore.

Id. at 1012 (emphasis added) (internal citations and quotation marks omitted). Similarly, the Dormant Commerce Clause does not confer on Respondents a constitutional right to own and operate a cabana house in the City's R-4 Resort Residential District, when the remainder of the market is available to Respondents and/or when they are able to use public parking and beach access points to shuttle guests to and from the coastline. And Respondents' reservations, profits, and data demonstrate they can successfully conduct its RV Resort business without a cabana house.

In the case of *Texas Manufactured Housing Association, Inc. v. City of La Porte*, 974 F. Supp. 602 (S.D. Tex. 1996), the plaintiff brought a constitutional challenge a municipal zoning ordinance that excluded manufactured homes from R-1 residential zoning districts. *Id.* at 602–05. Notably, manufactured homes were ***not*** excluded in other residential zoning districts. *See id.* at 610–11. In other words, market participants were not completely excluded from the market as in *Dean Milk*. The federal district court found stricter scrutiny under the Dormant Commerce Clause was inapplicable, because any potential effect on interstate commerce was incidental and the zoning ordinance was evenhanded. *Id.* at 608–14. The attenuation and absence of complete exclusion was important in *Texas Manufactured Housing* and so it should be in this case as well.

Both *Turlock* and *Texas Manufactured Housing* are apt comparisons with the case at bar, because they both deal with zoning ordinances. Any effect on interstate commerce here, if any, is purely incidental and the ordinances are constitutionally sound. *See Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1244–45 (11th Cir. 2012) (holding a local law is not discriminatory "where it (1) has incidental negative effects on *some* (but not all) out-of-state market participants and (2) does not reduce or curtail access to interstate markets") (emphasis in original) (citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978)).

Context matters. "Zoning is a matter of particular importance to state and local governments. As a result, [] courts have traditionally been somewhat hesitant to interfere in the zoning process." *Randy's Sanitation, Inc. v. Wright Cnty., Minn.*, 65 F. Supp. 2d 1017, 1029 (D. Minn. 1999) (citing *Night Clubs, Inc. v. City of Ft. Smith*, 163 F.3d 475, 479 (8th Cir. 1998)); *see also Pomponio v. Fauquier Cnty. Bd. of Sup'rs*, 21 F.3d 1319, 1327 (4th Cir. 1994) ("We also have reiterated that state and local zoning and land use law is particularly the province of the State and that federal courts should be wary of intervening in that area in the ordinary case."). The Project Requirement recognizes projects within the City, which may create a distinction with projects outside of the City. But most, if not all, zoning regulations create inclusive and exclusive distinctions. After all, the basic purpose of zoning is to create different zones for land use and development for the benefit and general welfare of the community. *See* North Myrtle Beach, S.C., Code of Ordinances ch. 23, art. II, § 23-1 (1984).

Further, there is not any substantive difference between special exception cabana houses and accessory uses[11] that the City and other municipalities allow. (Tr. Vol. I, p. 425, l. 9 – p. 428, l. 9.) After all, accessory uses—such as a detached garage at a residence, classroom space or a kitchen at a church, or a pool at a hotel—are uses that are restricted to owners and users of properties within the municipality and within the zoning district. Indeed, the City's legislative history in amending the City's Ocean Overlay Zone recognizes the accessory nature of cabana houses, because the staff report notes the purpose of the amendment was "to permit cabana homes and amenities when ***accessory*** to second row multifamily projects." The only difference is that accessory uses are generally co-located with the dominant use, whereas the special exception cabana house is in close proximity to the beach with the project being further inland and not co-

[11] An "accessory use" is a "use that is dependent on or pertains to a main use." *Use*, *Black's Law Dictionary* (11th ed. 2019).

located. But this distinction is one without a substantive difference.

Several courts have recognized the inherently discriminatory nature of zoning regulations. *See, e.g.*, *Studen v. Beebe*, 588 F.2d 560, 565 (6th Cir. 1978) ("All zoning plans have inherent within them a discrimination between the various land uses permitted thereunder."); *Bay Area Addiction Rsch. & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 733 (9th Cir. 1999) (noting "the inherently discriminatory nature of zoning"); *Thai Meditation Ass'n of Alabama, Inc. v. City of Mobile, Alabama*, No. 1:16- CV-395-TFM-MU, 2019 WL 2250275, at *13 (S.D. Ala. May 24, 2019), *aff'd*, 980 F.3d 821 (11th Cir. 2020) (finding true that "zoning laws inherently distinguish between uses and necessarily involve selection and categorization"); *Church of Scientology of Georgia, Inc. v. City of Sandy Springs, Ga.*, 843 F. Supp. 2d 1328, 1371 (N.D. Ga. 2012) (same) (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234 (11th Cir. 2004)).

Therefore, to take Respondents' assertions to their logical conclusion would mean to view all zoning distinctions and classifications as facially discriminatory, rendering all zoning plans violative of the Dormant Commerce Clause. For example, in the case of *Randy's Sanitation*, cited above, a waste hauler challenged a county's denial of its rezoning request and its application for a conditional use permit under the Dormant Commerce Clause. *Randy's Sanitation*, 65 F. Supp. 2d at 1029. However, the denial of a conditional use permit (similar to a special exception use[12]) or the enforcement of special exception ordinances (such as in this case) do not automatically constitute an effect on interstate commerce. *See id.* Indeed, the court noted the following:

> Randy's asks this Court, on the basis of two zoning decisions, to

[12] Of note, "[t]he term 'special exception' has now given way in most zoning ordinances to the terms conditional use and special use; most courts now consider all three terms to be interchangeable." *Definition*, Discretionary Land Use Controls § 3:1; *see also* 83 Am. Jur. 2d *Zoning and Planning* § 712 ("The terms 'special exception' and 'conditional use,' as employed in the zoning law, are essentially interchangeable . . . . A 'conditional use' is nothing more than a special exception which falls within the jurisdiction of the municipal legislative body rather than the zoning hearing board.").

> declare that those decisions [denying the rezoning request and the denying of a conditional use permit] had the 'effect of discriminating against interstate commerce.' Those decisions may have had such an effect, but no more so than would any commonplace zoning decision preventing a distributer from building a distribution warehouse in a residential zone.

Id. A property owner possesses "no legitimate claim of entitlement, and thus no property right" to a special exception use. *Biser v. Town of Bel Air*, 991 F.2d 100, 104 (4th Cir. 1993). To claim the denial of a privilege to use a Cabana House in the City (because it is a privilege, and not a right) substantially affects interstate commerce would turn zoning law on its head and render all zoning authority obsolete. In fact, such arguments, like the ones Respondents asserted at trial, were essentially attempted (unsuccessfully) in the case of *Flava Works, Inc. v. City of Miami, Florida*, 800 F. Supp. 2d 1182 (S.D. Fla. 2011). In *Flava Works*, the City of Miami prohibited the operation of an adult entertainment business in a R-4 residential district, which was challenged on Dormant Commerce Clause grounds. The court held the following:

> The City has a local public interest in preserving residential areas free of the operation of businesses to ensure safety, and prevent traffic, congestion, overcrowding, or parking concerns, to list a few reasons. Any effects on interstate commerce as a result of this ordinance are, at most, incidental. Thus, the ordinance does not run afoul of the Dormant Commerce Clause.

Id. at 1193. Here, the City has the same legitimate local interests by allowing commercial enterprises desiring recreational amenities to locate in certain zoning districts, while preventing them from operating within the R-4 Resort Residential District.

In sum, the City has not placed itself in economic isolation. *See Maine v. Taylor*, 477 U.S. 131, 151 (1986). Quite to the contrary, because it relies on the tourism industry, the City has no incentive to discriminate against interstate commerce and does not do so by the promulgation and enforcement of the zoning ordinance requirements. Instead, it used its broad zoning authority to design a zoning plan that maintains a family-oriented and dispersed community, rather than a high-

rise, commercialized beachfront that suffers from a lack of ocean visibility and overly intensive and congested use in certain areas.

E. *McBurney* and Conclusion

The foregoing analysis of discrimination in the zoning context is important in light of the case of *McBurney v. Young*, 667 F.3d 454 (4th Cir. 2012), *aff'd*, 569 U.S. 221 (2013). The Circuit Court's Order focuses on the "plain language" of the ordinances at issue and suggests the City cannot escape the "plain language," which is allegedly discriminatory on its face. (Order of Nov. 20, 2023, p. 25.) However, facial discrimination does not necessarily violate the Dormant Commerce Clause, which *McBurney* highlights. *McBurney* concerned the Virginia Freedom of Information Act ("**VFOIA**"), which limited access rights to public records to citizens of the Commonwealth of Virginia. The plaintiff in that case asserted VFOIA was facially discriminatory as a result of the act barring the release of public records to noncitizens. *Id.* at 468–69. The Fourth Circuit held the plaintiff's argument failed, "because it is ***not enough*** that a statute discriminates on the basis of citizenship for it to offend dormant Commerce Clause principles." *Id.* at 469 (emphasis added). "***Rather***, the challenged statute ***must*** discriminate 'against interstate commerce' or 'out-of-state economic interests.'" *Id.* at 469 (emphasis added) (quoting *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007)). The Fourth Circuit continued: "Although VFOIA discriminates against noncitizens of Virginia, it does not discriminate 'against interstate commerce' or 'out-of-state economic interests.'" *Id.* The ultimate holding of the the Fourth Circuit, which was affirmed by the Supreme Court, was that "[n]othing in VFOIA burdens 'the flow of interstate commerce,'" which the Fourth Circuit defined as "the flow of goods, materials, and other articles of commerce across state lines." *Id.* (quoting *Brown v. Hovatter*, 561 F.3d 357, 364 (4th Cir. 2009)). "At most, it prevents [plaintiff] from using his

'chosen way of doing business,' but it does not prevent him from engaging in business in the Commonwealth." *Id.*; *see also Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) ("We cannot . . . accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market.").

In much the same way, the City's zoning ordinances, which could be viewed as inherently discriminatory, do not necessarily discriminate ***against interstate commerce***, which is the critical analysis. The Circuit Court's Order conflates the two analyses. Instead, when properly analyzed through the *Lopez-Morrison* framework, it is clear the City's ordinances do not substantially affect interstate commerce and the Circuit Court's Order should therefore be overturned.

II. THE THREE ORDINANCE REQUIREMENTS ARE *NOT* "INEXTRICABLY LINKED," SUCH THAT EVEN IF THE PROJECT REQUIREMENT VIOLATES THE DORMANT COMMERCE CLAUSE, THE OTHER REQUIREMENTS MUST BE ANALYZED INDEPENDENTLY, RESULTING IN THE CONCLUSION THEY DO NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

The Circuit Court erred in treating the City's separate requirements as "inextricably linked." (Order of Nov. 20, 2023, p. 21.) The City has three separate requirements for cabana houses:

1. **Project Requirement:** By definition, a cabana house must "be used by projects in North Myrtle Beach";

2. **HOA Ownership Requirement:** By definition, a cabana house "shall be owned . . . by a homeowner's association"; and

3. **HOA Maintenance/Establishment Requirement:** By definition and by operative statute, a cabana house "shall be . . . maintained by a homeowner's association," ***and*** "a homeowner's association shall have been established for the project."

North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, §§ 23-2, 23-22(4)(d)(1) (1984).

Respondents' erroneous assertions that these separate requirements work in combination to violate the Dormant Commerce Clause induced the Circuit Court into a similar, but flawed analysis. For the purposes of this section, this Brief will assume *arguendo* the Project Requirement

violates the Dormant Commerce Clause. But just because the Project Requirement might violate the Dormant Commerce Clause does not necessarily establish the other two homeowner's association ("**HOA**") requirements also violate the Dormant Commerce Clause as a consequence. There is a critical distinction that arises with ***and*** between the HOA Ownership Requirement and the HOA Maintenance/Establishment Requirement. And the City's Rule 30(b)(6) designee testified to the separateness of these requirements, which the Circuit Court's Order conflates. (Tr. Vol. I, p. 421, l. 25 – p. 422, l. 19; p. 455, ll. 13–22.)

The Circuit Court's Order treats the two HOA requirements as a singular requirement and then treats that singular requirement as working in tandem with the Project Requirement:

> [S]ection 23-2 provides that a cabana house must be owned by a local homeowners' association. Section 23-22(4)(d)(1) provides, in relevant part, that a homeowners' association must be established for the local project utilizing the cabana house. Accordingly, the homeowners' association ***requirement*** is ***inextricably linked*** to the project's geographic restriction and violates the dormant Commerce Clause in the same way.
>
> Under South Carolina's Homeowners' Association Act, a homeowners' association governing documents must be recorded in the Register of Deeds office in the county where the property owned by the association is located. S.C. Code Ann. § 27-30-130(A)(1). In its effect, the homeowners' association requirement in both sections 23-2 and 23-22 of the Zoning Ordinance violates the dormant Commerce Clause because it requires the ownership of the cabana house and the administration of the "project" using the cabana house to be located and registered in Horry County (pursuant to the statutes) because the subject property and associated project must be located in North Myrtle Beach. This precludes a non-local homeowners' association from owning a cabana house or establishing a "project" outside the City to access a cabana house, and plainly discriminates against interstate commerce in both its practical and legal effect.

(Order of Nov. 20, 2023, pp. 21–22 (emphasis added).) These are the only two paragraphs in the Order that consider the constitutionality of the two HOA requirements. Nevertheless, there are two errors committed in these two paragraphs.

First, the two HOA requirements do not preclude a non-local HOA from owning a cabana house. Certainly nothing on the face of the two HOA requirements excludes non-local HOAs, so the only way in which discrimination could occur is via practical effect, as the Circuit Court Order appears to concede. Via state statute, the HOA that owns the cabana house must record its governing documents in Horry County. However, this recordation requirement does not require the project for which the HOA is established to be located in Horry County. Assuming the Project Requirement is stricken as a violation of the Dormant Commerce Clause, Respondents have not presented any authority and the City is not aware of any authority that suggests an HOA cannot be established for a project outside of Horry County and simultaneously own property in North Myrtle Beach. It is erroneous to hold "the homeowners' association requirement is inextricably linked to the project's geographic restriction and violates the dormant Commerce Clause in the same way," (Order of Nov. 20, 2023, p. 21), because of the severability of ordinances.

Naturally, a "statute may be constitutional and valid in part and unconstitutional and invalid in part." *Thayer v. S.C. Tax Comm'n*, 307 S.C. 6, 12–13, 413 S.E.2d 810, 814 (1992) (citing *Strom v. Amvets*, 280 S.C. 146, 311 S.E.2d 721 (1984)). Thus, statutes and ordinances can be severed so as to strike down invalid portions while preserving valid portions. "The test for severability is whether the constitutional portion of the statute remains 'complete in itself, wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the [legislative body] would have passed it independent of that which is in conflict with the Constitution. . . .'" *Id.* at 13, 413 S.E.2d at 814–15. As testified to at trial by the City's witnesses, most pointedly by its Rule 30(b)(6) designee, there are independent reasons for requiring an HOA to own and/or to maintain a cabana house. Most notably, because the City intended for cabana houses to be used in a limited, noncommercial manner, the City did not have an intent to regulate

cabana houses via business licenses. Without the ability to regulate via business licenses, and given cabana houses were to be used in conjunction with projects, a reasonable method of regulation would be to require an HOA to own and/or maintain the cabana house. Because the two HOA requirements are wholly independent of the alleged geographic/residency discrimination and because there are independent reasons why the City would have passed the two HOA requirements, the Project Requirement can be severed and stricken as unconstitutional, while preserving the remaining valid portions of the City's ordinances. After all, the HOA Maintenance/Establishment Requirement simply states "a homeowner's association shall have been established for the project," without any additional requirement that the project or the HOA has to be located within the City. North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-22(4)(d)(1) (1984).

Second, even assuming *arguendo* the HOA Ownership Requirement is inextricably linked to the Project Requirement, there remains a distinction between the HOA Ownership Requirement and the HOA Maintenance/Establishment Requirement. There is nothing facially discriminatory in requiring a homeowner's association to maintain a cabana house or being established for the project, which is, again, apparently conceded by the Circuit Court's Order with its focus on the "practical effect" of both the HOA requirements. If severed from the two other requirements, all the HOA Maintenance/Establishment Requirement does is to require an HOA to be established for a project anywhere in the United States and then to maintain the cabana house. There is no requirement in this situation for the HOA to own the property and therefore be arguably required to be local to Horry County via the state statutory recordation requirement. This isolated requirement does not discriminate against interstate commerce on its face or in effect. Respondents certainly have not presented any facts or authority that the HOA Maintenance/Establishment Requirement independently violates the Dormant Commerce Clause. Instead, Respondents

jumbled these separate ordinances together under one roof in the hopes of convincing the Circuit Court to strike down all of them as one, which it unfortunately did. It is not constitutionally sound to do so. Based on the two reasons set forth above, this Court must reverse the improper merging of the three requirements as one and follow the authority requiring severance to preserve portions of ordinances that are constitutionally valid.

III. IN THE ALTERNATIVE, THE CITY'S LEGITIMATE LOCAL PURPOSES OVERCOME EVEN THE STRICTEST SCRUTINY

Assuming *arguendo* that the ordinance requirements affect interstate commerce, the analysis proceeds to a two-step inquiry. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578–79 (1986). The first-tier approach states when a law "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," the law will generally be struck down. *Id.* at 579. However, the law can still survive if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Oregon Waste Sys., Inc. v. Dep't of Env't Quality of State of Or.*, 511 U.S. 93, 101 (1994)). Alternatively, when a law "has only indirect effects on interstate commerce and regulates evenhandedly, [courts] have examined whether the [governing body's] interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The latter test, i.e. the second-tier approach, is often known as the *Pike* balancing test.

The ordinances at issue in this case survive even the strictest constitutional scrutiny, because they advance legitimate local purposes, including, but not limited to: (1) reducing competition of the City's public parking; (2) reducing traffic congestion; (3) regulating the intensity of use and undue concentration in and around a special exception residential amenity;

(4) protecting ocean visibility by encouraging development further inland; (5) facilitating a harmonious community and compatible uses across neighboring properties; (6) facilitating other quality of life issues, including the adequate provision and prioritization of police and security from dangers; (7) promoting responsive and self-regulating and/or self-governing communities; and (8) preserving property values. A few will be addressed in-depth here.

First, homeowners' associations are effectively quasi-governmental entities. *Woodward v. Bd. Of Directors of Tamarron Ass'n of Condo. Owners, Inc.*, 155 P.3d 621, 624 (Colo. App. 2007) (noting the "quasi-governmental functions" homeowners' association serve); *Chantiles v. Lake Forest II Master Homeowners Assn.*, 37 Cal. App. 4th 914, 922, 45 Cal. Rptr. 2d 1, 5 (1995) (citing *Cohen v. Kite Hill Cmty. Assn.*, 142 Cal. App. 3d 642, 651, 191 Cal. Rptr. 209, 214 (Ct. App. 1983)). Given cabana houses are designed to be used in a noncommercial manner and the inability to regulate by issuing a business license, the City's requirement for an HOA to own and operate cabana houses serves as a reasonable alternative method of ensuring compliance and responsiveness to the City and its zoning ordinances. (Tr. Vol. I, p. 428, l. 10 – p. 429, l. 13.) The testimony of the City demonstrated these entities are more responsive to the City in the context of a residential zoning district and a special exception use. This responsiveness concern is evidenced by the testimony from the City Manager and the City's Rule 30(b)(6) Representative and by the RV Resort's General Manager ignoring the City's attempted contact. (Tr. Vol. I, p. 266, l. 13 – p. 268, l. 4; p. 429, l. 18 – p. 430, l. 6; p. 449, ll. 19–24.) Even Respondents' own attorney later apologized for the RV Resort's "unresponsiveness." (App. Trial Ex. 71.) Respondents have no motivation to be responsive either, because they are not subject to business licensing and are effectively immune from compliance. A five-hundred-dollar ($500) fine for an ordinance violation is likely to be viewed as the cost of doing business in order to host events. North Myrtle Beach,

S.C., Code of Ordinances Ch. 23, Art. II, § 23-1 (1984) (imposing a $500 fine for zoning ordinance violations). Tellingly, Respondents' charged exactly $500 for the rental cost of the Cabana House for certain events they hosted, while not charging any fee for facilities at their RV Resort. (App. Trial Ex. 56.)

Second, there are quality of life issues created when shuttling hundreds of RV Resort guests from outside the City to a fairly small cabana house sitting between two condominium complexes. And point in fact, Respondents were shuttling hundreds of guests to the Cabana House during the summer of 2021. There are several issues that result from that intensity of use, including traffic and parking congestion, shuttle buses backing out and/or conducting drop-off and pick-up near a four-lane highway, noise and light from the pool deck, potential for trespassing and altercations, and late night activities. The City's Code of Ordinances demonstrate density issues, the maintenance of order, adequate transportation nodes, and the general welfare are all purposes in the creation of the zoning classifications as well. North Myrtle Beach, S.C., Code of Ordinances ch. 23, art. II, § 23-1(2), (3), (5), (6) & (8) (1984). The City certainly has legitimate concerns in hundreds of vacationers filtering through a small access node in the immediate vicinity and proximity to a residential neighborhood zone when the City has already provided public access points to the beach that can accept and withstand mass public access. (Tr. Vol. I, p. 260, ll. 5–23; p. 261, l. 8 – p. 262, l. 18; p. 268, ll. 9–16; p. 408, l. 9 – p. 409, l. 1; p. 424, ll. 2–21; p. 430, l. 18 – p. 431, l. 20; p. 475, l. 10 – p. 476, l. 12.)

The Circuit Court's Order errs in assessing these quality of life issues by discounting the significant issue of transience in the RV Resort's guests and their intensity of use of the Cabana House versus out-of-state individuals renting properties within City limits; indeed, the Order equates the intensity of use of out-of-state individuals renting properties to the intensity of use of

the RV Resort's guests use of the Cabana House. (Order of Nov. 20, 2023, p. 18.) This finding belies the evidence as well as common sense. The intensity of use by a couple or few people renting a short term rental property is drastically different than hundreds of people filtering through a residential-style and residential-sized Cabana House, squeezed between two residential condominium projects, day-in and day-out, for months in the peak tourist season, as evidenced by Respondents' own log. The intensity of use issue was an important interest testified to during trial and it justifies the accessory nature of a cabana house for projects inside the City limits. (Tr. Vol. I, p. 422, l. 7 – p. 425, l. 5.) Further, Respondents' own records and internal communications acknowledge the significant increase in intensity of use anticipated at the Cabana House and that eventually occurred at the Cabana House. (App. Trial Exs. 26, 27, 31, 36, 37, 61, and 62.) Residents of the City simply do not generate an equal intensity of use of cabana houses as transient guests of project outside of the City, and the testimony from representatives of the other cabana houses, compared to Respondents' log, support this assertion. A high intensity of use results in quality of life issues, which presented continual problems at the Cabana House and to its neighbors through the summer of 2021. Moreover, this intensity of use warrants the City's use of its zoning power to regulate and underscores the legitimate local interests it is advancing here.

Third, in *Texas Manufactured Housing*, the federal district court found the "preservation of property values" as a legitimate local interest. 974 F. Supp. at 612. Notably, City representatives testified to the depreciation of property value being a concern of theirs relative to the ordinances at issue in this case. (Tr. Vol. I, p. 268, ll. 9–16; p. 407, ll. 1–8; p. 424, l. 2 – p. 425, l. 5; p. 448, ll. 9–17.) Further, residents of Sea Cloisters expressly testified that if Respondents are not prohibited from using the Cabana House, then it is going to affect their property values and quality of life.[13]

[13] South Carolina law allows for property owners to testify as to their own property values. *See S.C. State Highway Dep't v. Wilson*, 254 S.C. 360, 370, 175 S.E.2d 391, 397 (1970) (holding a

(Tr. Vol. I, p. 157, ll. 8–13; p. 225, l. 14 – p. 226, l. 6.) Based on the foregoing, the City's legitimate interests are sufficient to survive even the strictest constitutional scrutiny.[14]

IV. THE VAGUENESS OF THE CIRCUIT COURT'S ORDER REQUIRES REMAND AT MINIMUM

The Circuit Court's Order finds certain portions related to the "residency requirement" in both Section 23-2 and 23-22 of the City's ordinances are unconstitutional. (Order of Nov. 20, 2023, p. 25.) However, the Order fails to define what the residency requirement is. Indeed, the Order does not expressly state which specific words of the City's ordinances are deemed unconstitutional. When a trial court's order is vague, ambiguous, and in need of clarification, remand is necessary. *See, e.g.*, *O'Connor v. Cent. Virginia U.F.C.W.*, 945 F.2d 799, 801 (4th Cir. 1991) (remanding when a trial court's order was ambiguous); *Dist. 29, United Mine Workers of Am. v. United Mine Workers of Am. 1974 Ben. Plan & Tr.*, 826 F.2d 280, 283 (4th Cir. 1987) (same). Therefore, at minimum, remand is necessary in order to clarify what specific language the Circuit Court found is unconstitutional.

CONCLUSION

The City is a tourist destination. The Circuit Court's Order suggests the City's zoning ordinances "plainly discriminate[] against interstate commerce." (Order of Nov. 20, 2023, p. 18.) Such a position belies common sense, as the City has no interest in deterring tourism. It also belies

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property owner "who is familiar with his property and its value, is allowed to give his or her estimate as to the value of the land or damages thereto").

[14] The Circuit Court's Order erroneously suggested the "City offered no argument at trial that the *Pike* test applies here." The City's primary position, of course, was that the regulations regarding cabana houses do not constitute regulation of an economic activity, such that the Dormant Commerce Clause is not implicated. Despite this primary position, the City presented evidence at trial of its legitimate local interests that would apply under either of the tests, and argued these interests could survive even the strictest scrutiny in its Motion to Reconsider. But most importantly, Respondents specifically asked the Circuit Court not to do a *Pike* analysis. (Tr. Vol. I, p. 45, ll. 9–24.) Therefore, this dictum should not be held against the City.

the evidence, as Respondents' own data and actions demonstrate interstate commerce, much less its own economic enterprise, have not been affected. Further, no complete exclusion of the market has occurred either, as Respondents have and can continue to shuttle their guests to one out of over 100 public beach access points in the City and/or own and operate a recreational club in one of the three zoning districts that permit such use, just not within the R-4 Resort Residential District. An analysis of the *Lopez-Morrison* factors, which the Circuit Court failed to do, establishes the clear attenuation between a free residential amenity created for noncommercial purposes and any sort of exchange of good or service. The City's ordinances merely regulate a noneconomic activity, meaning the Dormant Commerce Clause is not implicated and is unavailing for Respondents. Without this Court's intervention, the Circuit Court's Order threatens the foundations of zoning, a matter of particular importance to state and local governments everywhere. Based on the foregoing, this Court should reverse the Circuit Court's Order, overturn the unjustified expansion of the Dormant Commerce Clause, and protect longstanding policy of upholding municipal authority and interests in exercising the inherent municipal police power to engage in zoning for the public welfare.

Respectfully submitted,

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