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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Maite Murphy, Circuit Court Judge

Appellate Case No. 2020-001387
Case No. 2017-CP-10-5493

Shem Creek Development Group, LLC, ... Respondent,

v.

The Town of Mount Pleasant, South Carolina, ... Appellant.

RECORD ON APPEAL - VOLUME 2 OF 4
(pp. 445-862)

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Certificate of Counsel

Certificate of Compliance

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

SHEM CREEK DEVELOPMENT GROUP,
LLC,

Case No. 2017-CP-10-5493

Plaintiffs,

**MOTION AND SUPPLEMENTAL
MEMORANDUM OF DEFENDANT FOR
INVOLUNTARY DISMISSAL OF
ACTION UNDER SCRCP 41(B) AND
ENTRY OF JUDGMENT UNDER
SCRCP 52**

vs.

TOWN OF MT. PLEASANT,

Defendants.

Comes now, the Defendant, Town of Mount Pleasant, and files its Notice and Motion for Involuntary Dismissal under SCRCP 41(b) on the ground that upon the facts and the law Plaintiffs have shown no right to relief and Entry of Judgment under SCRCP 52, and Supplemental Memorandum in Support.

PROCEDURAL BACKGROUND

Town presents this motion based upon the same legal arguments and evidence previously submitted by the parties on summary judgment and in Defendant's Pretrial Brief, as well as the trial record with the court. Likewise, Town incorporates by reference the legal memoranda previously filed in support of its motion for summary judgment. This motion is filed under SCRCP 41(b) and 52(a) which authorize the court, as the trier of fact, to determine the facts and render judgment.¹

LEGAL AUTHORITY AND ARGUMENT

I. PLAINTIFF'S BREACH OF CONTRACT CLAIM SHOULD BE DISMISSED AS A MATTER OF LAW.

¹See, *Waterpointe I Property Owner's Ass'n, Inc. v. Paragon, Inc.*, 342 S.C. 454, 458, 536 S.E.2d 878, 880 (Ct. App. 2000) ("Rule 41(b) allows the judge as fact finder to weigh the evidence and determine the facts.").

The cause of action for breach of contract requires the plaintiff to establish the following elements: (1) the existence of a contract, (2) a breach of the contract, and (3) damages to the plaintiff proximately resulting from the breach.² A breach occurs when a party to the contract fails to carry out a material term, promise, or condition of the contract.³

A. PLAINTIFF FIRST BREACHED A MATERIAL TERM OF THE PARKING LICENSE AGREEMENT BY FAILING TO PROVIDE CLEAR AND UNAMBIGUOUS NUMBER OF PARKING SPACES.

The Town is entitled to an involuntary dismissal because Plaintiff breached the Parking License Agreement (“PLA”) by failing to provide the negotiated number of parking spaces.

A valid and enforceable contract requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement.⁴ “Some terms are considered indispensable to a binding contract. Among these are price, time and place.”⁵ “In a contract for services two essential terms are the scope of the work to be performed and the amount of compensation.”⁶ Such material terms must be set out with reasonable certainty and the absence of material terms renders the agreement unenforceable.⁷

“[O]ne who seeks to recover damages for breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready and willing to perform it.”⁸ “When called upon to construe

² *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962).

³ *See Freeman Dodge, Inc. v. Fin. Servs., Inc.*, 272 S.C. 164, 249 S.E.2d 897 (1978).

⁴ *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 762 S.E.2d 696,700 (2014) (citation omitted).

⁵ *Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 247 S.E.2d 434, 436 (1978) (citing 17 C.J.S. Contracts, § 36(2)).

⁶ *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 762 S.E.2d at 700 (citation omitted).

⁷ *Rose Elec., Inc. v. Cooler Erectors of Atl., Inc.*, 418 S.C. 424, 429, 794 S.E.2d 382, 385 (Ct. App. 2016).

⁸ *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 326 S.C. 426, 483 S.E.2d 789 (Ct. App. 1997) (citation omitted).

contracts, courts cannot rule on their wisdom or substitute their interpretation for the agreement clearly entered into between the parties.”⁹

Plaintiff’s breach of contract claim should be dismissed because Plaintiff first breached a material term of the PLA by failing to provide 276 parking spaces. Pursuant to the PLA, the plaintiff was to provide 276 total parking spaces, including 132 spaces designated for public use 24 hours/day, 7 days/week.¹⁰ The remaining 144 spaces were to be available to the public Monday – Friday 5:00pm to 6:00am and all day Saturday and Sunday. As consideration for licensing these 276 spaces for 30 years, the Town was to pay Plaintiff a base rent of \$185,000/year for 15 years.¹¹ It is undisputed that Plaintiff failed to provide the 276 spaces required by the PLA. The requirement of 276 parking spaces was a key, material term of the PLA as it provided the scope of Plaintiff’s obligation under the PLA.¹²

The Garage as constructed provides only 234 parking spaces, rather than the 276. That is 42 spaces fewer or only 84.8% of the parking spaces Plaintiff promised in the PLA. Per the PLA, the Town was obligated to pay a total of \$2,775,000. Plaintiff argues the PLA required to the Town to pay the same \$2,775,000 for 84.8% of the spaces. This interpretation leads to the absurd result of the Town being obligated to pay the same rent regardless of the number of parking spaces Plaintiff provided and the Plaintiff is free to provide any number of spaces that suits their modified business plan.

1. The Parking Space Requirement was Clear, Explicit and Material to the Agreement.

Plaintiff’s claims are inconsistent with the plain meaning of the PLA and represent a material, unilateral alteration of the meaning of Section 2.02 of the PLA by arguing that the

⁹ Texcon, Inc. v. Anderson Aviation, Inc., 284 S.C. 307, 326 S.E.2d 168 (Ct. App. 1985).

¹⁰ See PLA, ¶¶ 1.05 and 1.06; see also Dep. of E. DeMoura, pp. 30:11-20; 145:3-9 attached **Exhibit E**.

¹¹ See PLA., ¶ 1.07(a).

¹² See Stevens & Wilkinson, 409 S.C. 568, 762 S.E.2d 696,700.

actual number of parking spaces only had to be “substantially similar” to the 276 spaces promised in the PLA. “The main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the [contract].”¹³ “If a contract’s language is clear and capable of legal construction, this [c]ourt’s function is to interpret its lawful meaning and the intent of the parties as found in the agreement.”¹⁴

“A clear and explicit contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary, and popular sense.”¹⁵ The purpose of the rules of contract construction is to ascertain the intention of the parties as gathered from the contents of the entire document and not from any particular provision within the contract.¹⁶ “Where the contract language is plain and capable of legal construction, that language alone determines the instrument's force and effect.”¹⁷

Also, where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction should prevail.¹⁸ An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided.¹⁹

Plaintiff asks the Court to adopt an interpretation of the PLA inconsistent with the plain, unambiguous language of the PLA. Section 2.02 of the PLA provides, “Licensor’s Work.”

¹³ Gilbert v. Miller, 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct. App. 2003).

¹⁴ Id. at 30-31, 586 S.E.2d at 864; Smith-Cooper v. Cooper, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001).

¹⁵ Id. at 31, 586 S.E.2d at 864

¹⁶ Koon v. Fares, 379 S.C. 149, 666 S.E.2d 230 (2008).

¹⁷ Stevens & Wilkinson, 409 S.C. 568, 762 S.E.2d 696, 700 (2014) (citing Jordan v. Sec. Grp., Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993)).

¹⁸ Koon v. Fares, 379 S.C. 149, 666 S.E.2d 230 (2008) (citing Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975)).

¹⁹ Id.

Licensor, at its sole cost and expense, shall construct the proposed Project, ***in a form*** substantially similar to the conception drawings attached hereto as Exhibit “B” (emphasis added).” The single page conceptual drawing attached to the PLA depicts only the Garage’s proposed exterior façade and elevation. There is absolutely no reference to the layout or number of parking spaces in this conceptual drawing.

Plaintiff also asks this court to believe the number of spaces negotiated was flexible based on the first sentence of Section 1.06 stating the 276 total parking spaces were “planned” for the Project. The term “planned” does not indicate that the plaintiff could deliver fewer than 276 spaces to the Town. Of course, the plaintiff could provide fewer spaces and nullify the PLA. Providing fewer spaces would not provide the Town a legal cause of action against plaintiff.

However, in two separate sections, Sections 1.05 and 1.06, the PLA specifically provides that the Garage will contain 276 spaces. These sections do NOT qualify the number 276 in anyway nor do they use the “substantially similar” language that Plaintiff advocates. Further, to the extent the term “substantially similar” is used in Section 2.02, it is clearly referring to the “form” of the Garage as depicted in the conceptual drawing.

Section 1.07, entitled “Rent” and the attached Exhibit related thereto, further supports the position that the required number of parking spaces is unambiguous. The required rent for 276 spaces is \$185,000 per year for 15 years with no reduction or adjustment based upon the number of parking spaces. The only potential adjustment to the Rent is described in Section 1.07(b) which permits a rent reduction for the Town based upon the profitability of the Garage. Like the Sections that prescribe the number of parking spaces, the remainder of the PLA does not contemplate more or less rent based upon more or fewer parking spaces. The rent formula was simple: \$185,000 per year for fifteen years for 276 parking spaces.

Plaintiff argues that the Town would have been obligated to pay \$185,000 per year for fifteen years as long as Plaintiff provided the vague “substantially similar” number of “planned” parking spaces. This interpretation is absurd and assumes the obvious inconsistency that the Town was willing to pay a specific amount of rent for a non-specific number of parking spaces. The “substantially similar” language in Section 2.02 references a conceptual drawing of the Garage’s façade, elevation and “form” of the Garage, not the number of parking spaces, which is specifically prescribed in Sections 1.05 and 1.06.

The Town argues that the PLA specifically required Plaintiff to provide 276 parking spaces, with a specific allocation of those spaces for use and availability. In exchange, the Town was to pay the specific amount of \$185,000 per year for fifteen years. The sections of the PLA that make specific reference to the number of parking spaces prevail over general sections that make no reference to parking spaces. This interpretation represents the more reasonable and probable agreement of the parties. Plaintiff failed to provide the promised 276 parking spaces, a material term of term of the agreement. Plaintiff first breached the agreement and therefore its breach of contract claim cannot survive.

Further, and in the alternative, even if the Court adopts Plaintiff’s interpretation that the Town only had to provide a number of parking spaces substantially similar to 276, 234 parking spaces, the number actually provided, is not substantially similar to 276.

Plaintiff’s Breach of the Parking License Agreement was a Material Breach.

Plaintiff cites Kiriakides v. United Artists Commc’ns, Inc., 312 S.C. 271, 275-76, 440 S.E.2d 364, 366-67 (1994), for the proposition that its failure to provide 276 parking spaces is not a material breach of the Parking License Agreement. However, Kiriakides is readily distinguishable from the present action and even if applied, supports the argument that Plaintiff

materially breached the PLA. In Kiriakides, the court interpreted the State's ejectment statute, S.C. Code Section 27-37-10, in the context of a commercial lease whereby the landlord sought to evict a tenant for a very minor breach of the lease; failure to pay an increase percentage in rent. Kiriakides, 312 S.C. at 274-275, 440 S.E.2d at 365-66. The present action involves a licensing agreement where neither the State ejectment statute nor eviction of a leasehold tenant are involved. Further, the court in Kiriakides was concerned that the landlord's interpretation of the ejectment statute "would lead to the absurd result that leases could be terminated for immaterial and trivial breaches." Kiriakides, 312 S.C. at 275, 440 S.E.2d at 366.

The court in Kiriakides in determining whether a failure to render or offer performance is material, considered the following circumstances significant: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Applying the factors to this case: (a) The Town will be deprived of 15% of the parking spaces of which it bargained for under the Agreement; (b) the Town cannot be adequately compensated for the damages associated with the loss of 42 spaces. These spaces are lost for the entirety of the 30 Year License Term and there is nothing in the PLA that permits the Town to seek a reduction in rent for fewer spaces; (c) although Plaintiff would suffer a forfeiture of the Town's rent payments, Plaintiff had the opportunity to terminate the PLA, but rather chose to

proceed with constructing a Project that did not comply with the PLA and continue with the Project at its own peril; (d) and (e) it is impossible for Plaintiff to provide the lost spaces and cure the breach at this point.

Whether in the context of Kiriakides or general contract principles, Plaintiff's business decision to proceed with premier office space and 85% of the required parking spaces constitutes a material breach of the PLA and justifies a dismissal.

The Town did not Prevent Plaintiff from Providing the Required Parking Spaces

Plaintiff's own mistakes, miscalculations, overestimations, and business decisions created the inability to provide the required parking spaces. Plaintiff's first mistake was commissioning the initial conceptual drawings by architect Ken Betsch, who did not conduct any analysis of the Town's zoning regulations. In fact, the sketch attached to the PLA provides no indication of what setback, if any, applied to the Garage. Betsch simply drew each of his renderings with "zero lot lines", meaning that his conceptual sketches assumed zero setbacks and drawn to the property lines. This first misstep was pivotal because it was these sketches that Plaintiff used to negotiate the terms of the PLA, which promised 276 parking spaces.

The evidence now shows that rather than having zero lot lines on the adjoining streets, Coleman Boulevard had a 20-30' build-to-line, Mill Street had a 20' setback, and Church Street had a 20' setback. These mistaken assumptions by Plaintiff regarding the setbacks caused it to vastly overestimate the foot print of the building and the number of parking spaces it could provide. Plaintiff did not know or seek to know what the Town's setbacks were when it entered into the Agreement and certainly did not communicate any expectation or assumption to the Town. Most importantly, the Agreement contains zero assumptions regarding the Town's zoning regulations, but rather, assures that the design will be consistent with the same.

Plaintiff argues that it was entitled to 5' setbacks on Mill Street and Church Street, which leads to its next major mistake. First, the possibility of 5' setbacks on Mill Street and Church Street was just that – a possibility. The evidence showed Plaintiff had to satisfy specific requirements to obtain 5' setbacks. These were not guaranteed. Plaintiff also had to comply with the new requirements for parking structures in Ordinance 13077, which was adopted, in part, following Plaintiff's request. Mr. Small testified he submitted two written requests to the Planning Committee Chair in July and August of 2013. In those requests, he specifically noted his intent to "provide open spaces and people oriented design details to ensure the integrity of the activity zones on our adjoining streets."

As a result, Ordinance 13077 added a requirement for all garages which did not have floodproofing or first floor commercial, that they "must provide added features such as public art, a fountain, a bus stop, similar features to promote and maintain pedestrian activity" on the "Boulevard side *and side street sides*." Plaintiff could not have fulfilled these requirements with 5' setbacks.

Plaintiff also had to have the design approved through the Design Review process, and there is absolutely no proof Plaintiff could have had such setbacks approved in the Design Review Process. Thus, if Plaintiff made the assumption it could obtain 5' setbacks, that assumption was inconsistent with its own representations as to the design features it intended provide surrounding the Garage and not guaranteed.

B. PLAINTIFF FAILED TO MEET THE CONDITION PRECEDENT OF THE AGREEMENT.

The Town is entitled to an involuntary dismissal because Plaintiff failed to meet the Parking License Agreement's condition precedent of constructing the Shem Creek Garage with 276 spaces in compliance with Town zoning regulations.

Where a party fails to comply with an express condition of a contract, that party has no right to enforce the contract.²⁰ “A condition precedent to a contract is ‘any fact, other than mere lapse of time, which, unless excused, must exist or occur before a duty of immediate performance by the promisor can arise.’”²¹ “The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ.”²²

M&M Group Inc., involved a contract where a purchaser’s obligation to purchase the property involved was contingent upon purchaser’s ability to secure commercial financing.²³ In affirming the grant of summary judgment on the plaintiff’s claims, the court held that the parties’ “use of the language ‘*is contingent upon*’ is unequivocal and patently indicates the parties’ respective obligations to buy and sell the business are contingent on [defendant’s] ability to secure financing. No other meaning could be deduced from such clear and commonly used language.”²⁴

In the present case, pursuant to the PLA’s express language, both Plaintiff’s obligation to license spaces to the Town and the Town’s obligation to pay rent under the PLA were contingent upon and subject to Plaintiff’s ability to build a parking garage with 276 spaces in accordance with the Town’s zoning laws and necessary approvals.

Section 2.03 titled *Licensor’s Contingency* provides:

Licensor’s obligations under the [PLA], including but not limited to the obligation to construct the Project, *are contingent upon* all necessary approvals for construction being issued by the appropriate Town of Mount Pleasant department or entity. Licensor, in its sole and absolute discretion, may elect to terminate this License Agreement at any time prior to the earlier of (i) twenty-four (24) months

²⁰ Ahrens v. McDaniel, 287 S.C. 63, 66, 336 S.E.2d 505, 507 (Ct. App. 1985).

²¹ M&M Group, Inc. v. Holmes, 379 S.C. 468, 666 S.E.2d 262, 266 (Ct. App. 2008) (citations omitted).

²² Id.

²³ Id. at 266-267.

²⁴ Id.

from the Effective Date, or (ii) Licensor's commencement of construction of the Parking Garage."²⁵

Like the contract in M&M Group, Inc., the PLA specifically contemplated Plaintiff's ability to construct the Garage in compliance with the Town's zoning laws and required approvals as express conditions precedent to parties' obligations thereunder.

Because Plaintiff failed to construct the garage with 276 spaces in compliance with the Town's zoning laws and regulations, neither Plaintiff's obligation to license the spaces nor the Town's obligation to pay rent arose. The intent of the parties to treat the construction of the Garage as a condition precedent to the licensing of parking is further demonstrated by the fact that the same section of the PLA that created this condition permitted Plaintiff to unilaterally terminate the agreement. Plaintiff had two years to decide whether it wanted to construct the Garage and, if not, could freely terminate the PLA with no consequences. No Garage, then no Parking License Agreement. The decision to build the garage without the financial commitment from the Town was solely Plaintiff's to make.

Tyler Flesch admitted at trial that this provision required the Project to comply the Town's zoning ordinances and receive all of the necessary approvals pursuant to Section 2.03. However, Plaintiff then argued that this is only a condition for Plaintiff's benefit. Plaintiff also argued that no such condition existed simply for the lack of if/then language. Such an interpretation leads to the absurd result that Plaintiff can demand Town pay full rental value even if it is unable to comply with the zoning ordinances and receive the necessary approvals to construct a compliant Garage..

²⁵ Id. at ¶ 2.03.

Plaintiff argues that by providing only 234 of the 276 promised parking spaces it has substantially performed under the PLA.²⁶ “[T]he doctrine of substantial performance does not apply to express conditions.²⁷ Thus, any evidence to show they substantially performed the contract is immaterial.²⁸ If substantial performance does not entitle a party to recovery on the contract, a judge is not required to hear an argument on the issue of substantial performance.²⁹ Therefore, the doctrine of substantial performance does not apply in this instance because Plaintiff failed to fulfill the express condition precedent of constructing the Garage with 276 parking spaces in accordance with the Town’s laws.

C. IF THE PLA IS CONCEPTUAL IN NATURE AND AS VAGUE AS PLAINTIFF ARGUES, THEN IT DID NOT SET OUT MATERIAL, ESSENTIAL TERMS TO A REASONABLE CERTAINTY AND, THEREFORE, IS NOT AN ENFORCEABLE CONTRACT.

For a contract to be binding, material terms cannot be left for future agreements.³⁰ Material terms must be set out with reasonable certainty and the absence of material terms renders the agreement unenforceable.³¹

Plaintiff repeatedly argued and testified that the PLA was based only on a concept, the numbers were meant to be fluid, and the terms of the Agreement were intended to be vague and flexible.

²⁶ See Pl. Comp. ¶ 29.

²⁷ Ahrens, 287 S.C. at 66-67, 336 S.E.2d at 507 (citation omitted); see also McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571 (2009) (“If a contract contains a condition precedent, that condition must either occur or it must be excused before a party’s duty to perform arise.” The doctrine of substantial compliance does not apply.).

²⁸ Id.

²⁹ Ahrens, 287 S.C. 63, 67, 336 S.E.2d 505, 508.

³⁰ Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 762 S.E.2d at 700 (citing Aperm of S.C. v. Roof, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct.App.1986)). Regardless of intent, an agreement which leaves open material terms is unenforceable. Id. at 701 (citing Aperm of S.C. v. Roof, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct.App.1986); 1 Corbin on Contracts § 2.8 (Rev. ed. 1993) (“Even if an intention to be bound is manifested by both parties, too much indefiniteness may invalidate the agreement, because of the difficulty of administering the agreement.”); 1 Corbin on Contracts § 4.1 (“A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract. They must have expressed their intentions in a manner that is capable of being understood.”)).

³¹ Rose Elec., Inc. v. Cooler Erectors of Atl., Inc., 418 S.C. 424, 429, 794 S.E.2d 382, 385 (Ct. App. 2016).

As reflected in the trial testimony and in an effort to avoid keeping Plaintiff's promise to provide 276 parking spaces, Plaintiff's principals argued that although the PLA expressly required 276 spaces, the agreement really did not mean what it said. As demonstrated above in Section I.A. and the cited testimony, the number of parking spaces was a material term to the Town, as it was committing tax dollars to a stated parking need, and is material to defining the scope of Plaintiff's obligation to perform under the PLA.³² Even if the Court were to adopt Plaintiff's interpretation that its only obligation was to provide a "substantially similar" number of parking spaces, such a vague promise does not define this material term with reasonable certainty and renders the PLA very difficult to understand and administer. Such indefiniteness in this material term renders the PLA unenforceable.³³

D. THE TOWN DID NOT BREACH ITS IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

There exists in every contract an implied covenant of good faith and fair dealing.³⁴ An implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract.³⁵

Plaintiff cites several examples of alleged deliberate actions taken by the Town that represent a breach of the implied covenant of good faith and fair dealing.³⁶ However, Plaintiff's allegations mischaracterize the Town's actions, none of which breached the implied covenant of good faith and fair dealing.

³² See Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 762 S.E.2d at 700 (citation omitted).

³³ Rose Elec., Inc. v. Cooler Erectors of Atl., Inc., 418 S.C. 424, 429, 794 S.E.2d 382, 385 (Ct. App. 2016).

³⁴ U.S. f/u/b/a Williams Electric Co., Inc. v. Metric Constructors, Inc., 325 S.C. 129, 480 S.E.2d 447 (1997) (citing Adams v. Creel, 320 S.C. 274, 465 S.E.2d 84 (1995); Parker v. Byrd, 309 S.C. 189, 420 S.E.2d 850 (1992); Tharpe v. G.E. Moore, 254 S.C. 196, 174 S.E.2d 397 (1970)); Swinton Creek Nursery v. Edisto Farm Credit, ACA, 326 S.C. 426, 483 S.E.2d 789 (Ct. App. 1997) (citing Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 147 S.E.2d 481 (1966)).

³⁵ RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004).

³⁶ See Pl. Compl. ¶ 39.

i. ***The Town's adoption of 2014 zoning amendments did not breach the implied covenant of good faith and fair dealing.***

Plaintiff first argued that the Town improperly adopted “zoning amendments that forced Plaintiff to redesign the parking deck and provide fewer spaces than originally planned.”³⁷ The primary zoning amendment Plaintiff complained about is the elimination of a footnote that ostensibly allowed them to apply a five-foot setback on Mill Street and Church Street. Without those five-foot setbacks, Plaintiff complains they could not possibly satisfy the required parking space count. There is no evidence, however, that Plaintiff could accomplish five-foot setbacks under the Town's zoning ordinances. Furthermore, Plaintiff has not proven they could have provided 276 spaces even if they were entitled to or could achieve five-foot setbacks.

The following facts were proven at trial:

- Plaintiff's principal Tyler Flesch admitted (Day 1 of direct examination) that none of the Town's ordinances or zoning determinations were illegal.
- Plaintiff's Tyler Flesch admitted (Day 1 of direct examination) that Plaintiff did not appeal the ordinance determinations or seek a variance therefrom.
- The Marine District determination by Kent Prause, the Town's Zoning Administrator, gave them 30 additional feet toward Shem Creek, eliminating any need to shrink the footprint of the building along Mill Street to offset the “land grab” associated with the activity zone and 20 foot build-to line created by Ordinance 14022.

Plaintiff's own statements and their requested amendments anticipated larger setbacks.

In written correspondence to the Town and recorded statements to the Town's Planning Committee, Plaintiff clearly expressed its expectation that the Garage's adjoining streets would

³⁷ Id. at ¶ 39(a).

have “open spaces”, “people-oriented design details”, and “activity zones.” Such features would be very difficult, if not impossible, to implement within a five-foot setback.

The zoning amendments enacted by Ordinance 13077 in 2013 at the behest of Plaintiff, are consistent with Plaintiff’s stated desire to “provide added features such as public art, a fountain, a bus stop, similar features to promote and maintain pedestrian activity” on the boulevard and side streets, such as Mill Street and Church Street in the case of the Shem Creek Garage.

The evidence surrounding the enactment of this specific amendment demonstrates the Plaintiff acknowledged and even desired the Garage to be designed in a way to incorporate these features, that could not have been possible within a mere five-foot setback. The subsequent zoning amendments to the Overlay District in Ordinance 14022 furthered that objective by changing Simmons Street and Mill Street, streets with anticipated pedestrian activity, from a 20-foot setback to a 20-30 build-to-line. This change to Mill Street from a 20-foot setback to a 20-30-foot build-to-line served to promote the requested amendments enacted by Ordinance 13077. In addition, Plaintiff’s own conceptual rendering of the Garage, which was attached to the PLA and considered the only design information available at the time these zoning amendments were adopted, clearly contemplated setbacks greater than five-feet on Mill Street.

Plaintiff’s architect never analyzed Town’s zoning regulations and included no zoning assumptions in the conceptual rendering attached to the PLA.

Betsch, who prepared the initial conceptual schemes did not conduct any analysis of the Town’s zoning regulations. In fact, the sketch attached to the PLA provides no indication of what setback, if any, applied to the Garage. Betsch simply drew each of his renderings with “zero lot lines”, meaning that his conceptual sketches assumed zero setbacks and drawn to the property lines. Plaintiff did not know or seek to know what the Town’s setbacks were when it

entered into the Agreement and certainly did not communicate any expectation or assumption to the Town. Most importantly, the Agreement contains no assumptions regarding the Town's zoning regulations, but rather, acknowledges that the design will be consistent with the same.

The Town's zoning amendments were appropriate and legally adopted during public meetings.

Plaintiff does not allege that Ordinance 14022 was illegally enacted. In fact, the amendments were noticed publicly, Plaintiff was given adequate opportunity to participate and provide comment, and the Ordinance was enacted after a first and final reading. The zoning amendments contained in Ordinance 14022 were addressed at length with public comment at the Ordinance's first reading. The zoning amendments were comprehensive to the entire Urban Corridor Overlay District and did not single out Plaintiff's property. The zoning amendments were legally adopted and consistent with the terms of the PLA and, as such, were proper. Plaintiff's only push back is that the Town was somehow obligated to "pick up the phone" and contact them prior to formally enacting complex amendments to an entire overlay district because staff was supposed to know what they intended to construct. This position is absurd and without merit given that there is no dispute that the various Planning Committee, Planning Commission and Town Council meetings were public and properly noticed.

ii. The Town's enforcement of its zoning requirement for nine-foot parking spaces was not a breach of the implied covenant of good faith and fair dealing.

Plaintiff alleges the Town breached the covenant of good faith and fair dealing by not allowing Plaintiff to build the Garage with spaces 8 feet 6 inches in width. Town ordinance 156.173(C) provides "[p]arking spaces 90 degrees to the travel way aisle shall not be less than nine feet in width."

Plaintiff never requested a zoning change, similar to those reflected in Ordinance 13077, to grant the smaller parking spaces. Plaintiff argues its concept presumed the Garage would have spaces that are 8 feet 6 inches wide; a presumption never communicated to the Town. Ken Betsch stated he always assumed nine feet spaces in his rendering, which is consistent with the Town's zoning regulations. Plaintiff's final architect said Betsch's sketches assumed a parking space width 8 feet 6 inches. Unfortunately, neither Plaintiff nor its architects can say with certainty what their assumption was with regard to parking space width when the parties entered the PLA, but in either case, it was never communicated to the Town.

Rather, once Plaintiff realized it was unable to provide the 276 spaces required by the PLA, it demanded Town staff provide special treatment and grant a variation from the standard applied Town-wide. Again, with Plaintiff offering no design plans when the parties entered the PLA, the Town could not have known that Plaintiff expected to build a Garage with parking spaces that were 8 feet 6 inches wide and inconsistent with the Town's parking space requirements enforced on other garages within the municipality.

- iii. ***The Town's refusal to accept Plaintiff's redesigned plan of 234 parking spaces as "substantially similar" to the 276 parking spaces required by the PLA was not a breach of the implied covenant of good faith and fair dealing.***

See Section I.A.1. above.

- iv. ***Town Council's vote to deny a proposed amendment to the Parking License Agreement was not a breach of the implied covenant of good faith and fair dealing.***

There is no legal authority permitting a court to order parties to renegotiate contract terms and enter into a new agreement.³⁸ Courts do not have authority to alter contracts or to make new contracts for the parties or to rewrite a contract and impose unwanted obligations and terms.³⁹

As demonstrated above, the requirement that Plaintiff's provide 276 parking spaces was a material term of the PLA, which Plaintiff was unable to fulfill. The law did not require Town Council to accept the terms of or enter into a new agreement.

v. *The Town never received or relied on confidential information improperly obtained by opponents of the Garage.*

Plaintiff argues the Town breached the implied covenant of good faith and fair dealing by "receiving and relying on confidential information improperly obtained by opponents of the project without authorization to concoct pretextual grounds for its failure to honor its contractual obligations."⁴⁰ Plaintiff has produced no evidence that the Town received or relied on any confidential information improperly obtained by anyone.

Plaintiff offers no evidence that the Town or any member of Town Council or staff member did anything to improperly take or use Plaintiff's confidential information. These allegations are related to alleged activities by past Town Council member Jim Owens, which took place before he was even elected to Town Council. The Town was not involved in the defamation suit between Mr. Flesch and Mr. Owens, and there are absolutely no allegations or evidence that the Town was even remotely connected to the alleged activities. Any allegation to the contrary is baseless.

vi. *The Town did not breach the covenant of good faith and fair dealing enforcing unfavorable interpretations of zoning ordinances related to this project.*

³⁸ Lowcountry Open Land Trust v. Charleston Southern Univ., 376 S.C. 399, 656 S.E.2d 775, 781 (Ct. App. 2008).

³⁹ Id.

⁴⁰ Pl. Comp. ¶ 39(g).

Plaintiff alleges that Town staff intentionally adopted unfavorable interpretations of the Town's zoning ordinances to hinder Plaintiff's ability to develop the Garage. Included in these were the Town's position that the Garage did not qualify as a civic use, which may have provided more favorable setbacks for the project. Plaintiff also alleged the Town made unfavorable interpretations related to Church Street which caused the foot print of the building to be smaller than they planned and affecting parking space numbers.

Plaintiff never appealed these staff decisions, nor does it not allege that any of Town staff's interpretations were illegal or erroneous. Rather, Plaintiff alleged that the Town did not provide the "spirit of cooperation" it expected under the mistaken presumption that this was a Joint Venture between the two entities. From trial testimony, it appears Plaintiff defined "spirit of cooperation" as simply Town staff giving them what they wanted without regard for past precedent, uniformity or historical application on other projects. Again, Plaintiff could have appealed any or all of the decisions it believed were incorrect or unlawful to the Board of Zoning Appeals, or sought a variance from the application of these determinations, but opted, instead, to attack the motives of staff for a valid interpretation of the zoning code.

Furthermore, Plaintiff's principal Tyler Flesch confirmed at trial that all of the Town's acts were legal and that Plaintiff failed to appeal any of the Town's decisions.

vii. *Exploring possible condemnation of the project site to prevent its development and completion.*

Plaintiff alleges the Town breached the implied covenant of good faith and fair dealing by exploring the "possible condemnation of the [Garage] site to prevent its development and completion." Plaintiff admits that the Garage property and three other adjacent properties were identified as prospective properties for condemnation; however, Town Council never voted to

condemn the Garage property. “[T]he governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise.”⁴¹ The opinions or inclinations of individual Town Council members do not bind the Town and in this instance, Town Council did not vote to condemn the Garage property, rendering this allegation irrelevant.

Tyler Flesch admitted at trial that Town Council did not vote to condemn the property.

E. Plaintiff’s Claim for Damages

Section 1.07 entitled Rent provides that “During the first fifteen years of the License Term (the “Rent Period”) Licensee covenants and agrees to pay to Licensor, in legal tender of the United States of America, without any prior demand..., the Fixed Minimum Rent, subject only to the adjustments set forth herein. During each year of the Rent Period, Fixed Minimum Rent shall be One Hundred Eighty-five Thousand and no/100 (\$185,000.00) Dollars. Fixed Minimum Rent for each License Year of the Rent Period Shall be paid on or before the commencement of each License Year during the Rent Period. Payment for the first License Year of the Rent Period shall be paid into escrow upon the commencement of construction by Licensor, with payment being release from escrow upon the Rent Commencement Date.

Section 1.09 License Year provides, “A License Year shall be successive period of twelve (12) calendar months commencing on the Rental Commencement Date.”

Section 1.10 License Term: Rental Commencement Date states in relevant part, “The term of the License (the “License Term”) shall begin on the Rent Commencement Date, and shall end upon the earlier of (i) thirty (30) License Years thereafter or (ii) a Major Capital Event (as defined hereinafter), unless extended or sooner terminated in accordance with the terms and

⁴¹ Bear Enterprises v. County of Greenville, 319 S.C. 137, 459 S.E.2d 883, 885, n.1 (Ct. App. 1995).

provisions of this License. The rental commencement date (“Rental Commencement Date”) shall be date of issuance of certificate of occupancy by the Town.

The pertinent part of Section 6.01 explains the damages available Plaintiff in the event of default by the Licensee and provides, “In addition, Licensors shall be entitled to bring an action for specific performance or breach of contract against Licensee but agrees that its sole and exclusive remedy shall be the Rent Payments *due under this Agreement.*”

1. PLA Does Not Permit Plaintiff to Recover 15 Years of Rent

As demonstrated above, both the PLA’s Rental Commencement Date and the License Term commenced on the date of issuance of certificate of occupancy by the Town, which was July 28, 2017. Importantly however, Plaintiff terminated the Agreement on June 23, 2016, approximately one year before the Town issued the Certificate of Occupancy. As such, neither the Rental Commencement Date nor the License Term of the PLA had even started when Plaintiff terminated the Agreement.

Assuming arguendo the Court determines the Town breached the PLA and Plaintiff is entitled to damages prescribed in Section 6.01, the most that the Town was obligated to do at the time Plaintiff terminated the Agreement was to pay the first year of rent into escrow on the date Plaintiff commenced construction of the Garage as required by Section 1.07. However, Section 1.07 also provided that the first rent payment could not be released to Plaintiff until the Rent Commencement Date, which was the date the Certificate of Occupancy issued and after Plaintiff terminated the Agreement. Simply, no rent was due to Plaintiff when it terminated the Agreement.

Section 8.17, titled “Survival of Obligations” provides, “The provisions of this License with respect to any obligation of Licensee to pay any sum owing or to perform any act after

expiration or other termination of this License shall survive the expiration or other termination of this License.” Plaintiff argues that this provision allows it to recover ALL 15 years of rent payments despite the fact it terminated the Agreement before the Rent Commencement Date and such an interpretation is absurd and goes against the clear intent of the parties.

Tyler Flesch testified that as the parties negotiated the Agreement, the Town insisted that neither consequential nor punitive damages could be recoverable. Further, Mr. Flesch admitted that the Town insisted that the acceleration clause in the original draft be removed. The absence of the acceleration clause removed by the Town is inconsistent with Plaintiff’s claim for immediate payment of all 15 years of rent payments.

2. If liquidated damages provision requires 15 year of payment, then is an unenforceable penalty.

The touchstone question in determining whether a sum stipulated in a contract is a liquidated damage or an unenforceable penalty is whether the amount is “reasonably intended by the parties as the predetermined measure of compensation for actual damages *that might be sustained* by reason of nonperformance....” ERIE Ins. Co. v. Winter Const. Co., 393 S.C. 455, 462, 713 S.E.2d 318, 322 (Ct. App. 2011)(citing Tate v. Master, 231 S.C. 429, 441, 99 S.E.2d at 46 (1957) (emphasis added); see also Restatement (Second) of Contracts § 356 (1981).

Whether a stipulation is one for liquidated damages or for a penalty is, of course primarily a matter of the intention of the parties. Implicit in the meaning of liquidated damages, is the idea of compensation; in that of “penalty”, the idea of punishment. Tate v. Master, 231 S.C. 429 at 441, 99 S.E.2d at 46 (1957). If it is clear that the stipulation is for liquidated damages, breach of the contract will generally entitle the offended party to retain or recover the sum stipulated, and neither more nor less without proof of damage actually sustained. Id.

The language used by the parties in this Agreement is conclusive of the question of whether the stipulation is for liquidated damages or for a penalty. Id. (citing Ould v. Spartanburg Realty Co., 94 S.C. 184, 77 S.E. 866 (1913)). Interpretation of the contract is governed by the objective manifestation of the parties' assent at the time the contract was made. Bannon v. Knauss, 282 S.C. 589, 593 320 S.E.2d 470 (1984). It is clear within the four corners of this contract, that liquidated damages were never a consideration for the Town. The Court's attempt to surmise the Town's intent during negotiations is inappropriate. However, if this Court determines that the Town's redlines during negotiations are determinative of its intent, it should be noted that Town representatives also removed Plaintiff's ability to accelerate rent payments in a breach, which directly contradicts the supposition that liquidated damages were contemplated. Removal of the acceleration clause is certainly inconsistent with Plaintiff's attempt to recover rent payments for the entire 15 years when Plaintiff terminated the agreement prior to a Certificate of Occupancy being issued.

Determination of Actual Damages Requires a Review of the Entire Agreement

In Foster v. Roach, our supreme court identified criteria to utilize in making a determination as to the qualification of damages:

In order to determine whether the sum named in a contract as a forfeiture for noncompliance is intended as a penalty or liquidated damages, it is necessary to ***look at the whole contract***, its subject-matter, the ease or difficulty in measuring the breach in damages and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach.

119 S.C. 102, 107, 111 S.E. 897, 899 (1922) (emphasis added).

The January 22, 2020 Order presumes the survival clause does not provide for the survival of any rights of the Town, including the right to calculate the amount of rent that may be

due by eliminating Section 1.07(b). Section 8.17 allows the survival of all provisions that relate to “the obligation to pay any sum owing...” Further, the parties waived any claims to consequential or punitive damages, with Plaintiff’s sole remedy being a claim for “rent payments **due** under the Agreement.”⁴² One cannot deduce what sum, if any, is “owing” without referring to all provisions of the Agreement, including calculation of Rent payments. This provision does not disclaim the rent reduction provision nor does it change the way rent is calculated in the event Plaintiff pursues a breach of contract claim against the Town. In order to determine the amount of rent actually due, the parties would have to revert back to 1.07(a) and (b). This Court’s position that Plaintiff is entitled to the Fixed Minimum Rent in its entirety without a commensurate reduction based upon the Garage’s profitability has no foundation or support in the Agreement and was never intended by Defendant during negotiations.

Town Would be Subject to an Unenforceable Penalty

Where the sum stipulated in an Agreement is so large that it is plainly disproportionate to any probable damage resulting from a breach of contract, the stipulation would be held one for penalty and not for liquidated damages, regardless of its terminology. Tate v. Master, 231 S.C. 429 at 441, 99 S.E.2d at 46 (1957) (citing 15 Am. Jur. Damages, Sec. 249, p. 681.). If the provision be for a penalty, recovery is measured not by the sum stipulated, but by the amount of **actual damage** proven to have been sustained as the result of the breach. Id. (citing 25 C.J.S. Damages § 116b, p. 704)(emphasis added).

CONCLUSION

For the foregoing reasons, Defendant’s Motion for Involuntary Dismissal under SCRCP 41(b) on the ground that upon the facts and the law Plaintiffs have shown no right to relief and

⁴² Sec. 6.01

Entry of Judgment under SCRCP 52.

s/Julia P. Copeland
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Charleston, South Carolina
February 6, 2020

Attorneys for the Defendant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Civil Action No.: 2017-CP-10-05493
	)	
Shem Creek Development Group, LLC	)	
	)	
Plaintiff,	)	
	)	MOTIONS FOR NEW TRIAL AND TO
v.	)	RECONSIDER, ALTER OR AMEND
	)	ORDER
The Town of Mount Pleasant, South	)	
Carolina,	)	
	)	
Defendant.	)	
_____	)	

The Defendant, pursuant to Rule 59(a) and (e), SCRCP, hereby moves the Court for a new trial or to alter or amend or reconsider its Order in favor of the Plaintiff on its Breach of Contract claim and its awarding the Plaintiff damages in the sum of \$2,604,316, in addition to attorney's fees and costs. Defendant also submits this Motion for Reconsideration in accordance with Rule 52(b), SCRCP, on the grounds that the court may amend its findings or make additional findings and may amend the judgment accordingly. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or had made a motion to amend them or a motion for judgment. Defendant renews all trial arguments and objections, in addition to the arguments below, and any pleadings or incorporated memoranda filed in this case.

1. Paragraph 7 incorrectly states that the projected lack of profitability of Plaintiff's project was largely driven by the lack of weekday parking demand. This statement is irrelevant as most ventures are unprofitable in the initial years as investment is recovered. The correct analysis is the difference between the loss expected and the loss experienced as a result of Town conduct. In addition, the arbitrary allocation of profit margin will influence comparative profitability.

2. Paragraphs 8 and 9 make reference to a design or scheme prepared by or on behalf of the Plaintiff. The defendant objects to the inaccurate characterization of this design or scheme as something which “did not necessarily reflect compliance with applicable zoning requirement.” The trial evidence and testimony demonstrated that the concept was drawn to zero lot lines on all sides of the garage, not just on Mill and Church Streets, making it, without rational dispute completely inconsistent with and in stark violation of Town requirements regarding setbacks and parking space width. The plan used by Plaintiff to negotiate the Parking License Agreement was, beyond any factual dispute, a gross overestimation of potential spaces because it failed to comply with the applicable setback requirements or parking space width requirements.
3. Paragraph 10 claims that Mr. Small and Mr. Flesch presented Mr. Betsch’s conceptual plans to the town in 2013. This is not supported by the evidence or testimony as Mr. DeMoura and all staff members testified that they never saw the parking layout concept, only the pictorial exhibit to the PLA. Additionally, there was no evidence that Mr. Flesch presented these plans to the Town. Mr. Small testified that he presented the conceptual plans to the Town, but this was not corroborated by any other witness. Further, the Order incorrectly represents that David Pagliarini, the Town’s attorney, drafted and/or provided revisions to the Agreement.
4. Paragraph 10 incorrectly states the Agreement was the creation of a public-private partnership, in contradiction to the actual language of the Agreement and the testimony of Mr. DeMoura. This contractual recitation is unambiguous and must not be altered by parole evidence.
5. Paragraph 11 incorrectly characterizes the licensing Agreement be interpreted as a construction agreement, when it was not.
6. Paragraph 12 incorrectly states that rent reduction is only a “possibility” if the garage is profitable, when rent reduction was a required and material term without the presence of which the agreement would not have been signed by the Town. The court has, in error, rewritten a material, unambiguous term of the contract and applied its misstatement to negate entirely the required rent reduction.
7. Paragraph 15 states “... the Town conducted no analysis to determine the number of spaces needed to meet parking demand in the area, and the Town never insisted that 276 total spaces and 132 public spaces be a minimum requirement.” This statement of fact is irrelevant in part and clearly erroneous in part. The contract clearly and unambiguously recites that 276 spaces were needed and that was a material inducement to the Town’s execution of the executed PLA. The Town was never required to conduct any supportive analysis to require or expect Plaintiff to fulfill its obligations under the PLA. The court

has, again, in error rewritten the contract to, de facto, delete a material term (provision of 276 spaces) and substitute its flawed determination that 276 parking spaces was meaningless.

8. Paragraph 16 asserts that “Mr. Small informed the Town that the changes were needed to ensure that the development would be economically feasible and maximize the number of spaces provided in the garage component of the project.” This statement is taken out of context, irrelevant and misleading as it fails to include the essential testimonial modification by Mr. Small that he would work with the Town staff to “promote pedestrian activity zones at the garage site.” Additionally, none of the referenced exhibits either refer to or use the phrase “maximize the number of spaces.”
9. Paragraph 17 incorrectly states the amendments proposed and adopted in Ordinance [No. 13077] were solely meant for the economic benefit of Mr. Small. Rather, Ordinance No. 13077 was a comprehensive Ordinance which included changes within the overlay district in addition to those specifically requested by the plaintiff.
10. Paragraph 20 misstates the significance of the survival clause, inappropriately infers the parties’ intent when negotiating the terms of the Agreement, and inappropriately rewrites an unambiguous provision of the Agreement. The survival clause does not extinguish or prohibit the bargained for right to reduced rent for the Town. Further, and as argued in prior motions and at trial, Defendant disputes that the PLA default clause contains a liquidated damages provision. Where the sum stipulated in an agreement is so large that it is plainly disproportionate to any probable damage resulting from a breach of contract, the stipulation would be held as a penalty and not for liquidated damages, regardless of its terminology. Tate v. Master, 231 S.C. 429 at 441, 99 S.E.2d at 46 (1957) (citing 15 Am. Jur. Damages, Sec. 249, p. 681.). If the provision be for a penalty, recovery is measured not by the sum stipulated, but by the amount of *actual damage* proven to have been sustained as the result of the breach. Id. (citing 25 C.J.S. Damages § 116b, p. 704)(emphasis added). Awarding Plaintiff the full amount of the PLA when Plaintiff terminated the Agreement prior to being entitled to the first rent payment is an unenforceable penalty and an abuse of discretion.
11. Paragraph 22 fails to acknowledge an important fact that SMHa immediately, upon engagement by plaintiff, determined that the Betsch concept did not comply with Town regulations and that the Plaintiff could not build 276 spaces. The evidence demonstrates that this fact was presented to the Plaintiff but was never communicated to the Town, despite initial awareness by Plaintiff, prior to the December zoning amendments [Ordinance No. 13077] being enacted.

12. Paragraph 27 incorrectly infers that plaintiff had earlier submitted a site-specific development plan and obtained a vested right to five-foot setbacks. Plaintiff did not submit a proposed plan until after the April 2014 zoning amendments and did not obtain vested rights until months later. Plaintiff neither argues nor offered evidence that it had vested rights which would preclude the application of Ordinance 14022 to the Shem Creek Garage property. S.C. Code Sections 6-29-1510, et seq., and Town Ordinance Sections 156.049, et seq., outline the State and Town requirements for obtaining vested rights, none of which Plaintiff achieved prior to the enactment of Ordinance 14022. Town Staff testified that Plaintiff neither submitted nor received approval of a site-specific development plan, as required by State and Town law, in order to achieve vested rights for the Garage and be protected from the application of Ordinance 14022 to the Project. Tr. pp. 704:22-705:4.

Further, The Court must reject the erroneous position that a municipality must grant vested rights to a developer solely because they are parties to an Agreement. The PLA did not preclude the Town from enacting lawful zoning ordinances that applied to the subject property and if Plaintiff wanted the benefit of the zoning regulations in effect at the time the parties executed the PLA, it needed to fulfill State law and Town of Mount Pleasants requirements for obtaining vested rights.

13. Paragraph 28 incorrectly states that the appropriate width of garage parking spaces was 8 ½' when clearly stated, undisputed trial testimony proved beyond a doubt that the only existing TOMP regulation pertaining to parking space width required 9' spaces.
14. Paragraph 29 incorrectly presumes the Town failed in its State-mandated notice requirements, simply because plaintiff, through its own inadvertence, was unaware of the activities handled in public meetings with published agendas. In effect the decision of this court has erroneously created a new class of citizens vested with rights superior to those granted to all other citizens. Town provided adequate notice of the public meetings. Although Plaintiff and SMHa may not have actually known, it was undisputed that the Town provided the statutorily required public notice and opportunity to comment/ask questions (see Paragraph 30 of the Court's Order) for all of the meetings relative to these changes and neither Plaintiff nor its representatives participated or offered input.

Additionally, the undisputed evidence was that that change to the setback on Mill Street only reduced the number of parking spaces by 1, hardly imperiling the fair value of the project. The December Amendments for the garage created a requirement equally applicable to all garages in the zoning district in question provide activity as outlined in those amendments.

15. Paragraph 29 also erroneously mischaracterizes the actual testimony of Planning director Christine Farrell by incorrectly manufacturing the finding that the footnote requiring a build-to-line was changed “specifically” because of project. Ms. Farrell testified clearly and directly that the amendment eliminating the 5’ setback possibility was comprehensive and affected all streets throughout the UC-OD and was enacted in response to public concerns pertaining to other developments, not the plaintiff’s project.
16. Paragraph 30 is clearly erroneous in that it asserts, without testimonial support beyond mere supposition that the zoning amendments were intended to only effect the project site as opposed to the entire UC-OD. The testimony clearly showed the amendments were intended for an entire zoning district, not just the garage site.
17. Paragraph 32 incorrectly states the facts: Mr. Small had lawful public notice of the amendments and should have made himself aware and commented as all other citizens have the opportunity to do, particularly when they have a substantial project within the boundaries of the zoning district being discussed.
18. Paragraph 33 is incorrect in that it is uncontroverted that this was the first time a plan was presented to the Town - AFTER the April zoning amendments. There is also no dispute that Plaintiff took no action to gain vested rights and protect it from the ordinance. SMHa should have known that the Town’s parking space width was 9’ at all times relevant to this and any other project as this was the requirement. Rather, SMHa incorrectly designed the project with 8 ½ feet spaces with no consideration of the Town’s existing ordinance and the court’s order erroneously rewrote the ordinance to permit 8 1/2’ spaces for this entity only thus creating an Equal Protection violation any time the Town enforced this Ordinance as actually written.
19. Paragraph 34 incorrectly states that requests for accommodations from the plaintiff were uniformly rejected when the evidence at trial demonstrated the Town ruled on the Marine District issue, which permitted Plaintiff to keep the designed width of the building and caused the Town to be subjected to a lawsuit by Save Shem Creek. Further, every Town witness testified that not a single decision by Town staff was made with the intent to “kill the project.”
20. Paragraph 35 erroneously omits the fact that the appropriate course of action in response to a decision of the Zoning Administrator or any member of staff of which you disagree, is to file an appeal to the Board of Zoning Appeals. Plaintiff admits and the Order acknowledges that all of the Town’s decisions were lawful decisions. If Plaintiff disagreed it was duty bound, as all plaintiffs are, to exhaust its remedies and should have appealed the decision. Therefore, Plaintiff should be precluded from raising and the court from considering this argument as evidence of bad faith. Further, the testimony of

the staff members who made those decisions does not support the position that they were acting in bad faith with the intent to kill the project.

21. Paragraph 37 incorrectly omits the fact that the appropriate course of action in response to a decision of the Zoning Administrator or any member of staff of which you disagree, is to file an appeal to the Board of Zoning Appeals. Plaintiff did not exhaust this administrative remedy. Therefore, Plaintiff should be precluded from raising and the court from considering this argument as evidence of bad faith. Further, the testimony of the staff members who made those decisions does not support the position that they were acting in bad faith with the intent to kill the project.
22. Paragraph 38 incorrectly omits the fact that the appropriate course of action in response to a decision of the Zoning Administrator or any member of staff of which you disagree, is to follow through with an appeal to the Board of Zoning Appeals. Plaintiff did not exhaust this administrative remedy. Therefore, Plaintiff should be precluded from raising and the court from considering this argument as evidence of bad faith. Further, the testimony of the staff members who made those decisions does not support the position that they were acting in bad faith with the intent to kill the project.
23. Paragraph 39 mischaracterize the facts and the language of the PLA. The proposed modified design did not comply with Sections 1.05 and 1.06 of the PLA that specifically did not permit the inclusion of surface parking in the number of Garage Parking Spaces. The testimony also supported the fact that this option required DOT approval. Plaintiff provided no evidence that it could or had obtained DOT approval.
24. Paragraph 40 fails to note that the Town approved this shift of the property, was sued by Save Shem Creek for doing so, and successfully defended the lawsuit.
25. Paragraph 43 incorrectly states the facts in that the Town offered testimony from multiple witnesses that the issue with restaurant parking was not that it violated the PLA. Rather, the issue was that the garage was inappropriately displacing existing parking spaces and the Town, from a zoning compliance perspective, had to make sure those spaces were replaced.
26. Paragraph 46 relies specifically on evidence erroneously, inappropriately admitted throughout this trial. As it did in a pre-trial Motion in Limine and during trial, Defendant objects to the admission of unauthenticated, unverified Youtube videos of Town Council meeting in violation of the South Carolina Rules of Evidence, the best evidence rule, and South Carolina precedent, as it was offered to dispute the official record of the meeting. Throughout the playing of the video at trial, it was often difficult to understand what any particular person was saying making attribution impossible guesswork and

misunderstanding even one word of a video can change the entire import or context of the statements at issue. The certified minutes for Town Council meetings are the only appropriate and competent evidence of the proceedings and actions of Town Council. This paragraph improperly has the effect of attributing statements by one Town Council member to all of Town Council.

27. Paragraph 47 is irrelevant because the PLA did not require the Town to substantiate or provide an analysis of the number of spaces it required. The number of spaces, 276, was a required, material term of the PLA upon which the Town relied in calculating the sum to be paid and agreed to by the Plaintiff as a result of protracted negotiation.
28. Paragraph 50 mischaracterizes the testimony of Mr. Prause. Mr. Prause's job is to interpret the language of the ordinance, and, as with each of the decisions addressed, including the decision regarding the 30' Marine District line, Mr. Prause must exercise reasonable discretion in his interpretation.
29. Paragraphs 51 and 52 acknowledge that Plaintiff terminated the PLA prior to the Rental Commencement Date, thus precluding its rights stated in the Agreement, including entitlement to rent or liquidated damages.
30. Paragraph 52 is irrelevant because it was the successor and not Plaintiff who completed the Garage. Plaintiff terminated the PLA before it completed the assignment to the successor and therefore the Town was not contractually obliged to pay rent to the successor as the assignment needed to be executed "at any time during the License Term."
31. Paragraph 53 is irrelevant because the PLA mandated 276 spaces. Furthermore, when Plaintiff terminated the PLA, the Town lost the benefit of the promise that Plaintiff would reserve parking spaces as required. Plaintiff presented no evidence that it is reserving the number of parking spaces as required by the PLA.
32. Paragraph 60 incorrectly creates an intent of the parties beyond the four corners of the Agreement. Defendant argued that "[O]ne who seeks to recover damages for breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready and willing to perform it." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 326 S.C. 426, 483 S.E.2d 789 (Ct. App. 1997) (citation omitted). "When called upon to construe contracts, courts cannot rule on their wisdom or substitute their interpretation for the agreement clearly entered into between the parties." Texcon, Inc. v. Anderson Aviation, Inc., 284 S.C. 307, 326 S.E.2d 168 (Ct. App. 1985). Plaintiff's breach of contract claim should fail because Plaintiff first breached a material term of the PLA by failing to provide 276 parking spaces. It is

undisputed that Plaintiff failed to provide the 276 spaces required by the PLA. The requirement of 276 parking spaces was a key, material term of the PLA as it provided the scope of Plaintiff's obligation under the PLA. Stevens & Wilkinson, 409 S.C. 568, 762 S.E.2d 696,700 (2014). Plaintiff admitted the PLA expressed a specific number of spaces. Tr. pp. 262:1-3; 368:14:22. Plaintiff readily acknowledges that the Garage as constructed provides only 234 parking spaces, rather than the 276. Tr. pp. 270:2-4; 392:3. That is 42 spaces fewer or only 84.8% of the parking spaces Plaintiff promised in the PLA.

33. Paragraph 62 contradicts the actual language of Council's motion, which the verified minutes show was "to deny any new proposal that may be put forward or submitted by the developer/applicant pertaining to this contract." The inappropriate admission of unverified Youtube video clips of the meeting was not harmless error, but in fact, inappropriately influenced this Court's decision.

In reviewing decisions of municipal governments, "[m]unicipal records properly authenticated or verified are the only competent evidence of the proceedings of the transactions of governing bodies." Berkeley Elec. Coop., Inc. v. Town of Mount Pleasant, 308 S.C. 205, 208, 417 S.E.2d 579, 581 (1992). "Parole evidence may not be admitted to explain, enlarge, or contradict minutes which are complete and unambiguous on their face." Id.; Davis v. Orangeburg-Calhoun Law Enf. Comm., 344 S.C. 240, 248, 542 S.E.2d 755 (Ct. App. 2001) (citing). In the present action, the relevant minutes for Town Council's meetings are both extensive and complete in describing the public comments, as well as Town Council's discussions and votes pertaining to the Garage. Given there is no ambiguity in those minutes, The Court should not have allowed Plaintiff to introduce and rely upon any parole evidence for the purpose of challenging the motives or subjective intent of the individual Council members. The minutes provided by the Town, authenticated by staff, were unambiguous, and most importantly, verified. This Court, incorrectly allowed these videos, based on a representation by the Town Administrator, Eric DeMoura, that he had no reason to doubt they were accurate. Tr. 461:2-5.

34. Paragraph 65 commits an error of law in holding that the Town cannot exercise its legislative authority to amend its own zoning ordinances, if the potential ramifications may hinder a private landowner's ability to maximize its investment. Plaintiff neither argued nor offered evidence that it had vested rights which would preclude application of Ordinance 14022 to the garage site. S.C. Code Sections 6-29-1510, et seq., and Town Ordinance Sections 156.049, et seq., outline the State and Town requirements for obtaining vested rights, none of which Plaintiff achieved prior to the enactment of Ordinance 14022. Town Staff testified that Plaintiff neither submitted nor received approval of a site-specific development plan, as required by State and Town law, in order to achieve vested rights for the Garage and be protected from application of Ordinance 14022 to the Project. Tr. pp. 704:22-705:4. Further, Defendant argued the Court should

reject the notion that a municipality should be required to grant vested rights to a developer solely because it was a party to a contract with the municipality. The PLA did not prevent the Town enacting lawful zoning ordinances or interpretations that applied to the garage site. If Plaintiff wanted the benefit of the zoning regulations in effect at the time the parties executed the PLA, it needed to satisfy State law and Town requirements for gaining vested rights.

35. Plaintiff and the Court's Order acknowledge that all of the Town's actions were lawful, yet somehow these "lawful" actions constitute a breach of the covenant of good faith and fair dealing. There is no South Carolina law to support such a bizarrely inconsistent legal assertion. Throughout trial Plaintiff utilized the definition of "Premises" in an attempt to suggest all it really needed to provide was 132 spaces. This mischaracterizes the PLA as a whole. The PLA is clear - Plaintiff was required to provide 276 parking spaces and the Town was paying rent for all of those spaces, not just the 132.
36. Paragraph 67 is an error of law, because the Court is inappropriately acting in an appellate capacity in finding the decisions of staff were arbitrary, capricious, and made in bad faith. Plaintiff should not have the benefit of this appellate review as they chose not to file an appeal with the Board of Zoning Appeals.
37. Paragraph 70 concedes that the Town's actions were lawful, but holds, without rational support, "the exercise of legitimate governmental authority does not immunize the Town from liability for a breach of contract, including for breach of the implied duty of good faith and fair dealing, if it exercises that authority to interfere with the purpose and performance of a contract. To hold otherwise would empower governmental entities to engage in bad faith to destroy or interfere with agreements to which they are parties at their convenience."

In order for the Court to reach a determination that Council's intent was to interfere with the purpose and performance of the contract, it must consider the intent and motivation of each Council member. This holding contradicts current South Carolina precedent, which holds motivation when acting in their legislative capacity simply is not a proper inquiry. See Greenville County v. Kenwood Enters., 353 S.C. 157, 174, 577 S.E.2d 428, 437 (2003) (citing Bear Enters. v. County of Greenville, 319 S.C. 137, 139, n.1, 459 S.E.2d 883, 885 (Ct. App. 1995) ("The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise.")).

38. Paragraph 71 cites cases from other jurisdictions, which are not binding on this Court and readily distinguishable from the present case, for the proposition that "the implied duty of good faith and fair dealing applies equally to discretionary acts of government as it does

to the acts of private parties.” The first case cited by Plaintiff is Guidiville Rancheria of Cal. v. United States, 704 Fed. Appx. 655 (9th Cir. 2017). In Guidiville, the City of Richmond, California entered into a Land Disposition Agreement with a developer and the Guidiville Band of Pomo Indians for the development of a decommissioned naval base. Id. at 657. The plaintiff appellants alleged that the mayor for the City of Richmond breached the implied covenant of good faith and fair dealing by contacting the Bureau of Indian Affairs, Contra Costa County, and various public officials including the Governor of the State of California and United States Senator Dianne Feinstein to encourage them to deny, delay, or otherwise oppose the Tribe’s quest to obtain the necessary federal and state approvals for gaming. Id. at 657-8. Plaintiffs alleged that as a result of the City’s actions, the federal gaming approval process was delayed and the U.S. Dept. of Interior determined that the property was not eligible for gaming, both of which the City used as reasons to abandon the agreement. Id. at 658.

In the present case, trial testimony demonstrated the Town enacted Ordinance 14022 and made the zoning interpretations in question in good faith. There is no evidence that any public official(s) enacted Ordinance 14022 with the intent to thwart development of the Garage. Further and unlike Guidiville Rancheria, there is no evidence that any Town official interpreted the Town’s zoning ordinances with the intent to stop the Garage.

The next case Plaintiff cites is Reserve at Woodstock, LLC v. City of Woodstock, 958 N.E.2d 1100 (Ill. 2011). In that case, the plaintiff developer submitted a plat to the City of Woodstock, Illinois, to develop certain property pursuant to an annexation agreement. Id. at 1104. The City denied the plat and eventually rezoned and disconnected the property. Id. The Court found however, the City rezoned the property AFTER the developer filed a lawsuit to enforce the annexation agreement. Id. at 1113. The annexation agreement contained specific provisions as to when and how property could be rezoned and disconnected. Id. The court held the City’s action with regard to rezoning and disconnecting the property after the property owner had filed suit to enforce its rights were inconsistent with the specific terms of the annexation agreement and a violation its duty of good faith and fair dealing. Id.

Unlike Reserve at Woodstock, neither the Town’s enactment of Ordinance 14022 nor the interpretations of the Town’s zoning ordinance are inconsistent with the Parking License Agreement nor any Town ordinance. Further, all parties agree that the Town’s actions were legal. As such, Reserve at Woodstock has no application to the present case.

Finally, Plaintiff cites the case of City of Golden v. Parker, 138 P.3d 285 (Colo. 2006), wherein plaintiff developers filed suit pursuant to economic incentive agreements entered with the City of Golden. Id. at 288. The dispute arose from the City’s subsequent

enactment of an amendment to its home rule city charter which required voter approval of all new grants of development subsidies or incentives in excess of \$25,000. Id. The primary issues in City of Golden were whether the subsequent ordinance retroactively applied to the prior economic incentive agreements and whether the developers had vested rights in the economic incentive agreements. Id. at 290-92. Although the court recognized that the implied duty of good faith and fair dealing may apply to discretionary budgetary appropriations where there are contractual assurances that a municipality would exercise its discretion in appropriation of city funds, that holding was made in considering the question of whether the developers had a vested right in the incentive agreements. Id. at 292-3. Here, Plaintiff did not even allege that the Parking License Agreement conferred some sort of vested right. Rather, trial testimony clearly established that Plaintiff had not taken the steps required by State or local law to confer a vested right. Unlike the developers in City of Golden, Plaintiff cannot establish it had a vested right.

39. Paragraph 72 incorrectly holds that the Town was required to exercise its legislative authority only in a way to favor a party to a contract. This is an error of law in that it creates an “implied contractual vested right” that binds actions of future Council in derogation of the precedent set by Cunningham v. Anderson County, 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013), which stands for the simple proposition that municipal councils may not deprive successor councils of discretion in matters involving their legislative or governmental powers, because public policy demands they should be left unimpaired. This holding inappropriately delegates that legislative authority to anyone contracted with the Town. Further, the holding in Paragraph 72 illegally creates a vested right, implied by contract, which exists nowhere in State or Federal law, case law, statute or ordinance.

The precedent created by Paragraph 72 will hinder the ability of a municipality to enter into future agreements and force each municipality to strongly reassess current contractual arrangements, if the governing body cannot make any legislative decision that could potentially impair a party’s ability to maximize its purpose or rights under said contract.

40. Paragraph 74 is an error of law, because the Court disregards a material, stated term of agreement, 276 spaces, when it relied, over the Town’s objection, on parole evidence and hearsay to determine that the true intent and purpose of the parties was to simply satisfy the need for additional parking in the Shem Creek area. Under the parole evidence rule, extrinsic evidence is inadmissible to vary or contradict the terms of a contract. Penton v. J.F. Cleckley & Co., 326 S.C. 275, 280, 486 S.E.2d 742, 745 (1997). As such, Plaintiff should not be permitted to admit parole evidence regarding the plain terms of the Parking License Agreement, which the Court clearly relied on. In construing and determining the

effect of a written contract, the intention of the parties and the meaning are determined only from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008) “If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect.” Ward v. West Oil Co., 379 S.C. 225, 239, 665 S.E.2d 618, 625 (Ct. App. 2008).

41. The Court committed an error of law in admitting every single piece of evidence into the record, despite the Town’s objection, under the legal premise proposed by Brown v. Allstate, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001). In Brown, the Supreme Court agreed that the lower court during a bench trial committed an error when it admitted irrelevant evidence. The Court then determined, however, that this error was harmless, because there was not a sufficient showing the trial judge affirmatively relied on the incompetent evidence. Here, the Court clearly and erroneously relied on irrelevant evidence submitted, over the Town’s objections, to reach its conclusion that 276 parking spaces was never a material term of the Agreement and that Council violated the good faith and fair dealing clause of the Agreement.
42. Paragraph 75 incorrectly holds, through consideration of parole evidence that 276 parking spaces was not a material term, disregarding the fact that the dollar amount was tied directly to the number of spaces. Plaintiff had not substantially performed under the PLA in producing 276 parking spaces and its breach of contract claim should have failed. First, the PLA was a licensing agreement and not a construction contract. The Town has no property interest in the Garage and does not possess any portion thereof.

Further, Plaintiff terminated the PLA prior to the Rental Commencement Date in the PLA. As such, the Garage provides only 234 of the 276 total spaces (85%) and 117 of the 132 (89%) public spaces, and, importantly, the Town did not receive the benefit of the promises under the PLA: for Plaintiff to reserve spaces as the contract required. As such, the parking spaces have “been returned” to Plaintiff. Plaintiff produced no evidence that it is reserving spaces as outlined in the PLA. To the extent Plaintiff is providing spaces to the public as required by Town regulations, it cannot argue that the Town is getting the benefits of the PLA. Plaintiff has not substantially performed under the contract.

43. Paragraphs 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, and 89 incorrectly rely on the analysis provided in Kiriakides v. United Artists Commc’ns, Inc., 312 S.C. 271, 275-76, 440 S.E.2d 364, 366-67 (1994), for the proposition that its failure to provide 276 parking spaces is not a material breach of the Parking License Agreement. Kiriakides is readily distinguishable from the present action and even if applied, demonstrates Plaintiff

materially breached the PLA. In Kiriakides the court was interpreting the State's ejectment statute, S.C. Code Section 27-37-10, in the context of a commercial lease whereby the landlord sought to evict a tenant for a very minor breach of the lease. Kiriakides, 312 S.C. at 274-275, 440 S.E.2d at 365-66. In contrast, the present action involves a licensing agreement where neither the State ejectment statute nor eviction of a leasehold tenant are involved.

Also, unlike the present situation, the court in Kiriakides was concerned that the landlord's interpretation of the ejectment statute "would lead to the absurd result that leases could be terminated for immaterial and trivial breaches." Kiriakides, 312 S.C. at 275, 440 S.E.2d at 366.

Applying the factors to this case: (a) The Town will be deprived of 15% of the parking spaces of which it financially bargained for under the Agreement; (b) the Town cannot be compensated adequately damages for the 42 lost spaces. These spaces are lost for the entirety of the 30 Year License Term and there is nothing in the PLA that permits the Town to seek a reduction in rent for fewer spaces; (c) although Plaintiff would suffer a forfeiture of the Town's rent payments, Plaintiff had the opportunity to terminate the PLA, but rather chose to proceed with constructing a Project that did not comply with the PLA and continue with the Project at its own peril; (d) it is impossible for Plaintiff to provide the lost spaces and cure the breach at this point; (e) Whether Kiriakides or general contract principles apply, Plaintiff's choice to provide only 85% of the required parking spaces is a material breach of the PLA.

44. Paragraph 81 incorrectly identifies the concept of "adequacy" to inappropriately alter the written, material terms in the Agreement and, inexplicably, attributes more significance to this judicially manufactured term than to an unambiguously stated material term. The PLA contained nothing to indicate Plaintiff could comply with the agreement by providing an "adequate" number of parking spaces.
45. Paragraph 87 incorrectly states facts that are inconsistent with the testimony offered by the plaintiff's own architect who presented the option, Mr. Betsch. Mr. Betsch testified that the inclusion of a 3rd level would not have taken away office space. Plaintiff may not have been obligated to provide a third level, but they were obligated to provide the number of spaces promised in the Agreement regardless of the impact on office space square footage or views of the water, which was not a part of the Agreement.
46. Paragraphs 90-93 incorrectly state the facts in that the Town did not prevent Plaintiff from performing under the Agreement, but rather Plaintiff was unable to fully perform because of its own mistakes, unreasonable assumptions, and desire for additional office space. Plaintiff's first mistake was commissioning the initial conceptual drawings without

any analysis or consideration of the Town's zoning regulations, including setbacks. In fact, the sketch attached to the PLA provides no indication of what setbacks, if any, applied to the Garage. The renderings were drawn with "zero lot lines", meaning that the conceptual sketches assumed zero setbacks and drawn to the property lines. This first misstep was pivotal because it was these sketches that Plaintiff used to negotiate the terms of the PLA, which promised 276 parking spaces.

The evidence revealed that rather than having zero lot lines on the adjoining streets, Coleman Boulevard had a 20-30' build-to-line, Mill Street had a 20' setback, and Church Street had a 20' setback. These mistaken assumptions by Plaintiff regarding the setbacks caused it to vastly overestimate the foot print of the building and the number of parking spaces it could provide when negotiating the Agreement with the Town.

47. Paragraph 92 mischaracterizes the terms of the Agreement, because while Section 2.06 governs excuse of performance, Sections 2.01(a) and 2.03 specifically say the project is subject to the zoning laws and Town approvals.
48. Paragraphs 94, 95, 96, 97, 98, and 99 state errors of law, because the Court incorrectly determined the number of parking spaces was immaterial, despite the express and explicit reference to the number and it being commensurate with the amount to be paid. Where a party fails to comply with an express condition of a contract, that party has no right to enforce the contract. Ahrens v. McDaniel, 287 S.C. 63, 66, 336 S.E.2d 505, 507 (Ct. App. 1985). "A condition precedent to a contract is 'any fact, other than mere lapse of time, which, unless excused, must exist or occur before a duty of immediate performance by the promisor can arise.'" M&M Group, Inc. v. Holmes, 379 S.C. 468, 666 S.E.2d 262, 266 (Ct. App. 2008) (citations omitted). "The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." Id.

M&M Group Inc., involved a contract where a purchaser's obligation to purchase the property involved was contingent upon purchaser's ability to secure commercial financing. Id. at 266-267. In affirming the grant of summary judgment on the plaintiff's claims, the court held that the parties' "use of the language 'is contingent upon' is unequivocal and patently indicates the parties' respective obligations to buy and sell the business are contingent on [defendant's] ability to secure financing. No other meaning could be deduced from such clear and commonly used language." Id.

In the present case, pursuant to the Agreement's express language, both Plaintiff's obligation to license spaces to the Town and the Town's obligation to pay rent under the PLA were contingent upon and subject to Plaintiff's ability to build a parking garage with

276 spaces in accordance with the Town's zoning laws and necessary approvals. Under the PLA, Plaintiff granted "an exclusive License over the Premises to [the Town] and [the Town] accepts same, subject only to the terms and conditions herein contained, and all applicable liens, encumbrances, easements, restrictions, zoning laws, and governmental or other regulations affecting the Property." See PLA, ¶ 2.01(a).

Further, Section 2.03 titled Licensor's Contingency provides:

Licensor's obligations under the [PLA], including but not limited to the obligation to construct the Project, are contingent upon all necessary approvals for construction being issued by the appropriate Town of Mount Pleasant department or entity. Licensor, in its sole and absolute discretion, may elect to terminate this License Agreement at any time prior to the earlier of (i) twenty-four (24) months from the Effective Date, or (ii) Licensor's commencement of construction of the Parking Garage." Id.

Like the contract in M&M Group, Inc., the Agreement specifically contemplated Plaintiff's ability to construct the Garage in compliance with the Town's zoning laws and required approvals as express conditions precedent to parties' obligations thereunder.

Because Plaintiff failed to construct the Garage with 276 spaces in compliance with the Town's zoning laws and regulations, neither Plaintiff's obligation to license the spaces nor the Town's obligation to pay rent arose. The intent of the parties to treat the construction of the Garage as a condition precedent to the licensing of parking is further demonstrated by the fact that the same section of the PLA that created this condition permitted Plaintiff to unilaterally terminate the agreement. Plaintiff had two years to decide whether it wanted to construct the Garage and, if not, could freely terminate the PLA with no consequences. No Garage, then no Parking License Agreement.

Plaintiff argues that by providing only 234 of the 276 promised parking spaces it has substantially performed under the PLA. "[T]he doctrine of substantial performance does not apply to express conditions. Ahrens, 287 S.C. at 66-67, 336 S.E.2d at 507 (citation omitted); see also McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571 (2009) ("If a contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to perform arise."). Thus, any evidence to show they substantially performed the contract is immaterial. Id. If substantial performance does not entitle a party to recovery on the contract, a judge is not required to hear an argument on the issue of substantial performance. Ahrens, 287 S.C. 63, 67, 336 S.E.2d 505, 508.

The doctrine of substantial performance does not apply in this instance because Plaintiff failed to fulfill the express condition precedent of constructing the Garage with 276 parking spaces in accordance with the Town's laws.

49. Paragraph 100 is an error of law. If, in fact, the PLA only required the number of parking spaces to be "substantially similar" to 276, then the PLA did not set out this material, essential term which the court inexplicably uses to modify an unambiguous material term. It is therefore, not enforceable. For a contract to be binding, material terms cannot be left for future agreements. Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 762 S.E.2d at 700 (citing Aperm of S.C. v. Roof, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct.App.1986)). Material terms must be set out with reasonable certainty and the absence of material terms renders the agreement unenforceable. Rose Elec., Inc. v. Cooler Erectors of Atl., Inc., 418 S.C. 424, 429, 794 S.E.2d 382, 385 (Ct. App. 2016).

As demonstrated during trial, the number of parking spaces was a material term to the Town, as it was committing tax dollars to a stated parking need, and was material to defining the scope of Plaintiff's obligation to perform under the PLA. Tr. pp. 496:14-497:17. Plaintiff's interpretation that its only obligation was to provide a "substantially similar" number of parking spaces is a vague promise that does not define this material term with reasonable certainty and renders the PLA impossible to understand and administer. Such indefiniteness in this material term renders the PLA unenforceable. Plaintiff is unable to say with any certainty how many spaces it was required to provide.

50. Paragraphs 101, 102, 103, and 104 as they relate to damages are in error, as the Agreement contained no Liquidated Damages provision. The touchstone question in determining whether a sum stipulated in a contract is a liquidated damage or an unenforceable penalty is whether the amount is "reasonably intended by the parties as the predetermined measure of compensation for actual damages *that might be sustained* by reason of nonperformance...." ERIE Ins. Co. v. Winter Const. Co., 393 S.C. 455, 462, 713 S.E.2d 318, 322 (Ct. App. 2011)(citing Tate v. Master, 231 S.C. 429, 441, 99 S.E.2d at 46 (1957) (emphasis added); see also Restatement (Second) of Contracts § 356 (1981).

The language used by the parties in this Agreement is conclusive of the question of whether the stipulation is for liquidated damages or for a penalty. Id. (citing Ould v. Spartanburg Realty Co., 94 S.C. 184, 77 S.E. 866 (1913)). It is clear within the four corners of this contract, that liquidated damages were never a consideration for the Town. The Court's attempt to surmise the Town's intent using parole evidence from negotiations is inappropriate. However, if this Court determines that the Town's redlines during negotiations are determinative of its intent, it should be noted that Town representatives also removed Plaintiff's ability to accelerate rent payments in a breach,

which directly contradicts the supposition that liquidated damages were contemplated. Removal of the acceleration clause is certainly inconsistent with Plaintiff's attempt to recover rent payments for the entire 15 years when Plaintiff terminated the agreement prior to a Certificate of Occupancy being issued.

The Town filed a motion to compel on October 22, 2019, seeking the compel financial documentation of the operating profit for the garage. The Court denied this motion by order dated January 22, 2020 denying the same holding that the survival clause did not provide for the survival of any rights of the Town, including the right to calculate the amount of rent that may be due by eliminating Section 1.07(b) and subjects the Town to an unenforceable penalty. The Town filed a Motion for Reconsideration on January 29, 2020, which was denied by the Court without the benefit of oral argument, in error, prior to the start of trial.

Respectfully submitted,

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Charleston, South Carolina

July 20, 2020

Attorneys for the Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 20th day of July, 2020, true copies of the foregoing **DEFENDANT'S MOTIONS FOR NEW TRIAL AND TO RECONSIDER, ALTER OR AMEND ORDER** has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto to.

E. Brandon Gaskins
MOORE & VAN ALLEN, PLLC
PO Box 22828

Charleston, SC 29413-2828

S/Julia P. Copeland
Hinchey, Murray & Pagliarini

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Civil Action No.: 2017-CP-10-05493
	)	
Shem Creek Development Group, LLC,	)	
	)	PLAINTIFF'S RESPONSE IN
Plaintiff,	)	OPPOSITION TO DEFENDANT'S
	)	MOTIONS FOR NEW TRIAL AND TO
v.	)	RECONSIDER, ALTER OR AMEND
	)	ORDER
The Town of Mount Pleasant, South Carolina,	)	
	)	
Defendant.	)	

Plaintiff Shem Creek Development Group, LLC ("SCDG") files this response in opposition to Defendant The Town of Mount Pleasant, South Carolina's (the "Town") Motions for New Trial and to Reconsider, Alter or Amend Order in favor of Plaintiff filed by this Court on July 13, 2020 and states as follows:

STANDARD

The decision to grant or deny a motion under Rule 59(e), SCRCP, lies within the sound discretion of the trial court. *Pollard v. Cty. of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994). "An abuse of discretion arises where the judge issuing the order was controlled by error of law or where the order is based on factual conclusions that are without evidentiary support." *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006).

RESPONSES TO OBJECTIONS

1. Paragraph 7 incorrectly states that the projected lack of profitability of Plaintiff's project was largely driven by the lack of weekday parking demand. This statement is irrelevant as most ventures are unprofitable in the initial years as investment is recovered. The correct analysis is the difference between the loss expected and the loss experienced as a result of Town conduct. In addition, the arbitrary allocation of profit margin will influence comparative profitability.

RESPONSE: Paragraph 7 correctly reflects the analysis of the Desman study and the testimony of Mr. Flesch and Mr. Small. (See Tr. 339:8-15; 352:21-353:2.) The information in Paragraph 7 establishes the factual background regarding the evolution of the project and

demonstrates why the office component of the project was necessary to make the project economically feasible. It has nothing to do with the damages analysis included in the order. Thus, the information is relevant and supported by the evidence.

2. Paragraphs 8 and 9 make reference to a design or scheme prepared by or on behalf of the Plaintiff. The defendant objects to the inaccurate characterization of this design or scheme as something which “did not necessarily reflect compliance with applicable zoning requirement.” The trial evidence and testimony demonstrated that the concept was drawn to zero lot lines on all sides of the garage, not just on Mill and Church Streets, making it, without rational dispute completely inconsistent with and in stark violation of Town requirements regarding setbacks and parking space width. The plan used by Plaintiff to negotiate the Parking License Agreement was, beyond any factual dispute, a gross overestimation of potential spaces because it failed to comply with the applicable setback requirements or parking space width requirements.

RESPONSE: The Town’s objection is invalid because it ignores the obvious fact that a “conceptual design” is conceptual by its very nature and is not intended to depict absolute compliance with applicable zoning requirements. The information in Paragraphs 8-9 correctly states the relevant foundational facts that led to the dispute and is appropriately included in the order.

3. Paragraph 10 claims that Mr. Small and Mr. Flesch presented Mr. Betsch’s conceptual plans to the town in 2013. This is not supported by the evidence or testimony as Mr. DeMoura and all staff members testified that they never saw the parking layout concept, only the pictorial exhibit to the PLA. Additionally, there was no evidence that Mr. Flesch presented these plans to the Town. Mr. Small testified that he presented the conceptual plans to the Town, but this was not corroborated by any other witness. Further, the Order incorrectly represents that David Pagliarini, the Town’s attorney, drafted and/or provided revisions to the Agreement.

RESPONSE: Contrary to the Town’s argument, Paragraph 10 correctly states the facts about who received the parking layout concept, and it is supported by the exhibits and trial testimony. (See Pl.’s Ex. 7, § 3.04; Tr. 343:1-346:12, 371:24-372:12; 435:14-438:13.) Furthermore, the fact that Mr. Pagliarini was involved in the drafting and revisions to the Agreement are confirmed by § 8.12 of the Agreement, Plaintiff’s Exhibit 39, and the trial testimony (Tr. 119:17-21, 123:1-9, 214:20-24, 238:5-239:7, 348:1-8.)

4. Paragraph 10 incorrectly states the Agreement was the creation of a public-private partnership, in contradiction to the actual language of the Agreement and the testimony of Mr. DeMoura. This contractual recitation is unambiguous and must not be altered by parole evidence.

RESPONSE: As confirmed by multiple trial exhibits and the testimony of multiple witnesses, including Mr. DeMoura, the garage project was a public-private partnership. (See Pl.’s Ex. 37-38; Tr. 104:10-15, 400:3-11, 401:20-405:7, 621:6-10.) Paragraph 10 is, thus, correct.

5. Paragraph 11 incorrectly characterizes the licensing Agreement be interpreted as a construction agreement, when it was not.

RESPONSE: Paragraph 11 does not characterize the licensing Agreement as a construction agreement. Rather, it merely states that SCDG – as opposed to the Town – was responsible for constructing the project. Therefore, the Town’s objection to Paragraph 11 has no merit.

6. Paragraph 12 incorrectly states that rent reduction is only a “possibility” if the garage is profitable, when rent reduction was a required and material term without the presence of which the agreement would not have been signed by the Town. The court has, in error, rewritten a material, unambiguous term of the contract and applied its misstatement to negate entirely the required rent reduction.

RESPONSE: Paragraph 12 correctly states that the parking license agreement made rent reduction a possibility. Because the rent was only to be reduced if the garage was profitable and there was no guarantee of profitability, rent reduction was only a possibility.

7. Paragraph 15 states “... the Town conducted no analysis to determine the number of spaces needed to meet parking demand in the area, and the Town never insisted that 276 total spaces and 132 public spaces be a minimum requirement.” This statement of fact is irrelevant in part and clearly erroneous in part. The contract clearly and unambiguously recites that 276 spaces were needed and that was a material inducement to the Town’s execution of the executed PLA. The Town was never required to conduct any supportive analysis to require or expect Plaintiff to fulfill its obligations under the PLA. The court has, again, in error rewritten the contract to, de facto, delete a material term (provision of 276 spaces) and substitute its flawed determination that 276 parking spaces was meaningless.

RESPONSE: Contrary to the Town’s objection, the Court did not rewrite the parking license agreement. The fact that the Town neither conducted any analysis to determine the number of spaces needed to meet parking demand in the area nor insisted that 276 total spaces and 132 public spaces be a minimum requirement is directly relevant to the materiality analysis in the order. Therefore, Paragraph 15 is accurate and relevant.

8. Paragraph 16 asserts that “Mr. Small informed the Town that the changes were needed to ensure that the development would be economically feasible and maximize the number of spaces provided in the garage component of the project.” This statement is taken out of context, irrelevant and misleading as it fails to include the essential testimonial modification by Mr. Small that he would work with the Town staff to “promote pedestrian activity zones at the garage site.” Additionally, none of the referenced exhibits either refer to or use the phrase “maximize the number of spaces.”

RESPONSE: Paragraph 16 accurately reflects Mr. Small and Ms. Farrell’s testimony and the relevant trial exhibits. (See Tr. 353:22-354:18, 621:11-624:5.)

9. Paragraph 17 incorrectly states the amendments proposed and adopted in Ordinance [No. 13077] were solely meant for the economic benefit of Mr. Small. Rather, Ordinance No.

13077 was a comprehensive Ordinance which included changes within the overlay district in addition to those specifically requested by the plaintiff.

RESPONSE: In its objection to Paragraph 17, the Town mischaracterizes the finding and attempts to put words in the Court’s mouth that do not exist. Nowhere in that paragraph does the Court state that the ordinance in question was “solely” meant for the economic benefit of Mr. Small. Thus, this objection has no merit.

10. Paragraph 20 misstates the significance of the survival clause, inappropriately infers the parties’ intent when negotiating the terms of the Agreement, and inappropriately rewrites an unambiguous provision of the Agreement. The survival clause does not extinguish or prohibit the bargained for right to reduced rent for the Town. Further, and as argued in prior motions and at trial, Defendant disputes that the PLA default clause contains a liquidated damages provision. Where the sum stipulated in an agreement is so large that it is plainly disproportionate to any probable damage resulting from a breach of contract, the stipulation would be held as a penalty and not for liquidated damages, regardless of its terminology. Tate v. Master, 231 S.C. 429 at 441, 99 S.E.2d at 46 (1957) (citing 15 Am. Jur. Damages, Sec. 249, p. 681.). If the provision be for a penalty, recovery is measured not by the sum stipulated, but by the amount of *actual damage* proven to have been sustained as the result of the breach. Id. (citing 25 C.J.S. Damages § 116b, p. 704) (emphasis added). Awarding Plaintiff the full amount of the PLA when Plaintiff terminated the Agreement prior to being entitled to the first rent payment is an unenforceable penalty and an abuse of discretion.

RESPONSE: The Town mischaracterizes the Court’s finding in Paragraph 20, which merely states verbatim what § 8.17 provides. Moreover, the Town cites no language that would support an interpretation that any of the Town’s rights survive the termination of the parking license agreement. Instead, the Town in conclusory fashion states that the Court is “inappropriately rewrite[ing]” the contract, and then argues that the damages provision is an unenforceable penalty, which is an argument that has been repeatedly raised by the Town and rejected by the Court.

11. Paragraph 22 fails to acknowledge an important fact that SMHa immediately, upon engagement by plaintiff, determined that the Betsch concept did not comply with Town regulations and that the Plaintiff could not build 276 spaces. The evidence demonstrates that this fact was presented to the Plaintiff but was never communicated to the Town, despite initial awareness by Plaintiff, prior to the December zoning amendments [Ordinance No. 13077] being enacted.

RESPONSE: The Town’s objection to Paragraph 22 of the order lacks evidentiary support. Notably, the Town does not cite to the transcript or any exhibit to support its characterization of the evidence. In fact, no testimony or evidence supports its assertion. Jeff Johnston, the project architect, discussed during his testimony the phases of the design process, and based on his explanation of when he started working, it would have been impossible for SCDG to know this purported fact prior to December of 2013 that the site could not yield 276 total and 132 public spaces, especially when the Town did not enact the required height and first floor zoning amendments until December of 2013. (Tr. 720:10-724:7.) Furthermore, the initial plan was not finalized for presentation to the Town until

April of 2014, and that plan contained more than 132 public spaces and only ten short of 276 total spaces. (Pl.'s Ex. 50; Tr. 735:19-736:24.) Mr. Johnston testified that the site could have yielded approximately 270 total spaces (and possibly 276 total spaces) if the Town had approved reasonable measures to increase spaces. (Tr. 758:2-15.) Thus, it is outlandish to suggest that SCDG knew from the beginning that the project could not produce all spaces planned for the garage and had withheld information from the Town. Instead, all relevant evidence demonstrates that SCDG consistently worked in good faith to produce as many spaces as possible.

12. Paragraph 27 incorrectly infers that plaintiff had earlier submitted a site-specific development plan and obtained a vested right to five-foot setbacks. Plaintiff did not submit a proposed plan until after the April 2014 zoning amendments and did not obtain vested rights until months later. Plaintiff neither argues nor offered evidence that it had vested rights which would preclude the application of Ordinance 14022 to the Shem Creek Garage property. S.C. Code Sections 6-29-1510, et seq., and Town Ordinance Sections 156.049, et seq., outline the State and Town requirements for obtaining vested rights, none of which Plaintiff achieved prior to the enactment of Ordinance 14022. Town Staff testified that Plaintiff neither submitted nor received approval of a site-specific development plan, as required by State and Town law, in order to achieve vested rights for the Garage and be protected from the application of Ordinance 14022 to the Project. Tr. pp. 704:22-705:4.

Further, The Court must reject the erroneous position that a municipality must grant vested rights to a developer solely because they are parties to an Agreement. The PLA did not preclude the Town from enacting lawful zoning ordinances that applied to the subject property and if Plaintiff wanted the benefit of the zoning regulations in effect at the time the parties executed the PLA, it needed to fulfill State law and Town of Mount Pleasants requirements for obtaining vested rights.

RESPONSE: The Town's objection to Paragraph 27 is confusing because Paragraph 27 neither infers a previously submitted plan nor discusses vested rights. Therefore, there is no basis for the Town's objections to this paragraph.

13. Paragraph 28 incorrectly states that the appropriate width of garage parking spaces was 8 1/2' when clearly stated, undisputed trial testimony proved beyond a doubt that the only existing TOMP regulation pertaining to parking space width required 9' spaces.

RESPONSE: Paragraph 28 does not state that the "appropriate width of garage parking spaces was 8 1/2'" as the Town claims. Instead, it provides factual background of why Mr. Johnson's initial design included 8 1/2' wide spaces. This information is relevant because it shows that the use of 8 1/2' wide spaces is customary and that it would have been reasonable for the Town to accept 8 1/2' wide spaces if maximizing the number of spaces in the garage was as important as it would have the Court believe.

14. Paragraph 29 incorrectly presumes the Town failed in its State-mandated notice requirements, simply because plaintiff, through its own inadvertence, was unaware of the activities handled in public meetings with published agendas. In effect the decision of this court has

erroneously created a new class of citizens vested with rights superior to those granted to all other citizens. Town provided adequate notice of the public meetings. Although Plaintiff and SMHa may not have actually known, it was undisputed that the Town provided the statutorily required public notice and opportunity to comment/ask questions (see Paragraph 30 of the Court's Order) for all of the meetings relative to these changes and neither Plaintiff nor its representatives participated or offered input.

Additionally, the undisputed evidence was that that change to the setback on Mill Street only reduced the number of parking spaces by 1, hardly imperiling the fair value of the project. The December Amendments for the garage created a requirement equally applicable to all garages in the zoning district in question provide activity as outlined in those amendments.

RESPONSE: Paragraph 29 does not incorrectly presume that the Town “failed in its State-mandated notice requirements.” In fact, in Paragraph 30, the Court expressly states that “the Town followed the lawful process for providing notice of zoning amendments.” Rather, Paragraph 29 merely states that SCDG and SMHa were not aware of the zoning amendments. Also, by focusing solely on the Mill Street setback change’s impact on parking spaces, the Town ignores the more substantial impact on parking spaces caused by the Church Street setback changes and the significant monetary injury resulting from the Mill Street setback change.

15. Paragraph 29 also erroneously mischaracterizes the actual testimony of Planning director Christine Farrell by incorrectly manufacturing the finding that the footnote requiring a build-to-line was changed “specifically” because of project. Ms. Farrell testified clearly and directly that the amendment eliminating the 5’ setback possibility was comprehensive and affected all streets throughout the UC-OD and was enacted in response to public concerns pertaining to other developments, not the plaintiff’s project.

RESPONSE: Contrary to the Town’s claim, the Court did not “manufacture” its finding in Paragraph 29 because it is directly supported by Ms. Farrell’s testimony. (See Tr. 638:9-643:20.)

16. Paragraph 30 is clearly erroneous in that it asserts, without testimonial support beyond mere supposition that the zoning amendments were intended to only effect the project site as opposed to the entire UC-OD. The testimony clearly showed the amendments were intended for an entire zoning district, not just the garage site.

RESPONSE: Paragraph 30 is supported by Ms. Farrell’s testimony and is not clearly erroneous. (See Tr. 638:9-643:20.)

17. Paragraph 32 incorrectly states the facts: Mr. Small had lawful public notice of the amendments and should have made himself aware and commented as all other citizens have the opportunity to do, particularly when they have a substantial project within the boundaries of the zoning district being discussed.

RESPONSE: Paragraph 32 correctly states the facts, as demonstrated by his testimony and the testimony of Ms. Farrell. (See Tr. 647:15-649:20.)

18. Paragraph 33 is incorrect in that it is uncontroverted that this was the first time a plan was presented to the Town - AFTER the April zoning amendments. There is also no dispute that Plaintiff took no action to gain vested rights and protect it from the ordinance. SMHa should have known that the Town's parking space width was 9' at all times relevant to this and any other project as this was the requirement. Rather, SMHa incorrectly designed the project with 8 ½ feet spaces with no consideration of the Town's existing ordinance and the court's order erroneously rewrote the ordinance to permit 8 1/2' spaces for this entity only thus creating an Equal Protection violation any time the Town enforced this Ordinance as actually written.

RESPONSE: The Town's objection to Paragraph 33 is confusing because that paragraph neither expressly nor implicitly states that a previous plan had been submitted to the Town. Moreover, there is no discussion of vested rights in Paragraph 33. Nor does Paragraph 33 rewrite the parking license agreement as the Town claims. Paragraph 33 is nothing more than an accurate finding of facts about what was presented to the Town by SMHa in the April 11, 2014 meeting.

19. Paragraph 34 incorrectly states that requests for accommodations from the plaintiff were uniformly rejected when the evidence at trial demonstrated the Town ruled on the Marine District issue, which permitted Plaintiff to keep the designed width of the building and caused the Town to be subjected to a lawsuit by Save Shem Creek. Further, every Town witness testified that not a single decision by Town staff was made with the intent to "kill the project."

RESPONSE: As explained in Paragraph 50 of the order and supported by Mr. Prause's testimony, the Town's ruling on the marine zoning district was mandated by law and was not discretionary. (See Tr. 449:18-453:25, 614:1-17.)

20. Paragraph 35 erroneously omits the fact that the appropriate course of action in response to a decision of the Zoning Administrator or any member of staff of which you disagree, is to file an appeal to the Board of Zoning Appeals. Plaintiff admits and the Order acknowledges that all of the Town's decisions were lawful decisions. If Plaintiff disagreed it was duty bound, as all plaintiffs are, to exhaust its remedies and should have appealed the decision. Therefore, Plaintiff should be precluded from raising and the court from considering this argument as evidence of bad faith. Further, the testimony of the staff members who made those decisions does not support the position that they were acting in bad faith with the intent to kill the project.

21. Paragraph 37 incorrectly omits the fact that the appropriate course of action in response to a decision of the Zoning Administrator or any member of staff of which you disagree, is to file an appeal to the Board of Zoning Appeals. Plaintiff did not exhaust this administrative remedy. Therefore, Plaintiff should be precluded from raising and the court from considering this argument as evidence of bad faith. Further, the testimony of the staff members who made those decisions does not support the position that they were acting in bad faith with the intent to kill the project.

22. Paragraph 38 incorrectly omits the fact that the appropriate course of action in response to a decision of the Zoning Administrator or any member of staff of which you disagree, is to follow through with an appeal to the Board of Zoning Appeals. Plaintiff did not exhaust this administrative remedy. Therefore, Plaintiff should be precluded from raising and the court from considering this argument as evidence of bad faith. Further, the testimony of the staff members who made those decisions does not support the position that they were acting in bad faith with the intent to kill the project.

RESPONSE: The Town's objections to Paragraphs 35, 37, and 38 have no merit because the Court properly rejected the Town's exhaustion of administrative remedies defense in footnote 4 of the order. The Court's ruling is also supported by the arguments raised in SCDG's Supplemental Memorandum Regarding Exhaustion of Administrative Remedies, which was submitted to the Court on April 7, 2020, and incorporated by reference in accordance with Rule 10(b), SCRCP.

23. Paragraph 39 mischaracterize the facts and the language of the PLA. The proposed modified design did not comply with Sections 1.05 and 1.06 of the PLA that specifically did not permit the inclusion of surface parking in the number of Garage Parking Spaces. The testimony also supported the fact that this option required DOT approval. Plaintiff provided no evidence that it could or had obtained DOT approval.

RESPONSE: The Town's claim that the parking license agreement did not specifically permit the inclusion of surface parking in the number of spaces is belied by the parking license agreement and the testimony at trial. Section 1.06 and 2.01(b) define the "Premises" as "only the [132] Public Spaces." Although Section 2.01(b) states that the Premises does not include surface parking areas, the parking license agreement does not prohibit on-street surface parking to be included in the reserved spaces. (See Pl.'s Ex. 7 §§ 1.06 and 2.01(b); Tr. 309:23-310:19, 324:20-327:24, 528:4-529:19.) Also, the Town's argument that DOT approval was required ignores the fact that DOT approval could not have been sought because the Town rejected SCDG's plan for on-street parking.

24. Paragraph 40 fails to note that the Town approved this shift of the property, was sued by Save Shem Creek for doing so, and successfully defended the lawsuit.

RESPONSE: The Town's objection to the purported omission in Paragraph 40 rings hollow because this fact is addressed in Paragraph 50 of the order.

25. Paragraph 43 incorrectly states the facts in that the Town offered testimony from multiple witnesses that the issue with restaurant parking was not that it violated the PLA. Rather, the issue was that the garage was inappropriately displacing existing parking spaces and the Town, from a zoning compliance perspective, had to make sure those spaces were replaced.

RESPONSE: Paragraph 43 includes no incorrect statements of fact. In fact, the Town's objection to Paragraph 43 confirms that restaurant parking was not relevant to whether SCDG's approved design complied with the requirements of the parking license agreement. The fact that the Town sought to address this issue in its findings of purported

non-compliance by SCDG further demonstrates its bad faith under the parking license agreement.

26. Paragraph 46 relies specifically on evidence erroneously, inappropriately admitted throughout this trial. As it did in a pre-trial Motion in Limine and during trial, Defendant objects to the admission of unauthenticated, unverified Youtube videos of Town Council meeting in violation of the South Carolina Rules of Evidence, the best evidence rule, and South Carolina precedent, as it was offered to dispute the official record of the meeting. Throughout the playing of the video at trial, it was often difficult to understand what any particular person was saying making attribution impossible guesswork and misunderstanding even one word of a video can change the entire import or context of the statements at issue. The certified minutes for Town Council meetings are the only appropriate and competent evidence of the proceedings and actions of Town Council. This paragraph improperly has the effect of attributing statements by one Town Council member to all of Town Council.

RESPONSE: The Court has previously rejected the basis of the Town's objections to Paragraph 46, and the Town has failed to proffer any persuasive reason for the Court to reverse itself now. In fact, in direct contradiction to the Town's argument here, Mr. DeMoura testified that that he had no reason to contest the accuracy of the YouTube videos. (See Tr. 461:2-5.) And the Town should not be permitted to question the authenticity of the videos when it referred SCDG to the Town's YouTube channel in response to SCDG's discovery requests for videos of the relevant council meetings. (See Tr. 460:22-461:1.)¹

27. Paragraph 47 is irrelevant because the PLA did not require the Town to substantiate or provide an analysis of the number of spaces it required. The number of spaces, 276, was a required, material term of the PLA upon which the Town relied in calculating the sum to be paid and agreed to by the Plaintiff as a result of protracted negotiation.

RESPONSE: As stated above, the fact that the Town conducted no analysis to determine the number of spaces needed to meet parking demand in the area is directly relevant to the materiality analysis in Paragraphs 81-83 of the order. Therefore, Paragraph 47 is relevant.

28. Paragraph 50 mischaracterizes the testimony of Mr. Prause. Mr. Prause's job is to interpret the language of the ordinance, and, as with each of the decisions addressed, including the decision regarding the 30' Marine District line, Mr. Prause must exercise reasonable discretion in his interpretation.

RESPONSE: As explained in Paragraph 50 of the order and supported by Mr. Prause's testimony, the Town's ruling on the marine zoning district was mandated by law and was not discretionary. (See Tr. 449:18-453:25, 614:1-17.)

¹ In the interest of judicial economy, SCDG has not attached the relevant discovery responses to verify this statement. However, if the Court wishes to review them, SCDG will gladly submit them.

29. Paragraphs 51 and 52 acknowledge that Plaintiff terminated the PLA prior to the Rental Commencement Date, thus precluding its rights stated in the Agreement, including entitlement to rent or liquidated damages.

RESPONSE: Paragraphs 51 and 52 are findings of fact and correctly state the facts as supported by the evidence. The Court's damages analysis in Paragraphs 102-103 correctly applies the survival clause of the parking license agreement and establishes SCDG's right to future rent under applicable law.

30. Paragraph 52 is irrelevant because it was the successor and not Plaintiff who completed the Garage. Plaintiff terminated the PLA before it completed the assignment to the successor and therefore the Town was not contractually obliged to pay rent to the successor as the assignment needed to be executed "at any time during the License Term."

RESPONSE: Paragraph 52 is a finding of fact and is relevant to provide foundational facts regarding the dispute.

31. Paragraph 53 is irrelevant because the PLA mandated 276 spaces. Furthermore, when Plaintiff terminated the PLA, the Town lost the benefit of the promise that Plaintiff would reserve parking spaces as required. Plaintiff presented no evidence that it is reserving the number of parking spaces as required by the PLA.

RESPONSE: Contrary to the Town's claim, Paragraph 53 is directly relevant to the Court's materiality analysis in Paragraphs 81-83 because it establishes facts necessary to determine whether and to what extent the Town has been deprived of any benefits under the parking license agreement.

32. Paragraph 60 incorrectly creates an intent of the parties beyond the four corners of the Agreement. Defendant argued that "[O]ne who seeks to recover damages for breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready and willing to perform it." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 326 S.C. 426, 483 S.E.2d 789 (Ct. App. 1997) (citation omitted). "When called upon to construe contracts, courts cannot rule on their wisdom or substitute their interpretation for the agreement clearly entered into between the parties." Texcon, Inc. v. Anderson Aviation, Inc., 284 S.C. 307, 326 S.E.2d 168 (Ct. App. 1985). Plaintiff's breach of contract claim should fail because Plaintiff first breached a material term of the PLA by failing to provide 276 parking spaces. It is undisputed that Plaintiff failed to provide the 276 spaces required by the PLA. The requirement of 276 parking spaces was a key, material term of the PLA as it provided the scope of Plaintiff's obligation under the PLA. Stevens & Wilkinson, 409 S.C. 568, 762 S.E.2d 696,700 (2014). Plaintiff admitted the PLA expressed a specific number of spaces. Tr. pp. 262:1-3; 368:14:22. Plaintiff readily acknowledges that the Garage as constructed provides only 234 parking spaces, rather than the 276. Tr. pp. 270:2-4; 392:3. That is 42 spaces fewer or only 84.8% of the parking spaces Plaintiff promised in the PLA.

RESPONSE: Paragraph 60 is merely a summary of the Court's conclusions of law, which are supported by the subsequent paragraphs in the order.

33. Paragraph 62 contradicts the actual language of Council's motion, which the verified minutes show was "to deny any new proposal that may be put forward or submitted by the developer/applicant pertaining to this contract." The inappropriate admission of unverified Youtube video clips of the meeting was not harmless error, but in fact, inappropriately influenced this Court's decision.

In reviewing decisions of municipal governments, "[m]unicipal records properly authenticated or verified are the only competent evidence of the proceedings of the transactions of governing bodies." Berkeley Elec. Coop., Inc. v. Town of Mount Pleasant, 308 S.C. 205, 208, 417 S.E.2d 579, 581 (1992). "Parole evidence may not be admitted to explain, enlarge, or contradict minutes which are complete and unambiguous on their face." Id.; Davis v. Orangeburg-Calhoun Law Enf. Comm., 344 S.C. 240, 248, 542 S.E.2d 755 (Ct. App. 2001) (citing). In the present action, the relevant minutes for Town Council's meetings are both extensive and complete in describing the public comments, as well as Town Council's discussions and votes pertaining to the Garage. Given there is no ambiguity in those minutes, The Court should not have allowed Plaintiff to introduce and rely upon any parole evidence for the purpose of challenging the motives or subjective intent of the individual Council members. The minutes provided by the Town, authenticated by staff, were unambiguous, and most importantly, verified. This Court, incorrectly allowed these videos, based on a representation by the Town Administrator, Eric DeMoura, that he had no reason to doubt they were accurate. Tr. 461:2-5.

RESPONSE: SCDG is confident that the Court, having presided over this case for more than two years and over trial for four days, was not inappropriately influenced by a relatively brief viewing of a YouTube video of a meeting, which the Town's primary witness confirmed was accurate.

34. Paragraph 65 commits an error of law in holding that the Town cannot exercise its legislative authority to amend its own zoning ordinances, if the potential ramifications may hinder a private landowner's ability to maximize its investment. Plaintiff neither argued nor offered evidence that it had vested rights which would preclude application of Ordinance 14022 to the garage site. S.C. Code Sections 6-29-1510, et seq., and Town Ordinance Sections 156.049, et seq., outline the State and Town requirements for obtaining vested rights, none of which Plaintiff achieved prior to the enactment of Ordinance 14022. Town Staff testified that Plaintiff neither submitted nor received approval of a site-specific development plan, as required by State and Town law, in order to achieve vested rights for the Garage and be protected from application of Ordinance 14022 to the Project. Tr. pp. 704:22-705:4. Further, Defendant argued the Court should reject the notion that a municipality should be required to grant vested rights to a developer solely because it was a party to a contract with the municipality. The PLA did not prevent the Town enacting lawful zoning ordinances or interpretations that applied to the garage site. If Plaintiff wanted the benefit of the zoning regulations in effect at the time the parties executed the PLA, it needed to satisfy State law and Town requirements for gaining vested rights.

RESPONSE: Although the Town complains of an error of law in Paragraph 65, it surprisingly cites no legal support for its argument. Instead, it relies on a red herring about SCDG's lack of vested rights in the project. Paragraph 65, however, does not address vested

rights in any manner. Rather, it deals with the implied covenant of good faith and fair dealing, which exists in every contract. *See Parker v. Byrd*, 309 S.C. 189, 194, 420 S.E.2d 850, 853 (1992) (“There exists in every contract an implied covenant of good faith and fair dealing.”). The Town has a duty to comply with the duty of good faith and fair dealing in every contract to which it is a party, regardless of the other contracting party’s vested rights. In making its novel argument, the Town attempts to limit the duty of good faith and fair dealing in a way that has no precedential or logical support. As a result, the Court should reject the Town’s argument.

35. Plaintiff and the Court’s Order acknowledge that all of the Town’s actions were lawful, yet somehow these “lawful” actions constitute a breach of the covenant of good faith and fair dealing. There is no South Carolina law to support such a bizarrely inconsistent legal assertion. Throughout trial Plaintiff utilized the definition of “Premises” in an attempt to suggest all it really needed to provide was 132 spaces. This mischaracterizes the PLA as a whole. The PLA is clear - Plaintiff was required to provide 276 parking spaces and the Town was paying rent for all of those spaces, not just the 132.

RESPONSE: What the Town characterizes as a “bizarrely inconsistent legal assertion” is nothing more than a fundamental principle of contract law, which is that it is not illegal to breach a contract. *See Taylor Steel, Inc. v. Keeton*, 417 F.3d 598, 608 (6th Cir. 2005) (“Breach of contract might give rise to a civil suit, but it is not illegal.”); *United States v. Blankenship*, 382 F.3d 1110, 1133 (11th Cir. 2004) (“It is not illegal for a party to breach a contract; a contract gives a party two equally viable options (perform or pay compensation), between which it is generally at liberty to choose.”); *Windsor Secur., Inc. v. Hartford Life Ins. Co.*, 986 F.2d 655, 664 (3rd Cir. 1993) (“Breach of contract is not ‘illegal’ either under common usage . . .”); *Benderson Dev. Co. v. United States Postal Serv.*, 998 F.2d 959, 962 (Fed. Cir. 1993) (“To breach a contract is not unlawful; the breach only begets a remedy in law or in equity.”). The implied covenant of good faith and fair dealing is “merely another term of the contract.” *Rotec Servs. v. Encompass Servs.* 359 S.C. 467, 472, 597 S.E.2d 881, 884 (Ct. App. 2004). In violating the implied covenant of good faith and fair dealing, the Town did not act unlawfully. Similarly, the Town did not have to commit an unlawful act to breach the implied covenant of good faith and fair dealing. This logic, though unassailable, somehow escapes the Town. Regardless, the Town’s failure to understand basic principles of contract law does not warrant reconsideration of the Court’s conclusion that the Town breached its duty of good faith and fair dealing in this case.

36. Paragraph 67 is an error of law, because the Court is inappropriately acting in an appellate capacity in finding the decisions of staff were arbitrary, capricious, and made in bad faith. Plaintiff should not have the benefit of this appellate review as they chose not to file an appeal with the Board of Zoning Appeals.

RESPONSE: In its objection to Paragraph 67, the Town concludes that the Court has committed an error of law but offers no legal support for its position. The Court clearly was not acting in appellate capacity in ruling that the Town violated its duty of good faith and fair dealing by failing to apply reasonable interpretations of the zoning code that would have fulfilled the purposes of the parking license agreement.

37. Paragraph 70 concedes that the Town's actions were lawful, but holds, without rational support, "the exercise of legitimate governmental authority does not immunize the Town from liability for a breach of contract, including for breach of the implied duty of good faith and fair dealing, if it exercises that authority to interfere with the purpose and performance of a contract. To hold otherwise would empower governmental entities to engage in bad faith to destroy or interfere with agreements to which they are parties at their convenience."

In order for the Court to reach a determination that Council's intent was to interfere with the purpose and performance of the contract, it must consider the intent and motivation of each Council member. This holding contradicts current South Carolina precedent, which holds motivation when acting in their legislative capacity simply is not a proper inquiry. See Greenville County v. Kenwood Enters., 353 S.C. 157, 174, 577 S.E.2d 428, 437 (2003) (citing Bear Enters. v. County of Greenville, 319 S.C. 137, 139, n.1, 459 S.E.2d 883, 885 (Ct. App. 1995) ("The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise.")).

RESPONSE: The Town's objection to Paragraph 70 has no merit. Contrary to the Town's argument, the Court did not make any determinations about the individual intent and motivation of each Council member. Instead, the Court makes clear that its conclusions apply to the Town as a whole based on the collective actions of the Town's staff and Council.

38. Paragraph 71 cites cases from other jurisdictions, which are not binding on this Court and readily distinguishable from the present case, for the proposition that "the implied duty of good faith and fair dealing applies equally to discretionary acts of government as it does to the acts of private parties." The first case cited by Plaintiff is Guidiville Rancheria of Cal. v. United States, 704 Fed. Appx. 655 (9th Cir. 2017). In Guidiville, the City of Richmond, California entered into a Land Disposition Agreement with a developer and the Guidiville Band of Pomo Indians for the development of a decommissioned naval base. Id. at 657. The plaintiff appellants alleged that the mayor for the City of Richmond breached the implied covenant of good faith and fair dealing by contacting the Bureau of Indian Affairs, Contra Costa County, and various public officials including the Governor of the State of California and United States Senator Dianne Feinstein to encourage them to deny, delay, or otherwise oppose the Tribe's quest to obtain the necessary federal and state approvals for gaming. Id. at 657-8. Plaintiffs alleged that as a result of the City's actions, the federal gaming approval process was delayed and the U.S. Dept. of Interior determined that the property was not eligible for gaming, both of which the City used as reasons to abandon the agreement. Id. at 658.

In the present case, trial testimony demonstrated the Town enacted Ordinance 14022 and made the zoning interpretations in question in good faith. There is no evidence that any public official(s) enacted Ordinance 14022 with the intent to thwart development of the Garage. Further and unlike Guidiville Rancheria, there is no evidence that any Town official interpreted the Town's zoning ordinances with the intent to stop the Garage.

The next case Plaintiff cites is Reserve at Woodstock, LLC v. City of Woodstock, 958 N.E.2d 1100 (Ill. 2011). In that case, the plaintiff developer submitted a plat to the City of

Woodstock, Illinois, to develop certain property pursuant to an annexation agreement. Id. at 1104. The City denied the plat and eventually rezoned and disconnected the property. Id. The Court found however, the City rezoned the property AFTER the developer filed a lawsuit to enforce the annexation agreement. Id. at 1113. The annexation agreement contained specific provisions as to when and how property could be rezoned and disconnected. Id. The court held the City's action with regard to rezoning and disconnecting the property after the property owner had filed suit to enforce its rights were inconsistent with the specific terms of the annexation agreement and a violation its duty of good faith and fair dealing. Id.

Unlike Reserve at Woodstock, neither the Town's enactment of Ordinance 14022 nor the interpretations of the Town's zoning ordinance are inconsistent with the Parking License Agreement nor any Town ordinance. Further, all parties agree that the Town's actions were legal. As such, Reserve at Woodstock has no application to the present case.

Finally, Plaintiff cites the case of City of Golden v. Parker, 138 P.3d 285 (Colo. 2006), wherein plaintiff developers filed suit pursuant to economic incentive agreements entered with the City of Golden. Id. at 288. The dispute arose from the City's subsequent enactment of an amendment to its home rule city charter which required voter approval of all new grants of development subsidies or incentives in excess of \$25,000. Id. The primary issues in City of Golden were whether the subsequent ordinance retroactively applied to the prior economic incentive agreements and whether the developers had vested rights in the economic incentive agreements. Id. at 290-92. Although the court recognized that the implied duty of good faith and fair dealing may apply to discretionary budgetary appropriations where there are contractual assurances that a municipality would exercise its discretion in appropriation of city funds, that holding was made in considering the question of whether the developers had a vested right in the incentive agreements. Id. at 292-3. Here, Plaintiff did not even allege that the Parking License Agreement conferred some sort of vested right. Rather, trial testimony clearly established that Plaintiff had not taken the steps required by State or local law to confer a vested right. Unlike the developers in City of Golden, Plaintiff cannot establish it had a vested right.

RESPONSE: There is nothing improper with the Court's reliance on judicial decisions from other jurisdictions. The Court's order does not indicate that it finds the decisions cited in Paragraph 71 as controlling. Instead, it is clear that the Court has cited these decisions as persuasive authority supporting the proposition that the implied duty of good faith and fair dealing applies to discretionary acts of government. As such, it is entirely appropriate to cite cases from jurisdictions outside of South Carolina. *See State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 837 S.E.2d 910, 917, 837 S.E.2d 910, 917 (Ct. App. 2019) ("When there is no South Carolina case directly on point, our courts may look to persuasive authority from other jurisdictions.").

39. Paragraph 72 incorrectly holds that the Town was required to exercise its legislative authority only in a way to favor a party to a contract. This is an error of law in that it creates an "implied contractual vested right" that binds actions of future Council in derogation of the precedent set by Cunningham v. Anderson County, 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013), which stands for the simple proposition that municipal councils may not deprive successor councils of discretion in matters involving their legislative or governmental powers, because public policy

demands they should be left unimpaired. This holding inappropriately delegates that legislative authority to anyone contracted with the Town. Further, the holding in Paragraph 72 illegally creates a vested right, implied by contract, which exists nowhere in State or Federal law, case law, statute or ordinance.

The precedent created by Paragraph 72 will hinder the ability of a municipality to enter into future agreements and force each municipality to strongly reassess current contractual arrangements, if the governing body cannot make any legislative decision that could potentially impair a party's ability to maximize its purpose or rights under said contract.

RESPONSE: The Town's objection to Paragraph 72 is misguided and overstated. First, Paragraph 72 does not hold that "the Town was required to exercise its legislative authority only in a way to favor a party to a contract." Instead, it states the uncontroversial proposition that the Town had a duty of good faith and fair dealing to take reasonable steps to fulfill the purpose of the parking license agreement and to avoid taking actions that interfered with the purpose of the parking license agreement.

Second, Paragraph 72 is not based on any legal principle that interferes or hinders a governmental entity's legislative authority. To be sure, the Court's order in no way invalidates any of the actions challenged in this lawsuit. The Court's ruling is simple: If a local government enters into a contract, it can either perform under the contract or not. But if it refuses to perform or takes other actions to interfere with that contract, it is subject to civil liability, just like any private party. This is not an error of law but rather the application of general principles of contract law to a governmental entity.

40. Paragraph 74 is an error of law, because the Court disregards a material, stated term of agreement, 276 spaces, when it relied, over the Town's objection, on parole evidence and hearsay to determine that the true intent and purpose of the parties was to simply satisfy the need for additional parking in the Shem Creek area. Under the parole evidence rule, extrinsic evidence is inadmissible to vary or contradict the terms of a contract. Penton v. J.F. Cleckley & Co., 326 S.C. 275, 280, 486 S.E.2d 742, 745 (1997). As such, Plaintiff should not be permitted to admit parole evidence regarding the plain terms of the Parking License Agreement, which the Court clearly relied on. In construing and determining the effect of a written contract, the intention of the parties and the meaning are determined only from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008) "If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect." Ward v. West Oil Co., 379 S.C. 225, 239, 665 S.E.2d 618, 625 (Ct. App. 2008).

RESPONSE: The Town's objection to Paragraph 74 has no merit because the Court made clear in Paragraph 76 that it need not determine whether the parking license agreement required SCDG to design the garage with no less than 276 total spaces.

41. The Court committed an error of law in admitting every single piece of evidence into the record, despite the Town's objection, under the legal premise proposed by Brown v. Allstate, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001). In Brown, the Supreme Court agreed that the lower court during a bench trial committed an error when it admitted irrelevant evidence. The Court then determined, however, that this error was harmless, because there was not a sufficient showing the trial judge affirmatively relied on the incompetent evidence. Here, the Court clearly and erroneously relied on irrelevant evidence submitted, over the Town's objections, to reach its conclusion that 276 parking spaces was never a material term of the Agreement and that Council violated the good faith and fair dealing clause of the Agreement.

RESPONSE: There was no error in the Court's admission of evidence during trial. The Supreme Court's ruling in *Brown v. Allstate Ins. Co.* could not be any clearer: "A trial judge's role in a bench trial is to admit all evidence and then evaluate in a non-jury setting." *Id.*, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001). This is exactly what the Court did in this case. Furthermore, the Town's objection is based on a mischaracterization of the Court's ruling. The Court did not conclude "that 276 parking spaces was never a material term of the Agreement" as the Town claims. Instead, the Court ruled that SCDG's design with 234 total spaces and 117 public spaces was not a material breach of the agreement. The distinction between "material term" and "material breach" is important and ultimately dooms the Town's argument.

42. Paragraph 75 incorrectly holds, through consideration of parole evidence that 276 parking spaces was not a material term, disregarding the fact that the dollar amount was tied directly to the number of spaces. Plaintiff had not substantially performed under the PLA in producing 276 parking spaces and its breach of contract claim should have failed. First, the PLA was a licensing agreement and not a construction contract. The Town has no property interest in the Garage and does not possess any portion thereof.

Further, Plaintiff terminated the PLA prior to the Rental Commencement Date in the PLA. As such, the Garage provides only 234 of the 276 total spaces (85%) and 117 of the 132 (89%) public spaces, and, importantly, the Town did not receive the benefit of the promises under the PLA: for Plaintiff to reserve spaces as the contract required. As such, the parking spaces have "been returned" to Plaintiff. Plaintiff produced no evidence that it is reserving spaces as outlined in the PLA. To the extent Plaintiff is providing spaces to the public as required by Town regulations, it cannot argue that the Town is getting the benefits of the PLA. Plaintiff has not substantially performed under the contract.

RESPONSE: As stated above, the Court did not rule "that 276 parking spaces was not a material term" as the Town claims. The Town obviously confuses the concept of "material term" with "material breach." A breach of a "material term" of a contract can be so insubstantial that it does not constitute a "material breach." As the Court correctly concluded in Paragraph 75, SCDG's approved design gave the Town substantially all that it bargained for in the parking license agreement.

43. Paragraphs 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, and 89 incorrectly rely on the analysis provided in Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275-76, 440

S.E.2d 364, 366-67 (1994), for the proposition that its failure to provide 276 parking spaces is not a material breach of the Parking License Agreement. Kiriakides is readily distinguishable from the present action and even if applied, demonstrates Plaintiff materially breached the PLA. In Kiriakides the court was interpreting the State's ejectment statute, S.C. Code Section 27-37-10, in the context of a commercial lease whereby the landlord sought to evict a tenant for a very minor breach of the lease. Kiriakides, 312 S.C. at 274-275, 440 S.E.2d at 365-66. In contrast, the present action involves a licensing agreement where neither the State ejectment statute nor eviction of a leasehold tenant are involved.

Also, unlike the present situation, the court in Kiriakides was concerned that the landlord's interpretation of the ejectment statute "would lead to the absurd result that leases could be terminated for immaterial and trivial breaches." Kiriakides, 312 S.C. at 275, 440 S.E.2d at 366.

Applying the factors to this case: (a) The Town will be deprived of 15% of the parking spaces of which it financially bargained for under the Agreement; (b) the Town cannot be compensated adequately damages for the 42 lost spaces. These spaces are lost for the entirety of the 30 Year License Term and there is nothing in the PLA that permits the Town to seek a reduction in rent for fewer spaces; (c) although Plaintiff would suffer a forfeiture of the Town's rent payments, Plaintiff had the opportunity to terminate the PLA, but rather chose to proceed with constructing a Project that did not comply with the PLA and continue with the Project at its own peril; (d) it is impossible for Plaintiff to provide the lost spaces and cure the breach at this point; (e) Whether Kiriakides or general contract principles apply, Plaintiff's choice to provide only 85% of the required parking spaces is a material breach of the PLA.

RESPONSE: The Town's objections to the Court's materiality analysis is utterly unpersuasive. First, the Town incorrectly suggests that the materiality analysis under *Kiriakides* does not apply to this case because *Kiriakides* involved a commercial lease agreement. But, as the Court rightly stated in Paragraph 79 of the order, the materiality factors set forth in *Kiriakides* apply to contracts beyond commercial leases as confirmed by *Palmetto Mortuary Transp., Inc. v. Knight Sys.*, 424 S.C. 444, 462-63, 818 S.E.2d 724, 734-35, fn. 5 (2018).

Second, the conclusory arguments presented by the Town to counter the Court's materiality analysis ignores nearly all of the evidence on which the Court relies. Materiality was the most important issue at trial, and the Court devotes fourteen paragraphs and over five pages to addressing it. Yet the Town refuses to engage with the specific findings the Court made on materiality and, instead, summarily dismisses the Court's ruling on this issue in one paragraph by repeating the same conclusory findings that it submitted in its proposed order. This is simply insufficient to warrant reconsideration of the Court's conclusions.

44. Paragraph 81 incorrectly identifies the concept of "adequacy" to inappropriately alter the written, material terms in the Agreement and, inexplicably, attributes more significance to this judicially manufactured term than to an unambiguously stated material term. The PLA contained nothing to indicate Plaintiff could comply with the agreement by providing an "adequate" number of parking spaces.

RESPONSE: The Town complains that “adequacy” of spaces is a “judicially manufactured term,” but it is actually a common-sense approach to determining whether SCDG’s approved design deprived the Town of the benefits it bargained for in the parking license agreement. The Town sought additional parking to serve the parking demand for the Shem Creek area, and determining whether the proposed parking spaces would have provided that benefit necessarily involves analyzing the demand for parking that existed and whether SCDG’s proposal could adequately satisfy that demand. Because that analysis does not favor the Town, it seeks to limit the analysis of the alleged deprivation of benefits to the percentage of reduction in total spaces. The Town’s sole focus on the percentage deficiency in the number of total spaces does not accord with the analysis required under *Kiriakides*. As stated in the *Restatement (2d) of Contracts* § 241, which was adopted under *Kiriakides*, the first factor requires that “all relevant circumstances must be considered” in determining whether the injured party has been deprived of the benefit to which it reasonably expected. See also, *U.S. ex rel. Virginia Beach Merch. Srvs., Inc. v. Samco Constr. Co.*, 39 F. Supp. 2d 661, 671 (E.D. Va. 1999) (declaring that “principles of contract law do not rely on ‘percentages alone’ to discern between a material and minor breach”) (citing *Restatement (2d) of Contracts* § 275). By focusing solely on the total space reduction percentage, the Town disregards the many benefits that the Town expected to receive from the parking license agreement. Thus, the Court appropriately conducted the materiality analysis by reviewing the adequacy of the spaces that SCDG designed.

45. Paragraph 87 incorrectly states facts that are inconsistent with the testimony offered by the plaintiff’s own architect who presented the option, Mr. Betsch. Mr. Betsch testified that the inclusion of a 3rd level would not have taken away office space. Plaintiff may not have been obligated to provide a third level, but they were obligated to provide the number of spaces promised in the Agreement regardless of the impact on office space square footage or views of the water, which was not a part of the Agreement.

RESPONSE: Contrary to the Town’s argument, Paragraph 87 correctly states the facts about the feasibility of another level of parking and its impact on the project, and it is supported by the exhibits and trial testimony. (See Def.’s Ex. 22; Tr. 396:8-397:16, 343:5-16, 755:9-756:2.)

46. Paragraphs 90-93 incorrectly state the facts in that the Town did not prevent Plaintiff from performing under the Agreement, but rather Plaintiff was unable to fully perform because of its own mistakes, unreasonable assumptions, and desire for additional office space. Plaintiff’s first mistake was commissioning the initial conceptual drawings without any analysis or consideration of the Town’s zoning regulations, including setbacks. In fact, the sketch attached to the PLA provides no indication of what setbacks, if any, applied to the Garage. The renderings were drawn with “zero lot lines”, meaning that the conceptual sketches assumed zero setbacks and drawn to the property lines. This first misstep was pivotal because it was these sketches that Plaintiff used to negotiate the terms of the PLA, which promised 276 parking spaces.

The evidence revealed that rather than having zero lot lines on the adjoining streets, Coleman Boulevard had a 20-30’ build-to-line, Mill Street had a 20’ setback, and Church Street had a 20’ setback. These mistaken assumptions by Plaintiff regarding the setbacks caused it to

vastly overestimate the foot print of the building and the number of parking spaces it could provide when negotiating the Agreement with the Town.

RESPONSE: The Town's objections have no merit. SCDG's concept plan was based on reasonable assumptions regarding its ability to reduce applicable setbacks and the permitted width of parking spaces. Although those assumptions were upended by the Town's zoning amendments and refusal to accommodate reasonable alternatives proposed by SCDG, SCDG, nevertheless, delivered an approved design with 89% of the initially anticipated number of public spaces. If the Town had cooperated with SCDG and approved reasonable measures to increase space, SCDG could have delivered approximately 270 total spaces (and possibly 276 total spaces), as Mr. Johnston testified. (Tr. 758:2-15.)

47. Paragraph 92 mischaracterizes the terms of the Agreement, because while Section 2.06 governs excuse of performance, Sections 2.01(a) and 2.03 specifically say the project is subject to the zoning laws and Town approvals.

RESPONSE: SCDG agrees that the project was subject to the Town's zoning laws and approvals, but it fails to understand how this fact causes Paragraph 92 to be a mischaracterization.

48. Paragraphs 94, 95, 96, 97, 98, and 99 state errors of law, because the Court incorrectly determined the number of parking spaces was immaterial, despite the express and explicit reference to the number and it being commensurate with the amount to be paid. Where a party fails to comply with an express condition of a contract, that party has no right to enforce the contract. Ahrens v. McDaniel, 287 S.C. 63, 66, 336 S.E.2d 505, 507 (Ct. App. 1985). "A condition precedent to a contract is 'any fact, other than mere lapse of time, which, unless excused, must exist or occur before a duty of immediate performance by the promisor can arise.'" M&M Group, Inc. v. Holmes, 379 S.C. 468, 666 S.E.2d 262, 266 (Ct. App. 2008) (citations omitted). "The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." Id.

M&M Group Inc., involved a contract where a purchaser's obligation to purchase the property involved was contingent upon purchaser's ability to secure commercial financing. Id. at 266-267. In affirming the grant of summary judgment on the plaintiff's claims, the court held that the parties' "use of the language 'is contingent upon' is unequivocal and patently indicates the parties' respective obligations to buy and sell the business are contingent on [defendant's] ability to secure financing. No other meaning could be deduced from such clear and commonly used language." Id.

In the present case, pursuant to the Agreement's express language, both Plaintiff's obligation to license spaces to the Town and the Town's obligation to pay rent under the PLA were contingent upon and subject to Plaintiff's ability to build a parking garage with 276 spaces in accordance with the Town's zoning laws and necessary approvals. Under the PLA, Plaintiff granted "an exclusive License over the Premises to [the Town] and [the Town] accepts same, subject only to the terms and conditions herein contained, and all applicable liens, encumbrances,

easements, restrictions, zoning laws, and governmental or other regulations affecting the Property.” See PLA, ¶ 2.01(a).

Further, Section 2.03 titled Licensor’s Contingency provides:

Licensor’s obligations under the [PLA], including but not limited to the obligation to construct the Project, are contingent upon all necessary approvals for construction being issued by the appropriate Town of Mount Pleasant department or entity. Licensor, in its sole and absolute discretion, may elect to terminate this License Agreement at any time prior to the earlier of (i) twenty-four (24) months from the Effective Date, or (ii) Licensor’s commencement of construction of the Parking Garage.” Id.

Like the contract in M&M Group, Inc., the Agreement specifically contemplated Plaintiff’s ability to construct the Garage in compliance with the Town’s zoning laws and required approvals as express conditions precedent to parties’ obligations thereunder.

Because Plaintiff failed to construct the Garage with 276 spaces in compliance with the Town’s zoning laws and regulations, neither Plaintiff’s obligation to license the spaces nor the Town’s obligation to pay rent arose. The intent of the parties to treat the construction of the Garage as a condition precedent to the licensing of parking is further demonstrated by the fact that the same section of the PLA that created this condition permitted Plaintiff to unilaterally terminate the agreement. Plaintiff had two years to decide whether it wanted to construct the Garage and, if not, could freely terminate the PLA with no consequences. No Garage, then no Parking License Agreement.

Plaintiff argues that by providing only 234 of the 276 promised parking spaces it has substantially performed under the PLA. “[T]he doctrine of substantial performance does not apply to express conditions. Ahrens, 287 S.C. at 66-67, 336 S.E.2d at 507 (citation omitted); see also McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571 (2009) (“If a contract contains a condition precedent, that condition must either occur or it must be excused before a party’s duty to perform arise.”). Thus, any evidence to show they substantially performed the contract is immaterial. Id. If substantial performance does not entitle a party to recovery on the contract, a judge is not required to hear an argument on the issue of substantial performance. Ahrens, 287 S.C. 63, 67, 336 S.E.2d 505, 508.

The doctrine of substantial performance does not apply in this instance because Plaintiff failed to fulfill the express condition precedent of constructing the Garage with 276 parking spaces in accordance with the Town’s laws.

RESPONSE: Here, the Town again repeats the same arguments that it has raised, and which the Court rejected, on numerous occasions. SCDG incorporates by reference the arguments that it has previously made in opposition to the Town’s motion for summary judgment, motion for directed verdict, and proposed order.

49. Paragraph 100 is an error of law. If, in fact, the PLA only required the number of parking spaces to be “substantially similar” to 276, then the PLA did not set out this material,

essential term which the court inexplicably uses to modify an unambiguous material term. It is therefore, not enforceable. For a contract to be binding, material terms cannot be left for future agreements. Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 762 S.E.2d at 700 (citing Aperm of S.C. v. Roof, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct.App.1986)). Material terms must be set out with reasonable certainty and the absence of material terms renders the agreement unenforceable. Rose Elec., Inc. v. Cooler Erectors of Atl., Inc., 418 S.C. 424, 429, 794 S.E.2d 382, 385 (Ct. App. 2016).

As demonstrated during trial, the number of parking spaces was a material term to the Town, as it was committing tax dollars to a stated parking need, and was material to defining the scope of Plaintiff's obligation to perform under the PLA. Tr. pp. 496:14-497:17. Plaintiff's interpretation that its only obligation was to provide a "substantially similar" number of parking spaces is a vague promise that does not define this material term with reasonable certainty and renders the PLA impossible to understand and administer. Such indefiniteness in this material term renders the PLA unenforceable. Plaintiff is unable to say with any certainty how many spaces it was required to provide.

RESPONSE: Here, the Town again repeats the same arguments that it has raised, and which the Court rejected, on numerous occasions. SCDG incorporates by reference the arguments that it has previously made in opposition to the Town's motion for summary judgment, motion for directed verdict, and proposed order.

50. Paragraphs 101, 102, 103, and 104 as they relate to damages are in error, as the Agreement contained no Liquidated Damages provision. The touchstone question in determining whether a sum stipulated in a contract is a liquidated damage or an unenforceable penalty is whether the amount is "reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance...." ERIE Ins. Co. v. Winter Const. Co., 393 S.C. 455, 462, 713 S.E.2d 318, 322 (Ct. App. 2011)(citing Tate v. Master, 231 S.C. 429, 441, 99 S.E.2d at 46 (1957) (emphasis added); see also Restatement (Second) of Contracts § 356 (1981).

The language used by the parties in this Agreement is conclusive of the question of whether the stipulation is for liquidated damages or for a penalty. Id. (citing Ould v. Spartanburg Realty Co., 94 S.C. 184, 77 S.E. 866 (1913)). It is clear within the four corners of this contract, that liquidated damages were never a consideration for the Town. The Court's attempt to surmise the Town's intent using parole evidence from negotiations is inappropriate. However, if this Court determines that the Town's redlines during negotiations are determinative of its intent, it should be noted that Town representatives also removed Plaintiff's ability to accelerate rent payments in a breach, which directly contradicts the supposition that liquidated damages were contemplated. Removal of the acceleration clause is certainly inconsistent with Plaintiff's attempt to recover rent payments for the entire 15 years when Plaintiff terminated the agreement prior to a Certificate of Occupancy being issued.

The Town filed a motion to compel on October 22, 2019, seeking the compel financial documentation of the operating profit for the garage. The Court denied this motion by order dated January 22, 2020 denying the same holding that the survival clause did not provide for the survival

of any rights of the Town, including the right to calculate the amount of rent that may be due by eliminating Section 1.07(b) and subjects the Town to an unenforceable penalty. The Town filed a Motion for Reconsideration on January 29, 2020, which was denied by the Court without the benefit of oral argument, in error, prior to the start of trial.

RESPONSE: Here, the Town again repeats the same arguments that it has raised, and which the Court rejected, on numerous occasions. SCDG incorporates by reference the arguments that it has previously made in opposition to the Town's motion for summary judgment, motion for directed verdict, and proposed order.

CONCLUSION

Based on the above, the Town has set forth inadequate grounds for the Court to grant a new trial or reconsider her Order in favor of SCDG dated July 13, 2020. Therefore, the Court should enter an order denying the Town's Motions for New Trial and to Reconsider, Alter or Amend Order in its entirety.

Respectfully submitted,

s/E. Brandon Gaskins

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*Attorneys for Plaintiff
 Shem Creek Development Group, LLC*

August 3, 2020
 Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Civil Action No.: 2017-CP-10-05493
	)	
Shem Creek Development Group, LLC,	)	
	)	
Plaintiff,	)	AFFIDAVIT OF ATTORNEYS' FEES
	)	AND COSTS
v.	)	
	)	
The Town of Mount Pleasant, South	)	
Carolina,	)	
	)	
Defendant.	)	

Personally appeared before the undersigned officer duly authorized to administer oaths, E. Brandon Gaskins, who, on oath, states as follows:

1. I, E. Brandon Gaskins, am over eighteen (18) years old, and of sound mind and body. I am competent to give this affidavit, and it is based upon my own personal knowledge.
2. I am the attorney for Plaintiff Shem Creek Development Group, LLC in the above-captioned action with the law firm of Moore & Van Allen, PLLC.
3. Plaintiff's attorneys' fees in this action are recoverable by Plaintiff from Defendant The Town of Mount Pleasant, South Carolina, pursuant to Section 6.01 of the Parking License Agreement, which is the subject matter of this action, and Paragraph 104 of the Court's Order granting judgment in favor of Plaintiff, which was issued by the Honorable Maite Murphy on July 13, 2020.
4. I was admitted to the Bar of the Supreme Court of South Carolina in 2004 and have been actively engaged in the practice of law since that time. A substantial portion of my practice relates to commercial litigation matters.

5. I am also a member of the Bar of the United States Court of Appeals for the Fourth Circuit and of the United States District Court for the District of South Carolina.

6. I am informed and believe that, under *Baron Data Systems, Inc. v. Loter*, 297 SC 382, 377 S.E.2d 296 (1989), and *Blumberg v. Nealco*, 310 SC 482, 427 S.E.2d 659 (Ct. App. 1993), there are six factors which should be considered in determining the reasonableness of a fee including: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor devoted to the case; (3) the professional standing of counsel; (4) contingency of compensation; (5) the fee customarily charged in the location for similar services; and (6) the beneficial results obtained.

7. I have attached hereto as Exhibit A a detailed spreadsheet showing all of Moore & Van Allen PLLC attorneys' fees, paralegal fees, and costs on this file beginning on September 15, 2017 through August 10, 2020. The amounts shown in Exhibit " represent a true and accurate reflection of time, effort and costs of my firm's legal services in this action. The spreadsheet has been redacted in part to protect certain information protected by the attorney-client privilege and the attorney work product doctrine.

8. As shown on Exhibit A, Plaintiff has incurred legal fees in the amount of Two Hundred Forty-Three Thousand Seven Hundred Eighty-Eight and 50/100 Dollars (\$243,788.50) for attorney and paralegal time related to the prosecution and trial of this action. In addition, Plaintiff has incurred costs in the amount of Thirty-Eight Thousand Six Hundred Forty-Eight and 62/100 Dollars (\$38,648.62) for filing fees, courier fees and postage, copying charges, travel expenses, research costs, deposition costs, expert fees, and other related litigation costs.

9. Prior to my involvement in Plaintiff's dispute with the Town of Mount Pleasant, Plaintiff was represented by attorneys Gray Taylor and Hamlin O'Kelly of the law firm of Buist

Byars & Taylor (“BB&T”). I have reviewed BB&T’s invoices issued to Plaintiff for its legal services. Based upon my review, Plaintiff incurred Thirteen Thousand One Hundred Thirty-Eight Dollars (\$13,138.00) in attorneys’ fees for BB&T’s services that were directly related to the dispute regarding the Parking License Agreement. This amount does not include legal fees related to the lawsuit of *Save Shem Creek v. Town of Mount Pleasant*, for which BB&T also provided legal services to Plaintiff.

10. In addition, Plaintiff incurred direct litigation costs of Three Thousand One Hundred Sixty-Nine and 27/100 Dollars (\$3,169.27) in this action for (1) technology costs for document production and trial paid to H.P. Technology (\$2,609.45); (2) lodging during trial (\$519.76); and (3) mileage reimbursement from Mount Pleasant to Ridgeland (\$40.06).

11. In sum, Plaintiff has incurred Two Hundred Ninety-Eight Thousand Seven Hundred Forty-Four and 39/100 (\$298,744.39) in attorneys’ fees and costs in pursuing this action and in other fees related to the dispute about the Parking License Agreement.

12. I believe that these fees and costs are reasonable under the six factors discussed above based on the following: (1) the matter was highly disputed and involved complex issues of contract and municipal law, a significant amount in controversy, a large volume of documents produced during discovery, and multiple discovery disputes; (2) the matter was litigated through trial and post-trial motions for nearly three years; (3) I am a lawyer in good standing with the South Carolina Bar, have never been involved any disciplinary proceedings, and believe I have a good reputation among other lawyers in the area who practice commercial litigation; (4) the matter was not based on a contingency arrangement, but the amount billed in fees by Moore & Van Allen for this action is less than what would be payable under a typical contingency fee arrangement of 33.3% or 40% of the award; (5) my hourly rate, which ranged from \$325/hour when the

representation commenced in 2017 to \$395/hour when the case was completed in 2020, is within the range of hourly rates customarily charged by commercial litigators of similar experience who practice in the Charleston area; and (6) Plaintiff obtained the beneficial result of a recovery in the full amount sought at trial.

13. I am further informed and believe that in the absence of any presentation of evidence to the contrary by Defendant in this action, it is appropriate to award the relief requested, including attorneys' fees and costs in the amount requested.



E. Brandon Gaskins

Subscribed and Sworn to before me

This 10th day of August, 2020



Notary Public for the State of South Carolina

My Commission expires 05-12-2024

EXHIBIT A

Fees Billed - Shem Creek Development Group, LLC - Shem Creek - Parking License Agreement (CM 043920.000001)				
Timekeeper	Transaction Date	Billed Amount	Narrative	Billed Hours
Gaskins, Edward B. (02733)	9/15/2017	\$ 162.50	Phone conference w/ Tex Small re: [REDACTED] Emails to and from Mr. Small re: [REDACTED]. Phone conference w/ Gray Taylor re: case and client documents.	0.50
Gaskins, Edward B. (02733)	9/21/2017	\$ 845.00	Analyze relevant documents for complaint. Draft complaint.	2.60
Gaskins, Edward B. (02733)	9/22/2017	\$ 65.00	Phone conference w/ Chris Anderson re: [REDACTED]	0.20
Gaskins, Edward B. (02733)	9/25/2017	\$ 1,852.50	Draft and revise complaint.	5.70
Scarminach, Charles R. (02797)	9/26/2017	\$ 360.00	Working session with Brandon Gaskins regarding Indemnification Agreement. Draft Indemnification Agreement.	1.60
Gaskins, Edward B. (02733)	9/28/2017	\$ 162.50	Revise indemnity agreement.	0.50
Gaskins, Edward B. (02733)	9/29/2017	\$ 65.00	Revise indemnity agreement.	0.20
Gaskins, Edward B. (02733)	10/2/2017	\$ 65.00	Phone conference w/ Tex Small re: [REDACTED]	0.20
Gaskins, Edward B. (02733)	10/11/2017	\$ 682.50	Analyze revisions to indemnification agreement from Somera Capital counsel. Phone conference w/ Tex Small re: [REDACTED]. Research legal materials re: [REDACTED]. Revise complaint.	2.10
Gaskins, Edward B. (02733)	10/20/2017	\$ 162.50	Final review and revisions of complaint and email same to clients.	0.50
Stockhausen, Wendy S. (08669)	10/23/2017	\$ 27.00	Process fee request to Clerk of Court for filing of Civil Cover Sheet, Summons and Complaint.	0.20
Stockhausen, Wendy S. (08669)	10/23/2017	\$ 27.00	Communications with Process Server regarding service of Summons and Complaint upon Town of Mt. Pleasant council.	0.20
Stockhausen, Wendy S. (08669)	10/23/2017	\$ 27.00	Draft Summons	0.20
Stockhausen, Wendy S. (08669)	10/23/2017	\$ 27.00	Draft Civil Cover Sheet.	0.20
Stockhausen, Wendy S. (08669)	10/23/2017	\$ 27.00	Revise Complaint.	0.20
Gaskins, Edward B. (02733)	10/23/2017	\$ 520.00	Revise 101 Capital Partners indemnification agreement and email to counsel. Revise complaint. Final review and execution of summons and complaint and coordinate filing of same.	1.60
Stockhausen, Wendy S. (08669)	10/23/2017	\$ 27.00	Communications with Clerk of Court regarding filing of Summons and Complaint.	0.20
Stockhausen, Wendy S. (08669)	10/24/2017	\$ 27.00	Communications with Process Server regarding confirmation of service of Summons and Complaint upon Ms. Barrett for Town of Mt. Pleasant council.	0.20
Gaskins, Edward B. (02733)	10/24/2017	\$ 97.50	Emails to and from clients re: [REDACTED]. Email and call to David Slade re: lawsuit. Phone conference w/ opposing counsel re: lawsuit.	0.30
Gaskins, Edward B. (02733)	10/26/2017	\$ 97.50	Phone interview with channel 5 reporter re: lawsuit. Emails to and from clients re: [REDACTED]	0.30
Gaskins, Edward B. (02733)	10/27/2017	\$ 552.50	Analyze filing in Jim Owens v. ADC lawsuit for information re: [REDACTED]. Emails to and from channel 2 reporter re: lawsuit.	1.70
Gaskins, Edward B. (02733)	11/16/2017	\$ 65.00	Emails to and from Julia Copeland re: extension to file answer. Emails to and from clients re: [REDACTED]	0.20
Stockhausen, Wendy S. (08669)	11/21/2017	\$ 27.00	Create secure Share File for uploading of documents by Mr. Flesch; e-mail communications to Mr. Flesch regarding [REDACTED].	0.20
Gaskins, Edward B. (02733)	11/21/2017	\$ 780.00	Review and analyze ADC court documents and client documents in preparation of meeting w/ clients. Travel to and from and meet w/ clients re: [REDACTED]	2.40
Gaskins, Edward B. (02733)	11/22/2017	\$ 325.00	Draft letter to ADC re: notice of claims and tolling agreement.	1.00
Scarminach, Charles R. (02797)	11/27/2017	\$ 450.00	Draft tolling agreement for ADC Engineering. Draft tolling agreement for Stubbs Muldrow Herin Architects.	2.00
Gaskins, Edward B. (02733)	11/28/2017	\$ 195.00	Review and revise tolling agreements for ADC and SMHA.	0.60
Gaskins, Edward B. (02733)	11/30/2017	\$ 260.00	Revise letter to ADC Engineering re: notice of claims and tolling agreement. Draft and revise tolling agreement. Email to client re: [REDACTED]	0.80
Stockhausen, Wendy S. (08669)	12/13/2017	\$ 27.00	Review notification from Sharefile; access and process SMH contract.	0.20

Gaskins, Edward B. (02733)	12/14/2017	\$ 227.50	Analyze contract b/t client and Stubbs, Muldrow & Herin Architects. Draft and revise tolling agreement and cover letter to SMHa. Final review and execution of letters to SMHa and ADC re: tolling agreement.	0.70
Stockhausen, Wendy S. (08669)	12/14/2017	\$ 67.50	Revise ADC Tolling Agreement (.2); revise letters to ADC and SMHA regarding tolling agreements (.2); process for service by certified mail (.1).	0.50
Gaskins, Edward B. (02733)	12/20/2017	\$ 65.00	Review correspondence from ADC Engineering. Emails to and from clients re: [REDACTED]	0.20
Gaskins, Edward B. (02733)	12/22/2017	\$ 97.50	Emails to and from Julia Copeland re: answer to complaint. Analyze answer to complaint.	0.30
Gaskins, Edward B. (02733)	12/27/2017	\$ 195.00	Phone conference w/ counsel for SMHa re: tolling agreement. Phone conference w/ opposing counsel re: referral to business court. Email to client re: [REDACTED]	0.60
Gaskins, Edward B. (02733)	1/4/2018	\$ 34.50	Emails to and from attorney for SMHa re: tolling agreement.	0.10
Firestone, Lesley A. (02763)	1/10/2018	\$ 27.50	Communicate re: drafting joint motion to refer matter to the business court.	0.10
Gaskins, Edward B. (02733)	1/17/2018	\$ 34.50	Review revisions to tolling agreement from ADC and SMHa attorneys.	0.10
Gaskins, Edward B. (02733)	1/18/2018	\$ 69.00	Final review and execution of tolling agreement w/ ADC and SMHa and multiple emails re: same.	0.20
Firestone, Lesley A. (02763)	1/24/2018	\$ 412.50	Review Complaint and Answer and begin drafting Motion for Case Assignment to Business Court and Description of Claims.	1.50
Firestone, Lesley A. (02763)	1/24/2018	\$ 192.50	Review S.C. Supreme Court Order and Form and Business Court Orders re: moving for case assignment to Business Court.	0.70
Firestone, Lesley A. (02763)	1/25/2018	\$ 880.00	Finalize cover letter, Joint Motion for Case Assignment to the Business Court Program, and Description of Claims.	3.20
Gaskins, Edward B. (02733)	2/9/2018	\$ 172.50	Emails to and from opposing counsel re: motion to refer to business court. Final review, execution, and coordination of filing of motion to refer to business court.	0.50
Stockhausen, Wendy S. (08669)	2/9/2018	\$ 40.50	Prepare motion cover sheet for business court motion; process fee request; communications with court regarding filing; finalize business court motion package for filing with court.	0.30
Stockhausen, Wendy S. (08669)	2/9/2018	\$ 27.00	E-mail communications with opposing counsel regarding motion to transfer to business court.	0.20
Stockhausen, Wendy S. (08669)	2/23/2018	\$ 67.50	Draft First Requests for Production to Town of Mount Pleasant.	0.50
Stockhausen, Wendy S. (08669)	2/23/2018	\$ 94.50	Draft First Interrogatories to Town of Mount Pleasant.	0.70
Gaskins, Edward B. (02733)	2/28/2018	\$ 1,035.00	Analyze case file and ordinances for drafting of discovery requests. Draft and revise discovery requests. Email to clients.	3.00
Gaskins, Edward B. (02733)	3/1/2018	\$ 138.00	Review comments from Tyler Flesch re: [REDACTED]	0.40
Gaskins, Edward B. (02733)	3/7/2018	\$ 69.00	Emails to and from Judge Young law clerk. Review order assigning case to business court.	0.20
Gaskins, Edward B. (02733)	3/16/2018	\$ 276.00	Review client documents for ESI protocol analysis. Draft ESI protocol.	0.80
Gaskins, Edward B. (02733)	3/19/2018	\$ 379.50	Draft ESI search protocol and email to opposing counsel.	1.10
Stockhausen, Wendy S. (08669)	3/21/2018	\$ 40.50	Draft Consent Scheduling Order.	0.30
Gaskins, Edward B. (02733)	3/21/2018	\$ 138.00	Review and revise draft scheduling order and email same to clients.	0.40
Gaskins, Edward B. (02733)	4/2/2018	\$ 34.50	Correspondence to and from Judge Murphy's law clerk re: scheduling order.	0.10
Gaskins, Edward B. (02733)	4/4/2018	\$ 448.50	Prepare for and attend conference w/ opposing counsel re: discovery issues and search protocol for electronically stored information. Revise letter to Judge Murphy re: scheduling order.	1.30
Stockhausen, Wendy S. (08669)	4/18/2018	\$ 27.00	Draft Subpoena duces tecum to ADC.	0.20
Stockhausen, Wendy S. (08669)	4/18/2018	\$ 27.00	Draft Subpoena duces tecum to Stubbs Muldrow Herin Architects.	0.20
Gaskins, Edward B. (02733)	5/1/2018	\$ 207.00	Draft correspondence to opposing counsel re: discovery issues. Analyze recent SC judicial decision re: [REDACTED]	0.60
Stockhausen, Wendy S. (08669)	5/8/2018	\$ 54.00	Draft service letters for subpoenas to SMHA and ADC; prepare certificates of authenticity; draft Exhibit A to ADC subpoena.	0.40

Gaskins, Edward B. (02733)	5/8/2018	\$ 69.00	Emails to and from and phone conference w/ opposing counsel re: electronic discovery issues.	0.20
Gaskins, Edward B. (02733)	5/23/2018	\$ 138.00	Revise subpoenas to SMHa and ADC Engineering.	0.40
Stockhausen, Wendy S. (08669)	5/24/2018	\$ 108.00	Revise and finalize subpoenas and service correspondence; process for service by mail; e-mail communications with counsel for SMHa and ADC forwarding copies of same; e-mail communications to opposing counsel providing copies of subpoenas for notice.	0.80
Gaskins, Edward B. (02733)	5/24/2018	\$ 345.00	Draft exhibits to subpoenas for ADC and SMHa. Emails to and from counsel for ADC and SMHa re: service of subpoenas. Revise letters to ADC and SMHa re: service of subpoenas.	1.00
Stockhausen, Wendy S. (08669)	5/25/2018	\$ 13.50	Communications with opposing counsel regarding receipt of subpoenas to SMHa and ADC.	0.10
Stockhausen, Wendy S. (08669)	5/25/2018	\$ 13.50	Communications with counsel for ADC regarding request for authorization to accept service of subpoena.	0.10
Stockhausen, Wendy S. (08669)	5/29/2018	\$ 148.50	Draft Answers and Responses to TOMP's First Interrogatories and Requests for Production.	1.10
Gaskins, Edward B. (02733)	5/30/2018	\$ 414.00	Initial review of document production from Town. Emails to and from opposing counsel re: technical issues w/ form of production.	1.20
Stockhausen, Wendy S. (08669)	5/31/2018	\$ 27.00	Prepare Motion cover sheet for Consent Scheduling Order; finalize and process for filing.	0.20
Stockhausen, Wendy S. (08669)	6/4/2018	\$ 40.50	Review filed Consent Scheduling Order; enter deadlines into VisionSQL docketing system.	0.30
Gaskins, Edward B. (02733)	6/5/2018	\$ 69.00	Draft and send case status update to clients.	0.20
Stockhausen, Wendy S. (08669)	6/6/2018	\$ 67.50	Process voluminous document production received from opposing counsel to MVA file system; communications with Jessica Bearding regarding processing to Relativity.	0.50
Beard, Jessica M. (08612)	6/7/2018	\$ 180.00	Configure and import electronic data into discovery database for attorney review.	1.00
Beard, Jessica M. (08612)	6/8/2018	\$ 144.00	Analyze and configure data set for attorney review.	0.80
Gaskins, Edward B. (02733)	6/8/2018	\$ 69.00	Working session re: technical issues w/ Town's document production. Emails to and from opposing counsel re: document production.	0.20
Beard, Jessica M. (08612)	6/11/2018	\$ 216.00	Analyze and configure data set for attorney review.	1.20
Gaskins, Edward B. (02733)	6/12/2018	\$ 241.50	Begin reviewing Town's document production.	0.70
Stockhausen, Wendy S. (08669)	6/12/2018	\$ 162.00	Draft Answers to Town of Mount Pleasant Interrogatories and Requests for Production.	1.20
Gaskins, Edward B. (02733)	6/13/2018	\$ 172.50	Continue reviewing documents produced by Town.	0.50
Stockhausen, Wendy S. (08669)	6/13/2018	\$ 54.00	Process e-mail document production received from opposing counsel to MVA file system; communications with Jessica Bearding regarding processing to Relativity.	0.40
Beard, Jessica M. (08612)	6/14/2018	\$ 324.00	Analyze and configure data set for attorney review.	1.80
Beard, Jessica M. (08612)	6/15/2018	\$ 90.00	Analyze and configure data set for attorney review.	0.50
Stockhausen, Wendy S. (08669)	6/15/2018	\$ 54.00	Process O'Neal e-mail document production received from opposing counsel to MVA file system; communications with Jessica Bearding regarding processing to Relativity.	0.40
Beard, Jessica M. (08612)	6/18/2018	\$ 144.00	Analyze and configure data set for attorney review.	0.80
Gaskins, Edward B. (02733)	6/25/2018	\$ 414.00	Emails to and from counsel for ADC and SMHa re: subpoena responses. Continue reviewing Town document production.	1.20
Beard, Jessica M. (08612)	6/26/2018	\$ 54.00	Analyze and configure data set for attorney review.	0.30
Gaskins, Edward B. (02733)	6/26/2018	\$ 1,173.00	Draft answers to Defendant's interrogatories. Analyze Town documents for answers to interrogatories.	3.40
Stockhausen, Wendy S. (08669)	6/26/2018	\$ 67.50	Review documents received from Stubbs Muldrow in response to subpoena; bates label and process to MVA file system; communications with Jessica Bearding regarding processing to Relativity.	0.50
Beard, Jessica M. (08612)	6/27/2018	\$ 450.00	Analyze and configure data set for attorney review.	2.50
Stockhausen, Wendy S. (08669)	6/27/2018	\$ 94.50	Process Carrier and Page e-mail document production received from opposing counsel to MVA file system; communications with Jessica Bearding regarding processing to Relativity.	0.70
Gaskins, Edward B. (02733)	6/27/2018	\$ 621.00	Continue drafting interrogatory responses and reviewing Town documents.	1.80
Gaskins, Edward B. (02733)	6/28/2018	\$ 241.50	Continue drafting interrogatory responses and reviewing Town document production.	0.70
Stockhausen, Wendy S. (08669)	7/6/2018	\$ 27.00	Review e-mail from Mr. Gaskins and ADC Engineering regarding subpoena response; access secure file share and download files; extract from zipfile and process to MVA file system.	0.20

Stockhausen, Wendy S. (08669)	7/6/2018	\$ 27.00	Review e-mail communications between Mr. Gaskins and opposing counsel regarding extension of time to respond to discovery requests; docket new deadline.	0.20
Gaskins, Edward B. (02733)	7/6/2018	\$ 103.50	Conduct preliminary review of documents received in response to ADC subpoena. Emails to and from opposing counsel re: discovery responses.	0.30
Gaskins, Edward B. (02733)	7/12/2018	\$ 931.50	Continue drafting and revise interrogatory answers.	2.70
Gaskins, Edward B. (02733)	7/13/2018	\$ 379.50	Revise interrogatory responses. Draft responses to requests for production. Email to client re: [REDACTED]	1.10
Gaskins, Edward B. (02733)	7/19/2018	\$ 345.00	Prepare for and participate in phone conference w/ Tex Small and Tyler Flesch re: [REDACTED]	1.00
Gaskins, Edward B. (02733)	7/25/2018	\$ 276.00	Draft search terms and guidelines for discovery document search and email to clients.	0.80
Gaskins, Edward B. (02733)	7/26/2018	\$ 241.50	Continue reviewing TOMP document production.	0.70
Gaskins, Edward B. (02733)	8/13/2018	\$ 655.50	Continue reviewing town documents.	1.90
Gaskins, Edward B. (02733)	8/27/2018	\$ 310.50	Complete review of Town produced documents.	0.90
Beard, Jessica M. (08612)	9/10/2018	\$ 324.00	Analyze and configure data set for attorney review.	1.80
Stockhausen, Wendy S. (08669)	9/26/2018	\$ 135.00	Review Scheduling Order; calculate new dates; draft Motion to Amend Scheduling Order and proposed Consent Scheduling Order.	1.00
Gaskins, Edward B. (02733)	10/2/2018	\$ 103.50	Review and revise consent motion to amend scheduling order and proposed scheduling order. Emails to and from opposing counsel re: same.	0.30
Stockhausen, Wendy S. (08669)	10/2/2018	\$ 27.00	E-mail to Mr. Gaskins regarding Consent Motion to Amend Scheduling Order and proposed Amended Scheduling; review reply; communications to opposing counsel forwarding same.	0.20
Gaskins, Edward B. (02733)	10/4/2018	\$ 103.50	Conduct initial review of documents produced by client.	0.30
Stockhausen, Wendy S. (08669)	10/4/2018	\$ 27.00	Review e-mail from Mr. Gaskins and Mr. Flesch; access site; download and process documents to MVA electronic file system.	0.20
Stockhausen, Wendy S. (08669)	10/5/2018	\$ 13.50	Communications with Mr. Hawkins regarding input of documents into Relativity.	0.10
Stockhausen, Wendy S. (08669)	10/5/2018	\$ 27.00	Draft correspondence to Clerk of Court and to Judge Murphy regarding Amended Scheduling Order.	0.20
Hawkins, Matthew C. (07012)	10/9/2018	\$ 58.50	Analyze Flesch data importing into document discovery database.	0.30
Trunk, Chelsea L. (08847)	10/9/2018	\$ 262.50	Analyze and configure data set for import into Relativity database.	1.50
Stockhausen, Wendy S. (08669)	10/10/2018	\$ 27.00	E-mail to Judge Murphy regarding Joint Motion to Amend Scheduling Order and proposed Order; review e-mail received from Judge Murphy's law clerk regarding same; docket new deadlines.	0.20
Gaskins, Edward B. (02733)	10/17/2018	\$ 897.00	Analyze client documents for discovery production.	2.60
Gaskins, Edward B. (02733)	10/25/2018	\$ 207.00	Continue analyzing client documents for production.	0.60
Gaskins, Edward B. (02733)	11/1/2018	\$ 276.00	Continue reviewing client documents for production.	0.80
Stockhausen, Wendy S. (08669)	11/2/2018	\$ 54.00	Review file; access SMHA document production from website; re-process SMHA subpoena responsive documents to MVA electronic file system to include documents not included in original download.	0.40
Gaskins, Edward B. (02733)	11/2/2018	\$ 724.50	Continue review of documents for document production. Revise interrogatory responses. Email to client re: [REDACTED]	2.10
Trunk, Chelsea L. (08847)	11/2/2018	\$ 175.00	Analyze and configure data set for import into Relativity database.	1.00
Stockhausen, Wendy S. (08669)	11/5/2018	\$ 54.00	Revise and finalize Seamon Whiteside subpoena; prepare Certificate of Authenticity for same; revise and finalize service letter; process for service upon registered agent by certified mail; e-mail to counsel of record providing copy of subpoena.	0.40
Trunk, Chelsea L. (08847)	11/5/2018	\$ 87.50	Analyze and configure data set for import into Relativity database.	0.50
Gaskins, Edward B. (02733)	11/20/2018	\$ 276.00	Continue reviewing documents for document production.	0.80
Gaskins, Edward B. (02733)	11/21/2018	\$ 759.00	Continue reviewing client documents for document production.	2.20
Gaskins, Edward B. (02733)	11/26/2018	\$ 241.50	Continue reviewing client documents for document production.	0.70
Trunk, Chelsea L. (08847)	11/27/2018	\$ 262.50	Assist case team with production of documents.	3.00
Gaskins, Edward B. (02733)	11/27/2018	\$ 2,656.50	Complete review of client documents for document production. Review SSC and SHMA large volume of documents for interrogatory responses and document production. Revise responses to interrogatories and requests for production.	7.70

Stockhausen, Wendy S. (08669)	11/28/2018	\$ 135.00	Compile and process document production and subpoena responses for electronic service via secure ShareFile; review, revise, and finalize discovery responses; prepare cover letter; e-mail(s) to opposing counsel regarding correspondence, discovery responses, link to protected production, and password; process discovery responses for service by mail in compliance with SC Rule.	1.00
Gaskins, Edward B. (02733)	11/28/2018	\$ 241.50	Final review of, revisions to, and execution of responses to interrogatories and requests for production.	0.70
Trunk, Chelsea L. (08847)	12/11/2018	\$ 105.00	Retrieve data from secure file transfer site and load to database.	0.60
Gaskins, Edward B. (02733)	12/11/2018	\$ 552.00	Prepare for and participate in office conference w/ clients re: [REDACTED]	1.60
Gaskins, Edward B. (02733)	12/12/2018	\$ 207.00	Phone conference w/ opposing counsel re: discovery matters. Working session re: subpoenas and expert issues.	0.60
Stockhausen, Wendy S. (08669)	12/12/2018	\$ 81.00	Research of information regarding service of subpoenas on Channel 2 and Channel 4 news stations; draft subpoenas to Channel 2 and Channel 4 news stations; draft service letters regarding same.	0.60
Gaskins, Edward B. (02733)	12/13/2018	\$ 207.00	Phone conference w/ Roy Strickland re: [REDACTED] Email Roy Strickland materials for re: [REDACTED] Working session re: subpoenas.	0.60
Stockhausen, Wendy S. (08669)	12/13/2018	\$ 94.50	Review online news videos of press conference; research regarding service of subpoena on Channel 5; draft subpoena to Channel 5 news station; draft service correspondence.	0.70
Trunk, Chelsea L. (08847)	12/14/2018	\$ 87.50	Plan and prepare for production of documents.	0.50
Stockhausen, Wendy S. (08669)	12/14/2018	\$ 135.00	Continued research regarding press conference and service of subpoenas; revise and finalize subpoenas to Channel 2, Channel 4, and Channel 5 news stations; revise and finalize service correspondence; prepare Certificate of Authenticity for each entity; process subpoena packages for service.	1.00
Stockhausen, Wendy S. (08669)	12/14/2018	\$ 13.50	E-mail to opposing counsel providing copies of subpoenas to news stations and Clawson & Staubes.	0.10
Gaskins, Edward B. (02733)	12/14/2018	\$ 793.50	Draft and revise subpoenas to Clawson & Staubes and TV stations. Analyze parking revenue data. Emails to and from client re: [REDACTED]. Review and working session re: production of SMHa documents.	2.30
Stockhausen, Wendy S. (08669)	12/14/2018	\$ 54.00	Revise and finalize Subpoena to Clawson and Staubes; prepare Certificate of Authenticity; prepare service letter; process for service by certified mail; e-mail to Matthew Story providing copy.	0.40
Trunk, Chelsea L. (08847)	12/17/2018	\$ 437.50	Assist with production of documents.	2.50
Gaskins, Edward B. (02733)	12/17/2018	\$ 103.50	Phone conference w/ Matt Story of Clawson and Staubes re: subpoena. Phone conference w/ Tyler Flesch re: [REDACTED]	0.30
Trunk, Chelsea L. (08847)	12/18/2018	\$ -		0.30
Gaskins, Edward B. (02733)	12/18/2018	\$ 69.00	Review proposed retainer agreement and invoice from DHG for [REDACTED] and email clients re: [REDACTED]	0.20
Gaskins, Edward B. (02733)	12/31/2018	\$ 241.50	Revise expert disclosure and draft interrogatory answers re: expert.	0.70
Gaskins, Edward B. (02733)	1/2/2019	\$ 37.50	Emails to and from opposing counsel re: protective order.	0.10
Gaskins, Edward B. (02733)	1/3/2019	\$ 37.50	Phone conference w/ Alex Smith from DHG re: [REDACTED]	0.10
Gaskins, Edward B. (02733)	1/4/2019	\$ 37.50	Email to and from WCIV representative re: subpoena response.	0.10
Gaskins, Edward B. (02733)	1/8/2019	\$ 262.50	Review subpoenas and deposition notice from defendant. Revise protective order. Multiple emails to and from opposing counsel protective order and deposition of Roy Strickland. Phone conference w/ Roy Strickland re: [REDACTED] [REDACTED] Emails to and from clients re: [REDACTED]	0.70
Stockhausen, Wendy S. (08669)	1/9/2019	\$ 27.00	Review correspondence and cd received from WCIV; process video to MVA file system; email to Mr. Gaskins regarding same.	0.20
Gaskins, Edward B. (02733)	1/16/2019	\$ 187.50	Review and respond to opposing counsel re: protective order/confidentiality agreement. Emails to clients re: [REDACTED]	0.50
Gaskins, Edward B. (02733)	1/30/2019	\$ 150.00	Review, identify, and send documents to Roy Strickland for [REDACTED]	0.40

Gaskins, Edward B. (02733)	1/31/2019	\$	37.50	Phone conference w/ Alex Smith of DHG re: [REDACTED]	0.10
Stockhausen, Wendy S. (08669)	1/31/2019	\$	27.00	Review Notice of Deposition received from counsel for defendant; process notice and docket deposition date.	0.20
Gaskins, Edward B. (02733)	2/1/2019	\$	150.00	Review and analyze Rule 30(b)(6) deposition topics. Multiple emails w/ opposing counsel re: depositions.	0.40
Gaskins, Edward B. (02733)	2/4/2019	\$	712.50	Prepare for and participate in office conference w/ clients and damages expert. Emails and phone conference w/ opposing counsel re: scheduling order and discovery issues.	1.90
Gaskins, Edward B. (02733)	2/6/2019	\$	112.50	Phone conference and emails w/ attorney for Stubbs Muldrow Herin architects re: Jeff Johnston interview.	0.30
Gaskins, Edward B. (02733)	2/8/2019	\$	337.50	Review Stubbs Muldrow Herrin documents in preparation for meeting w/ Jeff Johnston.	0.90
Gaskins, Edward B. (02733)	2/11/2019	\$	1,200.00	Review Stubbs Muldrow Herrin documents. Prepare for and participate in interview of Linda Page.	3.20
Gaskins, Edward B. (02733)	2/12/2019	\$	937.50	Review documents for, prepare for, travel to and from, and participate in witness interview of Jeff Johnston.	2.50
Gaskins, Edward B. (02733)	2/14/2019	\$	37.50	Review subpoena response from Clawson & Staubes.	0.10
Gaskins, Edward B. (02733)	2/18/2019	\$	37.50	Review proposed amended scheduling order and emails to and from opposing counsel re: same.	0.10
Gaskins, Edward B. (02733)	3/5/2019	\$	75.00	Phone conference w/ opposing counsel re: legal issues re: interview/depositions of council members.	0.20
Gaskins, Edward B. (02733)	3/7/2019	\$	112.50	Analyze issues re: [REDACTED] Emails to and from opposing counsel re: motion for protective order prohibiting interviews/depositions of council members.	0.30
Gaskins, Edward B. (02733)	3/12/2019	\$	225.00	Analyze and revise draft confidentiality order. Emails to and from opposing counsel re: deposition scheduling and confidentiality order. Analyze motion for protective order re: depositions/interviews of council members.	0.60
Gaskins, Edward B. (02733)	3/21/2019	\$	375.00	Review discovery re: outstanding discovery items. Multiple emails w/ opposing counsel re: deposition schedule and deposition of council members. Emails to and from client re: [REDACTED]	1.00
Stockhausen, Wendy S. (08669)	3/25/2019	\$	94.50	Review attorney communications; draft deposition notices and certificates of service for E. DeMoura, K. Prause, C. Farrell, M. Robertson, and B. Morrison.	0.70
Stockhausen, Wendy S. (08669)	3/26/2019	\$	81.00	Online research of deponents; revise and finalize deposition notices and certificates of service for E. DeMoura, K. Prause, C. Farrell, M. Robertson, and B. Morrison; prepare service correspondence; process for service by mail and e-mail; e-mail to opposing counsel forwarding copies of same.	0.60
Stockhausen, Wendy S. (08669)	3/27/2019	\$	27.00	Docket deposition dates and times; communications with court reporter regarding coverage.	0.20
Gaskins, Edward B. (02733)	3/29/2019	\$	300.00	Review deposition Rule 30(b)(6) deposition notice. Emails and phone conference w/ Tyler Flesch re: [REDACTED] [REDACTED] Conduct initial review of financial documents provided.	0.80
Trunk, Chelsea L. (08847)	4/1/2019	\$	175.00	Configure and import electronic data into discovery database for attorney review.	1.00
Gaskins, Edward B. (02733)	4/8/2019	\$	300.00	Analyze supplemental financial documents from client.	0.80
Beard, Jessica M. (08612)	4/8/2019	\$	216.00	Assist with production of documents.	1.20
Stockhausen, Wendy S. (08669)	4/8/2019	\$	27.00	Process supplemental production to password protected zipfile and upload to ShareFile in preparation of production.	0.20
Gaskins, Edward B. (02733)	4/9/2019	\$	75.00	Analyze 30(b)(6) deposition topics and begin preparing objections.	0.20
Stockhausen, Wendy S. (08669)	4/9/2019	\$	13.50	E-mail to opposing counsel providing link and password for access to supplemental production.	0.10
Stockhausen, Wendy S. (08669)	4/10/2019	\$	27.00	Communications with opposing counsel regarding signed copy of Consent Order.	0.20
Gaskins, Edward B. (02733)	4/11/2019	\$	600.00	Research caselaw re: [REDACTED]. Begin drafting correspondence to opposing counsel re: objections to Rule 30(b)(6) deposition notice.	1.60
Gaskins, Edward B. (02733)	4/15/2019	\$	900.00	Draft and revise letter to opposing counsel re: objections to Rule 30(b)(6) notice. Begin reviewing documents for deposition prep.	2.40
Gaskins, Edward B. (02733)	4/16/2019	\$	150.00	Phone conference w/ Tex Small re: [REDACTED] Phone conference w/ Alex Smith of DHG re: [REDACTED]	0.40

Gaskins, Edward B. (02733)	4/17/2019	\$ 37.50	Emails to and from opposing counsel re: Rule 30(b)(6) deposition issues.	0.10
Gaskins, Edward B. (02733)	4/18/2019	\$ 1,275.00	Review and identify documents for client deposition prep.	3.40
Gaskins, Edward B. (02733)	4/19/2019	\$ 825.00	Begin drafting client outline for Rule 30(b)(6) deposition.	2.20
Stockhausen, Wendy S. (08669)	4/19/2019	\$ 675.00	Analyze and compile voluminous exhibits for Shem Creek 30(b)(6) deposition preparation; assemble into notebooks; draft index for same.	5.00
Stockhausen, Wendy S. (08669)	4/20/2019	\$ 270.00	Finalize exhibit notebooks for deposition preparation of Shem Creek 30(b)(6) deponents; finalize index.	2.00
Gaskins, Edward B. (02733)	4/22/2019	\$ 525.00	Continue drafting outline for Rule 30(b)(6) deposition.	1.40
Gaskins, Edward B. (02733)	4/22/2019	\$ 675.00	Draft deposition outline for Rule 30(b)(6) deposition.	1.80
Gaskins, Edward B. (02733)	4/22/2019	\$ 1,425.00	Prepare for and participate in office conference w/ clients for [REDACTED]	3.80
Stockhausen, Wendy S. (08669)	4/22/2019	\$ 27.00	Review e-mail and Feasibility Study attached; bates label in preparation of production; e-mail to opposing counsel forwarding same.	0.20
Gaskins, Edward B. (02733)	4/23/2019	\$ 712.50	Phone conference w/ clients to [REDACTED]. Review documents re: outstanding deposition issues. Emails to and from opposing counsel re: deposition.	1.90
Stockhausen, Wendy S. (08669)	4/23/2019	\$ 40.50	Communications with opposing counsel concerning start time of Shem Creek 30(b)(6) deposition and production of documents; process certain document production to MVA ShareFile; e-mail to opposing counsel providing link to production.	0.30
Gaskins, Edward B. (02733)	4/24/2019	\$ 2,662.50	Prepare and attend Rule 30(b)(6) deposition of SCDG.	7.10
Stockhausen, Wendy S. (08669)	4/26/2019	\$ 472.50	Analyze and compile exhibits for Eric DeMoura deposition; assemble into notebook for attorney reference and folders for witness and court reporter; prepare index for same.	3.50
Gaskins, Edward B. (02733)	4/26/2019	\$ 1,425.00	Review documents and identify exhibits for DeMoura deposition. Begin drafting outline for DeMoura deposition.	3.80
Gaskins, Edward B. (02733)	4/28/2019	\$ 1,312.50	Draft outline for DeMoura deposition. Analyze exhibits and prepare for DeMoura deposition.	3.50
Stockhausen, Wendy S. (08669)	4/29/2019	\$ 175.50	Analyze and add additional documents to notebooks; revise and finalize index and notebooks.	1.30
Stockhausen, Wendy S. (08669)	4/29/2019	\$ 67.50	Analyze and compile additional documents for inclusion in DeMoura Exhibit Notebook and folders; revise index; research Mt. Pleasant Town Meeting Minutes from 2013; process for inclusion in deposition.	0.50
Gaskins, Edward B. (02733)	4/29/2019	\$ 2,362.50	Prepare for and take deposition of Eric DeMoura.	6.30
Stockhausen, Wendy S. (08669)	4/30/2019	\$ 54.00	Begin reviewing and analyzing documents in preparation of Kent Prause deposition.	0.40
Gaskins, Edward B. (02733)	4/30/2019	\$ 2,137.50	Identify and analyze exhibits for Prause deposition. Draft outline and prepare for Prause deposition.	5.70
Stockhausen, Wendy S. (08669)	4/30/2019	\$ 580.50	Analyze and compile exhibits in preparation of Kent Prause deposition; assemble into notebook for attorney reference and folders for witness and court reporter; prepare index for same.	4.30
Gaskins, Edward B. (02733)	5/1/2019	\$ 2,962.50	Prepare for and take deposition of Kent Prause.	7.90
Stockhausen, Wendy S. (08669)	5/1/2019	\$ 162.00	Review file; analyze documents and compile potential exhibits in preparation of C. Farrell deposition; prepare exhibit notebook and index.	1.20
Gaskins, Edward B. (02733)	5/2/2019	\$ 2,962.50	Prepare for and take deposition of Christiane Farrell.	7.90
Stockhausen, Wendy S. (08669)	5/2/2019	\$ 27.00	Analyze additional documents and compile additional exhibits in preparation of C. Farrell deposition; revise exhibit index.	0.20
Gaskins, Edward B. (02733)	5/7/2019	\$ 300.00	Emails to and from Judge Murphy re: hearing on Town's motion for protective order. Phone conference w/ Roy Strickland re: [REDACTED]. Analyze ULI study re: [REDACTED]	0.80
Gaskins, Edward B. (02733)	5/9/2019	\$ 112.50	Phone conference w/ Alex Smith re: [REDACTED]. Email to clients re: [REDACTED]	0.30
Gaskins, Edward B. (02733)	5/10/2019	\$ 225.00	Email to client re: [REDACTED]. Phone conference w/ Tyler Fleesch re: [REDACTED]. Search for documents re: Town's engagement of PR firm.	0.60

Stockhausen, Wendy S. (08669)	5/13/2019	\$ 54.00	Review and process deposition transcripts of Mr. Flesch and Mr. Small received from court reporter; communications with Mr. Flesch and Mr. Small regarding [REDACTED]	0.40
Stockhausen, Wendy S. (08669)	5/14/2019	\$ 40.50	Draft Plaintiff's Second Interrogatories and Second Request for Production to Defendant.	0.30
Stockhausen, Wendy S. (08669)	5/14/2019	\$ 40.50	Research Rawle Murdy; draft subpoena to Rawle Murdy Associates, Inc.	0.30
Stockhausen, Wendy S. (08669)	5/15/2019	\$ 54.00	Draft Exhibit A to Rawle Murdy Associates, Inc.'s subpoena.	0.40
Gaskins, Edward B. (02733)	5/22/2019	\$ 37.50	Emails to and from Trenholm Walker and opposing counsel re: mediation.	0.10
Gaskins, Edward B. (02733)	5/28/2019	\$ 75.00	Multiple emails w/ opposing counsel re: mediation. Email to T. Walker re: mediation.	0.20
Gaskins, Edward B. (02733)	5/29/2019	\$ 525.00	Draft supplemental discovery requests. Phone conference w/ Tyler Flesch re: [REDACTED] Research Town credit rating and bond issuances.	1.40
Stockhausen, Wendy S. (08669)	5/30/2019	\$ 27.00	Review notification received from court reporter; analyze and process Kent Prause deposition transcript with corrected exhibits.	0.20
Gaskins, Edward B. (02733)	5/31/2019	\$ 37.50	Email to mediator re: mediation dates.	0.10
Gaskins, Edward B. (02733)	6/3/2019	\$ 300.00	Research SEC rules re: municipal securities disclosures. Finalize supplemental request for production to Town.	0.80
Stockhausen, Wendy S. (08669)	6/3/2019	\$ 40.50	Revise and finalize Plaintiff's Second Requests for Production to Defendant; draft service correspondence and Certificate of Service; process for service by hand delivery; e-mail to opposing counsel regarding same.	0.30
Gaskins, Edward B. (02733)	6/4/2019	\$ 525.00	Analyze Town's memo in support of motion for protective order. Begin researching case law for [REDACTED]	1.40
Stockhausen, Wendy S. (08669)	6/4/2019	\$ 67.50	Draft Memorandum in Opposition to Defendants' Motion for Protective Order.	0.50
Gaskins, Edward B. (02733)	6/6/2019	\$ 562.50	Begin drafting memo in opposition to motion for protective order. Analyze caselaw [REDACTED]	1.50
Gaskins, Edward B. (02733)	6/7/2019	\$ 1,575.00	Research caselaw for [REDACTED] Draft memo in opposition to motion for protective order.	4.20
Gaskins, Edward B. (02733)	6/10/2019	\$ 1,387.50	Draft and revise memo in opposition to motion for protective order. Prepare for motion hearing.	3.70
Stockhausen, Wendy S. (08669)	6/10/2019	\$ 202.50	Analyze Memorandum in Opposition to Defendant's Motion for Protective Order; compile exhibits; communication with Clerk of Court regarding filing; finalize Memorandum and exhibits; prepare filing and service correspondence; process Memorandum and exhibits for filing and service.	1.50
Gaskins, Edward B. (02733)	6/11/2019	\$ 1,312.50	Travel to and from and attend hearing on Town's motion for protective order.	3.50
Gaskins, Edward B. (02733)	6/17/2019	\$ 262.50	Emails to and from clients re: [REDACTED] Emails to and from judge's law clerk and opposing counsel re: status conference.	0.70
Gaskins, Edward B. (02733)	6/21/2019	\$ 225.00	Status conference w/ Judge Murphy and David Pagliarini re: trial scheduling. Emails to and from clients re: [REDACTED] Phone conference w/ David Pagliarini re: mediation. Phone conference w/ Tyler Flesch re: [REDACTED]	0.60
Gaskins, Edward B. (02733)	6/27/2019	\$ 150.00	Phone conference w/ clients re: [REDACTED]	0.40
Gaskins, Edward B. (02733)	7/9/2019	\$ 75.00	Phone conference w/ Roy Strickland re: [REDACTED]	0.20
Gaskins, Edward B. (02733)	7/10/2019	\$ 150.00	Email to clients re: [REDACTED] Phone conference w/ Julia Copeland re: expert depositions.	0.40
Gaskins, Edward B. (02733)	7/11/2019	\$ 75.00	Preliminary review of discovery responses. Emails to and from Town counsel re: email search terms.	0.20
Gaskins, Edward B. (02733)	7/16/2019	\$ 37.50	Phone conference w/ Roy Strickland re: [REDACTED]	0.10
Gaskins, Edward B. (02733)	7/17/2019	\$ 825.00	Multiple phone conferences w/ Alex Smith re: [REDACTED] Analyze financial statements and lease agreement for [REDACTED] Emails and phone conference w/ Tyler Flesch re: [REDACTED]	2.20
Beard, Jessica M. (08612)	7/17/2019	\$ 360.00	Analyze and configure data set for attorney review.	2.00

Gaskins, Edward B. (02733)	7/18/2019	\$ 600.00	Multiple phone conferences w/ Alex Smith re: [REDACTED] [REDACTED] Analyze PLA re: [REDACTED] [REDACTED] Review case documents re: [REDACTED] [REDACTED] Research caselaw and accounting materials re: [REDACTED]	1.60
Beard, Jessica M. (08612)	7/18/2019	\$ 180.00	Analyze and configure data set for attorney review.	1.00
Gaskins, Edward B. (02733)	7/19/2019	\$ 1,350.00	Phone conference w/ Roy Strickland re: [REDACTED] Phone conference w/ Tyler Flesch re: [REDACTED] Conduct independent analysis re: damages. Research and analyze caselaw and other legal materials re: [REDACTED]	3.60
Trunk, Chelsea L. (08847)	7/22/2019	\$ 210.00	Configure and import produced documents into discovery database for attorney review.	1.20
Hawkins, Matthew C. (07012)	7/22/2019	\$ 156.00	Resolve technical issue related to corrupted files.	0.80
Gaskins, Edward B. (02733)	7/22/2019	\$ 1,275.00	Multiple phone conferences w/ Alex Smith and Roy Strickland re: [REDACTED] Analyze and conduct research re: [REDACTED] Review and analyze supplemental documents produced by Town.	3.40
Gaskins, Edward B. (02733)	7/23/2019	\$ 1,537.50	Multiple phone conferences w/ Alex Smith re: [REDACTED] [REDACTED] Phone conference w/ Roy Strickland re: [REDACTED] [REDACTED] Phone conference w/ Tyler Flesch re: [REDACTED] Review rent damages calculation. Draft and revise supplemental discovery responses re: damages and subpoena to Missy Johnson. Phone conference w/ Julia Copeland re: expert issues.	4.10
Gaskins, Edward B. (02733)	7/25/2019	\$ 150.00	Review correspondence re: Town's withdrawal of expert and deposition of Tyler Flesch. Emails to and from opposing counsel re: deposition of B. Morrison. Phone conferences w/ Tyler Flesch re: [REDACTED]	0.40
Trunk, Chelsea L. (08847)	7/29/2019	\$ 175.00	Configure and import electronic data into discovery database for attorney review.	1.00
Stockhausen, Wendy S. (08669)	7/29/2019	\$ 27.00	Revise Notice of Deposition for Brad Morrison; process for service by mail; email to counsel of record regarding same.	0.20
Stockhausen, Wendy S. (08669)	7/29/2019	\$ 13.50	Communications with court reporter regarding coverage for Brad Morrison deposition.	0.10
Gaskins, Edward B. (02733)	7/29/2019	\$ 75.00	Review deposition notice for Tyler Flesch. Email to clients re: [REDACTED]	0.20
Gaskins, Edward B. (02733)	7/31/2019	\$ 900.00	Identify and analyze documents for Morrison deposition. Research statutes and Town documents in preparation for Morrison deposition.	2.40
Stockhausen, Wendy S. (08669)	7/31/2019	\$ 13.50	Communications with court reporter confirming Brad Morrison deposition coverage.	0.10
Gaskins, Edward B. (02733)	8/1/2019	\$ 112.50	Phone conference w/ Julia Copeland re: Morrison deposition and documents. Phone conference w/ Tyler Flesch re: [REDACTED] Emails to and from J. Copeland re: document production issues.	0.30
Stockhausen, Wendy S. (08669)	8/1/2019	\$ 94.50	Analyze, process and compile potential exhibits for Brad Morrison deposition; prepare and index deposition notebook.	0.70
Trunk, Chelsea L. (08847)	8/1/2019	\$ 52.50	Prepare produced documents from Relativity for attorney review.	0.30
Gaskins, Edward B. (02733)	8/5/2019	\$ 337.50	Phone conference w/ Julia Copeland re: subpoena. Phone conference w/ Alex Smith and Tyler Flesch re: [REDACTED]	0.90
Gaskins, Edward B. (02733)	8/7/2019	\$ 450.00	Identify document prep exhibits and prepare for deposition prep of Tyler Flesch.	1.20
Gaskins, Edward B. (02733)	8/8/2019	\$ 1,875.00	Prepare for and defend deposition of Tyler Flesch.	5.00
Stockhausen, Wendy S. (08669)	8/8/2019	\$ 108.00	Review, analyze and compile potential exhibits for Morrison deposition; create index for same.	0.80
Gaskins, Edward B. (02733)	8/9/2019	\$ 2,100.00	Identify and review exhibits for, draft outline for, and take deposition of Brad Morrison. Research SEC regulatory guidance re: [REDACTED]	5.60
Gaskins, Edward B. (02733)	8/12/2019	\$ 2,775.00	Draft and revise PowerPoint presentation for mediation. Prepare for mediation.	7.40
Gaskins, Edward B. (02733)	8/13/2019	\$ 2,250.00	Attend mediation.	6.00
Gaskins, Edward B. (02733)	8/14/2019	\$ 187.50	Phone conferences w/ Tyler Flesch re: [REDACTED] [REDACTED]	0.50
Gaskins, Edward B. (02733)	8/16/2019	\$ 150.00	Phone conference w/ Tyler Flesch re: [REDACTED] Draft email to Judge Murphy's law clerk re: trial schedule.	0.40

Gaskins, Edward B. (02733)	8/19/2019	\$ 187.50	Phone conference w/ Tyler Flesch re: [REDACTED] Phone conference w/ Trenholm Walker re: mediation. Email to Judith McInnis re: subpoena to 101 Coleman Partners.	0.50
Gaskins, Edward B. (02733)	8/20/2019	\$ 712.50	Draft letter to opposing counsel re: settlement and mediation. Analyze Town official statement for bond issuance re: [REDACTED]. Phone conference w/ Judith McInnis re: subpoena response.	1.90
Gaskins, Edward B. (02733)	8/21/2019	\$ 112.50	Phone conference w/ Grayson Lambert re: subpoena to 101 Coleman Partners. Phone conference and email to Tyler Flesch re: [REDACTED]	0.30
Gaskins, Edward B. (02733)	8/23/2019	\$ 1,050.00	Draft and revise settlement/mediation letter to Town's attorney. Research case law and legal materials re: [REDACTED]. Emails to and from clients re: [REDACTED]. Review and revise letter re: 101 Coleman Partners subpoena.	2.80
Stockhausen, Wendy S. (08669)	8/26/2019	\$ 27.00	Convert Powerpoint presentation to pdf format; revise and finalize correspondence to Julia Copeland; e-mail to Mr. Gaskins regarding same.	0.20
Stockhausen, Wendy S. (08669)	8/26/2019	\$ 13.50	E-mail to opposing counsel forwarding correspondence to Ms. Copeland and pdf of Mediation PowerPoint Presentation.	0.10
Gaskins, Edward B. (02733)	8/26/2019	\$ 262.50	Phone conferences w/ Tyler Flesch re: [REDACTED]. Revise and send mediation letter to opposing counsel. Phone conference w/ Grayson Lambert re: 101 Coleman Partners subpoena. Review emails from Town counsel and G. Lambert re: 101 Coleman Partners subpoena.	0.70
Gaskins, Edward B. (02733)	9/4/2019	\$ 112.50	Phone conferences w/ Ken Betsch re: subpoena and case.	0.30
Gaskins, Edward B. (02733)	9/9/2019	\$ 112.50	Phone conferences w/ Tyler Flesch re: [REDACTED]. Phone conference w/ Julia Copeland re: mediation/settlement issues. Emails to and from clients re: [REDACTED]	0.30
Gaskins, Edward B. (02733)	9/10/2019	\$ 150.00	Draft responses to 2nd requests for production.	0.40
Stockhausen, Wendy S. (08669)	9/10/2019	\$ 67.50	Draft Responses to Defendant's Second Requests for Production.	0.50
Trunk, Chelsea L. (08847)	9/11/2019	\$ 210.00	Assist with production of documents.	1.20
Gaskins, Edward B. (02733)	9/11/2019	\$ 375.00	Phone conferences w/ Tyler Flesch re: [REDACTED]. Draft responses to 2nd RFP.	1.00
Beard, Jessica M. (08612)	9/13/2019	\$ 216.00	Assist with production of documents.	1.20
Gaskins, Edward B. (02733)	9/13/2019	\$ 1,012.50	Draft responses to 2nd RFPs.. Phone conference w/ Ken Betsch re: subpoena response. Phone conference w/ Tyler Flesch re: [REDACTED]. Draft and revise letter to Town counsel objecting to subpoenas/depositions of Ken Betsch and Jeff Johnston. Review and analyze documents produced by Ken Betsch.	2.70
Stockhausen, Wendy S. (08669)	9/13/2019	\$ 27.00	Draft objection correspondence to opposing counsel regarding notices and subpoenas issued to Ken Betsch and Jeff Johnson.	0.20
Gaskins, Edward B. (02733)	9/16/2019	\$ 150.00	Review proposed amended scheduling order from Town's attorney. Phone conferences w/ Claude Tackett re: discovery order and related issues.	0.40
Beard, Jessica M. (08612)	9/16/2019	\$ 540.00	Assist with production of documents.	3.00
Beard, Jessica M. (08612)	9/17/2019	\$ 36.00	Analyze and configure data set for attorney review.	0.20
Gaskins, Edward B. (02733)	9/17/2019	\$ 75.00	Phone conference w/ Paul Sperry re: Town's notice of deposition of and subpoena to Jeff Johnston.	0.20
Gaskins, Edward B. (02733)	9/19/2019	\$ 75.00	Review Town's motion to amend scheduling order. Revise responses to 2nd RFP.	0.20
Gaskins, Edward B. (02733)	9/20/2019	\$ 300.00	Review motion to amend scheduling order. Review and revise amendment to supplemental answer to interrogatories and responses to 2nd RFP.	0.80
Gaskins, Edward B. (02733)	10/7/2019	\$ 262.50	Draft and revise settlement correspondence to opposing counsel. Phone conferences w/ Tyler Flesch re: [REDACTED]	0.70
Gaskins, Edward B. (02733)	10/9/2019	\$ 75.00	Phone conference w/ Tyler Flesch re: [REDACTED]. Communications w/ Julia Copeland re: mediation and discovery issues.	0.20
Gaskins, Edward B. (02733)	10/14/2019	\$ 262.50	Phone conference w/ Tyler Flesch re: [REDACTED]. Emails to and from opposing counsel re: depositions. Strategy session re: pre-trial preparation.	0.70

Gaskins, Edward B. (02733)	10/15/2019	\$ 112.50	Phone conference w/ Ken Betsch re: deposition. Emails to and from opposing counsel re: depositions.	0.30
Gaskins, Edward B. (02733)	10/16/2019	\$ 75.00	Emails to and from SMHa attorney re: Johnston deposition. Emails to and from opposing counsel re: deposition.	0.20
Gaskins, Edward B. (02733)	10/22/2019	\$ 150.00	Review motion to compel filed by Town. Emails to and from opposing counsel and judge's law clerk re: hearing on motion to compel.	0.40
Phillips, Laura L. (08992)	10/25/2019	\$ 216.00	Prepared proposed Memorandum in Opposition to Defendant's Motion to Compel Production of Documents in Response to their Second Requests for Production.	1.60
Gaskins, Edward B. (02733)	10/31/2019	\$ 37.50	Review notice of depositions for Tex Small and Tyler Flesch. Review email from opposing counsel and notice of deposition re: Jeff Johnston.	0.10
Gaskins, Edward B. (02733)	11/6/2019	\$ 112.50	Phone conference w/ Tyler Flesch re: [REDACTED] [REDACTED] Phone conference w/ Julia Copeland re: deposition scheduling.	0.30
Gaskins, Edward B. (02733)	11/8/2019	\$ 937.50	Review and analyze Town's motion to compel. Research and analyze case law and legal materials re: [REDACTED] [REDACTED] Begin drafting response in opposition to motion to compel.	2.50
Gaskins, Edward B. (02733)	11/11/2019	\$ 937.50	Review correspondence from Grayson Lambert re: motion to compel hearing. Continue drafting response in opposition to motion to compel and review documents related to motion.	2.50
Gaskins, Edward B. (02733)	11/12/2019	\$ 825.00	Continue drafting memo in opposition to motion to compel. Multiple emails to and from law clerk, Town's attorneys, and clients re: motion to compel developments. Phone conference w/ Greyson Lambert re: motion to compel issues.	2.20
Phillips, Laura L. (08992)	11/13/2019	\$ 40.50	Prepared proposed Motion to Strike Defendant's Expert Disclosure.	0.30
Gaskins, Edward B. (02733)	11/13/2019	\$ 1,200.00	Review request for motion to extend discovery. Draft email to judge's law clerk in opposition to extension. Review Town's expert disclosure and previous documents relating to disclosure and withdrawal. Emails to and from client re: [REDACTED] Research and analyze case law re: [REDACTED] Continue drafting memo in opposition to motion to compel discovery.	3.20
Phillips, Laura L. (08992)	11/14/2019	\$ 81.00	Continued preparing proposed Motion to Strike Defendant's Expert Disclosure.	0.60
Gaskins, Edward B. (02733)	11/14/2019	\$ 112.50	Review correspondence from Town attorneys re: motion for extension of discovery. Emails to and from Greyson Lambert re: Town correspondence. Email from judge's law clerk and to clients re: denial of discovery extension.	0.30
Gaskins, Edward B. (02733)	11/15/2019	\$ 225.00	Review subpoena and deposition notice for 101 Coleman Partners. Emails to and from Town attorneys and Greyson Lambert re: 101 Coleman deposition. Phone conference w/ Tyler Flesch re: [REDACTED] Phone conference w/ Greyson Lambert re: deposition and motion to compel strategy.	0.60
Gaskins, Edward B. (02733)	11/18/2019	\$ 600.00	Research and analyze case law for [REDACTED] [REDACTED] Phone conference w/ Ken Betsch re: deposition.	1.60
Phillips, Laura L. (08992)	11/19/2019	\$ 27.00	Reviewed Motion to Strike Defendant's Expert Witness and gathered corresponding exhibits to the motion.	0.20
Phillips, Laura L. (08992)	11/19/2019	\$ 13.50	Prepared Motion to Strike Defendant's Expert Witness for electronic submission with the Charleston Clerk and electronically submitted same.	0.10
Gaskins, Edward B. (02733)	11/19/2019	\$ 75.00	Final review and revisions to motion to strike expert.	0.20
Gaskins, Edward B. (02733)	11/20/2019	\$ 3,562.50	Travel to and from and participate in deposition of Ken Betsch.	9.50
Gaskins, Edward B. (02733)	11/25/2019	\$ 225.00	Draft memo in opposition to motion to compel. Email to Judge Murphy's law clerk re: motion to strike expert.	0.60
Phillips, Laura L. (08992)	11/26/2019	\$ 27.00	Began gathering exhibits to Memorandum in Opposition to Defendant's Motion to Compel Production of Documents in Second Requests for Production and Documents per Subpoena to 101 Coleman Partners.	0.20
Gaskins, Edward B. (02733)	11/26/2019	\$ 2,287.50	Draft and revise memo in opposition to motion compel.	6.10

Phillips, Laura L. (08992)	11/27/2019	\$ 13.50	Correspondence to Tyler Flesch re: [REDACTED]	0.10
Phillips, Laura L. (08992)	11/27/2019	\$ 324.00	Continued gathering exhibits to Memorandum in Opposition to Defendant's Motion to Compel Production of Documents in Second Requests for Production and Documents per Subpoena to 101 Coleman Partners.	2.40
Phillips, Laura L. (08992)	11/27/2019	\$ 27.00	Prepared Memorandum in Opposition to Defendant's Motion to Compel Plaintiff to Produce Documents Responsive to Defendant's Second Request for Production and, in the Alternative, Compel the Production of the Same Documents in Response to Defendant's Subpoena to 101 Coleman Partners for electronic submission with Charleston Clerk and electronically submitted same.	0.20
Phillips, Laura L. (08992)	11/27/2019	\$ 13.50	Prepared correspondence to Judge Murphy re: submission of Plaintiff's Memorandum in Opposition to Defendant's Motion to Compel.	0.10
Phillips, Laura L. (08992)	12/2/2019	\$ 13.50	Correspondence from counsel for 101 Coleman Partners re: their Opposition to Defendant's Motion to Compel and their Motion to Quash the 30(b)(6) Deposition of 101 Coleman Partners.	0.10
Gaskins, Edward B. (02733)	12/2/2019	\$ 112.50	Phone conference w/ SMHa attorney re: Jeff Johnston deposition. Emails to and from clients re: [REDACTED]	0.30
Phillips, Laura L. (08992)	12/3/2019	\$ 13.50	Prepared Notice of Deposition of Missy Johnson.	0.10
Phillips, Laura L. (08992)	12/3/2019	\$ 13.50	Prepared deposition subpoena to Missy Johnson.	0.10
Phillips, Laura L. (08992)	12/3/2019	\$ 13.50	Prepared letter to Missy Johnson re: the Notice of Deposition and Deposition Subpoena for the taking of her deposition.	0.10
Phillips, Laura L. (08992)	12/3/2019	\$ 13.50	Processed outgoing Notice of Deposition and deposition subpoena to Missy Johnson.	0.10
Phillips, Laura L. (08992)	12/3/2019	\$ 162.00	Prepared proposed Memorandum in Support of Motion to Strike Defendant's Expert Witness.	1.20
Gaskins, Edward B. (02733)	12/3/2019	\$ 900.00	Analyze case law for [REDACTED] Draft memo in support of motion to strike.	2.40
Phillips, Laura L. (08992)	12/4/2019	\$ 324.00	Gathered and organized proposed exhibits to the deposition of Jeff Johnston.	2.40
Phillips, Laura L. (08992)	12/4/2019	\$ 40.50	Gathered and organized exhibits to the Memorandum in Support of Motion to Strike Defendant's Expert.	0.30
Phillips, Laura L. (08992)	12/4/2019	\$ 13.50	Prepared Memorandum in Support of Motion to Strike Defendant's Expert Witness for electronic submission with the court and electronically submitted same.	0.10
Phillips, Laura L. (08992)	12/4/2019	\$ 13.50	Prepared correspondence to Judge Murphy and her Law Clerk re: the Memorandum in Support of Motion to Strike Defendant's Expert Witness.	0.10
Gaskins, Edward B. (02733)	12/4/2019	\$ 2,437.50	Draft, revise, and prepare for filing memo in support of motion to strike expert. Phone conference w/ Tyler Flesch. Identify documents for deposition prep w/ Jeff Johnston. Participate in deposition prep w/ Jeff Johnston. Review Town's response to motion to strike.	6.50
Phillips, Laura L. (08992)	12/5/2019	\$ 13.50	Correspondence from counsel for Defendant re: their Memorandum in Opposition to Plaintiff's Motion to Strike its Expert Witness.	0.10
Phillips, Laura L. (08992)	12/5/2019	\$ 40.50	Prepared draft of Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion to Strike Defendant's Expert.	0.30
Phillips, Laura L. (08992)	12/5/2019	\$ 40.50	Reviewed select documents previously produced to see if 101 Coleman Partners was identified.	0.30
Magill, Clinton T. (02892)	12/5/2019	\$ 385.00	Supplement and revise our Reply to Defendant's Memorandum in Opposition to our Motion to Strike prior to filing same with Court	1.40
Phillips, Laura L. (08992)	12/5/2019	\$ 27.00	Gathered and organized exhibit to Plaintiff's Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion to Strike Defendant's Expert.	0.20
Phillips, Laura L. (08992)	12/5/2019	\$ 13.50	Prepared Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion to Strike Defendant's Expert Witness for electronic submission with the Charleston Clerk and electronically submitted same.	0.10
Phillips, Laura L. (08992)	12/5/2019	\$ 13.50	Prepared correspondence to Judge Murphy and her Law Clerk re: Plaintiff's Reply to Defendant's Memorandum in Opposition to Motion to Strike Defendant's Expert Witness	0.10

Gaskins, Edward B. (02733)	12/5/2019	\$ 2,175.00	Draft and revise reply to Town's memo in opposition to motion to strike. Attend deposition of Jeff Johnston. Research law re: [REDACTED] Review deposition transcripts for deposition prep for Tex Small.	5.80
Gaskins, Edward B. (02733)	12/6/2019	\$ 750.00	Deposition prep w/ Tex Small.	2.00
Gaskins, Edward B. (02733)	12/9/2019	\$ 37.50	Review correspondence from Elliott Davis counsel re: subpoena to Missy Johnson.	0.10
Gaskins, Edward B. (02733)	12/10/2019	\$ 1,125.00	Meet w/ Tex Small in preparation for deposition. Attend deposition of Tex Small.	3.00
Phillips, Laura L. (08992)	12/11/2019	\$ 67.50	Prepared proposed Order Granting Motion to Strike Defendant's Expert Witness.	0.50
Phillips, Laura L. (08992)	12/11/2019	\$ 67.50	Prepared proposed Order Denying Defendant's Motion to Compel Plaintiff to Produce Documents Responsive to Defendant's Second Request for Production and, in the Alternative, Compel the Production of the Same Documents in Response to Defendant's Subpoena to Related Entity, 101 Coleman Partners, LLC.	0.50
Gaskins, Edward B. (02733)	12/11/2019	\$ 75.00	Review correspondence from Judge Murphy's law clerk re: rulings on motions. Email and phone conference w/ client re: [REDACTED]	0.20
Gaskins, Edward B. (02733)	12/12/2019	\$ 37.50	Emails to and from counsel for Elliot Davis re: cancelation of deposition of Missy Johnson.	0.10
Gaskins, Edward B. (02733)	12/16/2019	\$ 450.00	Participate in deposition prep w/ Tyler Flesch.	1.20
Gaskins, Edward B. (02733)	12/17/2019	\$ 900.00	Attend deposition of Tyler Flesch. Phone conference w/ Robert Behre re: case status and issues.	2.40
Phillips, Laura L. (08992)	12/20/2019	\$ 351.00	Prepared initial draft of Pre-Trial Brief.	2.60
Phillips, Laura L. (08992)	12/23/2019	\$ 40.50	Organized and updated pleadings and correspondence.	0.30
Phillips, Laura L. (08992)	12/27/2019	\$ 418.50	Prepared deposition summary of Robert Small, Jr. taken 4/24/19.	3.10
Phillips, Laura L. (08992)	12/30/2019	\$ 229.50	Continued preparing summary of Robert Small, Jr.'s deposition taken 4/24/19.3	1.70
Phillips, Laura L. (08992)	12/30/2019	\$ 189.00	Prepared deposition summary of Tyler Flesch's deposition taken 4/24/19.	1.40
Phillips, Laura L. (08992)	1/2/2020	\$ 27.00	Prepared proposed Extension of Tolling Agreement to ADC Engineering.	0.20
Phillips, Laura L. (08992)	1/2/2020	\$ 13.50	Prepared proposed Extension of Tolling Agreement to Stubbs Muldrow Herin Architects.	0.10
Phillips, Laura L. (08992)	1/2/2020	\$ 432.00	Continued deposition summary of Tyler Flesch taken 4/24/19.	3.20
Gaskins, Edward B. (02733)	1/2/2020	\$ 908.50	Draft and revise proposed orders on motion to compel, motion to quash, and motion to strike expert.	2.30
Phillips, Laura L. (08992)	1/3/2020	\$ 13.50	Communications from Defendant's counsel re: their Supplemental Responses to Plaintiff's Second Requests for Production.	0.10
Phillips, Laura L. (08992)	1/3/2020	\$ 13.50	Prepared the proposed Order Granting Plaintiff's Motion to Strike Defendant's Expert Witness and the proposed Order Denying Defendant's Motion to Compel Plaintiff to Produce Documents Responsive to Defendant's Second Request for Production and the Production of the Same Documents in	0.10
Phillips, Laura L. (08992)	1/3/2020	\$ 13.50	Prepared correspondence to Judge Murphy's Law Clerk re: the proposed Order Granting Plaintiff's Motion to Strike Defendant's Expert Witness and the proposed Order Denying Defendant's Motion to Compel Plaintiff to Produce Documents Responsive to Defendant's Second Request for Production and the Production of the Same Documents in Response to Defendant's Subpoena to Related Entity, 101 Coleman Partners, LLC for electronic submission with the Charleston Clerk and electronically submitted same.	0.10
Phillips, Laura L. (08992)	1/3/2020	\$ 283.50	Continued deposition summary of Tyler Flesch taken 4/24/19.	2.10
Phillips, Laura L. (08992)	1/6/2020	\$ 661.50	Prepared deposition summary of Eric DeMoura taken 4/29/19.	4.90
Gaskins, Edward B. (02733)	1/6/2020	\$ 118.50	Emails to and from opposing counsel re: trial issues. Conduct initial review of draft pre-trial brief.	0.30
Phillips, Laura L. (08992)	1/7/2020	\$ 108.00	Continued deposition summary of Eric DeMoura taken 4/29/19.	0.80
Phillips, Laura L. (08992)	1/8/2020	\$ 513.00	Continued deposition summary of Eric DeMoura taken 4/29/19.	3.80
Phillips, Laura L. (08992)	1/9/2020	\$ 351.00	Prepared deposition summary of Kent Prause.	2.60
Phillips, Laura L. (08992)	1/10/2020	\$ 27.00	Phone conferences with the Jasper County Clerk re: location of trial.	0.20
Phillips, Laura L. (08992)	1/10/2020	\$ 324.00	Continued summary of deposition of Kent Prause.	2.40
Gaskins, Edward B. (02733)	1/10/2020	\$ 39.50	Emails to and from law clerk re: trial location.	0.10

Gaskins, Edward B. (02733)	1/13/2020	\$ 2,330.50	Conduct research for pre-trial brief. Draft pre-trial brief. Phone conference w/ opposing counsel re: case developments.	5.90
Phillips, Laura L. (08992)	1/13/2020	\$ 486.00	Prepared deposition summary of Jeff Johnston.	3.60
Phillips, Laura L. (08992)	1/14/2020	\$ 459.00	Recreated Deposition Preparation Notebook for Tyler Flesch.	3.40
Gaskins, Edward B. (02733)	1/14/2020	\$ 1,817.00	Continue researching and drafting pre-trial brief.	4.60
Phillips, Laura L. (08992)	1/14/2020	\$ 243.00	Prepared list of exhibits marked during depositions taken in this case in preparation of identifying them in the Pre-Trial Brief.	1.80
Phillips, Laura L. (08992)	1/15/2020	\$ 310.50	Continued preparing list of exhibits marked during depositions taken in this case in preparation of identifying them in the Pre-Trial Brief.	2.30
Phillips, Laura L. (08992)	1/15/2020	\$ 418.50	Prepared deposition summary of Brad Morrison.	3.10
Gaskins, Edward B. (02733)	1/15/2020	\$ 869.00	Continue drafting pre-trial brief.	2.20
Phillips, Laura L. (08992)	1/16/2020	\$ 13.50	Reviewed correspondence from Clerk re: Defendant's Motion for Summary Judgment and Memorandum in Support.	0.10
Phillips, Laura L. (08992)	1/16/2020	\$ 418.50	Prepared deposition summary of Ken Betsch.	3.10
Gaskins, Edward B. (02733)	1/16/2020	\$ 1,106.00	Analyze Town's motion for summary judgment and supporting materials. Begin outlining case theme and opening statement. Revise pre-trial brief.	2.80
Phillips, Laura L. (08992)	1/17/2020	\$ 378.00	Prepared deposition summary of Robert Small taken 12/10/19.	2.80
Phillips, Laura L. (08992)	1/17/2020	\$ 283.50	Prepared deposition summary of Tyler Flesch taken 8/8/19.	2.10
Phillips, Laura L. (08992)	1/21/2020	\$ 13.50	Correspondence from Clerk re: Defendant's Motion for Reconsideration of Order Granting Plaintiff's Motion to Strike Defendant's Expert Witness and Memorandum in Support.	0.10
Phillips, Laura L. (08992)	1/21/2020	\$ 13.50	Prepared exhibits to accompany the Pre-Trial Brief.	0.10
Gaskins, Edward B. (02733)	1/21/2020	\$ 2,409.50	Phone conference w/ Tyler Flesch re: [REDACTED] Continue researching and analyzing law for pre-trial brief. Draft, revise and submit pre-trial brief. Review motion to reconsider order striking expert. Initial review of Town's pre-trial brief.	6.10
Phillips, Laura L. (08992)	1/21/2020	\$ 418.50	Prepared deposition summary of Christiane Farrell taken 5/2/19.	3.10
Phillips, Laura L. (08992)	1/22/2020	\$ 94.50	Prepared proposed Motion in Limine.	0.70
Phillips, Laura L. (08992)	1/22/2020	\$ 27.00	Prepared trial subpoena to Eric DeMoura.	0.20
Gaskins, Edward B. (02733)	1/22/2020	\$ 1,027.00	Review order from court denying motion to compel. Review case documents and identify exhibits for trial.	2.60
Phillips, Laura L. (08992)	1/22/2020	\$ 324.00	Continued deposition summary of Christiane Farrell.	2.40
Phillips, Laura L. (08992)	1/23/2020	\$ 13.50	Prepared trial subpoena to Christiane Farrell.	0.10
Phillips, Laura L. (08992)	1/23/2020	\$ 13.50	Prepared trial subpoena to Brad Morrison.	0.10
Phillips, Laura L. (08992)	1/23/2020	\$ 13.50	Prepared trial subpoena to Kent Prause.	0.10
Phillips, Laura L. (08992)	1/23/2020	\$ 27.00	Prepared trial subpoena to Jeff Johnston.	0.20
Phillips, Laura L. (08992)	1/23/2020	\$ 54.00	Processed outgoing trial subpoenas.	0.40
Phillips, Laura L. (08992)	1/23/2020	\$ 81.00	Prepared notebook containing deposition summaries completed to date in preparation for trial.	0.60
Phillips, Laura L. (08992)	1/23/2020	\$ 229.50	Continued deposition summary of Christiane Farrell.	1.70
Gaskins, Edward B. (02733)	1/23/2020	\$ 1,066.50	Review, revise, and execute trial subpoenas. Phone conference w/ Julia Copeland re: pre-trial matters. Phone conference w/ Paul Sperry re: Jeff Johnston trial prep and attendance. Review depositions for witness examinations.	2.70
Phillips, Laura L. (08992)	1/23/2020	\$ 432.00	Prepared deposition summary of Tyler Flesch taken 12/17/19.	3.20
Phillips, Laura L. (08992)	1/24/2020	\$ 688.50	Prepared notebook containing proposed Trial Exhibits.	5.10
Gaskins, Edward B. (02733)	1/24/2020	\$ 711.00	Continue reviewing depositions for witness examinations.	1.80
Beard, Jessica M. (08612)	1/24/2020	\$ 19.00	Analyze and configure data set for attorney review.	0.10
Gaskins, Edward B. (02733)	1/26/2020	\$ 1,382.50	Analyze trial exhibits for witness examination outlines. Begin drafting direct examination outline for Tex Small.	3.50
Phillips, Laura L. (08992)	1/27/2020	\$ 13.50	Correspondence from Clerk re: Defendant's Motion in Limine to Challenge, Limit, Exclude Parol Evidence of Council Members' Motives or Subjective Intent.	0.10
Phillips, Laura L. (08992)	1/27/2020	\$ 13.50	Correspondence from Clerk re: Defendant's in Limine to Challenge, Limit, Exclude Evidence of the Town's Zoning Ordinance Interpretations.	0.10
Phillips, Laura L. (08992)	1/27/2020	\$ 13.50	Correspondence from Clerk re: Defendant's Motion in Limine to Challenge, Limit, Exclude Parol Evidence Regarding the Terms of the Parking License Agreement.	0.10

Phillips, Laura L. (08992)	1/27/2020	\$ 13.50	Prepared Motion in Limine for electronic submission with the Charleston Clerk and electronically submitted same.	0.10
Phillips, Laura L. (08992)	1/27/2020	\$ 94.50	Revised Index to Trial Exhibit Notebook and rearranged notebook per revisions.	0.70
Gaskins, Edward B. (02733)	1/27/2020	\$ 2,449.00	Phone conference w/ Judge Murphy and opposing counsel re: trial matters. Review exhibits and revise exhibit list. Review and revise motion in limine. Review Town's motions in limine. Conduct legal research re: [REDACTED] Draft examination outline for Tex Small.	6.20
Phillips, Laura L. (08992)	1/27/2020	\$ 216.00	Reviewed video of Town Council Meeting held April 8, 2014 and summarized discussion regarding parking garage and citizen comments.	1.60
Phillips, Laura L. (08992)	1/28/2020	\$ 94.50	Meeting with Paralegal Stockhausen to go over Trial Director program in preparation of trial.	0.70
Phillips, Laura L. (08992)	1/28/2020	\$ 364.50	Reviewed video of Town Council Meeting held February 10, 2015 and summarized discussions regarding parking garage and citizen comments.	2.70
Gaskins, Edward B. (02733)	1/28/2020	\$ 4,384.50	Draft and revise direct examination outlines for Tex Small and Tyler Flesch. Review case documents for trial exhibits for Small and Flesch examinations.	11.10
Phillips, Laura L. (08992)	1/29/2020	\$ 324.00	Prepared notebooks for Robert Small and Tyler Flesch containing Exhibits identified in Direct Examination outline.	2.40
Gaskins, Edward B. (02733)	1/29/2020	\$ 3,871.00	Revise examination outlines for Tex Small and Tyler Flesch. Meet w/ Tex Small and Tyler Flesch and prepare for direct examination. Begin drafting Jeff Johnston direct examination outline.	9.80
Phillips, Laura L. (08992)	1/30/2020	\$ 121.50	Gathered trial exhibits for Tyler Flesch's direct examination [REDACTED]	0.90
Phillips, Laura L. (08992)	1/30/2020	\$ 108.00	Revised Index to Trial Exhibit Notebook, rearranged notebook per revisions, and added additional exhibits.	0.80
Phillips, Laura L. (08992)	1/30/2020	\$ 256.50	Scanned and saved Trial Exhibit Notebook.	1.90
Phillips, Laura L. (08992)	1/30/2020	\$ 13.50	Phone conference with Clerk of Court for Jasper County re: need to test equipment out for trial.	0.10
Phillips, Laura L. (08992)	1/30/2020	\$ 40.50	Prepared proposed Memorandum in Support of Defendant's Motion to Summary Judgment.	0.30
Gaskins, Edward B. (02733)	1/30/2020	\$ 3,792.00	Analyze Town motion to reconsider order denying motion to compel. Identify trial exhibits for Jeff Johnston. Revise trial exhibit list. Participate in exhibit conference w/ opposing counsel. Phone conferences w/ Tyler Flesch re: [REDACTED] Draft and revise direct examination outline for Jeff Johnston.	9.60
Stockhausen, Wendy S. (08669)	1/30/2020	\$ 135.00	Assist with exhibits in preparation of trial.	1.00
Phillips, Laura L. (08992)	1/31/2020	\$ 513.00	Travel to and from Jasper County Courthouse in Ridgeland, SC and tested equipment in courtroom.	3.80
Phillips, Laura L. (08992)	1/31/2020	\$ 81.00	Marked Trial Exhibits.	0.60
Gaskins, Edward B. (02733)	1/31/2020	\$ 4,147.50	Prepare for and participate in witness prep w/ Jeff Johnston. Review and revise examination outlines for Tex Small and Tyler Flesch. Review Betsch designated deposition testimony and identify counter-designations. Draft outline for Eric DeMoura examination.	10.50
Magill, Clinton T. (02892)	1/31/2020	\$ 2,007.50	Analyze extensive meeting minutes from Town Council, Planning Committee, and Planning Commission identified by Defendant in advance of trial re [REDACTED]	7.30
Hawkins, Matthew C. (07012)	1/31/2020	\$ 246.00	Assist with preparations for February trial.	1.20
Phillips, Laura L. (08992)	2/1/2020	\$ 27.00	Prepared proposed Counter-Designations for Ken Betsch deposition.	0.20
Phillips, Laura L. (08992)	2/1/2020	\$ 432.00	Made copies of exhibits to be used at trial.	3.20
Gaskins, Edward B. (02733)	2/1/2020	\$ 3,160.00	Direct examination preparation w/ Tex Small and Tyler Flesch.	8.00
Phillips, Laura L. (08992)	2/2/2020	\$ 256.50	Prepared exhibits to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment.	1.90
Phillips, Laura L. (08992)	2/2/2020	\$ 148.50	Prepared Notebooks of deposition transcripts needed for trial.	1.10
Phillips, Laura L. (08992)	2/2/2020	\$ 54.00	Loaded additional trial exhibits to the Trial Director program.	0.40
Phillips, Laura L. (08992)	2/2/2020	\$ 108.00	Labeled trial exhibits to be presented at trial.	0.80
Phillips, Laura L. (08992)	2/2/2020	\$ 54.00	Prepared Notebook of Pre-trial Motions.	0.40

Gaskins, Edward B. (02733)	2/2/2020	\$ 4,740.00	Draft and revise memo in opposition to motion for summary judgment. Analyze case law for [REDACTED]. Prepare for and outline arguments for pre-trial motions. Identify additional trial exhibits. Draft and practice opening statement. Continue drafting examination outline for Eric DeMoura. Revise examination outline for Tyler Flesch.	12.00
Phillips, Laura L. (08992)	2/3/2020	\$ 1,350.00	Travel to and from Jasper County Courthouse and attend trial.	10.00
Gaskins, Edward B. (02733)	2/3/2020	\$ 5,925.00	Travel to Jasper County for trial. Attend hearings on pre-trial motions and MSJ. Attend trial. Prepare outlines and identify exhibits for Eric DeMoura.	15.00
Phillips, Laura L. (08992)	2/4/2020	\$ 1,350.00	Travel to and from Jasper County Courthouse and attend trial.	10.00
Gaskins, Edward B. (02733)	2/4/2020	\$ 5,530.00	Attend trial. Draft and revise examination outlines for Kent Prause and Christiane Farrell.	14.00
Phillips, Laura L. (08992)	2/5/2020	\$ 1,350.00	Travel to and from Jasper County Courthouse and attend trial.	10.00
Gaskins, Edward B. (02733)	2/5/2020	\$ 5,530.00	Attend trial. Travel from Jasper County. Review and revise examination outline for Jeff Johnston. Prepare outline for closing argument.	14.00
Phillips, Laura L. (08992)	2/6/2020	\$ 1,201.50	Travel to and from Jasper County Courthouse and attend trial.	8.90
Gaskins, Edward B. (02733)	2/6/2020	\$ 3,357.50	Travel to and from Jasper County. Attend trial.	8.50
Phillips, Laura L. (08992)	2/7/2020	\$ 13.50	Phone conference with the Charleston Clerk's office re: process of submitting sealed trial exhibits to the Charleston Clerk.	0.10
Phillips, Laura L. (08992)	2/7/2020	\$ 94.50	Compiled notebook of exhibits admitted during trial for Judge Murphy.	0.70
Gaskins, Edward B. (02733)	2/7/2020	\$ 118.50	Working session w/ Laura Phillips re: post-trial tasks. Emails to and from Judge Murphy's law clerk and opposing counsel re: supplemental briefing issues.	0.30
Phillips, Laura L. (08992)	2/10/2020	\$ 202.50	Continued compiling notebook of exhibits admitted during trial for Judge Murphy.	1.50
Phillips, Laura L. (08992)	2/11/2020	\$ 13.50	Correspondence to court reporter from trial re: trial transcript.	0.10
Phillips, Laura L. (08992)	2/11/2020	\$ 13.50	Prepared letter to Judge Murphy re: notebook of trial exhibits and Counter-Designations for Ken Betsch's deposition.	0.10
Phillips, Laura L. (08992)	2/11/2020	\$ 13.50	Phone conference with Caroline Leonard with Charleston County re: further need for instructions in submitting trial exhibits as evidence.	0.10
Gaskins, Edward B. (02733)	2/14/2020	\$ 158.00	Phone conference w/ Tyler Flesch re: [REDACTED]	0.40
Gaskins, Edward B. (02733)	2/17/2020	\$ 79.00	Phone conference w/ Paul Sperry re: trial and related claims against SMHa.	0.20
Phillips, Laura L. (08992)	2/19/2020	\$ 175.50	Prepared draft of proposed Order for Judgment in favor of Plaintiff.	1.30
Phillips, Laura L. (08992)	2/20/2020	\$ 81.00	Organized and updated pleadings and correspondence.	0.60
Phillips, Laura L. (08992)	2/21/2020	\$ 27.00	Revised proposed Order for Judgment in favor of Plaintiff.	0.20
Phillips, Laura L. (08992)	3/11/2020	\$ 13.50	Correspondence to Defense counsel re: the Trial Exhibit List for the notebook that was sent to Judge Murphy in February.	0.10
Gaskins, Edward B. (02733)	3/23/2020	\$ 908.50	Continue drafting proposed order.	2.30
Gaskins, Edward B. (02733)	3/27/2020	\$ 671.50	Continue drafting proposed order.	1.70
Gaskins, Edward B. (02733)	3/27/2020	\$ 316.00	Continue drafting proposed order. Emails to and from Judge Murphy's law clerk and opposing counsel re: proposed orders.	0.80
Gaskins, Edward B. (02733)	3/27/2020	\$ 553.00	Continue drafting proposed order.	1.40
Gaskins, Edward B. (02733)	3/28/2020	\$ 987.50	Continue drafting proposed order.	2.50
Gaskins, Edward B. (02733)	3/29/2020	\$ 869.00	Continue drafting proposed order.	2.20
Gaskins, Edward B. (02733)	3/30/2020	\$ 1,777.50	Continue drafting proposed order. Research and analyze caselaw re: [REDACTED]	4.50
Phillips, Laura L. (08992)	3/31/2020	\$ 121.50	Inserted sections of the Parking License Agreement into the proposed Order for Judgment in Favor of the Plaintiff.	0.90
Gaskins, Edward B. (02733)	3/31/2020	\$ 671.50	Revise draft proposed order. Phone conference w/ Tyler Flesch re: [REDACTED]. Phone conference w/ Julia Copeland re: transcript. Email to opposing counsel re: transcript.	1.70
Gaskins, Edward B. (02733)	4/2/2020	\$ 197.50	Multiple emails w/ judge's law clerk and opposing counsel re: deadline for proposed orders. Phone conference w/ Tyler Flesch re: [REDACTED]	0.50
Gaskins, Edward B. (02733)	4/3/2020	\$ 474.00	Begin drafting supplemental brief on exhaustion of administrative remedies.	1.20

Gaskins, Edward B. (02733)	4/4/2020	\$	711.00	Revise proposed order.	1.80
Gaskins, Edward B. (02733)	4/5/2020	\$	632.00	Revise proposed order and reviewed trial exhibits for cites in proposed order.	1.60
Gaskins, Edward B. (02733)	4/6/2020	\$	1,856.50	Research and analyze caselaw for memo re: [REDACTED]. Continue drafting memo re: [REDACTED]. Review L. Firestone's revisions and comments to proposed order. Phone conference w/ Tyler Flesch re: [REDACTED].	4.70
Firestone, Lesley A. (02763)	4/6/2020	\$	2,340.00	Review proposed order and parking license agreement and revise proposed order; shepardize all cases contained within proposed order and revise citations; review case law to add to proposed order; and correspond re: revisions to proposed order.	7.20
Gaskins, Edward B. (02733)	4/7/2020	\$	3,397.00	Revise proposed order and supplemental memo on exhaustion of administrative remedies. Review trial exhibits and insert citations. Research and analyze case law on [REDACTED]. Review rough drafts of final two days of trial transcript.	8.60
Firestone, Lesley A. (02763)	4/7/2020	\$	552.50	Analyze various cases re: [REDACTED] and revise Order to include argument re: SCDG's substantial performance of the parking license agreement.	1.70
Gaskins, Edward B. (02733)	4/24/2020	\$	237.00	Phone conference w/ Julia Copeland re: unjust enrichment claim. Initial review of Town's proposed order and supplemental brief. Phone conference w/ Tyler Flesch re: [REDACTED].	0.60
Gaskins, Edward B. (02733)	4/25/2020	\$	1,461.50	Analyze Town's proposed order and supplemental briefing. Email to court re: objections. Review transcript for testimony cited in Town's proposed order.	3.70
Gaskins, Edward B. (02733)	4/27/2020	\$	1,264.00	Phone conference w/ Tyler Flesch re: [REDACTED]. Emails to and from opposing counsel re: objections to proposed order and deadlines. Research Town ordinances and meeting minutes re: [REDACTED]. Continue reviewing transcript for objections to Town's proposed order.	3.20
Gaskins, Edward B. (02733)	4/29/2020	\$	1,027.00	Analyze Town's objections to proposed order. Continue drafting objections to Town's proposed order. Research and analyze case law re: [REDACTED].	2.60
Gaskins, Edward B. (02733)	4/29/2020	\$	1,580.00	Continue reviewing transcript and begin drafting objections to Town's proposed order.	4.00
Gaskins, Edward B. (02733)	4/30/2020	\$	1,066.50	Continue reviewing transcript and drafting objections to Town's proposed orders.	2.70
Gaskins, Edward B. (02733)	4/30/2020	\$	118.50	Phone conference w/ Tyler Flesch re: [REDACTED].	0.30

Fees Unbilled - Shem Creek Development Group, LLC - Shem Creek - Parking License Agreement (CM 043920.000001)					
Timekeeper	Transaction Date	To Bill Amount	Narrative		To Bill Hours
Gaskins, Edward B. (02733)	5/1/2020	\$1,145.50	Revise objections to Town's proposed order. Review transcript and draft supplemental filing of evidentiary support in response to Town's objections to SCDG's proposed order.		2.90
Gaskins, Edward B. (02733)	5/5/2020	\$118.50	Review Town's revised proposed order. Phone conference w/ Tyler Flesch re: [REDACTED].		0.30
Gaskins, Edward B. (02733)	6/5/2020	\$158.00	Emails to and from Judge Murphy's law clerk re: status of order. Phone conference w/ Tyler Flesch re: [REDACTED].		0.40
Gaskins, Edward B. (02733)	6/8/2020	\$79.00	Phone conference w/ Tyler Flesch re: [REDACTED].		0.20
Gaskins, Edward B. (02733)	6/19/2020	\$79.00	Phone conference w/ Tyler Flesch re: [REDACTED].		0.20
Gaskins, Edward B. (02733)	6/25/2020	\$79.00	Emails to and from Judge Murphy's law clerk re: order status.		0.20
Gaskins, Edward B. (02733)	7/8/2020	\$869.00	Review court order granting judgment. Phone conference w/ Tyler Flesch re: [REDACTED].		2.20
Gaskins, Edward B. (02733)	7/9/2020	\$118.50	Phone conference w/ Tyler Flesch re: [REDACTED].		0.30
Gaskins, Edward B. (02733)	7/13/2020	\$1,027.00	Multiple phone conferences w/ Tyler Flesch re: [REDACTED]. Phone conference w/ Julia Copeland re: possible settlement discussions. Review and revise letter to Town Council from T. Flesch re: settlement. Research SEC rules re: [REDACTED].		2.60

Phillips, Laura L. (08992)	7/14/2020	\$81.00	Prepared draft of Affidavit of Attorneys' Fees and Costs.	0.60
Gaskins, Edward B. (02733)	7/14/2020	\$237.00	Multiple phone conferences and emails w/ Tyler Flesch and Julia Copeland re: potential settlement.	0.60
Gaskins, Edward B. (02733)	7/15/2020	\$158.00	Multiple phone conferences w/ Tyler Flesch re: [REDACTED]	0.40
Gaskins, Edward B. (02733)	7/20/2020	\$276.50	Phone conferences w/ Tyler Flesch re: [REDACTED] [REDACTED] Phone conference w/ Julia Copeland re: scheduling issues. Email to court re: proposed scheduling order. Preliminary review of Town's motion for reconsideration.	0.70
Stockhausen, Wendy S. (08669)	7/21/2020	\$40.50	Draft Consent Scheduling Order with regard to Defendant's Motion for Reconsideration; finalize and format for compliance with South Carolina E-filing requirements;	0.30
Gaskins, Edward B. (02733)	7/21/2020	\$1,461.50	Draft and revise proposed scheduling order. Emails to and from opposing counsel and court re: proposed scheduling	3.70
Gaskins, Edward B. (02733)	7/22/2020	\$79.00	Phone conference w/ Tyler Flesch re: [REDACTED]	0.20
Gaskins, Edward B. (02733)	7/24/2020	\$39.50	Phone conference w/ David Pagliarini re: settlement.	0.10
Gaskins, Edward B. (02733)	7/28/2020	\$118.50	Phone conference w/ Tyler Flesch re: [REDACTED]	0.30
Gaskins, Edward B. (02733)	7/30/2020	\$197.50	Multiple phone conferences w/ Julia Copeland re: settlement meeting issues. Multiple phone conferences w/ Tyler Flesch re: [REDACTED]	0.50
Phillips, Laura L. (08992)	7/31/2020	\$94.50	Prepared draft of Response in Opposition to Defendant's Motions for New Trial and to Reconsider, Alter, or Amend Order.	0.70
Phillips, Laura L. (08992)	7/31/2020	\$54.00	Reviewed FOIA response from Town of Mount Pleasant's Administrative Services Department and separately calculated totals for attorneys' fees and for costs.	0.40
Gaskins, Edward B. (02733)	7/31/2020	\$1,659.00	Phone conference w/ Tyler Flesch re: [REDACTED] Communications to and from Julia Copeland re: settlement meeting. Begin reviewing information for compilation of attorneys fees. Emails to and from Hamlin O'Kelly re:	4.20
Gaskins, Edward B. (02733)	8/2/2020	UNPOSTED TIME	Continue analyzing motion for reconsideration in comparison to order. Begin drafting response to Town's motion for reconsideration.	2.70
Phillips, Laura L. (08992)	8/3/2020	UNPOSTED TIME	Continued preparing draft of Response in Opposition to Defendant's Motions for New Trial and to Reconsider, Alter, or Amend Order.	0.90
Gaskins, Edward B. (02733)	8/3/2020	UNPOSTED TIME	Continue drafting and revise response to Town's motion for reconsideration. Review trial transcript for record citations in response to motion for reconsideration. Research and analyze case law for [REDACTED]	6.20
Phillips, Laura L. (08992)	8/4/2020	UNPOSTED TIME	Prepared Response in Opposition to Defendant's Motions for New Trial and to Reconsider, Alter, or Amend Order for electronic submission with the Clerk and electronically submitted same.	0.10
Gaskins, Edward B. (02733)	8/4/2020	UNPOSTED TIME	Phone conference w/ Tyler Flesch re: [REDACTED]	0.30
Gaskins, Edward B. (02733)	8/5/2020	UNPOSTED TIME	Phone conference w/ Trenholm Walker re: mediation.	0.30
Gaskins, Edward B. (02733)	8/6/2020	UNPOSTED TIME	Phone conference w/ Tyler Flesch re: [REDACTED] Phone conference w/ Trenholm Walker re: mediation.	0.90
Gaskins, Edward B. (02733)	8/7/2020	UNPOSTED TIME	Attend mediation.	4.00
Gaskins, Edward B. (02733)	8/9/2020	UNPOSTED TIME	Revise affidavit of attorneys fees. Review BB&T invoices for affidavit of attorneys fees.	1.50
Gaskins, Edward B. (02733)	8/10/2020	UNPOSTED TIME	Review, revise and finalize affidavit of attorneys fees. Phone conference w/ Tyler Flesch re: [REDACTED]	2.20

Costs Billed - Shem Creek Development Group, LLC - Shem Creek - Parking License Agreement (CM 043920.000001)		
Transaction Date	Billed Amount	Narrative
4/28/2020	\$ 297.00	Computer Aided Research
4/27/2020	\$ 415.80	Computer Aided Research
4/27/2020	\$ 63.60	Computer Aided Research
4/7/2020	\$ 712.80	Computer Aided Research
4/7/2020	\$ 63.60	Computer Aided Research
4/6/2020	\$ 114.00	Computer Aided Research
4/6/2020	\$ 31.80	Computer Aided Research
4/6/2020	\$ 31.80	Computer Aided Research
4/6/2020	\$ 1,069.20	Computer Aided Research
4/6/2020	\$ 356.40	Computer Aided Research
4/6/2020	\$ 31.80	Computer Aided Research
3/31/2020	\$ 415.80	Computer Aided Research
3/31/2020	\$ 63.60	Computer Aided Research
3/23/2020	\$ 1,487.50	VENDOR: Town Of Mount Pleasant INVOICE#: FY20-05 DATE: 3/23/2020 TOWN OF
3/11/2020	\$ (25.00)	Cancellation of: Filing fees - - VENDOR: CLERK OF COURT - CHARLESTON COUNTY, S.C.
2/11/2020	\$ 14.95	Postage
2/11/2020	\$ 1.50	Postage
2/6/2020	\$ 86.39	VENDOR: Laura Phillips INVOICE#: 3986291202132142 DATE: 2/13/2020 Phillips, L - Travel to and from Jasper County Courthouse to attend trial to provide support to attorney. - Charleston, SC to Ridgeland, SC - 02/06/20
2/6/2020	\$ 86.43	VENDOR: Brandon Gaskins INVOICE#: 3951796402272043 DATE: 2/27/2020 Gaskins, E - Reimbursement for mileage for trial in Jasper County, SC. - Charleston, SC to Ridgeland, SC and back to Charleston, SC - 02/06/20
2/5/2020	\$ 86.39	VENDOR: Laura Phillips INVOICE#: 3986291202132142 DATE: 2/13/2020 Phillips, L - Travel to and from Jasper County Courthouse to attend trial to provide support to attorney. - Charleston, SC to Ridgeland, SC - 02/05/20

2/5/2020	\$	43.18	VENDOR: Brandon Gaskins INVOICE#: 3951796402272043 DATE: 2/27/2020 Gaskins, E - Reimbursement for mileage for trial in Jasper County, SC. - Ridgeland, SC to Charleston, SC - 02/05/20
2/5/2020	\$	259.88	VENDOR: Brandon Gaskins INVOICE#: 3951796402272043 DATE: 2/27/2020 Gaskins, E - Reimbursement for hotel stay related to trial. - 02/03/2020
2/4/2020	\$	86.39	VENDOR: Laura Phillips INVOICE#: 3986291202132142 DATE: 2/13/2020 Phillips, L - Travel to and from Jasper County Courthouse to attend trial to provide support to attorney. - Charleston, SC to Ridgeland, SC - 02/04/20
2/3/2020	\$	86.39	VENDOR: Laura Phillips INVOICE#: 3986291202132142 DATE: 2/13/2020 Phillips, L -
2/3/2020	\$	43.22	VENDOR: Brandon Gaskins INVOICE#: 3951796402272043 DATE: 2/27/2020 Gaskins, E - Reimbursement for mileage for trial in Jasper County, SC. - Charleston, SC to Ridgeland, SC - 02/03/20
2/2/2020	\$	891.00	Computer Aided Research
1/31/2020	\$	140.00	PAYEE: Prause, W. K.; REQUEST#: 2294840; DATE: 1/31/2020.
1/31/2020	\$	116.66	PAYEE: Johnston, Jeff; REQUEST#: 2294841; DATE: 1/31/2020.
1/31/2020	\$	130.23	PAYEE: DeMoura, Eric; REQUEST#: 2294842; DATE: 1/31/2020.
1/31/2020	\$	135.63	PAYEE: Farrell, Christiana; REQUEST#: 2294843; DATE: 1/31/2020.
1/31/2020	\$	131.84	PAYEE: Morrison, Brad; REQUEST#: 2294844; DATE: 1/31/2020.
1/31/2020	\$	11.19	VENDOR: Stephanie Bynum INVOICE#: 4002058702192013 DATE: 2/19/2020 Bynum, S - SNACKS FOR MEETING - 01/31/20
1/31/2020	\$	86.39	VENDOR: Laura Phillips INVOICE#: 3986291202132142 DATE: 2/13/2020 Phillips, L - Travel to and from Jasper County Courthouse to ensure equipment needed for trial worked. - Charleston, SC to Ridgeland, SC - 01/31/20
1/29/2020	\$	10.35	VENDOR: Phillip Rice INVOICE#: 3903560702192013 DATE: 2/19/2020 Rice, P - Courier Mileage - Office/Location - 01/29/20

1/27/2020	\$ 31.74	VENDOR: Stephanie Bynum INVOICE#: 4002058702192013 DATE: 2/19/2020 Bynum, S - FILING FEES - 01/27/20
1/24/2020	\$ 1.60	Postage
1/24/2020	\$ 0.50	Postage
1/24/2020	\$ 6.95	Postage
1/23/2020	\$ 7.75	Postage
1/21/2020	\$ 594.00	Computer Aided Research
1/21/2020	\$ 31.80	Computer Aided Research
1/15/2020	\$ 475.20	Computer Aided Research
1/15/2020	\$ 31.80	Computer Aided Research
1/15/2020	\$ 10.35	VENDOR: Phillip Rice INVOICE#: 3903560702192013 DATE: 2/19/2020 Rice, P -
1/14/2020	\$ 1,485.00	Computer Aided Research
12/31/2019	\$ 1,135.78	VENDOR: Walker Gressette Freeman & Linton, LLC INVOICE#: 4577 DATE: 12/31/2019 WALKER GRESSETTE FREEMAN & LINTON, LLC PROFESSIONAL SERVICE FEES
12/22/2019	\$ 164.75	VENDOR: Teri L. Sampson Db Magnolia Reporting INVOICE#: 2493-TS DATE: 12/22/2019 Teri L. Sampson Db Magnolia Reporting TRANSCRIPT COSTS
12/19/2019	\$ 155.85	VENDOR: Teri L. Sampson Db Magnolia Reporting INVOICE#: 2464-MR DATE: 12/19/2019 Teri L. Sampson Db Magnolia Reporting TRANSCRIPT COSTS
12/17/2019	\$ 216.00	VENDOR: Teri L. Sampson Db Magnolia Reporting INVOICE#: 2462-TS DATE: 12/17/2019 TERI L. SAMPSON DBA MAGNOLIA REPORTING TRANSCRIPT COSTS
12/5/2019	\$ 534.60	Computer Aided Research
12/4/2019	\$ 193.50	VENDOR: Teri L. Sampson Db Magnolia Reporting INVOICE#: 2394-RA DATE: 12/4/2019 TERI L. SAMPSON DBA MAGNOLIA REPORTING TRANSCRIPT FEES
12/3/2019	\$ 5.95	Copying
12/3/2019	\$ 7.25	Postage
11/27/2019	\$ 475.20	Computer Aided Research
11/27/2019	\$ 63.60	Computer Aided Research
11/26/2019	\$ 1,247.40	Computer Aided Research
11/26/2019	\$ 31.80	Computer Aided Research
11/20/2019	\$ 31.74	VENDOR: Stephanie Bynum INVOICE#: 3878918412262106 DATE: 12/26/2019 Bynum, S - FILING FEES - 11/20/19
11/18/2019	\$ 237.60	Computer Aided Research
11/15/2019	\$ 178.20	Computer Aided Research
11/11/2019	\$ 297.00	Computer Aided Research
11/8/2019	\$ 1,366.20	Computer Aided Research
9/20/2019	\$ 2.80	Color Copying
9/20/2019	\$ 3.40	Copying
9/20/2019	\$ 2.60	Postage
9/20/2019	\$ -	Computer Aided Research
9/20/2019	\$ -	Computer Aided Research
9/13/2019	\$ 0.50	Postage
9/13/2019	\$ 0.17	Copying
9/13/2019	\$ 0.35	Color Copying

9/11/2019	\$	237.60	Computer Aided Research
9/10/2019	\$	118.80	Computer Aided Research
8/30/2019	\$	0.34	Copying
8/29/2019	\$	361.55	VENDOR: Cheryl Foults Milligan INVOICE#: 19-649 DATE: 8/29/2019 Cheryl Foults Milligan TRANSCRIPT FEES
8/23/2019	\$	-	Computer Aided Research
8/23/2019	\$	-	Computer Aided Research
8/23/2019	\$	-	Computer Aided Research
8/20/2019	\$	115.25	VENDOR: Teri L. Sampson Db Magnolia Reporting INVOICE#: 2126-TS DATE: 8/20/2019 TERI L. SAMPSON DBA MAGNOLIA REPORTING TRANSCRIPT COSTS
8/9/2019	\$	2.55	Copying
8/9/2019	\$	1.53	Copying
8/9/2019	\$	1.40	Color Copying
8/9/2019	\$	2.04	Copying
8/9/2019	\$	2.04	Copying
8/8/2019	\$	2.04	Copying
8/6/2019	\$	12,500.00	VENDOR: DIXON HUGHES GOODMAN INVOICE: 000957819 C599DATE: 8/6/2019
8/5/2019	\$	4.48	SoundPath Conference Brandon Gaskins
8/1/2019	\$	2.04	Copying
8/1/2019	\$	0.51	Copying
8/1/2019	\$	2.10	Color Copying
7/29/2019	\$	0.51	Copying
7/29/2019	\$	0.68	Copying
7/29/2019	\$	0.50	Postage
7/29/2019	\$	1.00	Postage
7/23/2019	\$	1.87	Copying
7/23/2019	\$	4.93	Copying
7/23/2019	\$	2.04	Copying
7/23/2019	\$	4.25	Copying
7/23/2019	\$	1.00	Postage
7/23/2019	\$	1.30	Postage
7/23/2019	\$	1.45	Postage
7/22/2019	\$	-	Computer Aided Research
7/22/2019	\$	-	Computer Aided Research
7/19/2019	\$	-	Computer Aided Research
7/19/2019	\$	-	Computer Aided Research
7/17/2019	\$	5.78	Copying
6/21/2019	\$	1.25	SoundPath Conference Brandon Gaskins
6/10/2019	\$	82.62	Copying
6/10/2019	\$	2.50	VENDOR: Phillip Rice INVOICE#: 3390198507101946 DATE: 7/10/2019 Rice, P - Courier Mileage - 06/10/19
6/10/2019	\$	54.74	Copying
6/10/2019	\$	1.05	Color Copying
6/10/2019	\$	2.38	Copying
6/10/2019	\$	2.38	Copying
6/10/2019	\$	2.21	Copying
6/10/2019	\$	2.38	Copying
6/10/2019	\$	2.38	Copying
6/10/2019	\$	2.38	Copying
6/10/2019	\$	1.87	Copying
6/10/2019	\$	1.87	Copying
6/7/2019	\$	-	Computer Aided Research
6/7/2019	\$	-	Computer Aided Research
6/4/2019	\$	-	Computer Aided Research
6/4/2019	\$	-	Computer Aided Research

4/22/2019	\$	-	Copying
4/22/2019	\$	-	Copying
4/22/2019	\$	-	Copying
4/22/2019	\$	-	Copying
4/22/2019	\$	-	Copying
4/22/2019	\$	-	Copying
4/22/2019	\$	-	Copying
4/22/2019	\$	-	Copying
4/22/2019	\$	-	Copying
4/20/2019	\$	-	Copying
4/20/2019	\$	-	Copying
4/20/2019	\$	-	Color Copying
4/19/2019	\$	-	Copying
4/19/2019	\$	-	Copying
4/19/2019	\$	-	Copying
4/19/2019	\$	-	Copying
4/19/2019	\$	-	Copying
4/19/2019	\$	-	Copying
4/19/2019	\$	-	Copying
4/18/2019	\$	-	Copying
4/11/2019	\$	1.20	Computer Aided Research
4/11/2019	\$	-	Copying
4/9/2019	\$	-	Copying
3/26/2019	\$	2,827.50	VENDOR: DIXON HUGHES GOODMAN INVOICE: 000906097 DATE: 3/26/2019
3/26/2019	\$	1.45	Postage
3/26/2019	\$	1.45	Postage
3/26/2019	\$	0.85	Copying
3/26/2019	\$	3.85	Color Copying
2/12/2019	\$	2.55	Desktop Copying
2/12/2019	\$	2.55	Desktop Copying
2/12/2019	\$	1.87	Desktop Copying
2/12/2019	\$	5.25	Desktop Copying
2/4/2019	\$	2.55	Desktop Copying
2/4/2019	\$	8.67	Desktop Copying
12/31/2018	\$	1.63	Postage Postage Meter
12/31/2018	\$	2.72	Copying
12/27/2018	\$	0.47	Postage Postage Meter
12/14/2018	\$	6.67	Postage Postage Meter
12/14/2018	\$	7.41	Postage Postage Meter
12/14/2018	\$	3.06	Copying
12/14/2018	\$	1.87	Desktop Copying
12/14/2018	\$	6.67	Postage Postage Meter
12/14/2018	\$	7.41	Postage Postage Meter
12/14/2018	\$	6.67	Postage Postage Meter
12/14/2018	\$	7.41	Postage Postage Meter
12/14/2018	\$	7.35	Color Copying
12/14/2018	\$	6.67	Postage Postage Meter
11/28/2018	\$	-	Postage Postage Meter
11/28/2018	\$	-	Desktop Copying
11/28/2018	\$	-	Copying
11/28/2018	\$	-	Color Copying
11/28/2018	\$	-	Desktop Copying
11/27/2018	\$	-	Desktop Copying
11/27/2018	\$	-	Desktop Copying
10/9/2018	\$	1.42	Postage Postage Meter
10/9/2018	\$	0.68	Postage Postage Meter
10/9/2018	\$	0.34	Copying
10/9/2018	\$	2.50	Overnight Delivery RICE, P - Courier Mileage - 10/09/18
10/9/2018	\$	7.65	Copying
10/9/2018	\$	0.35	Color Copying
10/9/2018	\$	0.70	Color Copying
10/5/2018	\$	25.00	Filing fees - - VENDOR: CLERK OF COURT - CHARLESTON
8/9/2018	\$	2.38	Desktop Copying

7/19/2018	\$	4.93	Desktop Copying
7/19/2018	\$	3.06	Long-Distance Telephone Brandon Gaskins SoundPath Conf Call
7/13/2018	\$	4.93	Desktop Copying
7/12/2018	\$	5.10	Desktop Copying
6/26/2018	\$	3.74	Desktop Copying
5/30/2018	\$	1.02	Copying
5/30/2018	\$	25.00	Filing fees - - VENDOR: CLERK OF COURT - CHARLESTON COUNTY, S.C.
5/24/2018	\$	1.87	Desktop Copying
5/24/2018	\$	1.75	Color Copying
5/24/2018	\$	1.87	Desktop Copying
5/24/2018	\$	3.26	Postage Postage Meter
5/24/2018	\$	4.25	Copying
4/4/2018	\$	3.74	Desktop Copying
3/19/2018	\$	5.27	Desktop Copying
3/19/2018	\$	3.74	Desktop Copying
3/19/2018	\$	3.57	Desktop Copying
3/19/2018	\$	2.05	Postage Postage Meter
2/9/2018	\$	25.00	Filing fees - - VENDOR: CLERK OF COURT - CHARLESTON COUNTY, S.C.
2/9/2018	\$	0.68	Copying
2/9/2018	\$	2.80	Color Copying
1/25/2018	\$	25.00	Filing fees - - VENDOR: CLERK OF COURT - CHARLESTON COUNTY, S.C.
1/24/2018	\$	2.55	Desktop Copying
1/24/2018	\$	3.91	Desktop Copying
12/14/2017	\$	1.87	Copying
12/14/2017	\$	0.35	Color Copying
12/14/2017	\$	13.12	Postage Postage Meter
10/25/2017	\$	2.50	Overnight Delivery RICE, P - Courier Mileage - 10/25/17
10/25/2017	\$	0.70	Color Copying
10/24/2017	\$	95.00	Service Fees/Shf./Proc. Server SERVE-ONE, INC. Process Service
10/23/2017	\$	0.49	Long-Distance Telephone 12024577150 Washington, DC
10/23/2017	\$	2.04	Desktop Copying
10/23/2017	\$	150.00	Filing fees - - VENDOR: CLERK OF COURT - CHARLESTON COUNTY, S.C.
10/23/2017	\$	2.50	Overnight Delivery RICE, P - Courier Mileage - 10/23/17
10/23/2017	\$	7.82	Copying
10/23/2017	\$	2.04	Desktop Copying
10/23/2017	\$	2.04	Desktop Copying
10/18/2017	\$	3.92	Long-Distance Telephone 12024577150 Washington, DC
10/11/2017	\$	0.49	Long-Distance Telephone 12024577150 Washington, DC
9/30/2017	\$	3.00	Computer Aided Research Pacer
9/26/2017	\$	1.47	Long-Distance Telephone 18034793394 Columbia, SC

Costs Unbilled - Shem Creek Development Group, LLC - Shem Creek - Parking License Agreement (CM)			
Transaction Date	Billed Amount	Narrative	
6/4/2020	CA Research - Lexis Nexis (017)	\$	950.40
5/1/2020	CA Research - Lexis Nexis (017)	\$	475.20
5/1/2020	CA Research - Lexis Nexis (017)	\$	31.80
7/28/2020	Postage	\$	0.50
7/21/2020	Filing Fee	\$	31.74

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Civil Action No.: 2017-CP-10-05493
	)	
Shem Creek Development Group, LLC	)	
	)	
Plaintiff,	)	
	)	DEFENDANT'S OPPOSITION TO
v.	)	ATTORNEY'S FEE AWARD AND
	)	OBJECTIONS TO PLAINTIFF'S
The Town of Mount Pleasant, South	)	ATTORNEY FEE AFFIDAVIT
Carolina,	)	
	)	
Defendant.	)	
_____	)	

The Defendant hereby submits its opposition to the Court's award of attorneys' fees and objections to Plaintiff's Affidavit of Attorneys' Fees and Costs.

The general rule is that attorney's fees are not recoverable unless authorized by contract or statute. Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993)(citations omitted). There are six factors to consider in determining an award of attorney's fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained. Id. at 494, 427 S.E.2d at 660. "When an award of attorney's fees is requested and authorized by contract or statute, the court should make specific findings of fact on the record for each factor..." Id. at 494, 427 S.E.2d at 661. These findings of fact must be supported sufficient competent evidence. Baran Data Systems, Inc., v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1988)

Article VI, Section 6.01 of the Parking License Agreement ("PLA") contains the language cited by the Court and Plaintiff as providing the basis for an attorney's fee award. Section 6.01 discusses the implications of default under the PLA and provides,

Licensors may, at its option and without further notice to Licensee, (i) terminate Licensee's right to use the premises, (ii) without terminating this License, re-enter and resume exclusive possession of the Premises, or (iii) declare this License terminated, and may thereupon in either event remove all persons and property from the Premises in any manner permitted by South Carolina law. ***In addition, Licensor shall be entitled to bring an action for specific performance or breach of contract against Licensee, but agrees its sole and exclusive remedy shall be the Rent Payments due under this Agreement. Both parties waive any claims that either may have to any consequential or punitive damages, and agree that the prevailing party in any dispute shall be entitled to an award of costs and attorney's fees, including the cost of trial and any appeals.***

A. Plaintiff is not entitled an award of prelitigation attorney's fees.

When reading Section 6.01 and the "attorney's fees" language in context, the parties to the PLA contemplated an award of attorney's fees in a litigation context, NOT a prelitigation scenario. Plaintiff seeks to be awarded \$13,138.00 for fees charged by Buist Byars & Taylor ("BB&T") attorneys Gray Taylor and Hamlin O'Kelly prior to the institution of the present action. BB&T did not represent Plaintiffs in the present action. Rather, BB&T represented Plaintiff in its discussions with the Town regarding Plaintiff's disagreement with various zoning ordinances and decisions years prior to the present litigation. Further, Plaintiff's Attorney's Fees Affidavit provides no evidence relative to the foregoing six factors as to these prelitigation attorney's fees; an analysis and evidence required by South Carolina law. See *Blumberg*, 310 S.C. at 493, 427 S.E.2d at 661. As such, neither the PLA nor South Carolina law permit recovery of these prelitigation attorney's fees.

B. Plaintiff's claim for attorney's fees is not supported by sufficient evidence.

Additionally, Plaintiff's claim for attorney's fees is not supported by sufficient evidence. Consideration must be given to each of the foregoing six factors, with sufficient

evidence supporting each factor. Baran, 297 S.C. at 384, 377 S.E.2d at 297. Plaintiff provided a single Affidavit, executed by its attorney E. Brandon Gaskins, to support its attorney's fees. Although Attorney Gaskins Affidavit addresses each of the six factors, it does so in a very conclusory fashion. For example, in support of factor (5), Attorney Gaskins makes the bald declaration, "my hourly rate, which ranged from \$325/hour when the representation commenced in 2017 to \$395/hour when the case was completed, is within the range of hourly rates customarily charged by commercial litigators of similar experience in the Charleston area." Plaintiff offers no other evidence, such as an affidavit from a disinterested Charleston attorney, to support this statement.

Respectfully submitted,

s/Julia P. Copeland
David Pagliarini
Julia P. Copeland
Hinchey, Murray & Pagliarini, LLC
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Mount Pleasant, SC 29465
Telephone: 843-800-1126

Charleston, South Carolina

August 21, 2020

Attorneys for the Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 21st day of August, 2020, true copies of the foregoing **DEFENDANT'S OPPOSITION TO ATTORNEY'S FEE AWARD AND**

OBJECTIONS TO PLAINTIFF'S ATTORNEY FEE AFFIDAVIT has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto to.

E. Brandon Gaskins
MOORE & VAN ALLEN, PLLC
PO Box 22828
Charleston, SC 29413-2828

S/Julia P. Copeland
Hinchey, Murray & Pagliarini

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Civil Action No.: 2017-CP-10-05493
	)	
Shem Creek Development Group, LLC	)	
	)	
Plaintiff,	)	
	)	OBJECTIONS BY DEFENDANT TO
v.	)	PLAINTIFF'S PROPOSED ORDER
	)	DENYING DEFENDANT'S MOTION
The Town of Mount Pleasant, South	)	FOR NEW TRIAL AND TO
Carolina,	)	RECONSIDER, ALTER OR AMEND
	)	ORDER
Defendant.	)	
	)	

Now comes the Defendant, Town of Mount Pleasant, and for objections to Plaintiff's proposed order denying Defendant's Motion for New Trial and to Reconsider, Alter or Amend, states as follows:

1. Defendant renews all prior objections to Plaintiff's proposed final Order and the Court's final Order in its Motion for New Trial and to Reconsider, Alter or Amend, as well as all trial objections.
2. In Paragraph 2, Plaintiff's proposed order indicates that the information in 8 and 9 "correctly states the relevant foundational facts that led to the dispute and in appropriately included in the Order." Again, Defendant objects to the characterization of this design or scheme in that it "did not necessarily reflect compliance with applicable zoning requirement" and the fact that these paragraphs paint an incomplete picture of the significance of Plaintiff's "conceptual design." Plaintiff fails to mention that it is this conceptual design upon which the parties negotiated the Parking License Agreement, wherein Plaintiff promised to provide 276 parking spaces. The trial evidence demonstrated that the "conceptual design" was drawn to zero lot lines on all sides of the garage, completely inconsistent with Town requirements regarding setbacks, which was how the design was able to allegedly provide 276 parking spaces. Because the aforementioned plan did not comply with applicable setback requirements, it resulted in this "conceptual design" being a gross overestimation of potential spaces, which is directly related to Plaintiff's inability to provide the promised parking spaces.
3. In Paragraph 3, Plaintiff's proposed order claims that Paragraph 10 of the Order "correctly states the facts about who received the parking layout concept", more specifically, that Mr. Small and Mr. Flesch presented Betsch's conceptual plans to the town in 2013. This is not supported by the evidence as Mr. DeMoura (Tr. 432:12-16; 433:12-24; 498:2-13) and all staff members (Mr. Prause – Tr. 556:17-557:17; 559:2-8; Farrell – Tr. 704:22-706:6 (testified that even Exhibit A was not attached to version of the PLA that she saw) testified that they never saw the parking layout concept, only the

exhibit to the PLA. Additionally, there was no evidence that Mr. Flesch presented these plans to the Town. Mr. Small testified that he presented the parking layout to the Town, but that is inconsistent with the testimony of the Town's witnesses.

4. In Paragraph 7, Plaintiff's proposed Order paragraph 15, plaintiff states "The fact the Town conducted no analysis to determine the number of spaces needed to meet parking demand in the area, and the Town never insisted that 276 total spaces and 132 public spaces be a minimum requirement is directly relevant to the materiality analysis in the Order." However, Defendant argues that Plaintiff mischaracterizes the alleged import of such a materiality analysis. This is irrelevant because 276 spaces was a material term of the executed PLA and the Town was not required to conduct any supportive analysis to justify its expectations clearly written in PLA. Mr. Demoura testified that the Town accepted this number because that was the number provided by Plaintiff, presented to Town Council and memorialized in the PLA. (See Tr. 430:19-431:22).
5. In Paragraph 10, Plaintiff's proposed order states that "the Town mischaracterizes the Court's finding in Paragraph 20." Paragraph 20 misstates the significance of the survival clause, inappropriately infers the parties' intent when negotiating the terms of the Agreement, and inappropriately rewrites an unambiguous provision of the Agreement. The survival clause does not extinguish or prohibit the bargained for right to reduced rent for the Town. Further, and as argued in prior motions and at trial, Defendant disputes that the PLA default clause contains a liquidated damages provision. Where the sum stipulated in an agreement is so large that it is plainly disproportionate to any probable damage resulting from a breach of contract, the stipulation would be held as a penalty and not for liquidated damages, regardless of its terminology. Tate v. Master, 231 S.C. 429 at 441, 99 S.E.2d at 46 (1957) (citing 15 Am. Jur. Damages, Sec. 249, p. 681.). If the provision be for a penalty, recovery is measured not by the sum stipulated, but by the amount of **actual damage** proven to have been sustained as the result of the breach. Id. (citing 25 C.J.S. Damages § 116b, p. 704)(emphasis added). Awarding Plaintiff the full amount of the PLA when Plaintiff terminated the Agreement prior to being entitled to the first rent payment is an unenforceable penalty and an abuse of discretion. The survival clause does not extinguish the bargained for right to reduced rent.
6. In Paragraph 12, Plaintiff's proposed Order states, "The Town's objection to Paragraph 27 is confusing..." However, Defendant's point is that Paragraph 27 can be seen to suggest that because Plaintiff was designing its project with the Town's existing setbacks, somehow, Plaintiff was entitled to some sort of protection for that design. However, the only way under South Carolina law for Plaintiff's design to be protected was to submit a site-specific development plan. Paragraph 27 incorrectly infers that plaintiff had earlier submitted a site-specific development plan and obtained a vested right to five-foot setbacks. Plaintiff did not submit a proposed plan until after the April 2014 zoning amendments and did not obtain vested rights until months later. Plaintiff neither argues nor offered evidence that it had vested rights which would preclude the application of Ordinance 14022 to the Shem Creek Garage property. S.C. Code Sections 6-29-1510, et seq., and Town Ordinance Sections 156.049, et seq., outline the State and Town requirements for obtaining vested rights, none of which Plaintiff achieved prior to the

enactment of Ordinance 14022. Town Staff testified that Plaintiff neither submitted nor received approval of a site-specific development plan, as required by State and Town law, in order to achieve vested rights for the Garage and be protected from the application of Ordinance 14022 to the Project. Tr. pp. 704:22-705:4.

7. In Paragraph 13, Plaintiff's proposed order indicates that Plaintiff's design of 8 ½' parking space width was relevant because that width is customary and the Town should have accepted that width. However, it is undisputed that the only existing TOMP regulation pertaining to parking space width required 9' space width. The covenant of good faith and fair dealing does not require the Town to accept a "customary" width. It was Plaintiff's mistake to design the Garage with the incorrect space width and then insist the Town accept it. Plaintiff discussing the width with a Town Staff member from the building department is irrelevant as any alleged discussion does not change the law. Further, SCDG never asked for a variance from this requirement.
8. In Paragraph 14, Plaintiff's proposed Order admits that the Town followed the lawful process for providing notice of amendments. As such, the Town objects to the relevance of paragraph 29. Plaintiff asserts, irrelevantly, that neither Plaintiff nor SMHa knew about the referenced zoning amendments despite un rebutted evidence that these amendments were part of a properly noticed public meetings with published agendas which included the precise zoning amendments to be considered. Plaintiff's or SMHa's actual knowledge of these amendments is irrelevant. Accomplishing lawful, public notice renders this lack of knowledge irrelevant.
9. In Paragraph 14, Plaintiff's proposed Order regarding paragraph 29, continues to mischaracterize the actual testimony of Planning director Christine Farrell and the effect of the footnote requiring a build-to-line on Mill Street. Ms. Farrell testified that the possibility of 5' setback was eliminated throughout the entire zoning district (See Tr. 698:16-699:6). In the transcript portions cited by Plaintiff, Ms. Farrell is testifying that the prior footnote was changed to add a 20-30' build to line on Mill Street, as opposed to a 20' setback, which was the district wide standard after the April 2014 zoning amendments.
10. In Paragraph 15, Plaintiff's proposed Order states that Ms. Farrell's cited testimony supports all of the Court's findings in Paragraphs 30 and 32, an averment with which Defendant disagrees. For example, Defendant does not believe there is any evidence to suggest that "the Town drafted and pursued an amendment to the zoning code that **intentionally** reduced the usable area of the project site, ..." (emphasis added). This statement suggests the Town enacted the zoning amendments to shrink the size of the Garage. The Town's witnesses repeatedly testified that Plaintiff had not submitted a plan at the time of the zoning amendments and, as such, the Town did not know what impact the amendments would have on those plans.
11. In paragraph 17, Plaintiff's proposed Order cites testimony by Mr. Demoura and Mr. Prause's testimony as supportive of Paragraphs 34, 40 and 50 of the Court's Order. Defendant objects to this contention. Mr. Prause's interpretation regarding the Marine

District issue refutes the contention “that requests for accommodations from the plaintiff were uniformly rejected.” Further, every Town witness testified that not a single decision by Town staff was made with the intent to “kill the project” as stated in Paragraph 34. Plaintiff has created this distinction between “discretionary” decisions versus decisions mandated by law. All of the decisions in question (e.g., setbacks, parking space width, Marine District boundaries, civic use) are legal questions/decisions. Plaintiff describes the decisions that went against them as discretionary, but the ones in their favor as mandated as law, yet offers no legal support for such a distinction, which is a legal fiction.

12. In Paragraph 18, Plaintiff’s proposed Order cites footnote 4 of the Courts order as dispositive of the Town’s objections to paragraphs 35, 37, 38. However, Plaintiff’s proposed Order fails to address the simple issue that it offered no evidence to support the claim even if the Town had subscribed to Plaintiff’s requested interpretation, that such an interpretation would actually result in a five-foot setback. Both Town and Plaintiff’s witnesses agreed this was a possibility and not guaranteed.
13. In Paragraph 19, Plaintiff’s proposed Order continues the legally incorrect position that surface parking outside the Garage could have been included in calculating the number of parking spots. PLA Section 1.06 is dispositive of this issue:

Premises. That portion of the Property comprising 132 of the 276 total parking spaces planned for the Project (the “Public Spaces”; the remaining 144 spaces are referred to herein as the “Reserved Spaces”, and the Public Spaces and the Reserved Spaces are collectively herein the “Parking Spaces”). ***The Parking Spaces, along with the parking garage building in which they are located***, and all ancillary and/or associated structures, shall comprise the “Parking Garage”, as more particularly described and identified on Exhibit “A” (emphasis added).

This section without equivocation describes the Parking Spaces as being within the Parking Garage and forestalls any argument that surface parking could be included.

14. In Paragraph 19, Plaintiff mischaracterizes the Town’s objection to Paragraph 43 of the Court’s Order. The Town had two things to separate issues to consider as to the Garage: (1) the Parking License Agreement and (2) the Garage’s compliance with the Town’s zoning ordinances and how that impacted the parking requirements for other businesses. Mr. Demoura explained this in his trial testimony (See Tr. 456:1-458:18), yet Plaintiff continues to argue that it was somehow improper for the Town to consider how the Garage would impact other businesses FROM A ZONING PERSPECTIVE.
15. In 22, Plaintiff’s proposed order continues argue for the relevance of a parking space analysis in paragraph 47. However, this is contract case, wherein the contract had no such requirement. Whether or not the Town conducted a parking analysis is not relevant to a materiality analysis. These assertions are not relevant as 276 spaces was a required,

material term of the PLA upon which the Town relied. The PLA did NOT require the Town to substantiate or provide an analysis of the number of spaces it required.

16. Plaintiff's proposed Order fails to address the Town's objection to Paragraph 52 and the problem with the fact that it was Plaintiff's successor who completed Garage and received a certificate of occupancy. Plaintiff terminated the PLA before it completed the assignment to the successor and, therefore, the Town was not contractually obliged to pay rent to the successor because pursuant to PLA Section 7.01, the assignment needed to be executed "at any time during the License Term."
17. Defendant objects to Paragraph 23 of Plaintiff's proposed Order, which, beyond erroneously stating that the information in Paragraph 53 is relevant, fails to address the fact that when Plaintiff terminated the PLA, the Town lost the benefit of the promise that Plaintiff would reserve parking spaces as required. Plaintiff presented no evidence that it is reserving the number of parking spaces as required by the PLA.
18. Paragraph 25 of Plaintiff's proposed order misunderstands and misstates, at least in part, Defendant's objection to Paragraph 65. It is Defendant's contention that the Court's holding in Paragraph 65 uses contract law and the implied covenant of good faith and fair dealing to circumvent the State's vested rights laws. Plaintiff's witnesses acknowledged at trial that the Town did not act unlawfully. Both the State and Town laws provide protection to approved site-specific development plans, which Plaintiff failed to achieve prior to the ordinances and decisions of which it now objects. Taking the Court's holding to its logical conclusion, local governmental entities and private parties may circumvent vested rights laws by simply entering into contracts, which would effectively give vested rights to projects regardless of whether they have statutory requirements to claim vested rights.
19. In Paragraph 28, Plaintiff's proposed Order provides that Defendant's objection to paragraph 70, has no merit. However, there is no evidentiary support for the assertion that the Town's actions, either collectively or by individuals were in bad faith. Ironically, paragraph 70 of Plaintiff's proposed Order acknowledges the Town's actions were lawful. Defendant continues its objection to the Court's analysis of Town Council's motives when taking undisputed lawful actions as a legislative body.
20. In Paragraph 29, Plaintiff's proposed order dodges the substance of Defendant's objections to Paragraph 71. South Carolina courts may cite decisions from other jurisdictions, but those decisions are not binding. Most importantly, Plaintiff's proposed order provides no analysis or refutation as to why the cited cases are distinguishable from the case at bar.
21. In Paragraph 30, Plaintiff's proposed order improperly discounts and mischaracterizes the effect of paragraph 72 of the Court's order. Of course, the Town has a duty of implied good faith and fair dealing in its contracts, however, the Court's Order has the effect of allowing a contract to have the weight of law and prohibit what would be otherwise lawful action by the Town's legislative body. This is an error of law in that it creates an

“implied contractual vested right” that binds actions of future Council in derogation of the precedent set by Cunningham v. Anderson County, 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013).

22. In Paragraph 33, Plaintiff completely fails to address one of Defendant’s chief objections to the Court’s findings and holdings in Paragraph 75: Defendant argues that neither the PLA nor the evidence produced at trial support the holding that Plaintiff substantially performed under the contract. The Town has no property interest in the Garage and does not possess any portion thereof. Further, Plaintiff terminated the PLA prior to the Rental Commencement Date in the PLA. As such, and, importantly, the Town did not receive the benefit of the promises under the PLA: for Plaintiff to reserve spaces as the contract required. As such, the parking spaces have “been returned” to Plaintiff. Plaintiff produced no evidence that it is reserving spaces as outlined in the PLA. The Garage provides only 234 of the 276 total spaces (85%) and 117 of the 132 (89%) public spaces. To the extent Plaintiff is providing spaces to the public as required by Town regulations, it cannot argue that the Town is getting the benefits of the PLA. Plaintiff has not substantially performed under the contract.
23. In Paragraph 34, Plaintiff summarily dismisses Defendant’s analysis and objections to Paragraphs 78-89 of the Court’s Order by simply arguing that the Court’s analysis is longer than Defendant’s, yet fails to address the substance of Defendant’s arguments. Plaintiff spent a great deal of time at trial and in its proposed Orders trying to demonstrate that its breach of the PLA was not material. The brevity of Defendant’s analysis is based upon the simple analysis that Plaintiff materially breach a material term of the PLA and is consistent with the court’s analysis in *Kiriakides*.
24. In Paragraph 35, Plaintiff continues to defend the concept of “adequacy” as a “common-sense approach to determining whether SCDG’s approved design deprived the Town of the benefits it bargained for in the parking license agreement.” Plaintiff proceeds with a page of prose to defend a term that is nowhere in the PLA. The parties agreed to the discrete term of 276 parking spaces. Although the court in *Kiriakides* may provide for an analysis to determine material breaches, nowhere does that case say that courts may substitute the terms “adequacy” or “adequate” for express bargained for terms. The terms of the PLA define what the Town bargained for, not whether Plaintiff provided an “adequate” substitute.
25. In Paragraph 37, Plaintiff states that “SCDG’s concept plan was based on reasonable assumptions regarding its ability to reduce applicable setbacks and the permitted width of parking spaces.” Simply, this statement is not supported by the evidence. Plaintiff’s commissioning the initial conceptual drawings without any analysis or consideration of the Town’s zoning regulations, including setbacks. In fact, the sketch attached to the PLA provides no indication of what setbacks, if any, applied to the Garage. The renderings were drawn with “zero lot lines”, meaning that the conceptual sketches assumed zero setbacks and drawn to the property lines. There is nothing reasonable about assuming this the Garage would have zero setbacks. This first misstep was pivotal because it was these sketches that Plaintiff used to negotiate the terms of the PLA, which promised 276

parking spaces. The evidence revealed that rather than having zero lot lines on the adjoining streets, Coleman Boulevard had a 20-30' build-to-line, Mill Street had a 20' setback, and Church Street had a 20' setback. A cursory review of the Town's zoning regulations would have revealed this mistake. These mistaken assumptions by Plaintiff regarding the setbacks caused it to vastly overestimate the foot print of the building and the number of parking spaces it could provide when negotiating the Agreement with the Town.

Respectfully submitted,

s/Julia P. Copeland
David Pagliarini
Julia P. Copeland
Hinchey, Murray & Pagliarini, LLC
56 Folly Road Blvd.
Charleston, SC 29401
Telephone: 843-577-7455

Claude Tackett
Claude Tackett Law Firm, LLC
P.O. Box 429
Mount Pleasant, SC 29465
Telephone: 843-800-1126

Charleston, South Carolina

September 17, 2020

Attorneys for the Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 17th day of September, 2020, true copies of the foregoing **DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL AND TO RECONSIDER, ALTER OR AMEND ORDER** has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto to.

E. Brandon Gaskins
MOORE & VAN ALLEN, PLLC
PO Box 22828
Charleston, SC 29413-2828

s/Julia P. Copeland
Hinchey, Murray & Pagliarini

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Civil Action No.: 2017-CP-10-05493
	)	
Shem Creek Development Group, LLC,	)	
	)	
Plaintiff,	)	NOTICE OF FILING AFFIDAVIT OF
	)	ATTORNEYS' FEES ANC COSTS
v.	)	
	)	
The Town of Mount Pleasant, South	)	
Carolina,	)	
	)	
Defendant.	)	

Plaintiff Shem Creek Development Group, LLC hereby files G. Hamlin O'Kelley, III's Affidavit of Attorneys' Fees and Costs, which is attached hereto as Exhibit 1.

s/E. Brandon Gaskins

E. Brandon Gaskins (State Bar No. 73274)
MOORE & VAN ALLEN PLLC
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brandongaskins@mvalaw.com

*Attorney for Plaintiff Shem Creek
Development Group, LLC*

September 17, 2020
Charleston, South Carolina

EXHIBIT 1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Civil Action No.: 2017-CP-10-05493
	)	
Shem Creek Development Group, LLC,	)	
	)	
Plaintiff,	)	G. HAMLIN O'KELLEY, III'S
	)	AFFIDAVIT OF ATTORNEYS' FEES
v.	)	AND COSTS
	)	
The Town of Mount Pleasant, South	)	
Carolina,	)	
	)	
Defendant.	)	

Personally appeared before the undersigned officer duly authorized to administer oaths, G. Hamlin O'Kelley, III, who, on oath, states as follows:

1. I, G. Hamlin O'Kelley, III, am over eighteen (18) years old, and of sound mind and body. I am competent to give this affidavit, and it is based upon my own personal knowledge.

2. I am an attorney for in the law firm of Buist Byars & Taylor, LLC ("BB&T"), which formerly represented Plaintiff Shem Creek Development Group, LLC in matters relating to the Parking License Agreement between Plaintiff and Defendant Town of Mount Pleasant.

3. I was admitted to the Bar of the Supreme Court of South Carolina in 1998 and have been actively engaged in the practice of law since that time. A substantial portion of my practice relates to commercial litigation matters.

4. I am also a member of the Bar of the United States Court of Appeals for the Fourth Circuit and of the United States District Court for the District of South Carolina.

5. I am informed and believe that, under *Baron Data Systems, Inc. v. Loter*, 297 SC 382, 377 S.E.2d 296 (1989), and *Blumberg v. Nealco*, 310 SC 482, 427 S.E.2d 659 (Ct. App. 1993), there are six factors which should be considered in determining the reasonableness of a fee

including: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor devoted to the case; (3) the professional standing of counsel; (4) contingency of compensation; (5) the fee customarily charged in the location for similar services; and (6) the beneficial results obtained.

6. I have attached hereto as Exhibit A a detailed spreadsheet showing BB&T's attorneys' fees, paralegal fees, and costs incurred with respect to the dispute regarding the Parking License Agreement from January 5, 2015 to July 14, 2016. The amounts shown in Exhibit A represent a true and accurate reflection of time, effort and costs of my firm's legal services in this action. The spreadsheet has been redacted in part to protect certain information protected by the attorney-client privilege and the attorney work-product doctrine.

7. As shown on Exhibit A, Plaintiff has incurred legal fees in the amount of Thirteen Thousand One Hundred Thirty-Eight Dollars (\$13,138.50) in attorneys' fees for BB&T's services that were directly related to the dispute regarding the Parking License Agreement. This amount does not include legal fees related to the lawsuit of *Save Shem Creek v. Town of Mount Pleasant*, for which BB&T also provided legal services to Plaintiff.

8. The legal services reflected in Exhibit A were performed by myself, Gray Taylor, Esq., and paralegal Amanda Taylor. Mr. Taylor passed away in 2019. As a result, I am submitting this affidavit to attest to his fees and services as well as mine.

9. I believe that these fees and costs are reasonable under the six factors discussed above based on the following: (1) the matter was highly disputed and involved complex issues of contract and municipal law with a significant amount in controversy; (2) the time and fees incurred are reasonable considering that the dispute was active and unresolved over a period of eighteen months; (3) at all relevant times, Mr. Taylor and I were in good standing with the South Carolina

Bar, have never been involved any disciplinary proceedings, and have a good reputation among other lawyers in the area who practice commercial litigation and commercial transaction; (4) the matter was not based on a contingency arrangement; (5) the hourly rates, which ranged from \$285/hour and \$300/hour when the representation commenced in 2015 to \$300/hour and \$400/hour when the representation was completed in 2016, was within the range of hourly rates customarily charged by attorneys of similar experience to Mr. Taylor and myself, who practice in commercial transactions and litigation in the Charleston area; and (6) Plaintiff benefited from the services performed by BB&T by ultimately obtaining the beneficial result of a recovery in the full amount sought at trial.

10. I am further informed and believe that in the absence of any presentation of evidence to the contrary by Defendant in this action, it is appropriate to award the relief requested, including attorneys' fees and costs in the amount requested.



G. Hamlin O'Kelley, III

Subscribed and Sworn to before me
This 15th day of September, 2020



Notary Public for the State of South Carolina
My Commission expires _____



EXHIBIT A

Timekeeper	Transaction Date	Billed Amount	Narrative	Billed Hours
Taylor, Gray B.	1/5/2015	\$280.00	Finalized shared parking agreement and email to Tyler for review	0.8
Taylor, Gray B.	1/6/2015	\$140.00	Follow up with Tyler and David Pagliarini	0.4
Taylor, Gray B.	1/7/2015	\$280.00	Phone conference with David Pagliarini; emails to clients regarding [REDACTED]	0.8
Taylor, Gray B.	2/9/2015	\$350.00	Calls and emails to and from Tyler regarding [REDACTED]	1
Taylor, Gray B.	2/10/2015	\$1,575.00	Meeting and communications with Tyler Flesch; draft notice of default and forward to the Town; prepar for and attend town council meeting	4.5
O'Kelley, G. Hamlin	2/10/2015	\$85.50	Review and track changes to default letter to David Pagliarini	0.3
O'Kelley, G. Hamlin	2/10/2015	\$57.00	Further revisions to default letter	0.2
O'Kelley, G. Hamlin	2/10/2015	\$57.00	Further revisions to default letter to Town of Mt. Pleasant	0.2
Taylor, Gray B.	2/11/2015	\$105.00	Emails to and from David Pagliarini regarding council resolution	0.3
Taylor, Gray B.	2/11/2015	\$455.00	Phone conference with Tyler; review legal issues regarding [REDACTED] [REDACTED] phone conference with Town Attorney	1.3
O'Kelley, G. Hamlin	2/11/2015	\$85.50	Conference with Attorney Taylor re: [REDACTED]	0.3
O'Kelley, G. Hamlin	2/11/2015	\$85.50	Begin review of zoning ordinances re: appeal and status of parking issues	0.3

O'Kelley, G. Hamlin	2/11/2015	\$370.50	Further review of zoning issues.	1.3
O'Kelley, G. Hamlin	2/11/2015	\$171.00	Begin draft memorandum re: zoning, appeals, and other issues.	0.6
O'Kelley, G. Hamlin	2/12/2015	\$85.50	Further review of Town ordinances re: memorandum	0.3
O'Kelley, G. Hamlin	2/13/2015	\$57.00	Further correspondence with Attorney Pagliarini re: old code for town of Mt. Pleasant	0.2
O'Kelley, G. Hamlin	2/17/2015	\$85.50	Receipt and review old code for town of Mt. Pleasant	0.3
O'Kelley, G. Hamlin	2/17/2015	\$114.00	Revise Memo to clients re: [REDACTED]	0.4
Taylor, Amanda	2/22/2015	\$15.00	Communicate (other external) Document Production Review e-mail from Trisha Hughey to Hamlin O'Kelley re: Mount Pleasant Ordinance	0.1
Taylor, Amanda	2/22/2015	\$15.00	Review/analyze Document Production Review Mount Pleasant Ordinance documents produced by Trisha Hughey	0.1
O'Kelley, G. Hamlin	2/23/2015	\$57.00	Telephone call to Attorney Pagliarini re: old code for Mt. Pleasant	0.2
O'Kelley, G. Hamlin	2/24/2015	\$85.50	Review of old Coleman Blvd. Overlay district ordinances	0.3
O'Kelley, G. Hamlin	2/24/2015	\$57.00	Finalize Memorandum to client re: [REDACTED]	0.2
O'Kelley, G. Hamlin	2/24/2015	\$57.00	Revise memorandum to clients re: [REDACTED]	0.2

Taylor, Gray B.	3/11/2015	\$875.00	Meeting with Tylor and Chris; review and revise ground lease for Shem Creek; correspondence to Kent Prause regarding building permit	2.5
O'Kelley, G. Hamlin	3/11/2015	\$57.00	Correspondence with clients re: [REDACTED]	0.2
O'Kelley, G. Hamlin	3/11/2015	\$114.00	Letter to Town of Mt. Pleasant regarding FOIA Request as to communications from Councilman Gary Santos	0.4
O'Kelley, G. Hamlin	3/11/2015	\$57.00	Correspondence with clients re: [REDACTED]	0.2
O'Kelley, G. Hamlin	3/11/2015	\$57.00	Email to Attorney Pagliarini re: status of freedom of information act request	0.2
O'Kelley, G. Hamlin	3/13/2015	\$114.00	Research re: [REDACTED]	0.4
O'Kelley, G. Hamlin	3/13/2015	\$57.00	Email to Attorney Taylor re: [REDACTED]	0.2
O'Kelley, G. Hamlin	3/13/2015	\$57.00	Correspondence from Kent Prause re: parking issues	0.2
O'Kelley, G. Hamlin	3/13/2015	\$57.00	Correspondence from and to Attorney Pagliarini re: constructive notice with Councilman Santos	0.2
Taylor, Amanda	3/25/2015	\$15.00	Review/analyze Document Production Review FOIA request from Hamlin O'Kelley to David Pagliarini returned unable to forward	0.1

Taylor, Amanda	3/25/2015	\$15.00	Communicate (in firm) Document Production E-mail to Hamlin O'Kelley attaching returned FOIA request from David Pagliarini	0.1
Taylor, Amanda	3/25/2015	\$15.00	Communicate (in firm) Document Production E-mail from Hamlin O'Kelley re: returned FOIA request for David Pagliarini	0.1
O'Kelley, G. Hamlin	3/31/2015	\$57.00	Correspondence from town re: FOIA request response	0.2
O'Kelley, G. Hamlin	5/4/2015	\$57.00	Receipt and review correspondence from Kent Prause re: status of parking issues pre-permit	0.2
O'Kelley, G. Hamlin	5/5/2015	\$57.00	Correspondence with clients re: [REDACTED]	0.2
O'Kelley, G. Hamlin	5/5/2015	\$114.00	Conference call with clients and Gray Taylor	0.4
O'Kelley, G. Hamlin	5/8/2015	\$57.00	Correspondence with Town of Mt. Pleasant legal department re: status of FOIA response	0.2
O'Kelley, G. Hamlin	5/8/2015	\$57.00	Telephone call with Julia Copeland re: response to FOIA request from Town of Mt. Pleasant	0.2
O'Kelley, G. Hamlin	5/8/2015	\$57.00	Research re: [REDACTED]	0.2
O'Kelley, G. Hamlin	5/8/2015	\$85.50	Draft of Standard of Review Memorandum for Zoning Administrator Review to BZA	0.3
O'Kelley, G. Hamlin	5/8/2015	\$1,767.00	Review of emails and FOIA documents from Town of Mt. Pleasant	6.2

O'Kelley, G. Hamlin	5/11/2015	\$57.00	Telephone call with Julia Copeland re: status of FOIA documents	0.2
O'Kelley, G. Hamlin	5/11/2015	\$57.00	Further correspondence with Julia Copeland re: FOIA request response	0.2
Taylor, Amanda	5/11/2015	\$15.00	Review/analyze Document/File Management Review letter from David G. Pagliarini to Hamlin O'Kelley re: FOIA request of e-mails	0.1
O'Kelley, G. Hamlin	5/19/2015	\$370.50	Review of emails and text from Santos	1.3
Taylor, Amanda	6/13/2016	\$15.00	Review letter from Hamlin O'Kelley to David Pagliarini re: agreement between Shem Creek Development and Town of Mt. Pleasant	0.1
Taylor, Gray B.	6/6/2016	\$1,040.00	Work on demand letter to Town for breach of parking license agreement	2.6
O'Kelley, G. Hamlin	6/7/2016	\$90.00	Revise demand letter to Town of Mt. Pleasant	0.3
O'Kelley, G. Hamlin	6/7/2016	\$90.00	Draft of letter to Town Council	0.3
O'Kelley, G. Hamlin	6/7/2016	\$90.00	Telephone call with client re: [REDACTED]	0.3
Taylor, Gray B.	6/8/2016	\$160.00	Review and respond to emails from Tyler; revisions to TOMP demand letter	0.4
O'Kelley, G. Hamlin	6/8/2016	\$60.00	Telephone call with Tyler Flesch re: [REDACTED]	0.2
O'Kelley, G. Hamlin	6/8/2016	\$60.00	Revise letter to Town of Mt. Pleasant	0.2

O'Kelley, G. Hamlin	6/8/2016	\$60.00	Further telephone calls with client re: [REDACTED]	0.2
O'Kelley, G. Hamlin	6/8/2016	\$60.00	Further revisions to letter re: status of claims for SCDG demand for PLA	0.2
O'Kelley, G. Hamlin	6/8/2016	\$60.00	Further revisions to demand letter to Mt. Pleasant Town Council	0.2
O'Kelley, G. Hamlin	6/8/2016	\$60.00	Telephone call with client re: [REDACTED]	0.2
O'Kelley, G. Hamlin	6/8/2016	\$60.00	Further correspondence with client re: [REDACTED]	0.2
O'Kelley, G. Hamlin	6/9/2016	\$60.00	Correspondence with David Pagliarini re: demand letter and presentation to council	0.2
O'Kelley, G. Hamlin	6/9/2016	\$90.00	Telephone call with Tyler Flesch re: [REDACTED]	0.3
O'Kelley, G. Hamlin	6/9/2016	\$90.00	Telephone call with David Slade at Post & Courier re: settlement demand	0.3
O'Kelley, G. Hamlin	6/13/2016	\$60.00	Telephone call with David Pagliarini re: council meeting	0.2
O'Kelley, G. Hamlin	6/14/2016	\$60.00	Telephone call with Tyler Flesch re: [REDACTED]	0.2
O'Kelley, G. Hamlin	6/14/2016	\$90.00	Telephone call with client re: [REDACTED]	0.3
O'Kelley, G. Hamlin	6/14/2016	\$60.00	Telephone call with David Pagliarini re: status of meeting	0.2

O'Kelley, G. Hamlin	6/14/2016	\$90.00	Telephone call with David Pagliarini re: status of claims and counsel meeting	0.3
O'Kelley, G. Hamlin	6/14/2016	\$60.00	Telephone call with Tyler Flesch re: [REDACTED]	0.2
O'Kelley, G. Hamlin	6/16/2016	\$90.00	Telephone call with client re: [REDACTED]	0.3
O'Kelley, G. Hamlin	6/20/2016	\$330.00	Meeting with clients re: [REDACTED]	1.1
Taylor, Gray B.	6/20/2016	\$320.00	Meeting with Tyler and Tex on [REDACTED]	0.8
O'Kelley, G. Hamlin	6/21/2016	\$120.00	Draft Termination notice letter to Town of Mount Pleasant	0.4
O'Kelley, G. Hamlin	6/22/2016	\$90.00	Draft FOIA letter to Town of Mt. Pleasant regarding Credit Ratings	0.3
O'Kelley, G. Hamlin	6/22/2016	\$60.00	Telephone call with client re: [REDACTED]	0.2
Taylor, Amanda	6/22/2016	\$30.00	Email letter to David Pagliarini from Hamlin O'Kelley and note deadline to respond timely re: FOIA request	0.2
O'Kelley, G. Hamlin	6/23/2016	\$60.00	Telephone call with Tyler Flesch re: [REDACTED]	0.2
O'Kelley, G. Hamlin	6/23/2016	\$60.00	Correspondence with client re: [REDACTED]	0.2
O'Kelley, G. Hamlin	6/23/2016	\$60.00	Revise Termination letter to the Town of Mt. Pleasant	0.2

O'Kelley, G. Hamlin	6/23/2016	\$60.00	Communication with client re: [REDACTED]	0.2
O'Kelley, G. Hamlin	6/30/2016	\$60.00	Correspondence with client re: [REDACTED]	0.2
Taylor, Amanda	7/7/2016	\$15.00	Email to Hamlin O'Kelley re: deadline for Town of Mt. Pleasant FOIA request	0.1
Taylor, Amanda	7/11/2016	\$15.00	Email from Hamlin O'Kelley re: FOIA request deadline for Town of Mt. Pleasant	0.1
Taylor, Amanda	7/11/2016	\$15.00	Email to Hamlin O'Kelley re: FOIA request deadline for town of Mt. Pleasant	0.1
O'Kelley, G. Hamlin	7/14/2016	\$60.00	Receipt and review correspondence from Trisha Huey re: status of credit rating issues for the Town of Mt. Pleasant	0.2
O'Kelley, G. Hamlin	7/14/2016	\$60.00	Correspondence with client re: [REDACTED]	0.2
Taylor, Amanda	7/14/2016	\$30.00	Review Town of Mt. Pleasant's FOIA response documents	0.2
Taylor, Amanda	7/14/2016	\$15.00	Review email from Hamlin O'Kelley to client attaching [REDACTED]	0.1
TOTAL FEES	\$13,138.50			

2-3-2020 PROCEEDINGS

1 based on a Motion to Amend our pleadings.

2 Your Honor, the timeliness of it, it's just that
3 this has all happened in the last month or so, and
4 that's the basis for our motion.

5 THE COURT: All right. I'll think about that when
6 we take our lunch recess and reconvene, say, at 2:00.
7 Does that give everybody enough time? Or say 2:15 give
8 plenty of time?

9 MR. GASKINS: Yes, Your Honor.

10 MR. PAGLIARINI: 2:15 is fine.

11 MR. TACKETT: 2:15. Thank you, Judge.

12 THE COURT: All right. See everybody then.

13 (Lunch recess.)

14 THE COURT: Thank you, everyone. Please have a
15 seat. I hope everyone had a nice lunch.

16 Counsel, before we proceed, I've had an
17 opportunity to consider your request to amend the
18 pleadings at this juncture, and I'm going to
19 respectfully deny your motion to do so pursuant to Rule
20 15. Obviously, to do so at -- on the day of trial,
21 certainly that would be prejudicial and unfair surprise
22 to the Plaintiff at this juncture, and to not have an
23 opportunity to respond. Further -- and it's not -- you
24 said it's in accordance to Rule 15 where presenting of
25 evidence, the evidence has not been presented yet.

2-3-2020 PROCEEDINGS

1 My ruling, my previous ruling to both parties was
2 issued. Your notice of that ruling was on December
3 11th. It is now February 3rd. So, your motion to
4 amend it at this juncture, I don't think, is timely.
5 And also, further, in accordance with Rule 15, I don't
6 think your action would be subverted in any way by --
7 and being prejudice to obtain your action for defense
8 upon the merits of the case. You filed ten affirmative
9 defenses, which certainly cover the grounds for your
10 defense. And I don't think you will be unfairly
11 prejudiced either. So, your motion is respectfully
12 denied.

13 Are we ready to proceed?

14 MR. PAGLIARINI: Yes, Your Honor.

15 MR. GASKINS: We are, Your Honor.

16 THE COURT: You may proceed.

17 MR. GASKINS: Thank you, Your Honor. May it
18 please the Court.

19 THE COURT: Yes, sir.

20 MR. GASKINS: This is a case about cooperation,
21 working towards a common goal, and what happens when
22 one party to a contract stops cooperating and working
23 towards that goal.

24 The case begins in 2008 when the Town of Mt.
25 Pleasant identified the corner of Coleman Boulevard and

1 and this Court's attention to this matter. And we look
2 forward to hearing this case.

3 Thank you.

4 THE COURT: Thank you, counsel. You may call your
5 first witness.

6 MR. GASKINS: The Plaintiff calls Tyler Flesch to
7 the stand.

8 Thereupon,

9 TYLER FLESCH

10 was called as a witness, having been first duly sworn,
11 was examined and testified as follows:

12 THE COURT: You may proceed.

13 DIRECT EXAMINATION

14 BY MR. GASKINS

15 Q Mr. Flesch, where do you live?

16 A I reside at 1338 Putreach Lane, Mt. Pleasant,
17 South Carolina.

18 Q And what is your profession?

19 A I am a real estate investor and developer.

20 Q What's your educational background?

21 A I attended College of Charleston and University of
22 Dayton with degrees in -- a minor in finance and a degree in
23 corporate mitigations.

24 Q What did you do after you graduated?

25 A I went to work for a firm called Jupiter Realty,

1 which is a Chicago-based developer and investor in
2 commercial real estate.

3 Q What type of projects have you been involved in
4 the development of?

5 A In the course of my career, we've developed
6 multifamily apartments, industrial product, office
7 buildings, retail centers, hotels. Pretty much everything
8 except for single family.

9 Q What is your connection to the Plaintiff in this
10 case, Shem Creek Development Group?

11 A I am a partner through an affiliated entity.

12 Q When was Shem Creek Development Group formed?

13 A July, I believe, of 2013.

14 Q And have you been a member since it was formed in
15 2013?

16 A I have.

17 Q Why was Shem Creek Development Group performed?

18 A It was formed as a single purpose entity for the
19 development of the office and parking facility in Shem
20 Creek.

21 Q And who was responsible or who has been
22 responsible for the day-to-day operations of Shem Creek
23 Development Group?

24 A That would be Tex Small, my partner, and myself
25 split the responsibilities.

1 Q Okay. And what responsibilities or what primary
2 responsibilities did you have with regards to the
3 development of the garage project for Shem Creek Development
4 Group?

5 A As a partner, you're knowledgeable about
6 everything going on. My primary responsibilities were for
7 the procurement of the land itself, the financing, the
8 underwriting of the project, as well as the lease of the
9 office component.

10 Q Okay. Tell us when the idea of, of building -- of
11 building a parking garage was first considered?

12 A Of the origins of that location for a parking deck
13 were back to the CRAB Report of 2008. It was identified as
14 an ideal location for structured parking with the concept of
15 a public/private partnership.

16 Q Okay. And where is the site where the project was
17 being considered?

18 A It is essentially the corner of Mill Street and
19 Coleman Boulevard in Mt. Pleasant.

20 MR. GASKINS: Your Honor, may I approach the
21 witness?

22 THE COURT: You may.

23 BY MR. GASKINS:

24 Q Does this picture that I've handed you in
25 Exhibit 61, do you recognize that?

1 A I do.

2 Q Okay. And what is it?

3 A It's an aerial photograph of essentially the Shem
4 Creek area. But it also includes the corner of Mill and
5 Coleman where the office and parking facility are located.

6 MR. GASKINS: Your Honor, do we have -- do you
7 have any objection to us pulling it up on the screen?

8 THE COURT: No, sir. Any objection?

9 MR. PAGLIARINI: No objection, Your Honor.

10 BY MR. GASKINS:

11 Q All right. Can you identify, on this aerial
12 photo, where the project site is?

13 A I can. It's easier for me to get up and---

14 THE COURT: Sure.

15 THE WITNESS: I can walk over there if that's---

16 THE COURT: I have a laser if that's easier or you
17 can---

18 THE WITNESS: That would be great if it's there.

19 Whatever is easiest, that's fine. I can walk up.

20 That's not -- this is Coleman Boulevard and Mill
21 Street, and this is the project we are discussing.

22 MR. GASKIN: At this time, I would move to admit
23 Plaintiff's Exhibit 61 into evidence.

24 THE COURT: Without objection?

25 MR. PAGLIARINI: Without objection.

1 *(Whereupon, Plaintiff's Exhibit No(s). 61 marked*
2 *for identification and received in evidence.)*

3 BY MR. GASKINS:

4 Q Mr. Flesch, why was this site chosen as a
5 potential site for the garage project?

6 A Do you mean on the town's identifying the site or
7 our decision to?

8 Q Well, as it relates to Shem Creek Development
9 Group.

10 A Myself and two of the other partners within Shem
11 Creek Development Group are the landlords to the ground
12 lease of these parcels.

13 Q Okay. And when the project was first being
14 considered for a garage, did you contemplate any role or
15 participation from the town in the development of that
16 project?

17 A The original concept was for the town to simply
18 lease the land from us and build a standalone parking
19 facility there.

20 Q Okay.

21 A Essentially a parking garage without the office.

22 Q Did, did you have any discussions with anyone from
23 the town about its interest in the project?

24 A I approached Mr. Small and indicated that I, I
25 believe there was interests. And through Mr. Small's

1 relationships with the mayor and the town, he approached the
2 town to discuss their interest level.

3 Q Okay. And what is your understanding about
4 whether the town was interested in, in pursuing this project
5 on that site?

6 A They were very interested having -- especially
7 having it been identified in the CRAB Report as a key
8 location for structured parking.

9 Q Okay. And were you personally interested in
10 pursuing a project and partnership with the town?

11 A I was.

12 Q Okay. And why was that?

13 A Initially, in terms of a ground lease, number one,
14 I believe it would fulfill the purposes of that the CRAB
15 Report had suggested, which was to revitalize the area.
16 And, obviously, having the Town of Mt. Pleasant, which is a
17 Triple A rated entity, as a tenant is always desirable.

18 Q When you were having these early discussions with
19 the town back in 2011, did you have any idea about whether
20 the project, the development of a standalone parking garage
21 would be feasible?

22 A We didn't know the specifics of costs, revenue
23 estimates, no, not at that time.

24 Q Okay. Did you do anything to determine if it was
25 feasible?

1 A After Mr. Small had the conversation with the
2 town, we agreed to jointly fund a study to study those
3 various things. Essentially a 250-space parking garage that
4 I believe it looked at over a seven-year period of
5 operations.

6 Q Okay. And when you say we jointly commissioned,
7 who is the "we" you're referring to?

8 A I'm sorry. South -- Shem Creek Development Group.
9 Well, it wasn't formed yet. Essentially AVTEX, which is
10 Tex's company, was the one with the town who jointly funded
11 the study.

12 Q Okay. And you may have testified about this, but
13 who was, who was engaged to perform the feasibility study?

14 A It was a company out of Chicago, Illinois called
15 Desman Associates.

16 Q And why was Desman Associates chosen?

17 A They are a nationally renowned firm that does
18 mainly parking structures and parking analysis throughout,
19 throughout the United States.

20 Q Okay. And did Desman Associates, in fact, conduct
21 an economic feasibility study or a feasibility study of the
22 project?

23 A They did.

24 Q Okay. And what did Desman Associates do to
25 conduct this feasibility study?

1 A The study contained pro formas, construction
2 costs, financing costs, inventories in the Shem Creek area
3 for what parking existed.

4 MR. PAGLIARINI: All right. No objection.

5 MR. GASKINS: May I approach?

6 THE COURT: Yes, sir.

7 BY MR. GASKINS:

8 Q I've handed you what's been premarked as
9 Exhibit No. 2. Are you familiar with this document?

10 A Yes, I am.

11 Q Okay. What is it?

12 A It appears to be the Desman report that we're
13 discussing.

14 Q And what is the date of the Desman Study?

15 A January 26th, 2012.

16 Q And did you receive a copy of this study around
17 that time in January 2012 or early 2012?

18 A Yes, I did.

19 Q Okay. And does this, does this appear to be a
20 complete and accurate copy of that study?

21 A It does.

22 MR. GASKINS: Okay. At this time we would move
23 for the admission of Exhibit 2 into evidence.

24 MR. PAGLIARINI: No---

25 THE COURT: Any objection?

1 MR. PAGLIARINI: No objection to admitting, Your
2 Honor.

3 *(Whereupon, Plaintiff's Exhibit No(s). 2 marked*
4 *for identification and received in evidence.)*

5 BY MR. GASKINS:

6 Q And what conclusions did Desman Associates reach
7 about the financial feasibility of a 250-space standalone
8 parking deck?

9 A That it would produce negative net operating
10 income for the first seven years of the project.

11 Q Okay. If you could, Laura, bring up Page 18 of
12 the study. And we pulled up Page 18, Table 11. Are you --
13 what is, what is being analyzed here, or depicted here?

14 A This is what I would refer to as a pro forma for
15 the operation of the, of the garage. And it would cover the
16 operating expenses, the revenue expected, and then
17 ultimately a net income on the bottom would be determined,
18 profit or loss---

19 Q Okay.

20 A ---going out in time seven years.

21 Q And was this the economic analysis that you were
22 just referring to, the Desman---

23 A It is.

24 Q Okay. And what were the projections for the
25 garage, as studied in the Desman report?

1 A In the initial year the project would lose a
2 little over \$300,000 of net revenue. Actually for the first
3 two years, and then begin to lesson the losses all the way
4 down to losing 15,000 in year seven.

5 Q Okay. Can you estimate what the total losses
6 would be over that seven-year period that was studied?

7 A Somewhere between, I believe, 750,000 to 800,000
8 it looks like.

9 Q Was this report presented to the town?

10 A It was.

11 Q Okay. And was the town interested in pursuing the
12 project after receiving this report?

13 A No, they were pretty clear that they would not
14 want to pursue it under these circumstances.

15 Q Okay. So what happened to the project as
16 conceived or considered at that point in time?

17 A It was really rendered infeasible based on, in, in
18 part, these numbers. And it essentially sat or went
19 dormant.

20 Q Okay. Did you give up on the project?

21 A We didn't because the tenant at the location, they
22 were indicating they may not build their building on-site,
23 and so we wanted to find a solution. I believe we thought
24 there was great merit to bringing the parking to the Creek.
25 We were in agreement with the city on this. And what we

1 noticed, in the Desman report, without going into terrible
2 detail, was there seemed to be a very large doughnut hole in
3 the operations, which was the daytime use during the week.
4 Literally very little revenue.

5 And it would make sense, you know -- you
6 know, on the weekends is where Shem Creek really sees the
7 activity from a tourism and a restaurant standpoint. So,
8 Tex and I began to -- started with that premise, how do you
9 solve a daytime hole in a parking revenue? And this is
10 occurring over multiple months. And we began to formulate
11 the concept of adding office to the project. And that isn't
12 as simple as just saying, We'll build a office. We need to
13 see what the demand was out there and, in fact, what it --
14 what rent would be required to make this work, those sorts
15 of things.

16 And this is all in the backdrop of coming out
17 of the great recession. And, as a developer, we all learned
18 significant lessons coming out of that time period. And
19 being cautious and prudent was smart. So, we formulated
20 this concept, ultimately, and came to the conclusion it
21 might work if we added office.

22 Q And when would -- when did you revisit the project
23 at -- in, in this form of the concept with an office space
24 component?

25 A I believe it would have been late 2012, early

1 2013.

2 Q Okay. And did Shem Creek Development Group or the
3 principals of what would later become Shem Creek Development
4 Group approach the town about this concept?

5 A Yes, Mr. Small had a conversation with the town.

6 Q Okay. And what's your understanding of he, he had
7 a conversation with?

8 A I believe he spoke to the mayor possibly, Eric
9 DeMoura.

10 Q Okay. And what's your understanding of -- and who
11 was the mayor at that time?

12 A Billy Swails.

13 Q And what's your understanding of Mayor Swails to
14 this concept?

15 MR. PAGLIARINI: Your Honor, we're gonna object to
16 this on two grounds. One, it is hearsay. Also, once
17 again, we're gonna get into territory about legislative
18 thoughts and opinions. This was just a discussion of
19 this witness was not there. So, on those two grounds,
20 we'll object.

21 MR. GASKINS: Okay. Well, I, I can lay---

22 THE COURT: Sustained.

23 MR. GASKINS: I can lay some more foundation.

24 BY MR. GASKINS:

25 Q Did you and Mr. Smalls discuss his conversations

1 that he had with Mr. Swails?

2 A He did.

3 Q And did Mr. Small inform you about what his
4 understanding of, of Mayor Swails' position on the project
5 was at that time?

6 A He did. He, he did. He indicated there was a
7 positive response, and that we needed to continue to work
8 the concept. That it was something that was viable
9 potentially.

10 Q Okay. So, based on those discussions, you had
11 positive feedback that the town was interested in pursuing
12 the project or considering the project further?

13 A Yes.

14 Q Okay. So, what did you do at that point?

15 A At that point, I believe Mr. Small engaged Ken
16 Betsch.

17 Q And what was Mr. Betsch engaged to do?

18 A Essentially take the footprint of the property,
19 and taking lead from the Desman report, draw a 250-space
20 parking garage with an office element, office element
21 included on the third and fourth floor.

22 Q Okay. And why was the two -- the approximately
23 250-space number chosen?

24 A It was derived from the Desman report.

25 Q Okay. Did the town have any input in the numbers

1 that you asked Mr. Betsch to consider?

2 A They did not.

3 Q Okay. At that point in time, had anyone from the
4 town indicated that a minimum number of spaces must be
5 provided for the town to participate in this project?

6 A No, sir.

7 Q Okay. Did Mr. Betsch prepare any conceptual
8 drawings?

9 A He did, both concept layouts and conceptual
10 renderings of the building itself.

11 Q Can you describe the design and layout of the
12 building---

13 A Sure.

14 Q ---that he prepared?

15 A He took -- again, we were looking at a footprint
16 of land, and placed as many parking spaces on the first
17 floor -- first two levels with a ramp running through the
18 middle. And then the third and fourth floor of the building
19 were the office component, but pushed to the front of the
20 building on Coleman Boulevard.

21 MR. GASKINS: Your Honor, may I approach the
22 witness?

23 THE COURT: You may.

24 BY MR. GASKINS:

25 Q Are you familiar with this document?

1 A I am.

2 Q Okay. What is it?

3 A This is the Parking License Agreement.

4 Q Okay. If you could, turn to Page 11 of this
5 document.

6 A Okay.

7 Q Are you -- do you recognize the signatures on this
8 page?

9 A I do.

10 Q Okay. And if you'd go to Page 2. What's the date
11 of the agreement?

12 A October 17th, 2013.

13 Q Okay. Does this appear to be a complete and
14 accurate copy of the executed Parking License Agreement
15 between Shem Creek Development Group and the Town of Mt.
16 Pleasant?

17 A It does.

18 MR. GASKINS: Okay. We'd move to admit Exhibit 7
19 into evidence.

20 MR. PAGLIARINI: No objection, Your Honor.

21 THE COURT: It's in.

22 *(Whereupon, Plaintiff's Exhibit No(s). 7 marked*
23 *for identification and received in evidence.)*

24 BY MR. GASKINS:

25 Q All right. If you could, please turn to the next

1 to the last page. I believe it's referred to as Exhibit A.

2 Laura, if you could bring that up please.

3 A Okay.

4 Q What is Exhibit A that we're looking at here?

5 A This would be the conceptual rendering of the
6 project Mr. Betsch prepared.

7 Q Okay. And do your best to describe what we're
8 looking at.

9 A Yeah, I won't get out of my box and get locked out
10 again.

11 Q I'll help you. What, what is depicted on the top
12 two levels?

13 A The top two levels are the office component of the
14 project that are front loaded towards Coleman Boulevard.

15 Q Okay. And is this Coleman Boulevard right here?

16 A It is.

17 Q Would that be Mill Street?

18 A Correct.

19 Q Okay. And what is the back part of the property?

20 A The -- well, the entire -- the whole entire
21 footprint is comprised of the two levels of parking. When
22 you get to the back where the office ends, it's open air on
23 a symposium of parking on the back.

24 Q Okay. So, these bottom two levels, even that
25 front Coleman, that's part of the parking garage?

1 A That is. Correct.

2 Q And I believe you mentioned that Mr. Betsch also
3 prepared a layout of the parking design, is that correct?

4 A That's correct.

5 Q Okay. And how many spaces were included in this
6 conceptual layout?

7 A 276, I believe.

8 Q And did you understand, from Mr. Betsch's
9 drawings, that the site could yield exactly 276 spaces?

10 A No, this was a rough conceptual drawing on a plat
11 of land.

12 Q Okay. And what did you do when you received
13 Mr. Betsch's drawings? And when I say "you", I mean Shem
14 Creek Development Group.

15 A I believe Mr. Small spoke to the city.

16 Q And what was -- what's your understanding of the
17 result of Mr. Small taking this -- these conceptual drawings
18 back to the town?

19 A The end event was we were to move on to forming or
20 drafting the license agreement.

21 Q Okay. At that point in time is -- what was your
22 understanding of the town's reaction to the concept of an
23 office space combined with a parking component?

24 MR. PAGLIARINI: Your Honor, objection on the same
25 basis, relevance and hearsay.

1 MR. GASKINS: Okay.

2 MR. PAGLIARINI: I don't know what the town's
3 reaction is. I don't know that the town---

4 MR. GASKINS: Basically---

5 MR. PAGLIARINI: ---collectively had a reaction.

6 MR. GASKINS: We're, we're just laying foundation
7 to explain further testimony.

8 THE COURT: I'll allow it.

9 BY MR. GASKINS:

10 Q Okay.

11 A Enthusiasm. They wanted to move forward. So
12 clearly it has some -- a positive core.

13 Q What is your understanding that the town was
14 interested in pursuing some type of an agreement to
15 formalize this concept?

16 A Yes, it is.

17 Q Okay. And so what happened next in the
18 development of this project?

19 A I believe a draft agreement working with
20 Mr. Pagliarini, Mr. Gray Taylor, with input obviously from
21 Mr. Small and myself, the drafts were formed.

22 Q Okay. And were you involved in the negotiations
23 dealing with the terms of the agreement?

24 A As a partner I was involved, but Mr. Small led
25 those, those negotiations.

1 Q Okay. What's your understanding of the major
2 terms that were being negotiated?

3 A The---

4 MR. PAGLIARINI: Again -- well, this gets into our
5 pretrial objection based on the fact that we're now
6 getting into parole evidence. And the whys and the
7 hows as to the terms of the agreement, our position is
8 this is an example of what we mentioned in our
9 pretrial, that the terms of the agreement speaks for
10 themselves, and that this is -- this is not relevant in
11 accordance with the Parole Evidence Rule.

12 THE COURT: I'll allow it. I'm sorry. I missed
13 that last word. It's not relevant or---

14 MR. PAGLIARINI: Parole -- it's not relevant in
15 accordance with the Parole Evidence Rule. Thank you.

16 THE COURT: You may proceed.

17 BY MR. GASKINS:

18 Q Okay. What were the major terms that were being
19 negotiated?

20 A That we would use the concept drawing to formulate
21 a plan with approximately 276 spaces with a 132 dedicated
22 public spaces and I believe 144 reserve spaces for a term of
23 30 years with 15 years of rent payments at \$185,000 per
24 year.

25 Q Okay. And were there any negotiations based on

1 the number of spaces included in the garage?

2 A No.

3 Q Now, at that point in time, had Mr. DeMoura or
4 anyone from the town informed Shem Creek Development Group
5 that a certain number of spaces must be provided for the
6 town to support this project or participate in it?

7 MR. PAGLIARINI: Your Honor, we're gonna -- same
8 objection. Parole Evidence Rule.

9 THE COURT: Thank you, sir. You may proceed.

10 A No, they hadn't.

11 Q Okay. Earlier you mentioned that there was an
12 existing lease on the property, is that correct?

13 A That is correct.

14 Q Okay. Who was the tenant?

15 A Roper St. Francis Hospital.

16 Q Okay. And were they using the property for any
17 purpose?

18 A They had put a long-term ground, or had entered
19 into a long-term sublease, ground lease there. Had plans
20 for a medical facility, but had not built anything there,
21 obviously, yet.

22 MR. GASKINS: Okay. May I approach?

23 THE COURT: Yes, sir.

24 BY MR. GASKINS:

25 Q I'm handing you what's been marked as Plaintiff's

1 Exhibit 59 and Plaintiff's Exhibit 60.

2 A Okay.

3 Q Does the photograph in Exhibit No. 59 look
4 familiar to you?

5 A It does.

6 Q Okay. And what does that appear to be?

7 A This is at the site where today the parking
8 facility sits. I believe this would be the corner of Mill
9 and what is now Ronnie Boals Boulevard looking into the
10 property.

11 Q Okay. And was that building on the project site
12 prior to the execution of the Parking License Agreement?

13 A Yes.

14 Q Okay. If you could, please look at Exhibit No.
15 60. Are you familiar with what's being depicted in this
16 photograph?

17 A I am.

18 Q Okay. And what is that?

19 A This is another view going into the property
20 essentially from the corner of Mill Street and Coleman
21 looking into the property.

22 Q Okay. And so these were the improvements that
23 were on the property when you were considering developing
24 this site for a parking garage?

25 A That is correct.

1 Q Okay. Let's turn to the actual written agreement
2 that was negotiated. And you may have testified about this
3 earlier, and I apologize if I'm asking you to repeat
4 yourself. But who was involved in the process of actually
5 drafting and negotiating that agreement?

6 A Mr. Pagliarini, I'm sure, and some staff as well.
7 But Mr. Gray Taylor was our attorney. And Tex led the
8 negotiations from our side, Mr. DeMoura from the town. And
9 I had a cursory involvement as a partner.

10 Q Okay. Were Mr. Betsch's drawings relied on in any
11 way in drafting and negotiating the Parking License
12 Agreement?

13 A Yes, we used the concept that he had created for
14 the basis---

15 Q Okay.

16 A ---of the agreement.

17 Q And what about the parking layout that included
18 276 spaces, was that relied on in negotiating and drafting
19 the Parking License Agreement?

20 A Yes, that was the derivative to the conceptual
21 rendering that's included as an exhibit.

22 Q Okay. And what's your understanding of how many
23 spaces were to be provided in the garage under the Parking
24 License Agreement?

25 A Conceptually 276 with, I believe, 132 public

1 spaces.

2 Q Okay. And what's the distinction between a public
3 space and a reserved space, as those terms are used in the
4 Parking License Agreement?

5 A In the simplest terms, public spaces would be
6 available to the public 24/7, seven days a week. And the
7 reserved spaces would be available to public at all times
8 except during office hours, weekday office hours, which I
9 believe we defined as 6:00 a.m. to 7:00 p.m. if I'm not
10 mistaken.

11 Q Okay. Is it your understanding that 276 total
12 spaces and 132 public spaces were definite minimum numbers
13 or an approximation of what was to be provided?

14 MR. PAGLIARINI: Again, Your Honor, we're gonna
15 object based on Parole Evidence Rule.

16 THE COURT: Yes, sir. Thank you.

17 A They were an approximation.

18 Q And why do you say that?

19 A For a variety of reasons. What we had there was,
20 in our conversations, and this meeting I was at, so I
21 would -- I have firsthand knowledge of this meeting. There
22 was discussion about the site itself. What we had was a
23 drawing that encapsulated the entire plat of the land. You
24 just saw on the photograph, we probably should have left
25 that up there, were above-ground power lines. SCE&G had

1 transformers, switches out on Coleman.

2 It was uncertain exactly what the -- you
3 know, what you'd be able to build on there, but we had a
4 concept of what we were gonna try to do. And we had to
5 figure out the engineering of the site. You had a drawing,
6 a conceptual site. It doesn't tell you the soil quality,
7 the structural engineering that goes into a building of this
8 size. Could move spaces around, could move load bearing
9 walls around. We, we weren't there yet. This was a simple
10 drawing.

11 And the reason it was done like this, and I
12 think this is an important note to point out was, Roper
13 Hospital had begun to market this property. They had made
14 the decision that they were gonna move on and not build
15 their medical office building. And so there was time
16 pressure on, not only us, but the Town of Mt. Pleasant. And
17 this was -- I was at this meeting. So, I can tell you the
18 mayor said, We need to get this done. We may never have
19 another opportunity down here.

20 MR. PAGLIARINI: Your Honor, we're gonna object to
21 that. Move to strike as to what the mayor may have
22 said.

23 THE COURT: You may proceed.

24 THE WITNESS: Is that -- I'm sorry?

25 THE COURT: You can proceed.

1 A Oh, so there was some time crunch in the sense
2 that if somebody else were to acquire the project, another
3 project could be built there and the town would have lost
4 its opportunity, as well as us, would have lost the
5 opportunity to build the project. So we had to move, and
6 without answers to structural engineering, without answers
7 to soil quality. The town certainly couldn't vouch for
8 SCE&G, whether they could move a, a relay switch station.
9 For example, they weren't gonna say they could. They didn't
10 know. And so we had a plat of land. We drew it. We put it
11 in the agreement.

12 The reason there's a conceptual rendering in
13 there is the, is the mayor, again, as was reflected in the
14 Coleman Boulevard overlay district, wanted the height on
15 Coleman. It was key to keep the height away from the Old
16 Village, and away from the watershed, and the properties
17 back there. And that was told to us. And it led to, in
18 part, the conceptual rendering where the office component is
19 on Coleman, and that's where the four stories resides.

20 Q So, my original question to you was is, did you
21 think was a, a definite number or an approximation, and your
22 answer is that it was an approximation. Do you believe
23 anything in the Parking License Agreement supports your
24 interpretation---

25 A I do.

1 Q ---that 276 and 132 were not definite numbers?

2 A I do.

3 Q Okay. And I would ask that you refer back to
4 Exhibit No. 7, the Parking License Agreement. And, Laura,
5 if you could, please pull up Section 1.06. All right.
6 Explain to me what this -- what your understanding of this
7 provision, Section 1.06, is.

8 A This is the portion of the agreement that lays out
9 the reserved and public spaces and -- that we had planned
10 for the project.

11 Q Okay. And what in this agreement supports your
12 interpretation that the numbers included in Section 1.06
13 were not intended to be definite numbers?

14 A The -- I remember the word "plan" being inserted
15 into the agreement.

16 Q Okay.

17 A It was a plan.

18 Q And when you say "plan", where do you see that in
19 Section 1.06?

20 A I'm sorry. In the first sentence, the second to
21 the last word of the first line. Excuse me.

22 Q Okay. All right. What other provisions support
23 your interpretation?

24 A 1.07B, I guess it would be. If we could look at
25 that?

1 Q If you'd pull that out, Laura. All right. What
2 in 1-1 -- 1.07B supports your interpretation that it was not
3 a definite number?

4 A In concept, this is what Mr. Pagliarini alluded to
5 profit sharing, when offset with the success of the garage.
6 In the first paragraph, if you'd look at the last sentence
7 of the para -- last line of the paragraph. It talks about
8 the reduction if it's pro rata share based upon the
9 percentage of parking spaces comprising the public spaces.
10 And then it further goes on to describe a formula in II
11 below that.

12 And the design of this language was, because
13 it was uncertain and there wanted to be equitable payment of
14 any profit sharing, you had to create the flexibility to
15 adjust the numbers. So, by way of example in the formula,
16 you see the current numbers of 132 by 76, that could be
17 altered so the appropriate party would get the appropriate
18 amount of profit out of the deal. And it was done knowing
19 that we didn't 100 percent know the number of spaces, the
20 number of public spaces ultimately we would end up with.

21 Q Okay. And tell me what language you're referring
22 to which makes you think that this was not a definite
23 requirement.

24 A I'm sorry. I'm sorry. Say that again please.

25 Q Which language in the Section 1.07B makes you --

1 are you basing your understanding on that this was not a
2 definite requirement as the number of spaces?

3 A We were talking about the pro rata share, and the
4 need for the formula.

5 Q Okay.

6 A I'm sorry.

7 Q So you're talking about right here, pro rata share
8 based on 100 percentage of the parking spaces?

9 A That is correct.

10 Q And that formula was not a, a fixed percentage,
11 was it?

12 A No, that -- if, if the numbers were finite, you
13 just would have said 43 percent of the profit would go
14 there. This was designed to have a flexibility in
15 anticipation that we would -- might have to make adjustment
16 to the spaces either up or down. The formula worked no
17 matter what.

18 MR. PAGLIARINI: Your Honor, again, we object
19 based on parole evidence as to the testimony as to what
20 they were designed to do. I think the agreement speaks
21 for itself.

22 THE COURT: Yes, sir, and your objection is noted.
23 BY MR. GASKINS

24 Q Okay. Any other provisions of the Parking License
25 Agreement that support your interpretations that these were

1 not intended to be definite numbers?

2 A I believe 2.02.

3 Q Okay. Please pull that up. What's your
4 understanding of what this provision provides?

5 A This talks about that the licensure, which is our
6 entity, will construct the project in a form substantially
7 similar to the conception drawing that's in the exhibit that
8 we discussed earlier. I believe Exhibit B is a mistake. I
9 believe it's Exhibit A.

10 Q And why do you believe this section supports your
11 interpretation?

12 A Using the language of substantially similar.
13 Again, not knowing the exact parameters of what could be
14 built there without having the benefit of engineering. This
15 language talks about substantially similar.

16 Q Okay. And you see it, it refers to conception
17 drawings in plural form. Does that mean anything to you?

18 A Yes, it would reference the Ken Betsch's layout of
19 the parking. And then, ultimately, the derivative, which is
20 the conception drawing, which again, I believe is in
21 Exhibit A and not Exhibit B.

22 Q Okay. And so the -- one of the conception
23 drawings you're referring to is the design of the garage
24 that included the number of spaces---

25 A Yes, it was---

1 Q ---or depicted its---

2 A Yes, it was the layout---

3 Q ---number of spaces?

4 A ---of, of the spaces, and that led to the
5 rendering, which is what's included in the PLA.

6 MR. PAGLIARINI: Again, objection, Your Honor.

7 This clearly and definitely falls in the parole
8 evidence. They're arguing a document that is not part
9 of this agreement. Specifically, not part of this
10 agreement, which is the Betsch, the drawing that you
11 haven't seen, not the sketch, is part of this
12 agreement. Again, there's no copy, no executed
13 version, no anything with the Betsch sketch of spaces.
14 And that will be discussed later in this case, but it's
15 absolute violation of the Parole Evidence Rule to argue
16 and discuss that is -- that document should be
17 considered as part of this agreement.

18 THE COURT: Yes, sir, I understand your objection
19 and it's duly noted.

20 MR. GASKINS: And, Your Honor, I would also
21 counter by saying conception drawings, when there is
22 only one drawing, creates an ambiguity that would allow
23 for the parole evidence to be entered.

24 BY MR. GASKINS

25 Q Okay. Are there any other provisions of the

1 agreement that supports your interpretation that these were
2 not definite numbers?

3 A I would say 2.06.

4 Q Okay. If you could bring that up? All right.

5 And what is your understanding of what Section 2.06
6 provides?

7 A Essentially, this is an excuse of performance
8 clause that, if we are unable to perform some elements of
9 the PLA, it has a list of, of reasons, acts of God,
10 governmental authority, et cetera, then we have the excuse
11 of performance. However, the rent would still need to be
12 paid.

13 Q Why do you believe that this provision supports
14 your interpretation?

15 A Ultimately, you know, not at the time that we
16 drafted this, ultimately there were acts of government
17 regulation enacted that caused us not to be able to build as
18 many spaces as we, as we would have liked. Additionally,
19 this was contemplated when we were talking about SCE&G and
20 their relay station, the above-ground power lines, all these
21 things that we don't have control over, and they would
22 create an excuse of performance if, if that didn't work out.

23 Q To your knowledge, during the time that the
24 Parking License Agreement was being drafted and negotiated,
25 did the town ever conduct any analysis indicating that 276

1 total spaces or 132 public spaces were needed to satisfy
2 parking demand in the area?

3 A Not to my knowledge.

4 Q Okay. Did they ever present any analysis to you
5 to consider?

6 A No.

7 Q In drafting and negotiating the Parking License
8 Agreement, what were the goals and benefits that Shem Creek
9 Development Group was seeking to secure?

10 A From our end, it was, it was mainly the rent, and
11 creating a tenancy with a Triple A rated entity that would
12 enhance our financing and equity opportunities.

13 Q And why were the rental payments important
14 particularly from a public entity like the Town of Mt.
15 Pleasant?

16 A Well, again, given the credit quality and given
17 what we talked about coming out of the great recession,
18 lenders were much more focused on underwriting, on credit
19 quality, and in this case, this was going to be the first
20 pay to park garage in Mt. Pleasant, which is a variable
21 income stream. I think somebody mentioned earlier, it might
22 have been you, that it could rain or it could -- you know, a
23 restaurant could go out of business or whatever be -- the
24 income is variable, and lenders and equity partners do not
25 care for variable income. They, they want a certainty, and

1 this provided an element of certainty in the form of the
2 185,000 consistently every year.

3 Q Okay. In drafting and negotiating the Parking
4 License Agreement, did you obtain an understanding of the
5 benefits that the town was trying to secure through this
6 agreement?

7 A I believe I did.

8 Q Okay. And what was that understanding based on?

9 A The, the CRAB Report and then the language
10 actually in, in lane -- in the PLA itself.

11 Q Okay. And what's your understanding of what those
12 benefits were?

13 A I believe the purpose in, in the agreement is to
14 alleviate parking congestion in the Creek, to foster
15 tourism, and economic development in both Shem Creek, and
16 then as a larger part of the Shem Creek. Excuse me, the
17 Coleman Boulevard area. Additionally, what this agreement
18 did, as a benefit to the town, was transfer all the risks to
19 our group. The town had -- just like I had mentioned, I
20 wanted finite rent for the underwriters, in this case, it
21 was, in my opinion, beneficial for the town to have a finite
22 amount of rent payment. That was their only risk in the
23 project. Everything else fell to us.

24 Q Okay. Earlier you talked about Section 1.07B in
25 the rent sharing or rent reduction provision. Was that a

1 benefit to the town?

2 A Yes. I'm sorry. Yes.

3 Q I think it's pretty obvious, but if you could
4 explain why you believe it is?

5 A Yes, it was, obviously, an offset provision or a
6 participating in the profit is a net benefit. And it's one
7 that really is indicative, in my opinion, of collaboration.
8 If we have success together, everybody benefits. If we
9 don't have success together, that risk fell to Tex and I and
10 our partners.

11 Q Okay. And I believe your testimony earlier was
12 that town was agreeing to pay rent for a period of 15 years,
13 is that correct?

14 A That is correct.

15 Q Was the town only gonna get the benefit of
16 reserving spaces for a period of 15 years?

17 A No.

18 Q Okay. How long were they gonna get the benefit of
19 that---

20 A Thirty years.

21 Q ---those reserved spaces? But they were only
22 paying for 15?

23 A That's correct.

24 Q Okay. And where is that provided in the Parking
25 License Agreement?

1 A Section 1.10.

2 Q Pull that up. All right. The Parking License
3 Agreement was executed in October of 2013, is that correct?

4 A That's correct.

5 Q Okay. What were the next steps in developing the
6 project?

7 A We engaged an architect to begin design of the
8 project.

9 Q Okay. So, at that point in time, you didn't have
10 anything beyond Mr. Betsch's conceptual plans?

11 A No, we needed to fulfill our site engineering,
12 soils, the things I had previously mentioned would be
13 necessary to have a better idea of how to construct the
14 project.

15 Q And who was the architect that Shem Creek
16 Development Group hired for this project?

17 A Jeff Johnston of Stubbs Muldrow.

18 Q Okay. And do you recall when he was engaged?

19 A I don't recall the exact date. I don't.

20 Q Okay.

21 A It would have been shortly thereafter.

22 Q Shortly after the execution of the agreement?

23 A Correct.

24 Q And what was Mr. Johnston of Stubbs Muldrow &
25 Herin engaged to do? I know you said they were engaged as

1 the architect, but generally, what was their scope of work?

2 A To create a -- the project reflective of the
3 conceptual drawings that were included in the Parking
4 License Agreement.

5 Q Okay. After the parties executed the Parking
6 License Agreement, was the town cooperative in supporting
7 Shem Creek Development Group's efforts to build the garage
8 and satisfy its obligations under the Parking License
9 Agreement?

10 A Absolutely.

11 Q And what makes you say that?

12 A We were in communication about what we needed, and
13 part of that came to my partner had written a letter, I
14 believe, to the planning committee indicating some needs we
15 had and some changes to the zoning ordinance that would be
16 required for us to take our best foot forward and maximize
17 the parking area. And they were receptive to that and,
18 ultimately, worked to pass ordinances.

19 Q Okay. And what's your understanding of what
20 changes were needed for the project? What zoning changes
21 were needed?

22 A Sure. I mean this is all based also on the
23 initial review by Jeff Johnston, the engineers. To
24 accommodate the fourth floor of the office building, the
25 height would be required to change, if I recall, from

1 45-feet to 55-feet. There was a -- changes to the flood
2 zone, flood, flood proofing, excuse me, language as well as
3 a com -- the requirement for retail or commercial occupied
4 space on the first floor of the project.

5 Q Why were the changes to the first floor
6 requirements needed for the project?

7 A To maximize the parking, to open up the parking
8 downstairs, to allow the ramp a low enough grade that you
9 could park on the ramp. It was designed to maximize the
10 parking.

11 Q Was the project, as conceived in the Parking
12 License Agreement, was it feasible without the changes that
13 you were requesting to the zoning code?

14 A No, sir.

15 Q Okay.

16 MR. GASKINS: May I approach, Your Honor?

17 THE COURT: You may.

18 BY MR. GASKINS:

19 Q I'm handing you what's been premarked as
20 Plaintiff's Exhibit 8. Are you familiar with this document?

21 A I am.

22 Q What is it?

23 A This appears to be the zoning ordinances in
24 response to what we were discussing about the changes needed
25 to move forward with the project in height, flood zone or

1 flood proofing, and the elimination of the commercial space
2 on the first floor of the project.

3 Q Okay. If you could turn to the last page of this
4 exhibit.

5 A I'm sorry. That's blank.

6 Q Oh, that one is?

7 A Yeah. No, the second to last signature page, is
8 that what---

9 Q Yeah, the sig -- signature page.

10 A Yes.

11 Q Do you recognize whose signature that is?

12 A It appears to be the mayor, Mr. Pagliarini, and
13 the clerk of council.

14 Q And what's the date of this ordinance?

15 A December 11th, 2013.

16 MR. GASKINS: Okay. We move to admit Plaintiff's
17 Exhibit 8 at this time.

18 THE COURT: Any objection?

19 MR. PAGLIARINI: No objection, Your Honor.

20 THE COURT: All right. It's in.

21 *(Whereupon, Plaintiff's Exhibit No(s). 8 marked*
22 *for identification and received in evidence.)*

23 BY MR. GASKINS:

24 Q I would ask that you look at Page 2.

25 A Okay.

1 Q And tell me what you understand this section to
2 be.

3 A This is changes to the guidelines chart. And it
4 appears, I'm not a hundred percent sure, but I believe that
5 C1 area was broken into two subareas, A and B, and it
6 changed the height to 55-feet.

7 Q Okay. Why don't you walk me through this chart
8 and tell me your understanding of what is being depicted
9 here? First of all, UCCBS Development Guidelines, what do
10 you understand that to be?

11 A That's the urban corridor that we keep, we keep
12 talking about, and the development guideline chart for the
13 urban corridor.

14 Q Okay. And if we look at the first column, it says
15 "area". What is your understanding of what that column
16 reflects?

17 A The overlay district. It's the urban corridor
18 itself is broken into multiple areas. This is the
19 delineation for, in this case, the area where we are. There
20 is a graph with areas running off the entire overlay
21 district.

22 Q Okay. And what's your understanding of where the
23 project site was in, what area code did they use?

24 A I believe it to be -- I thought it was C1, but in
25 this case it looks like it's being divided.

1 Q Okay. And which one do you think it is in, A
2 or---

3 A C1A.

4 Q C1A.

5 A Yeah, that's right.

6 Q Okay. And what does the next column represent?

7 A That's the maximum building height allowed.

8 Q Okay. And was this part of the, the changes that
9 you were requesting?

10 A It was. The 55-feet is what we thought necessary
11 to build the fourth story of the office building.

12 Q Okay. So, originally, C1 had a maximum height of
13 45-feet?

14 A That's my understanding, yes.

15 Q Okay. What's your understanding about the rest of
16 the -- the provisions in this agreement? What's the next
17 one, front setback of build-to.

18 A The front setback on build-to on Coleman or Ben
19 Sawyer, this overlay district covers both Coleman Boulevard
20 and Ben Sawyer. They're essentially one road. But they
21 did -- they delineated there. That's a 20- to 30-foot
22 build-to line, which I believe is measured from back of the
23 curb. And that is a range in which your building footprint
24 of the front of the building would need to reside.

25 Q Okay. Did the zoning amendment that was enacted

1 in this ordinance, did that build-to line in Coleman change
2 in any way by this amendment?

3 A I don't believe so.

4 Q Okay. Let's go to the next column, front or side
5 setback or build-to on other streets. What's your
6 understanding of what that column reflects?

7 A I guess, in terms of front, it would be a front of
8 any building not on Coleman or Ben Saywer. So, any other
9 front of a building, side setbacks, on other streets would
10 be a 20-foot setback, which I think somebody had discussed
11 earlier is a little different than a build-to line. But,
12 essentially, 20-feet back. It's, it's measured a little bit
13 differently is my understanding.

14 Q Okay. Did this setback requirement for front or
15 side setbacks change as a result of this amendment?

16 A No.

17 Q Okay. I also note a footnote here, Number 5. Do
18 you have an understanding of what that footnote provides?

19 A I, I believe I do, yes.

20 Q Okay. And what's your understanding?

21 A That meeting a couple provisions, that 20-foot
22 setback could be reduced to 5-foot with the addition of a
23 sidewalk, certain plantings, and then alignment site
24 requirement through design.

25 Q Okay. And what about rear building setback?

1 A That's 5-feet.

2 Q Okay. And did that change as a result of this
3 amendment?

4 A No.

5 Q Okay. What about the last column?

6 A That's internal. I guess that would be property
7 lines internal. It's a 5-foot buffer, and I don't believe
8 that changed either.

9 Q So, if I understand your testimony correctly, the
10 only thing that changed, C1 was divided into two subareas,
11 and that the heights were changed---

12 A Just related to---

13 Q ---or one height changed?

14 A Just related to the chart is what you're asking?

15 Q Yes.

16 A Yes, that's correct.

17 Q Okay. And this would have been the setbacks in
18 place when you began designing the building in late 2013; is
19 that correct?

20 A That is correct.

21 Q Okay. And Shem Creek Development Group requested
22 that amendment, correct?

23 A Yes, there was a letter written to the, I believe,
24 the planning committee. I'm not sure if that's what it's
25 called. Planning committee, I believe, yes.

1 Q Did Shem Creek Development Group request any
2 changes to the setbacks that applied to the property at that
3 time?

4 A We did not.

5 Q And no changes were made, correct?

6 A No, that's correct.

7 Q Now, up until that point in December of 2014 when
8 this ordinance was adopted, had the town been cooperative?

9 A Yes, as I previously testified, they had been
10 cooperative.

11 Q Okay. Did the town become less cooperative over
12 time?

13 A Yes.

14 Q Okay. And when did you first notice that the town
15 was, was going to be or when you sensed that the town would
16 be less cooperative with this project?

17 A Leading into April of 2014.

18 Q Okay. And had anything changed with the project
19 from that point in time in December of 2013 through April of
20 2014?

21 A No, the project was in its due diligence,
22 engineering, and design phase. It was substantially the
23 same.

24 Q Okay. What about public support or opposition?

25 A Yeah, actually backing up to the December 2013

1 meeting where these changes were enacted, there, there began
2 to be an uprising of, you know, I would -- the opposite of
3 support. You know, trying to fight the project. Starting
4 to organize to stop the project.

5 Q Okay. And were you -- did you observe the tactics
6 and activities that the opponents engaged in?

7 A Yes, I did.

8 Q Okay. And what, what oppositional activities are
9 you aware of?

10 A The formation of Save Shem Creek mainly would be
11 the, the block of people I would associate this activity
12 with. They organized Facebook campaigns, bumper stickers,
13 began coming to meetings, lobbying councilmen on an
14 individual basis. They ultimately filed a lawsuit against
15 us and the town trying to stop the project. And also began
16 to, down the road, had members of town council elected from
17 their constituents, and later that -- those constituents
18 attempted to condemn the property.

19 Q I believe you, you spoke to this, but did the
20 opponents of the project ever come to town council and voice
21 their opposition?

22 A Extensively.

23 Q Okay. And what do you recall about that?

24 A There was a petition presented, or multiple
25 petitions presented both on the merits of the project and,

1 in particular, one avenue of resistance was to attack the
2 funding of the project.

3 Q Okay. And when do you recall that meeting was?

4 A The actual petition to -- for the funding?

5 Q Yeah, when, when---

6 A I believe that was brought up in April of 2014. I
7 believe it was the -- that council meeting is what I think
8 there was petition to rescind the funding.

9 Q Do you recall if town council considered,
10 considered any items or actions to take with regard to the
11 project at that point in time?

12 A Can you, can you ask that again? I'm sorry.

13 Q Okay. Do you recall whether town council
14 considered any agenda items or action items regarding to the
15 project during that April 2014 meeting?

16 A Yes, I mean Councilman Santos put a motion up to
17 rescind the funding of the project.

18 Q Okay. And did the project -- did that, did that
19 motion pass?

20 A I don't believe it made it to a vote. I don't
21 believe he got a second on that motion.

22 Q Okay. Now, at that point in time, had Shem Creek
23 Development Group submitted any proposed plans or designs to
24 the town?

25 A No, our pre-submittal meeting was three days

1 later.

2 MR. GASKINS: Okay. Your Honor, this is probably
3 a good starting point -- stopping point. If we could
4 take a break real quick?

5 THE COURT: Sure.

6 MR. GASKINS: Sure.

7 THE COURT: We'll take about a 10-minute break.

8 MR. GASKINS: Sure.

9 THE WITNESS: Can I step down?

10 THE COURT: You may.

11 THE WITNESS: Everything, just leave it?

12 THE COURT: He asked a question. You can step
13 down. Just don't discuss your testimony with anybody.

14 THE WITNESS: Yeah, use the restroom if that's all
15 right.

16 THE COURT: That's fine.

17 (Brief recess.)

18 THE COURT: All right. You may proceed.

19 MR. GASKINS: Thank you, Your Honor.

20 BY MR. GASKINS:

21 Q Mr. Flesch, you just referenced an April meeting
22 and you referenced it in connection to a -- I believe what
23 you called a design review meeting, is that correct? Was
24 that, was that your earlier testimony?

25 A Yes, I believe it's the, the -- a pre-submittal

1 meeting. It's a requirement that you meet with the staff.

2 Is that what you're referring to?

3 Q I think so.

4 A Yeah.

5 Q Yeah. So, when was that meeting held?

6 A I believe that was April 11th of 2014.

7 Q Okay. Tell me about what a pre-submittal design
8 review and what's the purpose of it based on your
9 understanding?

10 A Typically, your design professionals, potentially
11 your engineers, you know, people working on the project
12 would sit down with, you know, meeting with various members
13 of the staff and the town, different areas of expertise. An
14 initial review of the project. I guess the plans is the way
15 I would phrase. And then give feedback and comment. And I
16 think it's designed to eliminate or make more efficient the
17 process, and eliminate the number of denials they have to
18 ultimately issue on the plans by getting ahead of it, by
19 providing comment before you formally submit.

20 Q Okay. During this meeting in April 11th, 2014,
21 did Jeff Johnston present some plans for the project to the
22 town staff at that point in time?

23 A He did.

24 Q Okay. And what was the town staff's reaction to
25 the plans that were presented in that meeting?

1 A I wasn't in the meeting to give the reaction.
2 However, the outcome of the meeting was that our plan did
3 not meet a number of the new guidelines that had been
4 previously passed.

5 Q Okay. And what's your understanding of when those
6 new guidelines that you're referring to passed?

7 A Three days earlier.

8 Q And what's your understanding of what those
9 changes were, just on a very high general level, as it
10 relates to the project?

11 A That the setbacks on Mill Street had been changed,
12 the inclusion of an activity zone on Mill Street, the
13 removal of the footnote we described earlier allowing for
14 5-foot on side street had been removed. I'm sure there's
15 more. Off, off the top of my head, I can't think of it all.

16 Q And it's your understanding that those changes
17 were adopted in April of 2014?

18 A I -- yes, April 8th, I believe.

19 Q Okay. Prior to the outcome of this April 11th,
20 2014 meeting, were you aware that these changes that
21 affected the project were under consideration?

22 A No.

23 Q Were you surprised?

24 A Very.

25 Q You were surprised?

1 A Well, very, yes.

2 Q And why is that?

3 A That we didn't know about them, and subsequently
4 now to this, to this trial, I understand that my partner had
5 had a conversation, either at the meeting or just prior to
6 the meeting with Mr. DeMoura, that he knew about the changes
7 and was assured that they were only to residential uses and
8 would not affect commercial properties. I didn't realize
9 these changes were coming. I don't believe our
10 professionals that we had engaged understood them or knew
11 they were coming.

12 So, yeah, it was quite surprising to learn
13 that what we had relied on to design the project had, had
14 changed.

15 Q Okay. Would you have expected the town to reach
16 out to you and inform you that these changes were being
17 considered?

18 A Absolutely.

19 Q Okay. Did anybody do that?

20 A No.

21 Q Okay. Earlier you talked about the amendment that
22 was passed in December of 20 -- 2013. To your knowledge,
23 did the amendments that were passed in April affect this
24 chart and the setbacks and heights, set forth on that, on
25 that -- on this exhibit?

1 A Yes.

2 Q Okay.

3 MR. GASKINS: Your Honor, may I approach the
4 witness?

5 THE COURT: You may.

6 BY MR. GASKINS:

7 Q I've handed you what's been premarked as
8 Plaintiff's Exhibit 20. Are you familiar with this
9 document?

10 A I am.

11 Q What is it?

12 A This appears to be the ordinance that I was
13 referencing from the April 8th, 2014 meeting.

14 Q Okay. And what's the -- if you look on the first
15 page, what's the ordinance number?

16 A I believe it is, I'm sorry, 14022.

17 Q And if you look at the third page, do you see that
18 this ordinance was signed on April 15, 2014?

19 A Yes.

20 MR. GASKINS: Okay. We would move for the
21 admission of Plaintiff's Exhibit 20 at this time.

22 THE COURT: Any objection?

23 MR. PAGLIARINI: No objection, Your Honor.

24 THE COURT: All right. It's in.

25 *(Whereupon, Plaintiff's Exhibit No(s). 20 marked*

1 *for identification and received in evidence.)*

2 BY MR. GASKINS

3 Q If you could, Laura, please turn to Page 20, the
4 guidelines chart. Mr. Flesch, you previously walked us
5 through the version of the development guidelines chart
6 after it was amended in December of 2013. Walk us through
7 your understanding of the changes that were affected by the
8 April 2014 amendment. Let's start with the area. Was the
9 area changed as it relates to the project site?

10 A I believe I was told C1, but I don't see the
11 subcategories. I don't know if they've changed or just
12 aren't showing there. I don't see C1A or B either.

13 Q Okay. What about maximum building height allowed,
14 did that change?

15 A No, the 55-feet is consistent.

16 Q Okay. What about the build-to line on Coleman
17 Boulevard?

18 A Remained the same.

19 Q What about the front or side setback of build-to
20 on other streets, did that change?

21 A It did. The footnote changed.

22 Q Okay. Laura, if you could, please go to the next
23 page that shows the footnote. All right. The footnote that
24 you're referring to was Footnote 5, correct?

25 A Correct.

1 Q And what was your understanding of what Footnote 5
2 provided before this amendment?

3 A This is in our discussion where the, the allowed
4 setback would be 5-feet if you met three provisions
5 including a 5-foot sidewalk, certain plantings, and a line
6 of sight.

7 Q And was that included? Was that footnote or --
8 included in the amended guidelines chart that was passed in
9 April of 2014?

10 A No, that language has been completely erased and
11 replaced with different language.

12 Q Okay. And what language replaced it?

13 A The same footnote number, Number 3. Do you want
14 me to read it or---

15 Q Yeah. Please read it for us.

16 A Oh, I'm sorry. Footnote Number 5. The 20-foot
17 setback applies to all side streets except Mill Street where
18 a 20- to 30-foot build-to is required.

19 Q Okay. And the project was located off of Mill
20 Street, correct?

21 A Yes.

22 Q Okay. And go back to the previous page, please.
23 And where is Footnote 5 listed on this chart?

24 A If you looked in C1 and came across to the front
25 or side setback, not the Coleman one, front or side setback

1 or build-to on other streets.

2 Q Okay. Do you see Footnote 5 anywhere else -- used
3 anywhere else in this chart?

4 A No, it's not.

5 Q Okay. And the way you just read it, it says the
6 build-to line applies everywhere except Mill Street, or only
7 applies -- what was your testimony?

8 A It's a setback everywhere else, but a build-to
9 specifically to Mill Street.

10 Q Okay. So, that footnote applied only to Mill
11 Street, and only in C1, is that correct?

12 A That is correct.

13 Q Okay. And how many properties were affected by
14 that amendment?

15 A I'm not sure of the exact number, but it had to be
16 a handful. One, two, or three maybe. There were not many
17 there.

18 Q Okay. At that point in time in April 2014, how
19 many projects on Mill Street in the area C1 were under
20 development?

21 A Only ours.

22 Q Okay. Did anybody from the town inform you that
23 they were inserting this new build-to requirement on Mill
24 Street?

25 A No, I wasn't aware that the changes were happening

1 at all, let alone the detail of the changes.

2 Q Okay. All right. Going back to the chart as
3 included in the April 2014 amendment. Were there any
4 changes to the rear building setback?

5 A No.

6 Q What about the internal side and rear buffers?

7 A No.

8 Q Okay. So, the only change to the C1 was on Mill
9 Street, is that correct?

10 A That is correct.

11 Q Let's go back to number -- Footnote 5, Laura.
12 Mr. Flesch, looking at Footnote 5, it's been contended that
13 the changes that were made in Ordinance 14022 in April 14
14 were district-wide changes. Looking at Footnote 5, do you
15 believe that is a district-wide change?

16 A No.

17 Q And why do you say that?

18 A Because it's specific to simply Mill Street.

19 Q Okay. Can you go back to the previous page,
20 Laura? Okay. You said the rear building setback did not
21 change, is that correct?

22 A Correct.

23 Q And that is five feet?

24 A That is correct.

25 Q And what did you consider the rear of this project

1 to be as it was depicted in the April 2014 plans?

2 A Well, the depiction would indicate that Coleman
3 Boulevard was the front. But I would also guide you to the
4 third column where it says the front setback or build-to on
5 Coleman or Ben Sawyer. That would indicate the front of the
6 building would be on Coleman.

7 Q Okay. And so where would the rear setback be?

8 A Straight to the back of the building, which we're
9 gonna call, unfortunately, Your Honor, a multitude of
10 things. Church Street, Ronnie, you know, Ronnie Boals
11 Boulevard. It was in the right-of-way of Church Street is
12 what I would say.

13 Q Okay. Based on that, what's your understanding of
14 what setbacks should of applied to the Church Street side of
15 the building?

16 A A 5-foot setback.

17 Q Okay. Did the town agree that the Church Street
18 side of the building was the rear?

19 A They did not.

20 Q Okay. If you look there's a footnote, Number 3.
21 Laura, if you could go to the next page? And what does that
22 Footnote 3 provide?

23 A It says, In all cases where rear or side property
24 lines abut residential properties lying outside of the urban
25 corridor, a minimum 15-foot setback is required within which

1 a minimum 10-foot type C buffer yard with an F3 fence is
2 also required.

3 Q Okay. So, it sounds like Footnote 3 creates an
4 exception to the 5-foot setback. Would you agree with that?

5 A I would.

6 Q Okay. And it doesn't qualify it in any way except
7 for those properties that would fit within that exception?

8 A Yes, I believe that's correct.

9 Q Okay. Now, going back to the April 11th meeting,
10 April 11th, 2014, design review meeting, what's your
11 understanding of the setbacks that were utilized for the
12 plans that were presented to town council -- town staff?

13 A I believe we had a 5-foot setback on Mill Street
14 with the five -- with the three requirements of the 5-foot
15 sidewalk, the plantings, and the line of site requirement.

16 Q Okay.

17 A And I believe also then we have the 5-foot on,
18 again, the right-of-way, Church Street, Ronnie Boals
19 Boulevard, whatever we're referring to it as. The rear of
20 the property required a 5-foot setback as well.

21 Q Okay. How did the zoning amendment that, that
22 changed the setback on Mill Street with the ability to
23 reduce it to 5 feet, how did the change to requiring a
24 build-to affect the design of the plan?

25 A Significantly shrunk the footprint of the

1 buildable area.

2 Q Okay. Explain to me what you mean.

3 A Essentially, if you have a box of land that you
4 can develop on, and the box used to be 100-feet wide, it
5 would now become 85-feet wide because of the additional
6 setback required. You lose space. You lose land, the
7 ability to, to place a building on it. There wouldn't be as
8 much usable space to build as a direct result of the
9 increased setback.

10 Q And, again, I believe your testimony was that the
11 town did not consider Church Street, the side backing up to
12 Church Street, to be a rear setback?

13 A That was their interpretation. That's correct.

14 Q Okay. So, what setback did the town apply?

15 A They applied a side street setback.

16 Q Okay. So, what did that mean to the setback that
17 had -- well, let me back up. What was the setback utilized
18 in the design that was presented to town staff in the April
19 11th, 2014 meeting?

20 A Yes, I testified earlier, we used a 5-foot rear
21 setback for that portion of the building.

22 Q Okay. And how did the town's interpretation that
23 the Church Street side, the back of the building, that it
24 was not a rear setback?

25 A They applied a side street setback to that, which

1 is 20-feet, for a net loss of 15-feet.

2 Q Okay. How did that affect the project as it was
3 designed and presented in the April 2014 design review
4 meeting?

5 A The same concept as the Mill Street setback
6 addition, shrinking of footprint. You're squeezing the area
7 down in which the building could reside.

8 Q And what effect did those interpretations have on
9 the number of spaces that were designed for the building?

10 A It lowered the parking fairly dramatically.
11 That's fairly obvious. The less land you have to work with,
12 that you wouldn't be able to yield as much space.

13 Q Okay. What's your understanding of whether the
14 town presented any other objections or issues with the
15 design that was presented in the April 2014 design review
16 meeting?

17 A I believe they objected to the width of the
18 parking stalls.

19 Q Okay. And what objections did they have there?

20 A I believe that the drawings had contemplated an
21 8-foot 6" stall width, and the town indicated a 9-foot stall
22 width would be required.

23 Q Okay. And how did requiring larger stalls affect
24 the project and the number of spaces that were designed?

25 A This is kind of in re -- reverse to squeezing a

1 footprint. This is making the spaces bigger and eating up
2 more space within the footprint, taking up space. So, the
3 net result is you get less parking spaces.

4 Q Okay. What was your reaction when you learned
5 about the zoning changes and the issues that were presented
6 by the town staff at the design review meeting in April
7 2014?

8 A I was very surprised.

9 Q Why---

10 A Very surprised.

11 Q Why were you surprised?

12 A We had no indication that this was coming. We
13 were working diligently to create plans. We were working in
14 concert with the city to get the concept to move forward
15 with the PLA. And we show up for a meeting and they tell
16 us, three days earlier, they passed new law that just our
17 plans and effect -- effectively threw them in the trash, or
18 at least created significant issues within the plans.

19 Q Did you have any other reactions?

20 A I was angry. I mean, to be honest with you.

21 Q Okay. And why were you angry?

22 A I didn't think it was proper for the town to, to
23 not tell us what was coming. I didn't understand the need,
24 in particular, for the revision of a footnote specific to
25 our property. And subsequently learned that Mr. DeMoura had

1 told Mr. Small that this would not affect our property.

2 MR. PAGLIARINI: Objection, Your Honor. That's
3 hearsay.

4 THE COURT: That's sustained.

5 BY MR. GASKINS

6 Q So, you found in April 2011 that your plans were
7 not compliant with the town zoning code as interpreted by
8 the town's zoning -- by the town's planning staff. What did
9 you do next?

10 A First we had a -- to be honest with you, I didn't
11 know it had changed. I mean, we go through this analysis
12 now, and that wasn't happening in real-time. We had to ask
13 for the actual ordinance. And we did that. So, to figure
14 out what had changed.

15 Q And was the actual ordinance provided to you?

16 A Eventually, yes.

17 Q Okay. Did you review them?

18 A We did. And our professionals spent some time
19 digging into them as well.

20 Q Okay. After you reviewed them, did you agree with
21 the town's interpretations that they applied in the
22 April 11th, 2014 meeting?

23 A No.

24 Q Okay. Why not---

25 A Well, particularly---

1 Q ---and can you provide an example?

2 A Oh, I'm sorry. In particular, there was the item
3 we previously discussed on Church Street about that being
4 the rear of the building. The City was treating that as the
5 side of the building. Clearly, through their own chart and
6 common sense, you have the building fronting Coleman
7 Boulevard, and then the rear of the building would be
8 directly behind that. The town's interpretation of that was
9 a side street was something we just totally disagreed with.

10 Q Okay. Did you inquire with the town about that
11 interpretation?

12 A We did.

13 Q Okay. And what's your -- who's your -- what's
14 your understanding of who made that interpretation?

15 A I believe that it was the zoning administrator.

16 Q Okay. And what is his name?

17 A Kent Prause.

18 Q Did you do anything else to get the town staff to
19 adopt more favorable interpretations of the zoning code?

20 A We did. We came up with several interpretations
21 of the code we believe relevant. And our attorney, Gray
22 Taylor, formulated those requests in writing.

23 Q Okay. And what were the nature of those requests,
24 just a summary of them?

25 A The first one -- well, they're not necessarily in

1 order. But the -- one of them would be vested -- we
2 asserted vested rights. We wanted to be treated under the
3 zoning prior to the April 8th revisions. So, we made a
4 claim for vested rights. The second was we asserted -- we
5 didn't believe -- again, we've talked about this. Church
6 Street was a right-of-way and not a formal street, and
7 therefore, subject to a 5-foot setback. And then we also
8 asked for the interpretation that we thought was relevant,
9 that the project be considered a civic use.

10 MR. GASKINS: May I approach the witness?

11 THE COURT: You may.

12 BY MR. GASKINS:

13 Q I've handed you what's been premarked as
14 Plaintiff's Exhibit 44. Please review it.

15 A Okay.

16 Q Okay. Are you familiar with this document?

17 A I am.

18 Q Okay. What is it?

19 A This is communication from our attorney, Gray
20 Taylor, to Mr. Pagliarini.

21 Q And what's the date of it?

22 A This is May 1st, 2014.

23 Q Okay. And let's look at the first page of this
24 document. Well, let me back up. Did you receive a copy of
25 this document from your attorney, Mr. Taylor?

1 A Yes.

2 Q Okay. And did you review it at the time?

3 A Yes.

4 Q Okay. Does this appear to be a complete and
5 accurate copy of what you received and reviewed?

6 A It does.

7 MR. GASKINS: We'd move to admit Plaintiff's
8 Exhibit 44.

9 MR. PAGLIARINI: Your Honor---

10 THE COURT: Any objection?

11 MR. PAGLIARINI: ---our objection is based on the
12 fact that this letter is hearsay. It comes from a
13 third party. Second, that it is irrelevant. These are
14 communications on what's about to follow between
15 attorneys who made no decisions in this case. They
16 were merely legal discussions in a letter that ended up
17 having no bearing. Any decisions would have come from
18 staff and/or principals of Shem Creek Development. And
19 that's why it's irrelevant, Your Honor.

20 THE COURT: I'll allow it, subject to your
21 objection.

22 MR. GASKINS: Thank you, Your Honor.

23 *(Whereupon, Plaintiff's Exhibit No(s). 44 marked*
24 *for identification and received in evidence.)*

25

1 BY MR. GASKINS:

2 Q All right. Walk us through what Mr. Taylor is
3 communicating in the first page of this letter.

4 A He provides a brief history of the PLA, the
5 original zoning changes. We talked about modifying height,
6 et cetera. And then it talks about how we executed a
7 Parking License Agreement together.

8 Q Okay. If you could go to the second page, Laura?
9 And how does it, how does it continue on the second page?

10 A He then is citing the meeting, April 8th, in
11 which, of 2014, excuse me, in which the town adopted the new
12 zoning ordinance that we just discussed. And this is where
13 we assert our right of vested rights in the next paragraph.

14 Q Okay. And he was requesting that the project be
15 reviewed under the ordinances, zoning ordinance, as it, as
16 it existed prior to April 8, 2014; correct?

17 A Yeah, that is correct.

18 Q Okay. And how would that have affected the
19 project if the old zoning code had been applied?

20 A Right. We would go back to the footnote we talked
21 about being deleted. It would be -- it wouldn't be
22 reinstated. It just would have been there and that would
23 have allowed for the 5-foot setback on Mill Street with
24 those three consistent items you had to provide, the 5-foot
25 sidewalk, the plant things in the line of sight.

1 Q Okay. All right. Let's move on to the second
2 issue that he, that he touches on in the third full
3 paragraph. What is, what is being communicated here?

4 A This is him communicating our belief that this was
5 a civic use and should be considered as such.

6 Q Okay. And why was that request being made?

7 A Well, it was being made cause we truly believed it
8 was a civic use, but what that allowed was the discretion of
9 the town staff, the planning staff, to change the design
10 elements of the entire project. It would have been at their
11 discretion to modify setbacks, the width of the space, a
12 variety of things that would have been beneficial to the
13 project, and would have helped us maximize the parking
14 spaces.

15 MR. GASKINS: May I approach, Your Honor?

16 THE COURT: You may.

17 BY MR. GASKINS:

18 Q I've handed you what's been premarked as
19 Plaintiff's Exhibit 24. Are you familiar with this
20 document?

21 A I am.

22 Q And what is it?

23 A This, again, is communication from Mr. Taylor to
24 Mr. Pagliarini May 12th, 2014. It is a follow-up to his May
25 1st letter.

1 Q And did you receive a copy of this letter in May
2 of 2014?

3 A I did.

4 Q And does it appear to be a true and accurate copy
5 of the letter that you received and reviewed in that time
6 period?

7 A It does.

8 MR. GASKINS: We'd move that Plaintiff's Exhibit
9 24 be admitted into evidence.

10 MR. PAGLIARINI: Your Honor, same objection.
11 Based on relevancy.

12 THE COURT: All right, sir. Same ruling.

13 *(Whereupon, Plaintiff's Exhibit No(s). 24 marked*
14 *for identification and received in evidence.)*

15 BY MR. GASKINS:

16 Q All right. Please summarize what Mr. Taylor is
17 communicating to Mr. Pagliarini in this letter.

18 A That we had recently come into the information
19 that the state right-of-way for Church Street had been
20 removed from the state system and transferred to the town,
21 and that we didn't believe it to be a street, and that we
22 should be given a non-street buffer interpretation under the
23 zoning code. Our assertion was the town had not maintained
24 the street as, as a street or public road as the definition
25 requires.

1 Q Okay. Around this time, 2014, were you familiar
2 with the premises?

3 A Yes, I spoke---

4 Q Okay.

5 A ---to the landlord for both parcels, yes.

6 Q All right. To your -- had, had you ever observed
7 the town performing any maintenance on what we're calling
8 the Church Street right-of-way?

9 A No.

10 Q Okay. Had you seen anybody perform any meet --
11 maintenance on the Church Street right-of-way?

12 A I did.

13 Q And who was that?

14 A My tenants at Red's Ice House became as a matter
15 of routine to maintain that road. There were multiple
16 potholes and claims of liability against Red's---

17 Q Okay.

18 A ---for damage to cars.

19 Q And were cars also parking in that right-of-way?

20 A Yes.

21 Q And why were you requesting -- you referred to it
22 earlier. Why were you requesting that it be considered a
23 non-street buffer?

24 A If that interpretation was upheld, the setback
25 would be modified to 5-feet.

1 Q And what effect would that have on the plan for
2 the project if it was considered a non-street and you were
3 allowed a 5-foot buffer?

4 A The interpretation by the town had created a
5 20-foot setback. This would have brought that to five.
6 This would have increased the footprint and allowed for more
7 parking spaces.

8 Q And would that, would that interpretation have
9 allowed you to increase the number of spaces that could be
10 provided?

11 A Absolutely.

12 MR. GASKINS: May I approach, Your Honor?

13 THE COURT: You may.

14 BY MR. GASKINS:

15 Q I'm handing you what's been marked as Plaintiff's
16 Exhibit 32.

17 A Okay.

18 Q Are you familiar with this document?

19 A I am.

20 Q Okay. What is it?

21 A This is a letter from Mr. Pagliarini to Mr. Gray
22 Taylor acknowledging the receipt of the previous two letters
23 we just discussed, and essentially responding.

24 Q Okay. And what's the date of the letter?

25 A It's June 5th, 2014.

1 Q And did Mr. Taylor provide you a copy of this, of
2 Mr. Pagliarini's response?

3 A He did.

4 MR. GASKINS: Okay. We move to admit Plaintiff's
5 Exhibit No. 32.

6 MR. PAGLIARINI: Your Honor, same objection for
7 this letter. Relevancy.

8 THE COURT: All right, sir. Same ruling.

9 *(Whereupon, Plaintiff's Exhibit No(s). 32 marked*
10 *for identification and received in evidence.)*

11 BY MR. GASKINS:

12 Q All right. And how did Mr. Pagliarini respond to
13 Mr. Taylor in this letter?

14 A He begins by summarizing Mr. Taylor's assertions
15 or requests.

16 Q Okay. Laura, if you could move to Page 2, please.

17 A Sorry. Did you want me to continue?

18 Q And then what is being communicated? So, is that
19 on the first page?

20 A It is. And goes on to the top of the second page.
21 And then he addresses each of the three requests or
22 assertions and denies all three.

23 Q Okay. I want to focus on the next to the last
24 paragraph. Laura, if you could blow that up please? Could
25 you read that aloud for us please?

1 A Sure. Excuse me. Second, since there has been no
2 submittal, we cannot determine whether the project should be
3 classified as a civic use. As you are aware, the urban
4 corridor overlay district provides certain exceptions to
5 projects designated as a civic use. Historically, our
6 planning department has considered the term civic use to
7 describe churches, schools, and the like. While the code
8 does not define civic use, a for-profit, privately owned and
9 operated parking facility and commercial office building
10 does not appear to meet any reasonable definition of the
11 term.

12 Q Did you agree with Mr. Pagliarini's
13 interpretation?

14 A I did not.

15 Q Okay. Why not?

16 A First, I don't agree with the assertion that he
17 didn't have the information to ascertain whether it was a
18 civic use.

19 Q Why is that?

20 A We had been in discussions for months. We entered
21 into a Parking License Agreement with a specific purpose and
22 outlined specifically what was gonna happen there.
23 Additionally we had a pre-submittal meeting in which we
24 presented a plan that clearly illustrated what we were going
25 to do here, and under the, you know, under the Parking

1 License Agreement, it called for public funding, and the
2 spaces themselves are labeled as public. There was plenty
3 of information for him to make the determination of what was
4 coming. It was no secret what we were building here.

5 Q Did he request any further information---

6 A He did not.

7 Q ---that would help him in his analysis?

8 A I don't believe so. Not that I know of.

9 Q Okay. Let's keep going. And starting with the
10 paragraph that says, While the code does not define civic
11 use. Read that for us.

12 A Sure. While the code does not define civic use, a
13 for-profit, privately owned and operated parking facility
14 and commercial office building does not appear to meet any
15 reasonable definition of the term.

16 Q Do you agree with that statement by Mr.
17 Pagliarini?

18 A I do not.

19 Q Why not?

20 A I believe that what -- the civic use was defined
21 and fairly specifically.

22 Q Okay. What about the rest of it?

23 A I think it is reasonable to meet the definition of
24 the term, for sure.

25 MR. GASKINS: Okay. Your Honor, may I approach

1 the witness?

2 THE COURT: You may.

3 BY MR. GASKINS:

4 Q We are just using this for demonstrative purposes.
5 Mr. Flesch, do you recognize what's depicted on this
6 exhibit?

7 A Yes, it appears to be a definition of civic use.
8 It's backwards. Use: Civic.

9 Q And what's your understanding of where this
10 definition is found in the, in the zoning code?

11 A Well, it's labeled as 156.007 in the code.

12 Q Okay. And why do you believe that the project
13 meets the definition of -- meets this definition under the
14 town zoning code?

15 A In several ways. The first being this was a site
16 or project identified in the CRAB Report, which is a public
17 report. And we were -- it says we -- other uses that will
18 provide public or quasi public services. We were most
19 assuredly providing, providing public parking as defined in
20 the Parking License Agreement. The other goals of the
21 Parking License Agreement include foresting tourism and
22 economic development in the creek. And I would strongly
23 align that with socially important, as it, as it says here,
24 with social importance. Excuse me. And then, the most
25 obvious, which I guess I'd have to say, is at the very last

1 sentence, it is a parking structure. It's defined as a
2 parking structure. It's to be eligible for civic use, and
3 it is, in fact, a parking structure.

4 Q Okay. Why were you, through your attorney,
5 requesting that the project be considered a civic use?

6 A As we discussed a little bit ago, if in fact it
7 was considered a civic use, it gave the town discretion in
8 all manners of design. All of the design elements could be
9 considered by the staff, and at their discretion, could be
10 modified to fit what was needed.

11 Q If the town had approved the parking garage as a
12 civic use, do you believe that Shem Creek Development Group
13 could have designed the garage to provide 276 total spaces
14 and 132 public spaces?

15 A I absolutely do.

16 Q And why is that?

17 A I believe the combination of things we could have
18 changed from setback, to width of the spaces, to the ingress
19 egress points. There's just a variety of changes, when put
20 together and combined, would have yielded us potentially in
21 excess of 276.

22 Q Okay. How many spaces do you think could have
23 been provided -- what, what other options do you think could
24 have been considered to allow you to provide 276 total and
25 132 public spaces?

1 A Well, we talked about the setbacks, the
2 elimination of the activity zone, the width of the spaces.
3 There's any variety of things you could have done, the
4 ingress, egress points that we discussed. Anything. Any
5 design of the project could have been altered to maximize.
6 You know, not having been approved as a civic use led us to
7 non-examine every possibility that was there. It was, it
8 was infinite in the sense that we could have collaborated to
9 find any number of solutions to our problems.

10 Q Okay. Do you recall how many spaces were
11 presented to the town in the design that was presented in
12 the April 11th, 2014 meeting?

13 A Is this the one that includes the on-street
14 parking? Would that be the same design that was --

15 Q I think this was before. This was the initial
16 meeting.

17 A I don't recall then.

18 Q With the 9-foot spaces.

19 A I don't recall the exact number. I'm sorry.

20 Q Okay. It sounds like you, you did consider using
21 on-street parking at one point in time; is that correct?

22 A Absolutely.

23 Q Okay. And was that option presented to the town?

24 A It was.

25 Q The planning staff?

1 A Yes.

2 Q And do you recall how many spaces were presented
3 for on-street parking?

4 A I believe it was a total of ten, with the total
5 parking provided of 276 spaces.

6 Q Okay. Was that -- did the town planning staff
7 allow you to include on-street parking to help increase the
8 number of spaces that would be available?

9 A No, I believe the response was, in an activity
10 zone that would not be allowed.

11 Q In effect, if Mill Street was not considered an
12 activity zone, could you have been -- could you have
13 provided those on-street parking spaces?

14 A Yes, they were designed.

15 Q Okay. And if the project was considered a civic
16 use, would the town staff have the discretion to eliminate
17 that activity zone on Mill Street?

18 A Yes, all of the design elements of the building
19 would be at their discretion.

20 Q Okay. Did the town ever reconsider its
21 interpretations of the zoning code in a way that allowed you
22 to produce additional spaces?

23 A They did not.

24 Q Okay. It has been argued, and you've heard some
25 of those arguments today that, if you disagreed with the

1 town's interpretations of the zoning code by staff, that you
2 could have appealed those decisions. Have you heard that,
3 those arguments?

4 A I have.

5 Q Okay. Why didn't you appeal the decisions and
6 interpretations that were provided by the town when you
7 requested that they provide you some relief and allow you to
8 provide more spaces?

9 A I think that there were a handful of reasons. I
10 think the first, and understanding we're not operating in
11 the vacuum of a courtroom, we were finding solution after
12 solution. Every time we did there was a new problem
13 presented by the town to our plan. I think we felt like, no
14 matter what we had presented, it would have been similarly
15 rejected or another issue would have popped up. It felt --
16 it seemed fruitless to do that.

17 Additionally, some of the things that they
18 claim we should have appealed, we didn't take issue with the
19 legality of the zoning changes. I wasn't -- I don't think
20 we were challenging their ability to rezone in Mt. Pleasant.
21 That's a legal issue that could be resolved through a zoning
22 appeal. This was a contractual issue. This was going to
23 good faith and fair dealing. And it based all upon their
24 interpretations and their application of the zoning law to
25 the project, and then ultimately to the PLA taking certain

1 stances.

2 So, I don't know how much merit it has to --
3 or, you know, how much remedy we could have sought from a
4 board that dealt -- deals with the legal, you know, version
5 of ordinance and zoning. This was definitely a contractual
6 matter, and our relief for that is, unfortunately, where
7 we're sitting today.

8 Q Okay. Then---

9 A And then -- I'm sorry.

10 Q Oh, I'm sorry. Keep going.

11 A Lastly, the other avenue that, I guess, we would
12 have would be to sue or challenge in court. And you have to
13 understand, at this time, we were several years in. We're
14 leasing space to office tenants. We're making promises to
15 restaurants that parking is coming. We needed to move. We
16 didn't have time for a prolonged two-year battle in Court
17 over the interpretation of a zoning ordinance and its
18 application to our project. That just wasn't something that
19 was, was realistic for us.

20 Q It's also been contended by the town that it has
21 no duty to interpret the zoning code in the favor of the
22 developer. Do you believe that you were requesting
23 interpretations that were just favorable to the developer in
24 this case?

25 A Not necessarily, no.

1 Q Okay. And would you agree with me that the
2 interpretations that you were requesting were to the benefit
3 of the, of the town?

4 MR. PAGLIARINI: Objection, Your Honor. I haven't
5 objected yet, but the leading continues. We just
6 object on leading basis.

7 THE COURT: All right, sir. Thank you.

8 A I'd answer the question a different way that might
9 alleviate the objection. I think it was to the benefit of
10 the Parking License Agreement. Both parties. It was trying
11 to fulfill the spirit of the deal and what we were trying to
12 do.

13 Q Okay. Did -- the zoning changes adopted in
14 Ordinance 14022 in April of 2014 have any other effect on
15 the project?

16 A Well, ultimately it led the town to take the
17 position that we were not compliant with the PLA.

18 Q Okay. What about the way that the project sat
19 within the size of the property and how that affected other
20 leases on the property?

21 A Well, you know, the setback -- we covered the
22 setbacks already. But the effect of the setback off of Mill
23 Street, in order to build the project we had to shift the
24 project 15-feet in towards the creek, and that went across
25 the lease line. We didn't have the property to do it. And

1 so that caused, obviously initially, the killing of the
2 project. Ultimately it led to trying to acquire more
3 property to try to con -- you know, to, to make it happen.

4 Q Laura, can you bring up Exhibit 61 please? Okay.
5 You previously testified about this exhibit and where the
6 project is. Explain to us, using this exhibit, how the
7 implementation or application of an activity zone affected
8 the project, and how it affected the other properties?

9 A Can I get up?

10 THE COURT: Yes, sir.

11 A In terms of the activity zone, this, this is an
12 aerial, obviously, dated, you still see dirt and things
13 going on here, construction-wise. You can actually see the
14 activity zone. It's this strip of brown. It's dirt now.
15 It obviously has some plantings, and sidewalks, and other
16 things today. But you can see the difference between where
17 the sidewalk is, which is this narrow band, and -- which is
18 close to 5-feet, and now we have -- we're back 20-feet,
19 which is in the 20- to 30-foot build-to line. You see the
20 property had, or the building had to shift this way. And,
21 at the time Mr. Gaskins asked how did it affect what we were
22 doing, the lease line, you know, it's not exact. I'm using
23 my finger, but was somewhere in here. In other words, the
24 building would have pushed over into property we didn't have
25 rights to. My restaurant tenants possessed the rights to

1 those -- to that land.

2 Q How did you solve that problem?

3 A You want me to sit back down?

4 Q Yes.

5 A Okay. Well, we obviously, being the landlord to
6 those tenants, we initiated a conversation and it was a
7 difficult conversation. At this point we were already
8 contemplating taking out a good portion of parking during
9 the construction period, and there was a lot of
10 consternation on behalf of the tenants. Additionally, for
11 them to lose an additional 15 to 20-feet of their surface
12 parking caused them a great deal of heartburn. But,
13 ultimately, as is the case in many things, we incentivized
14 them to alter the lease line so we could acquire some more
15 property.

16 Q Okay. And what incentives were provided to those
17 tenants?

18 A It -- well, it's two restaurants. It's one
19 tenant. But the incentives require -- included the initial
20 rent of \$30,000. We also had to extend their lease at below
21 market rates for two five-year option periods on the end of
22 their leases. And then, beyond that, we were required to
23 build the entire surface parking lot, which is the other
24 large dirt area that you see in front of the restaurants.
25 We had to park -- storm drain treatment, water quality. We

1 had to do all of that work for them at our cost.

2 Q Okay. Can you estimate for me what you think
3 those costs ended up being?

4 A I tell you, I know our parking lot cost,
5 unfortunately I remember this number, a little over \$425,000
6 was the cost of that parking lot.

7 Q Okay. What about the other incentives that were
8 provided?

9 A Well---

10 Q Can you quantify those?

11 A The 30,000 is finite. The below market rent is
12 hard to quantify. And really is, is punitive if you ever
13 want to sell the building during that period. You're losing
14 sale value on a stream of income. Not knowing the market
15 conditions ten years from now, I'm not gonna wildly
16 speculate. It's significant. It's significant. It's in
17 excess of a million dollars easily.

18 Q And that was a result of an activity zone being
19 placed on Mill Street, is that correct?

20 A That's correct.

21 Q Okay. Now, ultimately you continued to pursue the
22 project despite the town's actions; correct?

23 A That's correct.

24 Q And how did the town's positions and its
25 interpretations of the zoning code ultimately affect the

1 final design of the parking garage and how many parking
2 sites were provided?

3 A Yeah, making the decision that we had no choice,
4 we had to move -- we were moving along. We had office
5 tenants we were trying to deliver for everything else. We
6 had no choice but to conform to what the town had indicated
7 the current zoning ordinance was.

8 Q And how many spaces were yielded according to that
9 design?

10 A 234.

11 Q And of those, how many of those were -- had to be
12 reserved for the office tenants?

13 A 117.

14 MR. GASKINS: Okay. May I approach, Your Honor?

15 THE COURT: You may.

16 BY MR. GASKINS:

17 Q Are you familiar with this photograph?

18 A I am.

19 Q Okay. What is it?

20 A This is the project as it exists today. You're
21 standing on Mill Street almost at the corner of Church
22 Street and Mill looking into the project.

23 Q Okay. And what is on the left side of this
24 photograph?

25 A Well, I'll point out in the front of the -- the

1 photograph is the famous activity zone, that green area. On
2 the left is the two stories of parking not encumbered by the
3 office over the top of it.

4 Q Okay. And so this would be Mill Street right
5 here?

6 A Correct.

7 Q Is then Coleman---

8 A Is that---

9 Q ---runs perpendicular?

10 A Yes, is that intersection where the lights that
11 you see.

12 Q Do you believe that what was designed and
13 ultimately constructed is substantially similar to the
14 concept plan included in the Parking License Agreement?

15 A I do.

16 Q Okay. And why is that?

17 A I believe it takes the same shape and form that
18 was presented in the conceptual rendering. I believe it's
19 two levels of parking, with two levels of office above it,
20 keeping the office fronting on Coleman. I think it's
21 extremely consistent.

22 Q Okay. And do you believe that Shem Creek
23 Development Group satisfied its obligations under the
24 Parking License Agreement by designing the project as
25 depicted here?

1 A I do.

2 Q And why is that?

3 A You know, as we discussed earlier, the original
4 plan, the conceptual plan that we had, we made every attempt
5 to maximize the number of spaces here. We just spent a
6 better part of an hour talking about requests for a civic
7 use, and certain setback, and interpretations. We tried to
8 build as many spaces as we could here. And ultimately we
9 built what we were able to build under, under the law. And
10 I think that brings in sections of the contract that provide
11 us protections under those circumstances.

12 Additionally, and honestly this is the one I
13 think is the most important, is that the town got the
14 benefits of what they wanted out of the PLA. If you look at
15 what's there, I'm gonna spend a minute to tell you, to-date,
16 where we're at with this because we're about to be three
17 years open here, and the PLA's goal was obviously to
18 alleviate parking pressure. That part is fairly obvious.
19 But it also talks about fostering tourism, and fostering
20 economic development in the Shem Creek area.

21 So, very briefly, and I don't want to take
22 too much time but, to-date, the parking has served over
23 150,000 transient parkers. Not office parkers, transient
24 parkers. We have four new restaurants that have opened on
25 this side of the creek, in part, because they have overflow

1 parking and employee parking. We have -- you know, those
2 restaurants pay property taxes, sales taxes. Those four
3 restaurants probably gross in excess of 15 million dollars a
4 year. That's almost a million dollars of sales tax a year.
5 Not counting the property taxes or the business licenses.

6 There's four new businesses in the office.
7 All four either relocated to Mt. Pleasant as part of this
8 project or doubled in size their office presence in the
9 community. Again, business licenses, property taxes, all
10 those things that you're excited to see when we talked
11 about, in constant, what the PLA would do here.
12 Additionally, the town built two new phases to their Shem
13 Creek Park. One, mainly a boardwalk. The second, a large
14 bridge with a viewing area on the creek, which is fantastic,
15 all with building no additional parking spaces to
16 accommodate their park.

17 This facility did exactly what it was
18 supposed to do. With 700 spaces, or three, it did it. It's
19 successful. It's beneficial for everybody. And you have to
20 give credit, honestly, to the town because they saw it all
21 the way back to the CRAB Report. They said, Put it here,
22 it's gonna revitalize the area. That's exactly what it has
23 done. So, when you asked me if I feel like we've violated,
24 you know, the terms of the agreement, no. We've done --
25 this is the perfect example of why. They got everything

1 they wanted. And I would suggest to you we often -- it's
2 done more than we thought it would.

3 So, I'm sorry, I get a little passionate, but
4 I believe in this. I -- this is something -- my office is
5 here. I invested a lot of time and passion, and work, into
6 this project. And it's, it's a success. And I don't mean
7 that in the -- a grandizing way to myself. It fulfilled
8 what we were trying to do.

9 MR. GASKINS: Your Honor, it's 5:00. I've got a
10 ways to go and this seems like a good stopping point---

11 THE COURT: All right.

12 MR. GASKINS: ---before we move into another
13 subject. Is that---

14 THE COURT: Why don't we reconvene at 9:30? Have
15 a good evening.

16 (Proceedings adjourned for the day.)

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2-3-2020 PROCEEDINGS

1 2-4-2020 PROCEEDINGS

2 THE COURT: Everyone ready to proceed?

3 MR. GASKINS: We are, Your Honor.

4 THE COURT: All right, sir. If you'd come on back
5 up to the witness stand. Sir, you're still under oath.
6 You don't need to be sworn again though. You may have
7 a seat.

8 THE WITNESS: Okay. Thank you.

9 THE COURT: Counselor, you may proceed.

10 MR. GASKINS: Thank you, Your Honor.

11 DIRECT EXAMINATION CONTINUED

12 BY MR. GASKINS:

13 Q Good morning, Mr. Flesch. Yesterday we were
14 discussing about certain actions that the town took, and the
15 effect of those actions on the project. Did those actions
16 that we discussed ever put the project in jeopardy?

17 A They did.

18 Q Okay. And did you ever provide notice, you being
19 Shem Creek Development Group, provide notice to the town
20 that the project was in jeopardy because of their actions?

21 A We did.

22 MR. GASKINS: Your Honor, may I approach the
23 witness?

24 THE COURT: Yes, sir.

25

1 BY MR. GASKINS:

2 Q I've handed you what's been premarked as
3 Exhibit No. 22. Are you, are you familiar with this
4 document?

5 A I am.

6 Q And what is it?

7 A This is communication from our attorney, Gray
8 Taylor, to the Town of Mt. Pleasant council members and the
9 mayor at the time.

10 Q Okay. And what is the date of that letter?

11 A June 4th, 2014.

12 Q Okay. And so that would have been roughly a
13 couple months after the zoning amendments in April of 2014,
14 correct?

15 A That is correct.

16 Q Okay. And did you receive a copy of this letter?

17 A I did.

18 Q Okay. Does it appear to be a complete and
19 accurate copy of the letter that you received?

20 A It does.

21 MR. GASKINS: Okay. We would move to admit
22 Plaintiff's Exhibit 22 at this time.

23 MR. PAGLIARINI: Your Honor, our objection is
24 based on the fact that this is clearly marked as a---

25 THE COURT: I'm sorry. I'm having a hard time

1 hearing you.

2 MR. PAGLIARINI: Yes, sir. Our objection is based
3 on the document as identified as not admissible as
4 evidence, for settlement purposes only. I understand
5 the Court's position on these. However, this gets into
6 absolute negotiations. So, I think this is, is
7 prejudicial to the town. So, that's our objection.

8 THE COURT: All right, sir. Your objection is
9 noted. You may proceed.

10 MR. GASKINS: Thank you. You said it is
11 admissible?

12 THE COURT: Yes, sir.

13 MR. GASKINS: Okay. All right.

14 *(Whereupon, Plaintiff's Exhibit No(s). 22 marked*
15 *for identification and received in evidence.)*

16 THE COURT: And, again, for the same reasons I
17 noted yesterday wherein I will rely upon it. Of
18 course, I'll determine it later. But for this -- at
19 this juncture, I'll admit it and then make a
20 determination.

21 MR. GASKINS: And, Your Honor, because that issue
22 is still under consideration, I would submit that it is
23 not being submitted for the purposes of establishing
24 liability. It is simply being offered to prove what
25 notice the town was given about the effect of this

1 actions.

2 THE COURT: All right, sir. Thank you.

3 BY MR. GASKINS:

4 Q All right. And, in this letter, did Shem Creek
5 Development Group provide notice to the town that the
6 project was in jeopardy because of the Town's actions?

7 A It did.

8 Q Okay. And where is that in the letter?

9 A The last paragraph and it carries over into the
10 next page, I believe.

11 Q Okay. Can you read that sentence or sentences
12 aloud please?

13 A Yes, sir. These changes, and specifically the
14 changes to building setbacks and parking space, space widths
15 render my client's project, as contemplated, in describing
16 the license agreement economically infeasible.

17 Q Okay. Again, the date of that letter is June 4th,
18 2014, correct?

19 A That's correct.

20 Q And yesterday we reviewed a letter from
21 Mr. Pagliarini in which he rejected that the project --
22 rejected the request that the project be considered a civic
23 use. Do you recall that letter?

24 A I do.

25 Q Okay. And what was the date of that letter?

1 A I believe it was June 5th of 2014.

2 Q Okay. So, the day after your lawyer sent that
3 letter to the town, is that correct?

4 A Right.

5 Q Okay. Have you seen any other documents that
6 would indicate that the town was aware that the project was
7 in jeopardy as a result of this action?

8 A I have.

9 MR. GASKINS: Your Honor, may I approach the
10 witness?

11 THE COURT: Yes, sir.

12 Q Are you familiar with this document?

13 A I am.

14 Q Okay. And what is this document?

15 A This is an email from the mayor at the time to
16 several council members.

17 Q Okay. And below it doesn't seem to be addressed
18 to any council members. Who does it appear to be---

19 A That's to Mr. Owens, Mr. Jim Owens.

20 Q Okay. Have you seen this document before?

21 A I have.

22 Q Okay. And have you seen related documents or a
23 similar document that was sent to Mr. Owens?

24 A Yes.

25 Q Okay. And where did you see those documents?

1 A Through this litigation and then a separate
2 litigation case.

3 Q Okay. And who is Jim Owens?

4 A Jim Owens is the founder of Save Shem Creek who we
5 discussed yesterday. The opposition to the project
6 basically. The organization opposing the project.

7 Q Okay. And is this one of the documents that you
8 were referring to that includes indication that the town was
9 on notice that the project was in jeopardy?

10 A It is.

11 Q Okay. And what about this email makes you think
12 that?

13 A In, in Section 10, and, again, in Section 14, they
14 reference the term economically unfeasible.

15 MR. PAGLIARINI: Your Honor, at this point I am
16 gonna renew our objection to -- this letter comes from
17 the then mayor of Mt. Pleasant. It is both hearsay and
18 in direct violation of the previous order of this Court
19 related to thoughts or opinions of council members,
20 elected officials, as they relate to all positions
21 regarding this case.

22 THE COURT: I admit that my eyes cannot see that.
23 So, I'm not sure what it contains.

24 MR. GASKINS: Your Honor, this is an email from
25 the mayor of the town at the time to the other council

1 members. It is not being offered to question the
2 motivations or their intent. It is simply being
3 offered to provide background facts and foundation.
4 And also to, to show what their understanding was at
5 the time that they took action and before, and the
6 information that they relied on in making those
7 determinations, and that is -- we believe that is
8 admissible and not covered by the Court's ruling.

9 What the Court said and what the cases say is that
10 individual council member's motivations cannot be
11 questioned during depositions, that the, that the body,
12 town council, acts as a collective group. Fair enough.
13 We are, we are happy to allow the meeting, minutes, and
14 the videos stand on their own. But what it -- what we
15 think we are allowed to do is show information that was
16 presented to the town and what information they had
17 when they made the decision. And that's supported by
18 the case of Richards v. Columbia, and this is a 1955
19 case from the Supreme Court of South Carolina.

20 And it involved a lawsuit challenging a municipal
21 ordinance, and it -- and the Court said that it is
22 admissible to show information upon which City Council
23 proceeded, and all of this information was before
24 council. So, again, this is information that was
25 before Council and it shows what their understanding

1 was.

2 I would also point to the case of Sloan versus
3 Greenville County. This is a Court of Appeals case
4 from 2003. 356 S.C. 531. In that, you're probably
5 familiar with Mr. Sloan and his activities challenging
6 various government actions, and here he was challenging
7 a procurement issue with the -- with the Greenville --
8 with Greenville County and actually sued County
9 Council. And there were some questions about the
10 admissibility of written determinations that were made
11 and presented to County Council.

12 And the, the plaintiff or, or the defendant
13 actually tried to bring in outside information showing
14 what went into those written determinations, and the
15 plaintiff questioned it. And what the Court said is,
16 it government -- it said collateral or background
17 information presented by way of testimonial,
18 documentary, and demonstrative evidence would be
19 necessary to fill in the gaps of the understanding.
20 This type of information is an important part of the
21 trial's process of educating itself. So, those are the
22 purpose for -- purposes for which we are offering this
23 evidence.

24 MR. PAGLIARINI: Except, Your Honor, it isn't
25 evidence of what information council had. This is a

1 direct letter from a council member to other members of
2 council, and it clearly spells out the thought process.
3 And that's exactly what our Courts and the Federal
4 Courts have sought to avoid is getting into a
5 discussion about what a body of nine, what one council
6 member may have been thinking at the time.

7 So, again, Mr. Gaskins is offering this as to what
8 council thought, not what information they had, but
9 what they thought. And this is one council member of
10 nine, and that is absolutely irrelevant and absolutely
11 why the prior Court order covers it. It's why we
12 argued it, and why we have an order.

13 THE COURT: Well, here's what we'll do, Counsel.
14 Obviously, the -- it comes in and not prejudiced
15 obviously. It's not a jury trial. I'm certainly able
16 to decipher what is admissible pursuant to that
17 previous order and what is not. So, we'll put it in
18 evidence, but obviously it may not be subject to my
19 consideration.

20 MR. GASKINS: Your Honor, at this time we would
21 move to admit Plaintiff's Exhibit 28 into evidence.

22 THE COURT: So admitted.

23 *(Whereupon, Plaintiff's Exhibit No(s). 28 marked*
24 *for identification and received in evidence.)*

25 MR. GASKINS: Okay. Please proceed.

1 MR. PAGLIARINI: And, again, Your Honor, just for
2 the record, that is subject to our objection.

3 THE COURT: Yes, sir.

4 MR. PAGLIARINI: All right.

5 A You'll have to---

6 Q Okay.

7 A It's been a long time since you asked---

8 Q I believe my question was is what in this email
9 indicated to you that the town, the town was under the
10 understanding that the project was in jeopardy because of
11 their actions?

12 A And I believe I mentioned Section 10 of this email
13 or Label 10 and 14 in which the email's discussing the
14 developer now claims that construction of a parking facility
15 is economically unfeasible.

16 Q And does this email also address the issue of
17 civic use?

18 A The email -- at the, at the top of the email talks
19 about that the mayor had the opportunity to discuss with
20 corporation counsel and gain an understanding of some
21 issues. If you'll give me and I'll go through it.

22 Q Yeah, take your time please. It does, in Number
23 11, speak to civic use.

24 Q And what's the date of this email?

25 A It's dated May 30th, 2014.

1 Q Okay. And so that also would have been a few days
2 before Mr. Pagliarini sent his letter denying the project
3 request to be deemed a civic use?

4 A Yes, it would seem to be about six days before.

5 MR. GASKINS: Your Honor, may I approach the
6 witness?

7 THE COURT: You may.

8 Q I've handed you what's been premarked as
9 Plaintiff's Exhibit 29. Are you familiar with this
10 document?

11 A I am.

12 Q Okay. What is it?

13 A This is an email Chris O'Neal to Jim Owens and
14 copying it appears the mayor, Chris Nichols, and Chris
15 O'Neal.

16 Q Okay. Who is Chris O'Neal?

17 A Chris O'Neal was a council member at the time of
18 this letter.

19 Q And who is Chris Nichols?

20 A Chris Nichols was a council member at the time of
21 this letter.

22 Q And what's the date of this email?

23 A May 30th, 2014.

24 Q Okay. And have you seen this email before?

25 A I have.

1 Q Okay. And where have you seen it?

2 A As part of this litigation, and part of separate
3 litigation.

4 Q Okay. And is there anything in this email that
5 indicates that the town was under the understanding that its
6 actions had jeopardized the project?

7 A Yes, there is.

8 MR. PAGLIARINI: Your Honor, again, same
9 objection. If I might, again, it's violation of a
10 Court order. It's also hearsay. This comes directly
11 from a council member indicating one council member's
12 thoughts on an issue.

13 THE COURT: Yes, sir. Thank you.

14 MR. GASKINS: Thank you. And just to address the
15 hearsay argument, we don't believe it's -- it is
16 hearsay. It's not offered to prove, prove the truth of
17 the matter asserted. It's just demonstrating what town
18 council's understanding was at the time. And, even if
19 it was, it -- even it was offered, it would be an
20 admission of a party opponent.

21 THE COURT: Okay. It's in.

22 *(Whereupon, Plaintiff's Exhibit No(s). 29 marked*
23 *for identification and received in evidence.)*

24 BY MR. GASKINS:

25 Q All right. I believe my previous question was

1 is -- what in this -- is there anything in this email that
2 indicates that the town was under -- had the understanding
3 that its actions had jeopardy the project?

4 A In, in the second paragraph, and I guess I'll just
5 read a section of it. At the end of the day, an elected
6 official won't prove anything by what they say. The proof
7 is in the outcome or result. I know yourself and others
8 want something done. Our belief is that it was already done
9 when the overlay district changes were made. I think that
10 he's referencing the not -- you know, the, the problems with
11 the project and that it wasn't gonna be feasible.

12 Q Okay. And, if you could, read the last sentence
13 of the first paragraph please.

14 A Excuse me. I am not a big euphemism guy, but when
15 someone is playing poker, and you know you have the better
16 cards, your opponent still gets to play their cards, no
17 matter how bad they may be, if they do not want to fold.

18 Q Okay. And what's your understanding of who the
19 opponent is that Mr. O'Neal is referring to?

20 A Unfortunately I believe it would be us, the
21 developer, the licensor.

22 Q All right. Ultimately, and as we saw yesterday,
23 Shem Creek Development Group proceeded with the project, and
24 carried it through to fruition with a partner, is that
25 correct?

1 A That is correct.

2 Q Okay. After the project received design approval,
3 did the town take any other actions that interfered with the
4 development of the garage?

5 A It did.

6 Q Okay. And what actions would those be?

7 A The foundation permits were held by the zoning
8 administrator.

9 MR. GASKINS: Your Honor, may I approach the
10 witness?

11 THE COURT: Yes, sir.

12 Q I've handed you what's been premarked as
13 Exhibit -- Plaintiff's Exhibit No. 23. Are you familiar
14 with this document?

15 A I am.

16 Q Okay. What is it?

17 A This is a letter from the zoning administrator,
18 Town of Mt. Pleasant, to our attorney, Gray Taylor.

19 Q And who is the zoning administrator?

20 A Mr. Kent Prause.

21 Q Okay. And I believe your testimony yesterday was
22 Mr. Prause was the individual who rejected the
23 interpretation that the Church Street side was the rear of
24 the project, is that correct?

25 A That's my understanding, yes.

1 Q Okay. What's the date of this letter?

2 A May 1st, 2015.

3 Q Did you receive a copy of this letter?

4 A Yes, we did.

5 Q Okay. Did you receive it from your attorney?

6 A I believe so, yes.

7 Q Does it appear to be a complete and accurate copy
8 of the letter that you received?

9 A I believe it does .

10 MR. GASKINS: We would move to admit
11 Plaintiff's Exhibit 23 at this time.

12 MR. PAGLIARINI: No objection.

13 THE COURT: All right, sir. It's in.

14 *(Whereupon, Plaintiff's Exhibit No(s). 23 marked*
15 *for identification and received in evidence.)*

16 BY MR. GASKINS:

17 Q Okay. And what's your understanding of what
18 Mr. Prause is communicating in this letter?

19 A That we would not have the ability to charge
20 certain patrons within the garage.

21 Q That you would not be able to charge?

22 A That is correct.

23 Q Okay. And was he saying that was a condition to
24 the permit?

25 A Yes, the permit had been held at this point. He

1 references some ordinances and his interpretation that the
2 outcome is -- that the permit was held based on that fact.

3 Q Okay. And why was the permit needed at this time
4 for the development to proceed?

5 A We were ready to break ground. You, you can't,
6 obviously, begin your project without the foundation permit.

7 Q Okay. And where in this letter does he condition
8 the issuance of the permit on, on, on providing parking free
9 of charge?

10 A It's sort of midway to the lower section of the --
11 of, of the second paragraph. It says this determination is
12 predicated upon provision of required parking spaces as
13 expressed throughout the off street parking and loading
14 division of Chapter 156 of the Mt. Pleasant Code of
15 Ordinances, Section 156.170. This determination turns up --
16 turns upon the obvious implication that required parking
17 spaces must be available without limitation or impediment
18 for the patrons of the businesses to which they are -- I'm
19 sorry. I can't pronounce that word. Pertinent -- I
20 can't---

21 Q Pertinent.

22 A Pertinent. There you go. Thank you. If a
23 parking fee is charged, patrons will park elsewhere where
24 there is not a charge. Therefore, defeating the provision
25 for required parking spaces for identified uses as specified

1 in the zoning code.

2 Q Are you aware of any law or town ordinance that
3 allowed the town to condition the issuance of a foundation
4 permit on the owner of the project providing free parking?

5 A No, I'm not.

6 Q Okay. Have you dealt with the town in other
7 projects in which you or one of your businesses was trying
8 to get a building permit?

9 A Yes.

10 Q Okay. And, in your experience, has the zoning
11 administrator gotten involved in the issuances of building
12 permits?

13 A I've never had that experience, no.

14 Q Okay. Did the town ultimately maintain its
15 position that in order to issue a foundation permit, the
16 developer had to provide free parking to restaurant patrons?

17 A They did not.

18 Q And do you know how that change in position came
19 about?

20 A I believe Mr. Taylor, our attorney, responded to
21 this letter citing the fact there was no pertinent
22 ordinance.

23 MR. GASKINS: Your Honor, may I approach the
24 witness?

25 THE COURT: Yes, sir.

1 Q I've handed you what has been premarked as
2 Plaintiff's Exhibit 40. Are you familiar with this
3 document?

4 A I am.

5 Q What is it?

6 A I believe this is the response to Mr. Prause's
7 letter we just discussed.

8 Q That your, you're attorney, Mr. Greg Taylor, sent?

9 A Correct.

10 Q Okay. And what's your understanding of what
11 Mr. Taylor is communicating to Mr. Pagliarini in this
12 letter?

13 A Essentially that there is no ordinance backing up
14 the determination of the previous letter.

15 Q After Mr. Taylor sent this letter -- well, wait a
16 second.

17 MR. GASKINS: Your Honor, we would move to admit
18 Exhibit -- Plaintiff's Exhibit 40 into evidence.

19 MR. PAGLIARINI: No objection, Your Honor.

20 THE COURT: All right, sir. It's in.

21 *(Whereupon, Plaintiff's Exhibit No(s). 40 marked*
22 *for identification and received in evidence.)*

23 BY MR. GASKINS:

24 Q After Mr. Taylor sent this letter, did the Town's
25 position change with regards to requiring the provision of

1 free parking?

2 A It did, and, ultimately, a foundation permit was
3 issued in July of that year.

4 Q Okay. Are you aware of the town taking any other
5 actions after you received design approval that interfered
6 or threatened to interfere with the development of the
7 project?

8 A I do.

9 Q Okay. And what else would that be?

10 A We had requested an estoppel certificate.

11 Q What is an estoppel certificate?

12 A An estoppel, estoppel certificate is a document
13 that verifies terms of a, a lease. In this case, a license
14 agreement. Primarily used for lenders, equity partners.
15 It's verifying that the existing lease is in place, and that
16 the terms are subsequent to what the lease said.

17 Q Why is an estoppel certificate important to a
18 developer, a developer or a landlord?

19 A For the most part, it comes down to financing and,
20 and equity. Lending institutions require estoppel
21 certificates to verify the income streams that they're
22 lending into. It is on every closing checklist I've seen
23 from every lender I've ever done a deal with. It takes --
24 it's a required extra step of authentication of your under,
25 underwriting and the income streams.

1 Q Mr. Flesch, do you have an understanding of
2 whether the town was required to provide an estoppel
3 certificate under the Parking License Agreement?

4 A Yes, I believe in Section 7.04 they're required to
5 provide an estoppel certificate.

6 Q All right. If you could blow that up for us
7 please. And do you have Exhibit 7 in front of you?

8 A I just grabbed it, yes. I'm a little behind.
9 Yes.

10 Q Okay. Can you read for the record what
11 Section 7.04 provides?

12 A Yes. It's labeled, Estoppel certificate. Within
13 ten days after request thereof by either party from time to
14 time, the other party agrees to deliver, in recordable form,
15 a certificate to any proposed mortgagee or purchaser, or to
16 any other party certifying that this license is unmodified
17 and in full force and effect. Or if there have been
18 modifications that the same is in full force and effect as
19 modified, and stating the modifications, that there are no
20 defenses or offsets thereto or stating those claimed, and
21 the dates to which the fixed minimal rent and additional
22 rent have been paid.

23 Q Okay. Did Shem Creek Development Group request an
24 estoppel certificate from the town?

25 A We did.

1 MR. GASKINS: May I approach the witness, Your
2 Honor?

3 THE COURT: You may.

4 BY MR. GASKINS:

5 Q I've handed you what's been premarked as
6 Plaintiff's Exhibit 43. Are you familiar with this
7 document?

8 A I am.

9 Q What is it?

10 A This is communication from Gray Taylor, our
11 attorney, to Mr. Pagliarini at the town.

12 Q And what's the date of this letter?

13 A October 20th of 2014.

14 Q Did you, did you receive a copy of this letter
15 around the time that it was sent to Mr. Pagliarini?

16 A I did.

17 Q And does this, does this appear to be a complete
18 and accurate copy of that letter?

19 A It does.

20 MR. GASKINS: Your Honor, we would move to admit
21 Exhibit 43 in evidence.

22 MR. PAGLIARINI: Your Honor, our objection is
23 similar. It's based on that this document is
24 irrelevant, and it also contains hearsay.

25 THE COURT: All right. And, for the same reasons,

1 it's admitted at this juncture.

2 *(Whereupon, Plaintiff's Exhibit No(s). 43 marked*
3 *for identification and received in evidence.)*

4 BY MR. GASKINS:

5 Q Okay. And what is Mr. Taylor communicating in
6 this letter?

7 A In the beginning of the letter, it's a response to
8 a prior email I believe from Mr. Pagliarini. He's answering
9 some questions that have been positive to Mr. Taylor, and
10 then, ultimately, it's the formal request for the estoppel
11 we were previously discussing.

12 Q Okay. And where is that request for the estoppel
13 found in this letter?

14 A It's the last paragraph on the second page.

15 Q All right. If you could, pull that up. Can you
16 read that aloud please?

17 A Sure. It says, accordingly, please allow this
18 letter to serve as a formal request, pursuant to
19 Section 7.04 of the agreement, that the town provide an
20 estoppel certificate within ten days of the date of this
21 letter in the form attached hereto. Should the town provide
22 a satisfactory letter indicating the sufficiency of the
23 approved plans within ten days, my client is willing to
24 forego the necessity of a formal estoppel certificate.

25 Q Did the town provide an estoppel certificate in

1 response to this request?

2 A It did not.

3 Q And what effect did the Town's failure to provide
4 an estoppel certificate have on Shem Creek Development Group
5 and this project?

6 A It renders the income stream contemplated in the
7 Parking License Agreement unfinanceable.

8 Q Okay. And what does that mean in regards to
9 looking for credit or financing?

10 A Right. The initial impact would be a significant
11 less amount of loan available, proceeds, dollars. The
12 second impact would be on rate. Given the credit quality of
13 the Town of Mt. Pleasant being a Triple A rated creditor,
14 that is viewed very highly by lending institutions, and
15 would cause the rate to be lower.

16 Q Okay. And so, by not providing it, it would have
17 an -- it would ultimately increase the borrowing cost on the
18 project, is that correct?

19 A Both the borrowing cost and the amount of equity
20 needed to fulfill the project, yes.

21 Q Okay. Did the town ever respond to Mr. Taylor's
22 letter of October, 2014 requesting an estoppel certificate?

23 A They did.

24 Q Okay. And how did they respond?

25 A I believe a letter was sent from Mr. DeMoura back

1 to us.

2 MR. GASKINS: Your Honor, may I approach the
3 witness?

4 THE COURT: Yes, sir.

5

6 BY MR. GASKINS

7 Q I've handed you what has been premarked as
8 Plaintiff's Exhibit 13. Are you familiar with this
9 document?

10 A I am.

11 Q What is it?

12 A This is the letter that Mr. DeMoura I believe sent
13 back to Mr. Taylor.

14 Q And---

15 A His response to the last letter we're talking
16 about.

17 Q What is the date of that letter?

18 A November 11th, 2014.

19 Q Did you receive a copy of this letter around the
20 time that it was sent in November of 2014?

21 A I did.

22 Q Okay. And did you review that letter?

23 A I did.

24 Q Does this appear to be a complete, accurate
25 copy -- complete and accurate copy of that letter?

1 A Yes, it does.

2 MR. GASKINS: Okay. At this time we would move to
3 admit Plaintiff's Exhibit 13.

4 MR. PAGLIARINI: No objection, Your Honor.

5 THE COURT: All right. It's in.

6 *(Whereupon, Plaintiff's Exhibit No(s). 13 marked*
7 *for identification and received in evidence.)*

8 BY MR. GASKINS

9 Q What's your understanding of what Mr. DeMoura is
10 communicating in this letter?

11 A In its essence, that we were not compliant with
12 Parking License Agreement in his estimation, and he goes
13 into some calculations as to why.

14 Q Can you describe or explain your understanding as
15 of the way he was calculating the sufficiency of the number
16 of spaces?

17 A It appears he was relying on a shared ULI parking
18 analysis that had been performed in determining the amount
19 of spaces that would be required for the neighboring
20 restaurants as well as our project.

21 Q Okay. And did he also take into account spaces
22 that were provided in a surface lot?

23 A He did.

24 Q Okay. Is there anything in the Parking License
25 Agreement that required Shem Creek Development Group to

1 provide parking for the neighboring restaurants?

2 A No.

3 Q Do you agree with Mr. DeMoura's analysis?

4 A I, I do not.

5 Q Okay. And why not?

6 A I believe there's two separate issues. The
7 compliance of the Parking License Agreement is a separate
8 issue from zoning compliance. What I mean by that, zoning
9 compliance is -- you are required to have certain parking
10 spaces for a project. PLA compliance would talk about the
11 number of spaces provide, in general, availability.

12 Q Okay. At -- now, at this point in November of
13 2014, the project had already received design review
14 approval from the town staff, correct?

15 A In September of that year, that's correct.

16 Q Okay. And the project was in zoning compliance as
17 depicted at that time?

18 A It was.

19 Q Okay. What did you do or what did Shem Creek
20 Development Group do in response to receiving this letter?

21 A I think, after taking some time to, to, to go
22 through the letter, I believe my partner, Tex Small, reached
23 out to Mr. DeMoura to ascertain if there's anything we could
24 do to work out our differences, and, you know, could this
25 bridge, you know, the gap be bridged in some way.

1 Q Okay. And after reaching out, did the parties
2 engage in any efforts to resolve that dispute?

3 A Yes, I believe there was a mutual desire to have
4 my partner meet with staff and create a solution to our
5 differences.

6 Q And what solution was contemplated at that time?

7 A An amendment to the Parking License Agreement.

8 MR. GASKINS: Your Honor, may I approach the
9 witness?

10 THE COURT: Yes, sir.

11 BY MR. GASKINS:

12 Q I've handed you what has been premarked as
13 Plaintiff's Exhibit 14. Are you familiar with this
14 document?

15 A I am.

16 Q What is this document?

17 A This appears to be the draft of the first
18 amendment to the Parking License Agreement we were just
19 discussing.

20 Q Okay. Do you know who was involved in drafting
21 this proposed amendment, amendment to the Parking License
22 Agreement?

23 A I believe with input from staff and Mr. Small, the
24 lawyers would have, Mr. Taylor and Mr. Pagliarini.

25 Q Okay. And how would this amendment, or what is

1 your understanding of how this amendment would have modified
2 the executed Parking License Agreement?

3 A It would have changed the number of spaces from
4 276 to 234.

5 Q And where is that reflected in the amendment?

6 A Item Number 3.

7 Q Okay. All right. Will you blow that up please?
8 All right. Were there any other proposed amendments or any
9 other changes that would have been affected by the
10 amendment?

11 A Yes, in Section 1.06, the number of public places
12 would change to 117.

13 Q And is that reflected in Paragraph 4 of the
14 proposed first agreement?

15 A Item Number 4, correct.

16 Q Okay. If you could, bring up Item Number 4? I
17 think most of it is on the second page. And here we're
18 looking at an amendment to Section 1.06?

19 A Right.

20 Q All right. What other changes would have been
21 made by this amendment had it been adopted?

22 A 1.07, rent.

23 Q Pull that up on there. And what changes were
24 being made to the rent?

25 A There was a pro rata reduction in the rent to

1 reflect the reduction in spaces. The new rent for the 15
2 period, there would be \$163,800.

3 Q Okay. So, a little over \$20,000 less in annual
4 rent, is that correct?

5 A Correct.

6 Q Okay. And what would the change in spaces, what
7 effect would that have had on the rent reduction provisions
8 that we've discussed earlier?

9 A As we discussed yesterday, there was, in place, a
10 formula for this very scenario where, if the number of
11 spaces changed, the calculation would change. In this case,
12 the, the town would enjoy the benefit of the profit sharing
13 going up to 50 percent from, I believe, it was at 47 percent
14 prior.

15 MR. GASKINS: If I haven't done so previously, I
16 would move to admit Exhibit -- Plaintiff's Exhibit 14
17 into evidence.

18 MR. PAGLIARINI: No objection, Your Honor.

19 THE COURT: All right. It's in.

20 *(Whereupon, Plaintiff's Exhibit No(s). 14 marked*
21 *for identification and received in evidence.)*

22 BY MR. GASKINS:

23 Q Why did Shem Creek Development Group propose this
24 amendment to the Parking License Agreement?

25 A I think at the time -- now I have to admit, at

1 first, I was skeptical to do this. I didn't feel like we
2 needed to do this, and I don't feel any of the partners felt
3 we needed to do this. But in the spirit of cooperation, in,
4 in trying to move the project forward, in trying to operate
5 in good faith. We, we thought it was a solution that, that
6 would move the project towards fruition. We fully believed
7 in the merits of this project, as we discussed yesterday,
8 with the benefits. And this was a way to, to get us home,
9 and, and really address what Mr. Pagliarini, Pagliarini,
10 sorry, Mr. Pagliarini had said yesterday, which is we didn't
11 think it was fair to pay a hundred percent of the rent for
12 85 percent of the spaces. Well, they didn't have to. We
13 were offering to lower the rent to match even though we
14 believed the reason we were providing less spaces was not
15 due to our control. We offered to lower the rent to
16 accommodate that exact number.

17 Q Did the town accept this amendment to the Parking
18 License Agreement?

19 A No, they did not.

20 Q Has the town ever paid any rent under the Parking
21 License Agreement?

22 A No, sir.

23 Q Okay. Now, Shem Creek Development Group has
24 brought a claim for breach of contract in this case for --
25 against the town for failing to perform its obligations

1 under the Parking License Agreement. Why do you believe
2 that the town has breached the Parking License Agreement?

3 A Primarily failing to provide the estoppel, failing
4 to pay rent, and not operating in good faith and fair
5 dealing.

6 Q Okay. And obviously you're aware that the town
7 takes the position that it has no obligation to pay rent
8 because Shem Creek Development Group breached the Parking
9 License Agreement by failing to deliver a sufficient number
10 of spaces, aren't you?

11 A Yes.

12 Q Okay. Do you believe that Shem Creek Development
13 Group has breached the Parking License Agreement?

14 A I do not.

15 Q Okay. And why not?

16 A As we discussed yesterday, we made every attempt
17 to provide the maximum number of spaces that we could based
18 upon conceptual plans and the agreement was drafted with
19 language addressing conceptual plans, addressing
20 substantially similar to both the drawings and the numbers
21 of spaces. And we did those things, and ultimately we
22 discussed at length the benefits the town enjoyed, even at
23 the 234 space level, they got what they signed up for
24 essentially. They, they -- they've, they've, they've solved
25 the parking problems down there. They've got economic

1 development. We talked about restaurants and office users.
2 I won't rehash everything I said. But we believe it
3 provided everything that they had asked for.

4 Q The breach of contract claim also includes the
5 claim for breach of the implied duty of good faith and fair
6 dealing, and yesterday you used that phrase, good faith and
7 fair dealing. What does that duty mean to you?

8 A In regards to the Parking License Agreement, to
9 me, is that both parties, us included, would utilize
10 discretion to try to fulfill the agreement terms, and, at a
11 minimum, not try to interfere with each other to try to
12 fulfill the terms of the agreement.

13 Q Do you believe that the town has violated the duty
14 of good faith and fair dealing in the Parking License
15 Agreement?

16 A Unfortunately, I do.

17 Q Okay. And why is that?

18 A We've talked at length about actions taken,
19 including changes to setbacks. The town didn't notify us
20 about any of the changes. The failure to provide the
21 estoppel, failing to take reasonable interpretations of, of
22 the code that would have allowed us to provide more spaces.
23 Ultimately, also, they didn't pay rent obviously would be
24 another one.

25 Q Okay. Now, it has been suggested by the town that

1 Shem Creek Development Group could have designed more spaces
2 and complied with his obligations of the Parking License
3 Agreement by providing another level of parking, and
4 eliminating either a whole level or part of a level of
5 office space. Have you heard that?

6 A I have.

7 Q Okay. Why did Shem Creek Development Group not do
8 that?

9 A It's a handful of reasons, but the first would be
10 I don't believe it's physically possible to build what
11 they're suggesting. The second reason would be,
12 economically, would cripple the project. The second floor
13 of the office, which is the third floor of the building, is
14 crucial, as we discussed yesterday, to fulfilling the
15 economic platform to make this happen.

16 Go all the way back to the original report,
17 we were trying to fill daytime parking spaces with office
18 users, and that's how the project would be to be built and
19 stand alone economically. You would lose that ability
20 between that third floor of office. It would cripple the
21 project economically, and you wouldn't be able to build it
22 or finance it.

23 And, lastly, I believe it would create a
24 conflict with the PLA. We spent a good deal of time
25 yesterday talking about Exhibit A, a conceptual rendering

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1 that clearly had two levels of parking, two levels of
2 office, and we're bound to build something substantially
3 similar to that, and I, and I believe we have. To radically
4 change the design to add a third level of parking and
5 potentially lose the office, I, I don't believe is
6 substantially similar to what Exhibit A depicted.

7 Q Okay. And it's been suggested that Shem Creek
8 Development Group just could have abandoned the project
9 after the town indicated that it was not going to pay rent,
10 and perform its obligations under the PLA. Why did Shem
11 Creek Development Group continue to pursue the, the project
12 and not abandon it?

13 A First of all, we were in belief that we had -- you
14 know, we were in compliance with the Parking License
15 Agreement. There would be no reason to abandon the project.
16 We disagreed with the Town's interpretation that we were not
17 in compliance. Secondly, a significant amount of resources
18 had been placed to bring the project to this point. If you
19 recall, we discussed the purchase of the property from Roper
20 and the commitment of over 90 years of ground rent to this
21 location. Between that, and design, and all the other costs
22 incurred, it's not as simple as just walking away from the
23 project. So, that -- those are the reasons.

24 Q Okay. At this point in time, in 2000 and -- late
25 2014, 2015 when you realized that the town was not going to

1 perform under the Parking License Agreement, were you having
2 any discussions with potential tenants in the building?

3 A Yes, we were -- the challenge became in the office
4 component of tenants of -- demanding is a bad word. Asking
5 for a date delivery. You know, certainty on when we could
6 deliver, and given all the obstacles we kept going through,
7 we were having a hard time assuring tenants when we could
8 open the building. And we had -- we had commitments --
9 letters of intent for office space at this same time that
10 made it hard to walk away from the project.

11 Q Did Shem Creek Development Group do everything it
12 could do to produce as many spaces as possible while also
13 complying with its obligations under the Parking License
14 Agreement?

15 A I truly believe that, yes.

16 Q Earlier when I asked you if you believed that --
17 if you believed whether Shem Creek Development Group had
18 breached the PLA, you said something about the town got the
19 benefits that it wanted included the parking on Shem Creek.
20 So, I want to talk about those benefits that you were, you
21 were referring to, and, specifically, parking utilization
22 and demand. Have you ever seen any studies or analysis
23 indicated that 234 total spaces and 132 public spaces or 117
24 public spaces would not be adequate to support parking
25 demand in the area?

1 A No, it's actually the opposite.

2 Q Okay.

3 A I have seen studies.

4 Q And what studies are you referring to?

5 A The Desman Report that we commissioned with the
6 town --

7 Q Okay.

8 A -- in 2012.

9 Q And I believe that's already been admitted into
10 evidence as Plaintiff's Exhibit No. 2. If you could refer
11 to that? And what did the Desman Study conclude about
12 parking demand for the garage?

13 A I need to find it. Sorry.

14 Q Okay. I'm sorry.

15 A I have a lot of stuff up there.

16 Q Please take your time.

17 A All right. I, I have it. I'm sorry. Ask your
18 question again please?

19 Q What did the Desman Study conclude about parking
20 demand in the area that the garage could utilize or would
21 rely on?

22 A As we discussed yesterday, the Desman Study had
23 studied the, the demand and had come up with both a weekday
24 and weekend peak use calculation.

25 Q And where's that referenced in the report?

1 A It -- it's the last paragraph, first sentence.

2 Q On Page --?

3 A I'm sorry. Page 14.

4 Q If you could pull that up? And what does this
5 conclusion state?

6 A That the -- that -- it says as shown on Table A.
7 But the average weekday and weekend parking demand is 195
8 and 230 spaces respectively.

9 Q And, obviously, 234 spaces is more than 230,
10 correct?

11 A Yes. Correct.

12 Q Do you know what assumptions the Desman -- Desman
13 & Associates relied on in calculating demand?

14 A I believe they utilized the, the restaurant
15 component. And then all -- had a proposed hotel and meeting
16 space or banquet space included within the, the, you know,
17 theoretical of what would happen in the next seven years
18 there, yes.

19 Q Okay. And did that hotel and conference center
20 ever come to fruition?

21 A No, it did not.

22 Q Okay. What effect do you think the
23 non-realization of those projects had on the assumptions for
24 parking demand?

25 A It has the potential to overstate what the demand

1 would be. If those facilities don't exist, they don't need
2 parking.

3 Q Have you seen any other studies analyzing parking
4 demand and parking utilization?

5 A I have.

6 Q Okay. And what's -- what analysis are you
7 referring to?

8 A I think we previously discussed the shared parking
9 UMI analysis.

10 Q I'll ask you to pull up Exhibit 40.

11 A I'm sorry. What was the number?

12 Q It's Exhibit 40. If you turn to---

13 A Hold on. I'm sorry. Just got a lot up here. I
14 know we have it because we talked about it. I'm sorry. I
15 can't seem to find it. I don't see it here. Okay. Sorry.

16 Q No problem. You got a lot of paper up there.

17 A Okay. Sorry. Go for it.

18 Q I would ask that you turn to Page 4 of Exhibit 40.

19 A Okay.

20 Q And, Laura, can you blow that up so we can see it?
21 Are you familiar with this document?

22 A I am.

23 Q And what is this?

24 A This is the analysis. We're discussing the shared
25 parking ULI analysis.

1 Q And when was this analysis conducted?

2 A I don't know the exact date of the analysis. Hold
3 on. I have the full --.

4 Q All right. Well, if you look at the first page of
5 Exhibit 40. It's attached to a letter dated May 6th, 2014.
6 Does that help refresh your recollection, your recollection?

7 A It looks like in January of -- well, that's
8 talking about the requirements.

9 Q Mr. Flesch, if you'd refer to Page 1 of the
10 exhibit, and look at the date of the agreement or date of
11 the letter.

12 A It's May 6th, 2015.

13 Q Okay. Do you believe this is roughly around the
14 time that this analysis was prepared?

15 A Approximately, yes.

16 Q And who prepared it?

17 A This was prepared by CSC, which is an engineering
18 firm, owned by David Stevens.

19 Q And why was it prepared?

20 A At the request of the town.

21 Q And why did the town request it?

22 A To evaluate probably for zoning compliance I would
23 imagine.

24 Q All right. And what analysis is being shown in --
25 on Page 4 of Exhibit 40?

1 A Well, I'll try not to put everybody to sleep.
2 This is the three uses on the entire footprint, the two
3 restaurants and the office component. And, essentially, ULI
4 is the Urban Land Institute, publishes standards that are
5 accepted by both development companies and many
6 municipalities. And they run the analysis via for each use
7 by the code applied to it for how many parking spaces are
8 required by ordinance, and then it allows for adjustments
9 for time of day. So, it would make sense that the
10 restaurants, you know, or the office that, at 3:00 in the
11 morning wouldn't, you know, need parking, for example, or on
12 weekends. And so it adjusts the requirement for how much
13 parking's required under the ordinance based on time of day
14 for each of the three uses.

15 Q Okay. And it appears, if you look at Page 5,
16 there's a -- there appear to be weekend and weekday
17 analyses, is that correct?

18 A That is correct.

19 Q Okay. And I think going back to Page 4, Laura,
20 blow that back up. Walk us through this analysis about
21 parking demand and available parking for these three uses
22 based on this ULI analysis?

23 A In the simplest way, and in terms of expedience,
24 the yellow line is the peak hour in which all three uses
25 would have the most parking needed on the far right. This

1 would represent the, the peak demand throughout the day,
2 essentially.

3 Q Okay. And what was the peak demand for a weekend?

4 A 189 spaces.

5 Q And how many spaces were being provided under this
6 analysis?

7 A 339.

8 Q Okay. And the garage had 234 of those spaces,
9 correct?

10 A That's correct.

11 Q Okay. Where were the other 105 spaces?

12 A There's 100 spaces located in the surface lot we
13 had talked about we were required to build under the
14 acquisition of the land when the town had moved the building
15 over. So, there was 100 spaces in the surface lot, and
16 there's five that they call offsite that are really parking
17 spaces adjacent to Church Street that you back out onto
18 Church Street when you leave them. So, they consider those
19 offsite.

20 Q Okay. And what conclusions did this analysis
21 reach about whether there was sufficient supply to meet peak
22 parking demand?

23 A There's clearly a, a surplus of 150 spaces.

24 Q Okay. If we could go to the next page please,
25 Laura? And that was for weekend uses, correct?

1 A Yes, sir.

2 Q Okay. All right. And there was a similar
3 analysis done on Page 5 --

4 A There was.

5 Q -- for weekday use?

6 A Weekday use, that's correct.

7 Q Okay. And what were the conclusions reached about
8 whether there was sufficient parking supply to meet peak
9 parking demand for -- on weekdays?

10 A It's the same concept. You end up with a time of
11 day where all the use is peak, and it makes sense that,
12 during the week, the office component now would require
13 spaces to fulfill their obligations. So, 1:00 p.m. becomes
14 the peak usage time for a total of 237 parking spaces.

15 Q Are you aware of the actual parking utilization in
16 the garage since it first opened?

17 A Yes. Fairly.

18 Q Okay. And how are you aware?

19 A We're both a minority operating party to the
20 development and my office is physically there.

21 Q Okay. So, based on your role as a minority member
22 and the owner, the current owner and operator of the
23 project, do you have access to data that would show parking
24 utilization?

25 A Yes.

1 Q Okay. And have you reviewed that data?

2 A Periodically, yes.

3 Q And based on your knowledge of that data, has 234
4 spaces ever been insufficient to meet parking demand?

5 MR. PAGLIARINI: Your Honor, we're gonna note an
6 objection at this point. This was litigated and we, we
7 asked these questions and questions like them about
8 parking, financials related to parking, and they
9 specifically refused to answer them. In fact, there
10 was a motion, and, Judge, you ruled that we were not
11 entitled to any of this information, any information
12 about value, dollars, business. This was specifically
13 excluded. We were not allowed to have it. I don't
14 know how we're able to cross-examine or answer any
15 questions. Further, it, it seems irrelevant to all of
16 this. We're not talking now about the Parking License
17 Agreement. We're talking about their economic status.
18 So---

19 THE COURT: That's correct, counselor. Let's move
20 on.

21 MR. GASKINS: Your Honor, I would just say that
22 I'm not asking about economics, and money, financial
23 performance. Just utilization itself. And we have
24 actually provided data showing the, the usage to them
25 in prior discovery. So, we think we should be allowed

1 to---

2 THE COURT: Let's just keep it concise to as---

3 MR. PAGLIARINI: Okay.

4 THE COURT: ---as to utilization as contemplated
5 pursuant to the agreement, but outside the financials
6 outside of it, that's out.

7 Q Okay. Not addressing the financials, what has
8 your review of the parking utilization data indicated to you
9 about whether 234 spaces have ever been insufficient to meet
10 parking demand?

11 A That only on a handful of evenings has the parking
12 deck ever been completely full, and the logical conclusion
13 is it's providing enough parking based on the fact it's not
14 full.

15 Q Okay. All right. Well, let's talk about your
16 personal objections. Where is your office?

17 A My office is in, in the building on the fourth
18 floor.

19 Q Okay. And do you park in the garage attached to
20 that building?

21 A Yes, I do.

22 Q And what hours do you normally work?

23 A It varies, but fairly consistently 7:00 a.m. to
24 5:00 p.m.

25 Q Okay. Do you ever work after hours?

1 A Sure. Weekends too on occasion.

2 Q So you also work weekends. Based on your
3 observations, personal observations, have you ever seen the
4 garage entirely full?

5 A I haven't.

6 Q Okay. Based on your personal observations, do you
7 believe that the parking garage is inadequate to satisfy
8 parking demand in the area?

9 A I don't based on what I've seen.

10 Q Now, I want to move on to another one of the
11 Town's defenses, and that is conditioned precedent. You're
12 aware -- you've sat through the arguments. You're aware of
13 the argument that they're making that the town has no
14 obligation to perform because Shem Creek Development Group
15 failed to meet a condition precedent, is that correct?

16 A I'm aware of the argument, but don't have clear
17 understanding of what their argument is.

18 Q Okay. Well, are you familiar with the concept of
19 a conditioned precedent?

20 A I am.

21 Q Okay. In your line of work as a real estate
22 developer, how often do you or your entities enter into
23 written contracts?

24 A Fairly often.

25 Q Okay. And what type of contracts would those be?

1 A Purchase agreements, lease agreements, financing
2 arrangements.

3 Q Okay. And do those contracts ever contain
4 conditions precedent?

5 A Fairly often, yes.

6 Q Okay. And what is your understanding of what a
7 condition precedent is?

8 A It requires an event to occur before another
9 party's required to, to do something.

10 Q Okay. Can you provide an example of types of
11 condition, conditions precedent that you've seen in the
12 written agreements that you or your entities have entered
13 into?

14 A Sure. Purchaser's closing is contingent upon
15 financing or, if seller fixes the roof, then buyer will
16 close. Things like that.

17 Q Okay. In your experience, what terms, words, or
18 language does -- do parties use to denote a condition
19 precedent?

20 A Okay. I just used the example. If then, subject
21 to, contingent upon.

22 Q Okay. Does the Parking License Agreement include
23 any language indicating that Shem Creek's delivery of 276
24 total spaces and 132 public spaces was a condition precedent
25 to the town performing its obligations under the license?

1 A No.

2 Q Okay. If you could, please bring up Exhibit 7,
3 Section 2.03. Mr. Flesch, I'll ask you to refer back to the
4 Parking License Agreement which has been marked as
5 Plaintiff's Exhibit No. 7.

6 A Okay.

7 Q And the Town's content -- contends that this
8 Section 2.03 serves as a condition precedent to it's
9 obligations. Do you agree with that interpretation?

10 A I don't.

11 Q Why not?

12 A I believe a condition precedent is to the
13 licensor's benefit. Not to the licensee's benefit.

14 Q What makes you say that?

15 A Well, if you read, if you read it, it says
16 licensor's obligations under this license agreement
17 including, but not limited to, the obligation to construct
18 the project are contingent upon all necessary approvals for
19 construction being issued -- construction -- it says
20 approvals for construction being issued by the appropriate
21 Town of Mt. Pleasant department or entity, licensor, which
22 is obviously us, in its sole and absolute discretion, may
23 elect to terminate this license agreement at any time prior
24 to 24 months from effective date or the licensor's
25 commencement of the parking garage. This is for my benefit,

1 not my benefit, our partnership's benefit. This is
2 protection should the town not give us a permit. We would
3 have the ability to have some protection, and not be
4 obligated to construct the project or to, you know, to have
5 to move forward.

6 I don't understand how there's any benefit
7 ascribed to the licensee here. It doesn't say licensee
8 anywhere. It wouldn't make sense that the necessary
9 approvals would be tied to the licensee. They issued the
10 necessary approvals. They control that. You wouldn't need
11 a protection from yourself. So, I, I, I don't understand
12 that, that argument.

13 Q Okay. In any case, was this condition precedent
14 to the licensor's obligation satisfied?

15 A They did. Ultimately, they issued construction
16 permits both for foundation and final construction of the
17 project.

18 Q All right. I want to turn now to the issue of
19 damages. Have you calculated damages caused by the Town's
20 breach of contract?

21 A We have.

22 Q Okay. And what do those damages consist of?

23 A In totality or --?

24 Q No, just -- the elements of the damages. What
25 were you looking at?

1 A Oh, we considered, obviously, rent, loss revenue
2 from the spaces we weren't able to, to build, the additional
3 cost, legal, construction. We spoke about the land
4 acquisition yesterday that we were required to do. Those
5 are mainly the large -- the larger costs.

6 Q Okay. And I'm talking about specifically in your
7 calculation that you prepared for this litigation.

8 A Oh. We're limited in our calculation, yeah. So,
9 that -- it would be rent.

10 Q Okay. And just now you talked about other types
11 of damages that you believe Shem Creek Development Group has
12 suffered. Explain what those are.

13 A Right. We were just kind of speaking to that. I
14 mean, obviously, any time we can build -- we're able to
15 build less spaces, we lost the revenue from those spaces.
16 There was a significant cost in redesign, legal costs. We
17 had to acquire the land. We discussed a little bit about
18 that yesterday. We believe that was in excess of a million
19 dollars of costs to us. It was significant and some of it's
20 undetermined to know what it will be because there's a sale
21 value to those spaces and to that land that we had to get.
22 All those things. So, it's much higher than potential rent
23 payments that are contemplated under the agreement.

24 Q Okay. Now, these other types of damages that you
25 just explained, are you seeking those or is Shem Creek

1 Development Group seeking those in this lawsuit?

2 A No, sir.

3 Q Why not?

4 A We believe there's a liquidated damages provision
5 within the agreement that the town drafted.

6 Q Okay. Laura, if you could, please bring up
7 Section 6.01 of Exhibit 7, and is this the section that you
8 were just referring to?

9 A Yes, this is the, the default and remedies section
10 where it, it allows us to seek rent in the pursuit of or
11 after there's a default event by the licensee.

12 Q And can you read the pertinent language that you
13 believe provides for liquidated damages limited, limited to
14 rent?

15 A Sure. I'm sorry. I'm trying to get to the top of
16 the sentence. So, it's towards the bottom. Says licensure
17 shall be entitled to bring an action for specific
18 performance or breach of contract against licensee, but
19 agrees that its sole and exclusive remedy shall be rent
20 payments due under this agreement. Both parties waive any
21 claims that either may have to any consequential or punitive
22 damages and agree that the prevailing party in any dispute
23 shall be entitled to an award of costs and attorney's fees
24 including the cost of trial and any appeals.

25 Q Now, was that provision, 6.01, is that the -- is

1 that in the form that was originally proposed---

2 A No.

3 Q ---by Shem Creek Development Group?

4 A No, sir.

5 Q Where did that language come from?

6 A That language was inserted by Mr. Pagliarini
7 during the drafting and negotiation of the Parking License
8 Agreement.

9 MR. GASKINS: Your Honor, may I approach the
10 witness?

11 THE COURT: Yes, sir.

12 Q I've handed you what's been premarked as Exhibit
13 No. 39, as Plaintiff's Exhibit 39. Are you familiar with
14 this document?

15 A Yes.

16 Q Okay. And what is the first page?

17 A This, this is an email from Mr. DeMoura, and
18 it's -- well, it's actually a copy. It's, it's really --
19 email Mr. DeMoura asking someone to print something. I
20 apologize. That's not the important part. But it's the
21 email from David Pagliarini to myself, copying Gray, Eric
22 DeMoura, and Jim Hinchey, who I believe is the attorney for
23 the town, and he's attaching a red line version, one of the
24 red line versions of the Parking License Agreement.

25 Q Okay. And is it your understanding that the

1 attachment is the red line version that Mr. Pagliarini was
2 sending to you?

3 A Yes.

4 Q Okay. And the red lines in the attachment, those
5 would reflect the changes that were being proposed by the
6 town?

7 A Yes, sir, that appears to be correct.

8 MR. GASKINS: Okay. Your Honor, we would move to
9 admit Exhibit No. 39 into evidence.

10 MR. PAGLIARINI: Your Honor, again, this falls
11 under our parole evidence objection, and we make that
12 objection based on the fact that this is, not only
13 parole evidence, but clearly negotiation between
14 attorneys and it would be irrelevant as well.

15 THE COURT: Yes, sir, same ruling, and it is
16 admitted.

17 MR. GASKINS: Your Honor, and just for the record,
18 I would state that they're making the argument that it
19 is -- that the interpretation is different than what
20 you've ruled, and the interpretation which offered
21 which suggests there's an ambiguity in which, in which
22 case parole evidence would be proper.

23 THE COURT: All right, sir. Thank you.

24 *(Whereupon, Plaintiff's Exhibit No(s). 39 marked*
25 *for identification and received in evidence.)*

1 BY MR. GASKINS

2 Q All right. I'll ask that you turn to Page 6.

3 A Okay.

4 Q And look at Section 6.01 at the bottom.

5 A Okay.

6 Q Was the town proposing any revisions to the first
7 part of this section?

8 A It doesn't appear so, no.

9 Q Okay. All right. Let's turn to the next page,
10 Laura, please. Does the remainder of this section indicate
11 that the town was proposing revisions to Section 6.01?

12 A Yes.

13 Q And what's your understanding of the, of the
14 revisions that were proposed by the town?

15 A They struck the entirety of our language in that
16 section, which would have allowed for consequential and
17 punitive damages as well as acceleration of rent at the time
18 of default, and they replaced it with ultimately -- I mean
19 their language in red, which I believe created the
20 liquidated damages provision in the agreement.

21 Q And, ultimately, those changes proposed by the
22 town were adopted by the -- all the parties, correct?

23 A We, we did agree to it, yes.

24 Q If we could, Laura, please go back to the original
25 Parking License Agreement, Plaintiff's Exhibit No. 7, and if

1 you could refer to that as well Mr. Flesch?

2 A Okay. I'm just juggling back here. Yeah, I've
3 got it. It's got multiple, but that's all right. Go ahead.

4 Q All right. If you could, look at Section 1.07B.

5 A Yes, sir.

6 Q And there's already been testimony on it. So, I
7 don't want to be duplicative, but this is the rent reduction
8 provision that would allow the Town's rent to be reduced if
9 the parking operations were profitable, correct?

10 A That's correct.

11 Q Okay. In performing your damage analysis for this
12 litigation, did you factor in this provision into your
13 calculation?

14 A We did not.

15 Q Okay. And why not?

16 A There is language that -- the offset language or
17 the rent reduction language in the first paragraph of B
18 talks about the rent period of the license. That's when you
19 begin to calculate this provision. We never made it to a
20 rent period of the license. The town failed to provide the
21 estoppel. The town failed to make the initial deposit,
22 which was required under this, and, ultimately, in, in June,
23 we terminated the agreement, and those rights would have
24 ceased at that point.

25 Q Okay. In June of 2016?

1 A That is correct.

2 MR. GASKINS: Your Honor, may I approach the
3 witness?

4 THE COURT: Yes, sir.

5 A Are we done with these? I can put these somewhere
6 else.

7 Q Yes.

8 A Okay. I'm sorry. One second. Okay.

9 Q You've been handed what's been premarked as
10 Plaintiff's Exhibit No. 42. Are you familiar with this
11 document?

12 A I am.

13 Q And what is it?

14 A This is the reference termination that we made
15 terminating the Parking License Agreement.

16 Q Okay. And did you receive a copy of this
17 document?

18 A I did.

19 Q Okay. And who drafted it?

20 A Gray Taylor.

21 Q Okay. And who was it sent to?

22 A I believe that we sent it to Mr. Pagliarini.

23 MR. GASKIN: Okay. At this time, Your Honor, we
24 would move to admit Plaintiff's Exhibit 42 into
25 evidence.

1 MR. PAGLIARINI: No objection, Your Honor.

2 MR. GASKINS: Okay.

3 THE COURT: All right. It's in.

4 *(Whereupon, Plaintiff's Exhibit No(s). 42 marked*
5 *for identification and received in evidence.)*

6 BY MR. GASKINS

7 Q What's the date on this letter?

8 A It says June 23rd, 2015.

9 Q I'm sorry. 2015?

10 A Yes, sir.

11 Q Okay. Do you believe that date is correct?

12 A No, that's a mistake.

13 Q Okay. And why do you say it's a mistake?

14 A If you go through the body of the letter, you'll
15 see, at the last paragraph, the first page, I'll just read
16 it. Best way to do it. Our client informed the Town of Mt.
17 Pleasant on June 8th, 2016. Our client's damages under
18 Section 6.01, I won't read the rest, but, essentially, there
19 was a letter sent to the town on June 8th of 2016. That was
20 prior to the termination. So, I know it was in 2016. Not
21 2015.

22 Q Okay. And have you seen that letter referenced
23 that was allegedly sent on June or referenced as being sent
24 June 8th, 2016?

25 A Yes.

1 Q Okay. And do you believe June 8th, 2016, is
2 actually when that letter was sent?

3 A Yes.

4 Q Mr. Flesch, is it your understanding that the
5 Parking License Agreement allows Shem Creek Development
6 Group to recover rent that would come due after termination?

7 A Yes, I do.

8 Q Okay. And why do you believe that?

9 A I believe, in the defaults section, it states that
10 and with a survival clause in 8.17 of the license agreement.

11 Q Okay. Put that up. Laura, if you could pull up
12 the Parking License Agreement again please and turn to
13 Section 6.01. Okay. You just referenced Section 6.01 as
14 allowing the licensor, Shem Creek Development Group, to
15 terminate the agreement and seek rent that comes -- that
16 would be due after termination. What in this section
17 supports your interpretation?

18 A You -- well, we previously discussed, in addition,
19 licensure shall be entitled to bring an action for specific
20 performance, excuse me, specific performance or breach of
21 contract against licensee, but agrees that sole and
22 exclusive remedy shall be rent payments due under this
23 agreement.

24 Q And that sentence begins in addition, correct?

25 A Yes, that's -- it's on top of being able to

1 terminate.

2 Q Okay. All right. You also referred to the
3 survival clause, Section --?

4 A It's 81.17 I believe.

5 Q Laura, if you could pull that up, and what's your
6 understanding of what this provision provides?

7 A That, that our ability to -- the obligations
8 survive the termination of this lease potentially. It says
9 the provision of the licensee with respect to any
10 obligations of licensee to pay any sum owing or to perform
11 any act after expiration or other termination of this
12 license shall survive the expiration or other termination of
13 this license.

14 MR. GASKINS: Your Honor, may I approach the
15 witness?

16 THE COURT: Yes, sir.

17 BY MR. GASKINS:

18 Q Mr. Flesch, you've been handed what's been
19 premarked as Plaintiff's Exhibit No. 53. Are you familiar
20 with this document?

21 A Yes, sir.

22 MR. GASKINS: If the Court will indulge me, I've
23 had my binder opened.

24 Q What is this document?

25 A This is the damages calculation as provided in the

1 liquidated damages provision. So the PLA for the rent.

2 Q And it says damages associated with present value
3 of fixed minimum rent payments, is that correct?

4 A That's correct.

5 Q Okay. In your line of work, do you commonly
6 prepare present value calculations?

7 A I do. Both in loan to fees and buyouts of leases
8 quite frequently.

9 Q And what is the total amount of damages for rent
10 that you have calculated in this exhibit?

11 A \$2,604,316.

12 Q And explain to the Court how you conducted this --
13 how you performed this calculation? What was your
14 methodology?

15 A So, if we just start at the top of the document,
16 there's, there's the date of the loss, and this would be --
17 it would be the date that the town was required to make the
18 first rent payment, which I believe the Certificate of
19 Occupancy, and then we have 15 years of rent as we've
20 previously discussed. And then we had to make assumption of
21 the date of trial or when the payments would start because
22 that splits the payment into past due, and then the future
23 where the net present value would be applied. So, that's a
24 little bit off. We have February 27th, 2020, but it's
25 easily adjustable.

1 And then you have to apply a discount factor
2 to the future payments that are owed, that are owed, and
3 then, for the past rent that is owed, we use what we believe
4 to be the statutory rate of 8.75 percent. And then, of
5 course, the annual rent is the 185,000 that we've been
6 discussing at length.

7 Q Okay. And then what did you do?

8 A And so then you, you split, based on date, we have
9 essentially three years of past due rent that are at the
10 full value of 185,000 because they were already due, and
11 they are brought to bear interest at an 8.75 rate, and then
12 total---

13 Q Why did you use that rate?

14 A I'm sorry.

15 Q Why did you use 8.75?

16 A I believe that to be the statutory prejudgement
17 rate.

18 Q Okay. Keep going. Sorry to interrupt.

19 A That's okay. That, that totals to about \$631,000,
20 and then you still have the future years where the discount
21 then starts to apply, and that's a simple Excel formula
22 discounting the rate back using a 2.03 percent discount
23 factor.

24 Q Okay. And why did you use a 2.03 percent discount
25 factor?

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1 A So, the PLA itself does not expressly state a
2 discount factor as it relates to this situation. And so the
3 American Institute of Certified Public Accounts has criteria
4 on how you would calculate in this situation, and the
5 language first would say defer to the agreement. In this
6 case, there is none. The second would be to utilize an
7 instrument that was at mere likely of zero loss on a ten
8 year treasury, something that would be very, very hard to
9 default on. But, in this case, we thought it appropriate
10 and had the opportunity to mirror the credit. This is a
11 general obligation. The, the agreement's tied to the
12 general obligations of the Town of Mt. Pleasant, and we used
13 a general obligation bond for the Town of Mt. Pleasant, and
14 it's indicative rate out in time.

15 Q And hold on one second while Laura---

16 A Sure.

17 Q ---pulls up the bottom of that.

18 A That's enough.

19 Q Is that the information that you used to come up
20 with the 2.03 percent discount rate?

21 A It is. You'll see the yield for each other year
22 being different. We took an, an average of the yield giving
23 the benefit to the growing yield over time.

24 Q Okay. All right. Laura, if you could pull up the
25 top again? Okay. All right. And if you could kind of wrap

1 it all up and summarize how you came up with your, your
2 total number?

3 A Having the, the rent payment segmented into the
4 two both past and then future, obviously, we need to total
5 those, and, when you total those, you use 631,756 of past
6 losses and the future losses with the, the net present
7 calculation of 1,972,560. And that's how you come to total
8 damages of \$2,604,316.

9 Q Okay. Are you seeking any other damages or costs
10 in this lawsuit?

11 A Yes.

12 Q Okay. And what are those?

13 A Legal and trial costs as provided under the PLA.

14 Q Okay. And is it your understanding that the
15 parties have agreed to handle those matters after trial?

16 A Correct.

17 Q Okay. And what contractual provision, if any,
18 allows you to recover attorney's fees and costs if you
19 prevail on this case?

20 A I believe that it's gonna be 6.01, but let me
21 confirm that please. Yes, the last sentence of 6.01, and
22 I'll just get to the middle of it, and agree that the
23 prevailing party in any dispute shall be entitled to an
24 award of costs and attorney's fees including the cost of
25 trial and appeals.

1 Q Because we're talking about damages and lost
2 income and money, I want to address the Town's contention
3 that they've made in this lawsuit. That -- you could have
4 provided 276 spaces, total spaces, and 132 public spaces,
5 but you didn't because you want to maximize profits and
6 imply that you're greedy. What's your response to that?

7 A I'll use my words cautiously. That doesn't sit
8 well with me to ascribe a motive like that to what we're
9 doing. I think we've demonstrated, you know, through the
10 past several hours of testimony, we did everything we could
11 do to maximize the number of spaces here. We offered
12 multiple solutions and found an unwilling partner in those
13 to accommodate us to build a number of spaces, and then it's
14 suggested that the only reason we wouldn't build a third
15 floor of parking is profit. There's -- nothing could be
16 farther from the truth.

17 That project, I don't believe, could be built
18 with a third story. It's economically unfeasible to do so,
19 and this whole time we're talking about -- I'm sorry. This
20 is, this is just a little -- this one hits home for me
21 because you're, you're basically suggesting that greed is
22 the driving factor here, and we went to incredible expense
23 to continue to pursue this project. We had to acquire land.
24 We had to modify design, pay attorneys. And through all of
25 this, when we tried to get them to adjust the zoning, to

1 work with us on civic use. At the end of the day we still
2 offered to lower the rent. I don't ascribe that to somebody
3 that's pursuing profit.

4 We were gonna lower the amount of money we
5 were gonna make just to try to get this project through,
6 and, ultimately, the decision was made, at great, you
7 know -- I'm sorry. It -- the decision was made to move
8 forward with this project. Our, our -- Shem, Shem Creek
9 Development Group had to sell an 85 percent portion of this
10 project to make it happen. And Mr. Small and I had to
11 guarantee 14 and a half million dollars of debt personally,
12 nobody else, to get this done. And we did so for a variety
13 of reasons. We, we believed in this project.

14 We had told restaurants that this project was
15 coming. We had told the City we were gonna build this
16 project. We had told office users we were gonna build this
17 project. And, ultimately, it is not very profitable for
18 Mr. Small and I. However, all of the benefits ascribed
19 under the agreement that we discussed yesterday, 150,000
20 parking spaces -- uses in the parking garage, new office
21 tenants, new restaurants, property taxes, licenses, all of
22 these things happened and all these benefits were given to
23 the town and are today.

24 If we drove down there today, we could go
25 into that garage, and I've received zero dollars in rent,

1 and it's not greed. We, we saw this project through, to our
2 own detriment at times, and we offered so many solutions to
3 try to get this done. And it's actually sad because,
4 ultimately, if we worked together, we could have done even
5 better. But I believe, as it sits, we did a great job, and
6 it's doing exactly what it's ascribed to do without a third
7 story of, of parking that wasn't feasible in the first
8 place. So, I -- it -- I'm sorry to be animated. It offends
9 me when men ascribe a motive to something that's just not
10 the case I guess is the way I would leave it. It's just not
11 true.

12 MR. GASKINS: Thank you, Mr. Flesch. That's all I
13 have at this time.

14 THE COURT: Now we'll take a brief morning recess
15 before we go into cross-examination. Why don't we take
16 about a ten minute break, and then we'll start with
17 cross-examination.

18 MR. PAGLIARINI: Very well, Your Honor. Thank
19 you.

20 (Short break.)

21 THE COURT: Come back up, sir.

22 MR. GASKINS: Your Honor, before we start the
23 cross examination, I failed to move to admit two of the
24 photographs that we had marked as exhibits yesterday,
25 59 and 60. And, at this time, we would move to admit

1 Plaintiff's Exhibits 59 and 60 into evidence.

2 THE COURT: Any objection?

3 MR. PAGLIARINI: No, Your Honor.

4 THE COURT: All right. They're in.

5 *(Whereupon, Plaintiff's Exhibit No(s). 59-60*

6 *marked for identification and received in evidence.)*

7 THE COURT: You may proceed. Your witness.

8 MR. PAGLIARINI: Thank you, Your Honor.

9 CROSS EXAMINATION

10 BY MR. PAGLIARINI:

11 Q Good morning, Mr. Flesch.

12 A Good morning.

13 Q You have been in the develop -- development
14 business for some time, correct?

15 A That is correct.

16 Q How many years?

17 A A little over 20.

18 Q You've done numerous projects, is that correct?

19 A Yes.

20 Q In every project, as you've previously -- as we've
21 previously discussed, there are challenges, is that correct?

22 A Yes, sir.

23 Q Financial challenges?

24 A Yes.

25 Q Legal challenges?

1 A Yes.

2 Q Design and zoning challenges, is that correct?

3 A Yes, sir.

4 Q And as you testified at the end of yesterday, the,
5 and today, this project was completed; is that right? There
6 is a structure. There is an office building. There is a
7 parking garage. Is that correct?

8 A Yes, sir.

9 Q And you're very proud of that building I think as
10 you've testified? You even -- your office is in the
11 building, is that correct?

12 A That's correct.

13 Q It's been a success?

14 A In my estimation it's been a success, yes, sir.

15 Q At the time you began considering an office
16 building project on Shem Creek, this, this specific parcel
17 of land that -- had a tenant with a 99 year ground lease, is
18 that correct?

19 A That's correct.

20 Q And that tenant was Roper Hospital or Roper?

21 A Roper St. Francis, correct.

22 Q And you came to understand that Roper was looking
23 to exit that position as tenant of the property; is that
24 correct?

25 A Potentially, yes.

1 Q Ultimately, the ground lease position was listed
2 for sale?

3 A It, it was.

4 Q And there was a concern with -- between you and
5 Mr. Small, your partner, that someone else might purchase
6 the ground lease and construct some sort of project at that
7 location, is that correct?

8 A I believe it was a mutual concern between the town
9 and us, yes, as it related to the parking structure.

10 Q But---

11 A Not as it relates to the ground itself, no.

12 Q But you had some concern that -- some time concern
13 that you and Mr. Small needed to act in order to take
14 advantage of this property; is that correct?

15 A Again, in relation to the parking structure---

16 Q No. It not---

17 A I'm sorry. Ask your question again.

18 THE COURT: Can you repeat the question?

19 THE WITNESS: Yeah. I'm sorry.

20 BY MR. PAGLIARINI:

21 Q You and Mr. Small had some concern that, in order
22 for you to act, or, excuse me, that with Roper's position,
23 that you needed to act quickly in order to acquire the
24 rights to build on this property, is that correct?

25 A That is not just ascribed to Mr. Small and I.

1 That's to the town as well. We were trying to do something
2 together. That's correct.

3 Q I'm asking for you and Mr. Small.

4 A Yes, we had some concerns, that's correct.

5 Q You, specifically you, were not involved in
6 retaining Ken Betsch, the architect, to prepare the concept
7 sketches for the garage, is that correct?

8 A Yes, sir.

9 Q And part of Mr. Small's role in this project was
10 to take the lead in the, in the design, is that correct as
11 well?

12 A In part, yeah. He would, he would have been the
13 partner that was leading that, correct.

14 Q So, at the time Mr. Betsch was retained, and I'm
15 going back to December, 2012, you had not undertaken any
16 effort to know or understand any specific zoning laws or
17 development requirements that would apply to the subject
18 property, is that correct?

19 A That's correct.

20 Q Your recollection, when I asked you in your
21 deposition, one of your depositions, was that Mr. Beck---

22 MR. GASKINS: Your Honor, this is improper
23 impeachment. If he's got a question, he can ask it,
24 and if he provides an inconsistent statement, then he
25 can use the deposition. But just referring to the

1 deposition is improper.

2 THE COURT: Mr. Pagliarini.

3 BY MR. PAGLIARINI:

4 Q I'll ask it. Your recollection was that
5 Mr. Betsch was not tasked with reviewing or gaining any
6 understanding of the zoning laws or requirements, is that
7 right?

8 A I believe that's correct, yes.

9 Q And you don't know whether any setbacks were
10 included in Mr. Betsch's drawings or designs, is that right?

11 A It would appear that, that it is a zero lot line
12 drawing.

13 Q And, specifically, on Coleman Boulevard, when you
14 say zero lot line, he did the building right up on Coleman
15 Boulevard, is that right?

16 A All of the lot lines, correct.

17 Q Yeah. But you never met with Mr. Betsch to
18 discuss these conceptual drawings, is that correct?

19 A I didn't.

20 Q Again, Mr. Small was the person who has -- was in
21 contact with Mr. Betsch in discussing the design with him,
22 is that right?

23 A Yes.

24 Q You did not have a decision in, in excluding any
25 of the three schemes that Mr. Betsch provided for you -- for

1 the, for the development company, I guess, is the best way
2 to put it?

3 A I'm a partner in that company. Would have input
4 on anything that the partnership would ultimately do.

5 Q You didn't re -- you didn't review those schemes
6 with Mr. Betsch though, did you?

7 A With Mr. Betsch, no.

8 Q So, Mr. Flesch, I put our exhibits in a, in a
9 binder there, and the Judge has a, a matching binder. And
10 so I understand you have a pile of exhibits, but I think,
11 for our purposes, it might be easier just to refer to these,
12 but whatever helps you.

13 A Sure.

14 Q Specifically, I want to turn to Tab 18, which is
15 the Parking License Agreement, if you would?

16 A Yes, sir.

17 Q Now, as, as, as you, you testified to today and
18 yesterday, you were not prominently involved in the, in the
19 negotiation with representatives of the Town of Mt. Pleasant
20 regarding the Parking License Agreement, is that correct?

21 MR. GASKINS: Your Honor, I hate to interrupt at
22 this minute, and I'm not interrupting his questioning,
23 but I was given an exhibit folder from the Defendants,
24 and I believe it includes some of their work product,
25 and I don't want to be accused of having access---

1 MR. PAGLIARINI: Okay.

2 MR. GASKINS: ---having access to that. So, I
3 would like to return it and get a clean copy.

4 MS. COPELAND: Bear with me one second. I'm gonna
5 have to change out a copy.

6 MR. PAGLIARINI: I'm referring to the PLA.

7 MR. GASKINS: I know you are.

8 MR. PAGLIARINI: All right.

9 MR. GASKINS: I just didn't -- I just wanted to do
10 that---

11 MR. PAGLIARINI: All right. Thank you.

12 MR. GASKINS: ---as soon as possible.

13 MS. COPELAND: Excuse me one second. Yeah, let me
14 take yours. Actually, hold on.

15 BY MR. PAGLIARINI

16 Q So, Mr. Flesch, you executed the Parking License
17 Agreement, is that correct?

18 THE COURT: Does everyone have the notebook that
19 we're---

20 A You had asked me a question prior to the question
21 you just asked.

22 Q Sure.

23 A I, I apologize. I didn't understand what you
24 asked me.

25 Q Sure. I'll go back.

1 A Or was it a statement? I don't remember.

2 A

3 BY MR. PAGLIARINI

4 Q Sure. You, you were not primarily involved in
5 negotiations with the Town of Mt. Pleasant regarding the
6 terms and provisions of the Parking License Agreement, is
7 that correct?

8 A I was not the point person within our partnership
9 that was knowledgeable of the Parking License Agreement,
10 yeah, that would be---

11 Q But as, as was discussed, you executed, and as is
12 evident on the Parking License Agreement, you executed that
13 agreement, is that correct?

14 A That is correct.

15 Q Section 1.05, which is on Page 2 of the agreement
16 --

17 A Yes, sir.

18 Q -- and that is entitled project, is that correct?

19 A That's correct.

20 Q Can you read that provision into the record, the
21 entire 1.05?

22 A Yes, sir. It's labeled project. The project
23 consists of a multilevel structured parking garage comprised
24 of 276 total spaces and proposed office complex. A
25 conceptual rendering of the project is attached and hereto

1 as Exhibit A.

2 Q Well, 1.05, as, as you just read in, the project
3 consists of 276 total parking spaces, correct?

4 A Correct. Reflected in conceptual rendering,
5 that's correct.

6 Q Okay. Well, let's go to that conceptual rendering
7 in Exhibit A, and are there any notations as to how many
8 parking spaces are -- are there any notations on Exhibit A
9 as to how---

10 A I'm sorry, Mr. Pagliarini, but I don't have
11 Exhibit A.

12 Q Okay. Here you go, sir. This is the Parking
13 License Agreement. Just use that.

14 A Okay.

15 Q Can you go to Exhibit A?

16 A Yes, sir.

17 Q Are there any notations as to parking -- number of
18 parking spaces on Exhibit A?

19 A There are not.

20 Q Can you tell by looking at the picture how many
21 parking spaces are in Exhibit A?

22 A No.

23 Q It does not define at all, Exhibit A, the number
24 of parking spaces, is that right?

25 A It's not written on Exhibit A, no.

1 Q And going back to 1.5, 276 is listed as a specific
2 number, is that correct?

3 A Yes, sir.

4 Q You agree that a number had to be included so that
5 you knew what to build, is that right?

6 A I would go in reverse with that answer. We had a
7 conceptual rendering of 276 spaces. Therefore, that's what
8 made into the agreement, correct.

9 Q That 276 is a number that I say you, whether you
10 and/or Mr. Small, your partnership, that is a number that
11 you all came up with, right?

12 A It was reflective of Mr. Betsch's conceptual
13 layout, yes.

14 Q All right. You based it on what Mr. Betsch had
15 provided?

16 A Correct.

17 Q And rent, as has been discussed on Page 3 in
18 Section 1.07, the fixed rent was tied to the number of
19 spaces, is that correct?

20 A I would not necessarily agree with that, no.

21 Q In your mind, the amount of rent was not, what the
22 town was renting, 276 spaces, was not tied to the -- to a
23 specific number of spaces---

24 A I'm gonna---

25 Q ---is your position?

1 A ---expand on what you're asking me. This
2 agreement was negotiated. We started out at an amount
3 higher -- much on rent, and the town started out much lower,
4 and very commonly, in negotiations, you meet in the middle
5 at a number, which is what happened here. I don't know how
6 they were ascribed per space. I don't know what that math
7 was. We were over \$200,000 a year in rent, and I, I -- I'm
8 not a hundred percent sure. I believe the town was in the
9 160s, but, ultimately, we came together in the middle on a
10 number. So --

11 Q The fixed rent amount was a bargain for a number
12 is what you're saying?

13 A It was negotiated, yes.

14 Q So, as you've testified, it's your position that
15 the Parking License Agreement did not require Shem Creek
16 Development Group to provide 276, but rather that that was a
17 conceptual or fluid number, is that correct?

18 A Based on certain circumstances, that's correct.

19 Q The truth is you and your partner were in a hurry
20 at this point, in the Summer of 2013, to move forward with
21 an agreement so that you can make sure that the subject
22 property was not -- the, the ground lease was not sold to a
23 third party, is that right?

24 A Mr. Pagliarini, that's the third time you've
25 ascribed that motivation strictly to my partner and myself

1 and not saying the town. Our conversations with the town,
2 we wanted to do the project together. The project, the land
3 that we're talking about was being marketed. So, yes, we
4 had concerns we wanted to move. So did the town. You keep
5 ascribing that it was just my partner and I. That's not
6 accurate.

7 Q Well, here's where I get confused because I look
8 at this agreement, and I see Section 6.05, which I'd ask you
9 to turn to. Excuse me.

10 A There is no 6.05, sir.

11 Q Hold on. Section 8.05 on Page 8.

12 A Hold on a second, please. Yes.

13 Q Can you read Section 8.05 in its entirety into the
14 record, sir?

15 A Sorry. Excuse me. I just dropped the document.
16 Section 8.5 (sic) is labeled no partnership. By execution
17 or performance of this license or any related agreement,
18 licensor does not, in any way or for any purpose, become a
19 partner of licensee in the conduct of its business or
20 otherwise or joint venture or member of a joint enterprise
21 with the licensee.

22 Q So, you, you just testified -- you just told me
23 that the town had concerns about you-all acquiring the
24 property.

25 A Absolutely.

1 Q Are, are you saying there was some joint effort to
2 acquire the property?

3 A That was not what I said.

4 Q All right.

5 A I said there were concerns. If the property were
6 to be sold to other users, the Town's vision for the parking
7 and ultimately the benefits the parking would give to the
8 town would not be possible. That's where the concern arises
9 from.

10 Q You'd also agree that the licensor, as provided in
11 the agreement, Shem Creek Development Group, had sole and
12 exclusive control and responsibility for management of the
13 project, is that right?

14 A Yes, sir.

15 Q And decisions regarding staffing, hiring of
16 employees, operational standards, maintenance, parking fees,
17 rules, regulations, and all other decisions related to
18 operation, operation of the project rested with your
19 company; is that correct?

20 A Yes, sir.

21 Q The town had no say in those matters?

22 A Short of it being applicable by law, no.

23 Q At the time that the PLA or around the time the
24 PLA was executed, it's your position that the company could
25 have built anywhere between 28,000 and 42,000 square feet,

1 is that right?

2 A I, I believe we had a consent. I think that was
3 part of the next step was to figure out exactly how many
4 square feet could be built.

5 Q There, there was no decision on the number of
6 square feet that could be constructed for office space at
7 the time that this was agreed to, is that correct?

8 A Yeah, I think there would be a reasonable
9 discussion amongst our side of, you know, if it were 200,000
10 square feet, that that might not be marketable, but
11 that's -- that range is fairly accurate.

12 Q You also agree that, at the time the PLA was
13 executed in October, 2014, the Town of Mt. Pleasant's zone
14 ordinance required nine, 9-foot by 18-foot parking spaces,
15 is that correct?

16 A I don't agree with that.

17 Q You don't agree that that's what the ordinance
18 required?

19 A I believe there's some ambiguity to the ordinance.

20 Q Do you know of any ordinances that would allow an
21 8-foot 6-inch parking space in a, in a structure?

22 A I don't offhand, but I'm happy to review the
23 ordinance with you if I have it.

24 Q Do you know of any structures in the Town of Mt.
25 Pleasant that were parking decks or parking garages that

1 have 8-foot 6-inch parking spaces?

2 A My understanding is we were the first parking
3 deck, structured parking deck for pay in Mt. Pleasant.

4 Q There are others at this point, are there not?

5 A I believe there are now.

6 Q Do you know if any of those have 8-foot 6-inch
7 spaces?

8 A I, I would have no reason to look into what their
9 parking spaces are. So, no, I guess is the answer.

10 Q You don't know the parking space width that
11 Mr. Betsch utilized in his conceptual schemes, is that
12 correct?

13 A I wasn't a hundred percent sure, but I've come to
14 know it was 9-feet.

15 Q So, Mr. Betsch used 9-feet, is that correct?

16 A That's correct.

17 Q You also -- you agree that the rendering,
18 Exhibit A that we just reviewed, is the sole rendering
19 attached to the Parking License Agreement at the time it was
20 approved by Mt. Pleasant town council in October '13 --
21 2013, is that right?

22 A Attached, yes.

23 Q And you don't know whether any of the conceptual
24 plans, any of the -- that Mr. Betsch had prepared were ever
25 provided to anyone at the Town of Mt. Pleasant prior to that

1 date, prior to approval of the Parking License Agreement?

2 A I'm sorry. Ask that question again please.

3 Q Sure. Mr., Mr. Betsch, as we, as we discussed
4 earlier, prepared schemes, proposals essentially, for the,
5 the building plan and design, is that right?

6 A Yes.

7 Q You don't know that any of those schemes were
8 provided to anyone at the Town of Mt. Pleasant prior to the
9 approval of the Parking License Agreement in 2013?

10 A My understanding is Mr. Small had presented them
11 to the town.

12 Q You did not?

13 A I did not personally, no, sir.

14 Q In fact, you don't know whether any of those
15 schemes or plans were provided before April, 2014 when
16 the -- excuse me, June, 2014, when the ultimate plan was
17 submitted to the Town of Mt. Pleasant?

18 A I just testified I believe my partner provided
19 those schemes.

20 Q You were not at the preplanning meeting in June,
21 2014, is that correct?

22 A I don't believe so, no.

23 Q You testified yesterday about that, but you didn't
24 testify that you were there. I don't want to say that you
25 did, but it was clear that you were not at that meeting, is

1 that right?

2 A That -- I believe that -- yes.

3 Q You're not aware that any of Mr. Betsch's schemes
4 were provided to the Town of Mt. Pleasant at that meeting,
5 are you?

6 A At that meeting specifically, no, I was not there.

7 Q You're not aware that any proposal or development
8 plans, plans outlining the number or showing the number of
9 spaces, were provided to the Town of Mt. Pleasant until that
10 pre-submission meeting in June, 2014?

11 A I'm sorry. I'm gonna say it again. My partner
12 provided the plans to the Town of Mt. Pleasant.

13 Q You're, you're definitive now or you think your
14 partner provided them?

15 A I didn't say think. I've, I've said -- this is
16 the third time I have said that my partner provided the
17 plans to the Town of Mt. Pleasant. That's what I
18 understand.

19 Q You're not aware that anyone from your group, Shem
20 Creek Development Group, or any of its contractors met with
21 anyone at the town prior to the execution of the PLA, the
22 Parking License Agreement, to discuss feasibility or initial
23 plans, is that correct?

24 A I, I believe my partner was in communication with
25 the town about feasibility of the project, yes. I, I do

1 think he was in contact with them.

2 Q As completed, the garage contains 234 spaces, is
3 that right?

4 A Yes, sir.

5 Q Yesterday you discussed Ordinance 13077. Is that
6 number familiar to you or is that ordinance familiar to you?

7 A I believe that's the first amendment from
8 December of 2014.

9 Q Yes, sir. And, for reference, if you would, that
10 is in our exhibits Page 21 or, excuse me, Exhibit 20, Number
11 21.

12 A Let me get that. Okay.

13 Q Ultimately this ordinance was approved in
14 December, 2013, is that right?

15 A Yes, sir, I believe so.

16 Q And I believe you testified to yesterday, at --
17 in -- at the time this ordinance was approved in December,
18 2014, there was a 20 to 30-foot setback on Mill Street, is
19 that correct?

20 A No, that's not correct.

21 Q What was the setback on Mill Street?

22 A I believe the side street setback was 20-feet with
23 a footnote with a reduction of 5-feet with the three
24 criteria that you needed to provide at least.

25 Q So the standard was 20 to 30-feet?

1 A No, sir.

2 Q Okay.

3 A I don't believe that it was a build-to line.

4 Q I said---

5 A I believe it was a setback.

6 Q I said setback line. So, it's---

7 A It's not 20 to 30-feet either I don't believe---

8 Q Okay.

9 A ---on Mill Street.

10 Q Yes, sir, on Mill Street.

11 A I don't believe it's 20 to 30-feet.

12 Q Okay.

13 A Prior to, no.

14 Q What was the setback on Mill Street?

15 A Our 20-foot setback with a Footnote Number 5 that
16 allowed for the reduction of that to 5-feet with certain
17 parameters that were met.

18 Q With the parameters, is that correct?

19 A Right, but it was 20-feet before that. Not 20 to
20 30-feet.

21 Q 5-foot setbacks, there had to be certain items,
22 certain matters that were achieved before you can get the
23 5-feet, is that right?

24 A Three, three items. The 5-foot setback --
25 sidewalk, certain plantings, and a line of sight requirement

1 by design.

2 Q Did you undertake any study, prior to submission
3 of the plans, submission to the Town of Mt. Pleasant in
4 June, 2014, whether the Shem Creek Development Group could
5 achieve the reduction to that 5-foot setback?

6 A Are you asking me personally or ever our, our
7 vendors. Our, our architects certainly did, yes.

8 Q Okay. So, did you?

9 A Personally---

10 Q Yes.

11 A ---design the building, no.

12 Q Right.

13 A No, sir.

14 Q All right. Did they tell you that you could
15 achieve a 5-foot setback on Mill Street?

16 A Yes, sir.

17 Q And who told you that?

18 A Jeff Johnston.

19 Q Jeff Johnston told you that?

20 A Yes, sir.

21 Q All right. Did anyone at the Town of Mt. Pleasant
22 tell you that you could achieve a 5-foot setback?

23 A I hadn't had any discussions with anybody from the
24 Town of Mt. Pleasant.

25 Q Well, did, did, did Mr. Johnston tell you that

1 someone at the town told him that he could achieve, through
2 his design, a 5-foot setback?

3 A I don't recall the specific conversation. It was
4 Mr. Johnston applying the Code to what he was drawing.

5 Q So, he applied the Code. He didn't speak with
6 anyone at the Town of Mt. Pleasant?

7 A I don't know. I can't speak for Mr. Johnston. I
8 believe you'll have an opportunity to speak with him I'm
9 sure. I don't know---

10 Q Well, you---

11 A ---if he spoke to the town.

12 Q You were in his deposition when we took his
13 deposition, weren't you?

14 A Yes, sir, that was about the seventh or eight
15 deposition I've been a party to. I don't remember
16 everything---

17 Q And you---

18 A ---said at every deposition.

19 Q You, you don't remember that he testified---

20 MR. GASKINS: I'm going to object.

21 Q ---that the first time he spoke---

22 MR. GASKINS: This is hearsay. He's
23 referring to a deposition. This witness is gonna be
24 presented, and he can talk about what, what---

25 THE COURT: He's already answered he didn't -- he

1 doesn't remember. Let's move on, counsel.

2 BY MR. PAGLIARINI

3 Q There's no doubt that getting the 5-feet -- 5-foot
4 setback in accordance with 13077 was speculative; is that
5 right?

6 A No, I don't believe speculative. I believe it --
7 you meet the three requirements, you get the setback. I
8 wouldn't call that speculative.

9 Q Well, you had to meet the three requirements.

10 A Right, there's a pathway to meet them. We're not
11 speculating -- we're not guessing that we can meet them.
12 It's laid out. The pathway's laid out to meet that setback
13 given those three requirements.

14 Q Let's go back to Ordinance 13077, and are you
15 aware that this ordinance was approved in December, 2014,
16 second reading of town council, is that right?

17 A I believe that's correct.

18 Q You were not present at that meeting?

19 A I don't believe I was present at that meeting.

20 Q Do you know whether Mr. Small was present at that
21 meeting?

22 A I, I don't remember, no, sir.

23 Q You testified yesterday, I'm moving to -- I don't
24 want to confuse you, the Court, or anybody, about Ordinance
25 14022, the one that had final reading in April, 2014, that

1 changed the setbacks?

2 A Can you refer me to the exhibit please?

3 Q Sure. Yes, that is 26.

4 A Thank you, sir.

5 Q Okay. You testified yesterday that it was a
6 surprise to you when 14022 was approved in April, 2014, is
7 that right?

8 A That's correct.

9 Q That you had no notice or no knowledge that it was
10 being discussed or that it had even been approved, is that
11 right?

12 A No, I learned from Mr. Johnston I believe when our
13 plans -- we had our pre-submittal meeting I believe three
14 days later, and the feedback was given to him that these new
15 applications of zoning code would apply. Now, subsequently
16 coming to the trial, I -- my understanding is Mr. Small had
17 a conversation with Mr. DeMoura in regards to that.

18 Q Do you know whether the genesis of 14022 was
19 discussed at the December, 2013 council meeting?

20 A I don't know.

21 Q You, you were not there. You'd have to rely on
22 Mr. Small to answer that question?

23 A I would rely on the town to tell me what the
24 genesis of their own ordinance is.

25 Q Okay. I'd like to point you to December, 2013,

1 December 13th, 203, town council minutes, which is No. 8.

2 A Okay. One second.

3 THE COURT: Counsel, what number was that?

4 MR. PAGLIARINI: No. 8, ma'am.

5 THE COURT: What exhibit number?

6 MR. PAGLIARINI: Exhibit No. 8 in our book, which
7 is the December 10th, 2013, council minutes.

8 BY MR. PAGLIARINI:

9 Q Mr. Flesch, I'd like you to turn to Page 14 of 36.

10 A Yes, sir.

11 Q And, at the very bottom, the last paragraph, it
12 says, Ms. Stokes-Marshall, do you see that, moved that the
13 planning committee study. Do you see that paragraph?

14 A Yes, sir.

15 Q Can you read that?

16 MR. GASKINS: Your Honor, I'm, I'm gonna object.
17 I don't believe there's any -- been any foundation laid
18 that Mr. Flesch has any personal knowledge. He
19 testified he was not at this meeting. He hasn't asked
20 him any questions about whether he's reviewed these
21 meeting minutes. So, if he wants to ask questions
22 about this, he should ask the people who are there or
23 who drafted the minutes.

24 THE COURT: I'll give him some latitude on
25 cross-examination. You can ask it.

1 BY MR. PAGLIARINI

2 Q Can you read that paragraph then, sir?

3 A Yes, sir. Ms. Stokes-Marshall moved that the
4 planning committee study the relationship between the Main
5 Street revitalization effort and existing neighborhoods.
6 Specifically items such as parking setbacks, density
7 building heights, and development standards. For example,
8 requirements such as public streets, minimum lot sizes,
9 studying or existing commercial properties meet existing
10 residential properties. The planning commission should
11 deliver it's recommendations within 60 days. She said that
12 they will be reaching out to members that are representative
13 of the community in the Old Village with a dialogue where
14 they can come to a meeting of the minds and consensus of
15 agreement that will ultimately benefit and continued the --
16 improve the quality of life of our citizens. And then it
17 says the motion was seconded by Mr. Nichols.

18 Q And, sir, if you could then go to Page 18 of 36.

19 A Yes, sir.

20 Q And I want to say the -- around the tenth line.

21 I'm sorry if I'm not precise. But it says
22 Ms. Stokes-Marshall amended her motion to include
23 residential properties. Do you see that line?

24 A Yes, sir.

25 Q And, further down, I believe it says Mr. Santos

1 seconded the amendment to the motion. Do you see that
2 portion?

3 A Yes, sir.

4 Q And then, ultimately, it says, and, and correct me
5 if I'm wrong, the motion carried eight to one with
6 Mr. Santos voting no, is that correct?

7 A Yes, sir, that's right. Yes, sir.

8 Q Okay. So, it's eight to one that council was
9 going to study this issue, is that right?

10 A Yes.

11 Q And this issue being the relationship between Main
12 Street revitalization effort and existing neighborhoods such
13 as parking setbacks, density, and building heights, and
14 development standards, is that right?

15 A Yes.

16 Q This is the same meeting where town council agreed
17 to increase the height limit to 55-feet, is that right?

18 A Among other things, yes.

19 Q And, and to allow no commercial development on the
20 fort -- on the first floor of the, of the project, is that
21 right?

22 A That is correct.

23 Q You understood, and, again, I want to make sure
24 I'm not confusing Ordinance 13077, that was approved in
25 December, 2013, that was a district wide amendment, is that

1 correct, in that it affected properties other than the
2 property you proposed to build the project on, is that
3 right?

4 A Please ask the question again for me.

5 Q Sure. Ordinance 13077, and I'll ask it this way,
6 affected more than one property, is that right?

7 A My recollection, and I was not at the meeting, my
8 recollection is that it altered Area C-1, which had more
9 than one property, but I believe less than five.

10 Q So, Mr. Flesch, in Exhibit 8, we, we -- I asked
11 you to read provision from Page 14 and from Page 18, and I'd
12 like you to go to Page 26 if you wouldn't mind.

13 A Yes, sir.

14 Q And about a third of the way down it says final
15 reading and ordinance to amend various provisions. Do you
16 see that section?

17 A Yes, I do.

18 Q Can, can you just -- you don't need to read it out
19 loud, but can you take a look at that provision?

20 A Yes, sir.

21 Q Is it your understanding that Ordinance 13077 was
22 passed by council at that time?

23 A Yes.

24 Q It was passed after they discussed the proposed
25 review into the setbacks and other development standards

1 near the Old Village, is that right?

2 A Yes.

3 Q But you-all didn't have any notice that these
4 discussions and changes were, were going to happen or at
5 least be discussed over the next few months, is that right?

6 A Let me be clear with you, okay, because we're,
7 we're, we're confusing the two ordinances. This is the
8 December, 2013 ordinance. We made the request in a letter.
9 I say we, my partner made a request in a letter to
10 Ms. Stokes-Marshall for changes that would help us build the
11 facility. The notification issue, or the lack thereof, is
12 applicable to the April changes that were made, which I
13 apologize if I get the number wrong, but I believe it's
14 14022.

15 Q All right.

16 A I'm not -- I, personally, am not saying we weren't
17 notified about the 077 meeting. We requested these changes.
18 We knew it would be voted on at some point. They were our
19 changes that we requested in part. I know you did other
20 things. So, no, we knew about this, this meeting. That's
21 what you're asking me about, the notification for this
22 particular meeting. Is that accurate?

23 Q What I'm asking you is you claimed that you didn't
24 have any notification about Ordinance 14022 that was
25 approved in April of 2014, is that right?

1 A That is correct.

2 Q And what I'm saying, and what you just read, was
3 that not the genesis? Was that discussion not had by town
4 council as to what they intended to do that ultimately
5 became Ordinance 14022?

6 A Your suggestion is the verbiage they're talking
7 about in this ordinance review that I didn't attend the
8 meeting was proper notice to me that they were gonna make
9 significant changes in April. No, I don't, I don't consider
10 that notice. I didn't know about this.

11 Q I'm not suggesting that it was proper notice or
12 any kind of legal notice. What I'm suggesting is, is that
13 it was discussed at the December, 2013 council meeting, is
14 that correct?

15 A That they would review what you said, yes.

16 Q Yes.

17 A It said nothing about April, but --

18 Q Right.

19 A Correct.

20 Q That -- those issues would be reviewed, is that
21 right?

22 A Yeah, they tasked people to review them.

23 Q And these are the same council members that
24 approved a 55-foot building height, is that right?

25 A That's correct.

1 Q And the same council members that would allow
2 construction on the first floor without commercial
3 development, is that right?

4 A That's correct.

5 Q Are you aware, Mr. Flesch, that on December 19th,
6 2014, there was a special planning committee meeting to
7 discuss the motion that was made at the council meeting just
8 over a week prior?

9 A No, I was not aware of that.

10 Q Are you aware that those special planning
11 committee meetings are announced to the public and made
12 available?

13 A I would imagine they are.

14 Q And they're public meetings, right?

15 A Yes, sir, I would imagine they are.

16 Q Are you aware that there was another special
17 planning committee meeting to further discuss what would
18 become Ordinance 14022 on January 10th, 2014?

19 A No, I've clearly testified I didn't know about
20 those ordinance changes.

21 Q Are you aware that on February 14, 2014, there was
22 a planning commission meeting where they considered proposed
23 amendments to the urban corridor overlay district that would
24 eventually become Ordinance 14022?

25 A No, sir.

1 Q Are you aware that planning commission meetings
2 are required -- that there was a public hearing required at
3 that meeting?

4 A Generally those are open to the public, yes, I
5 believe so.

6 Q And are you aware that they're also advertised to
7 the public in the newspaper?

8 A I believe that's part of the requirement, yes.

9 Q Are you aware that on February 27th, 2014, there
10 was another special planning commission meeting to discuss
11 this issue?

12 A No, sir.

13 Q Are you aware that on March 11th, 2014, there was
14 a town council meeting where Ordinance 14022 received first
15 reading?

16 A No, sir.

17 Q Are you aware that on April 8th, 2014, town
18 council approved the second and final reading of the
19 ordinance that was Number 14022?

20 A Am I aware now or aware---

21 Q All right. Were you aware at the time?

22 A No, sir.

23 Q And you would not disagree with me that all of
24 these meetings are noticed by the Town of Mt. Pleasant so
25 that the public could attend, is that right?

1 A I assume that they were. I don't know.

2 Q And yet you expected that someone from the town
3 would pick up the phone and call you and tell you that this
4 was -- that all of this was happening?

5 A I didn't characterize it like that, that they pick
6 up the phone and call us. I do think, when we're trying to
7 collaborate to bring a project to fruition and changes to a
8 specific location that the town is a licensee in, and would
9 have an effect, contractual effect, that someone might take
10 notice and give notice, yes, or at least consider the
11 impacts of said ordinance.

12 Q Well, that would assume that someone from the town
13 knew or had knowledge that the amendments in 14022 were
14 gonna affect your design, is that right?

15 A Yes.

16 Q It would assume they had that knowledge, right?

17 A How could they not have that knowledge?

18 Q Well, I'll tell you how they could not.

19 A Fair enough.

20 Q Did you -- did your architect get with anyone from
21 the Town of Mt. Pleasant, prior to the enactment of 14022,
22 to discuss proposed plans?

23 A I don't know the answer to that.

24 Q All right. Did you get with anyone at the Town of
25 Mt. Pleasant in that interim to discuss proposed plans?

1 A I did not. But I can answer your question for you
2 if you would prefer.

3 Q As of April, 2014, after April 8th, after
4 April 8th, some three days later, April 11th is when the
5 first pre-submittal meeting occurred, is that right?

6 A That's correct.

7 Q And there's a series of emails that you're aware
8 of where Mr. Johnston reported to you his findings at, at
9 that meeting, is that right?

10 A That's when I became aware of the ordinance
11 changes, that's correct.

12 Q All right. You have reviewed Ordinance 14022, is
13 that correct?

14 A In passing.

15 Q Okay. Well, you, you went through it yesterday.
16 Do you have a general knowledge, general knowledge or
17 understanding that those amendments -- that that amendment
18 and those amendments to the UCOD affected the entire overlay
19 district?

20 A And that was my comment in passing the amendment
21 applicable to our project. I didn't review the entire
22 ordinance. I do believe there's changes to other places,
23 yes.

24 Q What I believe you testified to, and what you are
25 aware of, is that Footnote 5 that you discussed at length

1 yesterday, is that right?

2 A I'm aware of Footnote 5, yes.

3 Q And Footnote 5 provided, on Mill Street, that
4 there would be a build-to line instead of a setback, is that
5 right?

6 A No, I don't believe that's accurate.

7 Q Okay. Well, what did the footnote provide?

8 A I believe it was 20-foot setback except at Mill
9 Street where 20 to 30-foot build-to line was -- I believe it
10 was -- did say -- I believe it applied to Mill Street in
11 Footnote 5 exclusively this 20 to 30-foot, foot build-to
12 line.

13 Q So, it went from -- on the, on -- let's, let's
14 agree to this. On Mill Street, there was a setback that you
15 had the possibility of 5-feet in the before situation,
16 before 14022, is that right?

17 A I would, I would say we had a pathway to the five,
18 yes, that's correct.

19 Q All right. Pathway, possibility, whatever it
20 is---

21 A Fair enough.

22 Q ---you could have somehow argued, at least, that
23 you could have the 5-feet, is that right?

24 A Yes, sir.

25 Q After that it became a build-to line of 20 to

1 30 feet, is that right?

2 A Right, with the requirement of an activity zone.

3 Now, that may not have been---

4 Q Okay.

5 A ---in the footnote.

6 Q Now, let's talk about that activity zone. I want
7 to direct you to the letter, and I say the letter, the
8 July 23rd, 2014, letter from Mr. Small to the Town of Mt.
9 Pleasant, and that is Exhibit No. 20 in our book,
10 Mr. Flesch.

11 A Okay. Yes, sir.

12 Q So, you -- and that is the letter with the heading
13 of AVTEX Commercial Properties dated July 23rd, 2013, is
14 that right?

15 A Yes, sir.

16 Q This is the letter that is addressed to
17 Ms. Thomasena Stokes-Marshall who is the chair of the
18 planning committee at that time, correct?

19 A Correct.

20 Q And just in general, this is the letter where
21 Mr. Small makes it known that they need a height, height
22 increase to 55-feet, and, and also the requirement to not
23 require retail on the ground floor, is that---

24 A Yes, sir.

25 Q Is that correct?

1 A Yes, sir.

2 Q All right. In the third paragraph, which says it
3 is our intent to work with staff, you see that sentence?

4 A Yes, sir.

5 Q Okay. What is -- can you read that sentence for
6 the Court?

7 A It says our intent to work with staff to provide
8 open spaces, and people oriented design details to ensure
9 the integrity of the activity zones on adjoining streets.

10 Q So, you would agree that, by this letter, the
11 intent was to provide open spaces, is that right?

12 A To work with staff to provide open spaces, yeah.

13 Q Sure.

14 A Where possible.

15 Q And people oriented design details, is that right?

16 A Correct.

17 Q Okay. And that essentially meant activity zones,
18 is that right?

19 A That's not my understanding.

20 Q You wanted -- he didn't want zero lot lines, did
21 he?

22 A It doesn't address lot lines.

23 Q Okay. Well, let, let, let's talk about Mill
24 Street, and I'm not as fancy with the TV. So, you'll have
25 to deal with me, sir. You have -- you've seen this board?

1 A Sure.

2 Q And is it fair to say that this is Coleman
3 Boulevard and the building sits right here?

4 A Yes, sir.

5 Q And according to Mill Street -- if you need to get
6 up, that's fine.

7 A No, I can see.

8 Q But this is Mill Street, is that right?

9 A It is.

10 Q We just talked about the changes that 14022
11 brought to Mill Street and the build-to line as opposed to
12 the setback that had previously been in place, is that
13 right?

14 A Right.

15 Q Do you have an opinion as to whether the change,
16 14022 on Mill Street, required you-all to shift the building
17 away from Mill Street towards Shem Creek?

18 A Ultimately I believe it did.

19 Q All right. Do you have an opinion as to whether
20 that change required you to change the width of the
21 building?

22 A No, the point was to keep the integrity of the
23 parking base intact. I don't believe so.

24 Q Okay. So, the -- your, your initial concept of
25 the width of the building, this, this is the issue, did

1 14022 change the width of the building?

2 A It didn't, but it changed our ability to alter the
3 width of the building through future land acquisition.

4 Q Okay. Because, in, in June of 2014, the Town's
5 zoning administrator, Mr. Prause, made a ruling that you had
6 an additional 30-feet on this side of the building to shift
7 over, is that right?

8 A I think the interpretation was there was 30-feet
9 of discrepancy into the marine district. That doesn't mean
10 the building can simply shift over 30-feet. I don't believe
11 that's accurate.

12 Q But you were allowed to shift the building closer
13 to the creek into the marine district, is that right?

14 A Yeah, with the setback between the two properties,
15 yes.

16 Q And, ultimately, the width of the building did not
17 change?

18 A Right, but it, it stopped our ability to widen the
19 building as it became apparent that the concept wasn't
20 maximizing the spaces we wanted to. You basically absorbed
21 land by creating activity zone that the land I ultimately
22 acquired to move the building would have been available for
23 the expansion of the deck potentially had it not then
24 required the whole building to shift. You -- I'm not saying
25 you. I apologize. The town essentially gobbled up land

1 that would have been, would have been an avenue to expand
2 for more parking potentially.

3 Q Are you aware of your architect's position on the
4 width of the building and how it affected parking spaces or
5 proposed number of parking spaces?

6 A From which setback?

7 Q The width of the building. If you could have made
8 the building wider, would it have increased the number of
9 parking spaces?

10 A I believe it would have, yes.

11 Q And do, do -- are you aware of what Mr. Johnson's
12 testimony is?

13 A No, sir.

14 Q If it didn't, if it didn't affect the number of
15 parking spaces that you could have put in the building, it
16 would be fair to say that 14022, and the footnote included,
17 didn't affect the number of parking spaces you could have
18 built at all?

19 A That is completely inaccurate. Let me back up a
20 step to what you, you're, you're talking about. You
21 enacted -- I'm sorry, I apologize. The town enacted a
22 zoning ordinance which created an activity zone and a new
23 setback requirement or build-to line. It pushed the
24 building, as you just mentioned, over into another area. We
25 didn't control the land at the time that you pushed the

1 building over. We didn't have the rights to the land. I
2 didn't know if I could ever get the rights to the land.

3 That zoning ordinance, at that time, killed
4 that project. And Mr. Small and myself had to find a way to
5 overcome what the town had just put on us. Which is now I
6 had to go to the waterfront tenants and say, Hey, guys, I
7 need to take X number of feet off your 99-year ground lease
8 to try to accommodate what we were doing. I didn't know if
9 I could do it at the time. Now, ultimately, we know,
10 because the building is there, I was successful. I was
11 successful because we had to incentivize those tenants to do
12 that. That is an extreme amount of costs and -- but, at the
13 time, I didn't know if it was possible. That ordinance
14 effectively killed the project at that moment.

15 Q It didn't kill the project, and Mr.---

16 A It did at that moment.

17 Q And Mr. Prause's decision on the extra 30-feet
18 actually benefited from a legal standpoint.

19 A If we didn't own the land it doesn't matter what
20 Mr. Prause says. We didn't have control of that dirt.
21 Physically, I couldn't move the building at that time.

22 Q Your---

23 A I had to figure out that solution in response to
24 14022 that created the build-to line, the activity zone. It
25 effectively did compromise the width of the project at the

1 time. Now, we were able to overcome it by creating and
2 acquiring new land to shift the project. And then, yes,
3 Mr. Prause's interpretation of the marine district was
4 beneficial in that regard.

5 Q So, the, the open spaces and people oriented
6 design that Mr. Small had contemplated since June of 2014,
7 well before the PLA, is that correct?

8 A I'm sorry. Say that again.

9 Q You, you mentioned the, the over -- you mentioned
10 the -- let's talk about Mill Street so we're talking about
11 the same thing.

12 A Right.

13 Q The open space and people oriented design details
14 along Mill Street that he had contemplated since his
15 June 2013, excuse me, his July 23rd, 2013, letter, is that
16 right?

17 A Yeah, these spaces were at the corner of Coleman
18 and Mill. There was discussion of artwork, potentially a
19 statue, a planter. It was oriented to that corner where it
20 was a prominent corner where a fountain or, you know, again,
21 there was -- I think we met with an arts committee to
22 discuss that corner of Coleman and Mill. That's what he's
23 referencing of people oriented spaces and open space. And,
24 ultimately, we did. We put a large circular planter, bench
25 seating. It, it -- the area was actually created as he

1 suggests in this letter. That's what he's referencing.

2 Q There were favorable decisions along the way
3 between October, 2014, the time of the PLA was executed, and
4 the time that the building was constructed, favorable
5 decisions by town staff regarding zoning issues and
6 interpretations, is that correct?

7 A I, I believe they followed the law. Favorable, I
8 guess they were to our benefit. If you follow the law, yes.

9 Q So, it's your testimony that, when it's favorable
10 to you, the town followed the law, is that right?

11 A I did not say that.

12 Q You just said they followed the law. Did they
13 follow the law---

14 A And then I opposed the question does that mean
15 that they're favorable. I believe they followed the law in,
16 in those circumstances, yes.

17 Q Do you believe, when it came to the application of
18 civic use that was unfavorable as you've already testified,
19 that the town followed the law in that circumstance?

20 A They had the legal right to interpret that
21 ordinance as, as they saw fit through their discretion.
22 Yes, I do agree with that.

23 Q So, in that decision, specifically civic use, you
24 agree that the town had the legal right to make that
25 decision, is that right?

1 A As it relates to the zoning ordinance, yes. As it
2 affects the good faith and fair dealing under the PLA, I
3 believe it violates those covenants.

4 Q It's your testimony that this contract, the PLA,
5 superseded town ordinance, is that right, that because you
6 had a contract, the town did not have to abide by its own
7 ordinance. Is that what you're saying?

8 A That's not what I'm saying.

9 Q Okay.

10 A I'm suggesting they are lawful in passing
11 ordinance wherever they please to some degree. What I'm
12 suggesting is that ordinance has the possibility, when
13 discretion can be applied, that it could violate the good
14 fair and fair dealing of the, of the agreement.

15 Q So, by applying, applying its legally authorized
16 discretion, town staff would have violated the terms and
17 provisions of the PLA is what you're saying?

18 A Potentially, yes. When discretion could have been
19 applied, absolutely. It's no different than if you condemn
20 a property and you take somebody's property. Is that
21 lawful? Yes, but compensation is required. In this case,
22 you can pass the ordinance you want to affect the property.
23 But it has ramifications within the PLA, and I'm sure we'll
24 get into excusive performance and things of that nature.
25 But your position or the Town's position is you pass the

1 ordinance, and then you come around the backside of the
2 agreement, and say we didn't perform. So, I'm not
3 suggesting you can't pass the ordinance. Who, who am I to
4 say that? I'm saying to you that there are applications to
5 the PLA that you don't have to consider them if you don't
6 want to, but my opinion would be, in good faith, that you
7 should.

8 Q All right. You had lengthy discussion with your
9 legal counsel about Section 2.03 of the PLA, which, again, I
10 believe, is Exhibit 18 in our book.

11 A It's not. I've got to use this one.

12 Q Yeah. Please.

13 A So, the number again? I'm sorry.

14 Q Section 2.03.

15 A Yes, sir.

16 Q And that is a licensor's contingency, is that
17 right?

18 A That is correct.

19 Q Reserved solely for the licensor as you testified
20 to earlier, is that correct?

21 A That is my opinion, yes, sir.

22 Q And in the -- on, on the second line of that, it
23 says the -- you're limited to the obligations to construct
24 the project are contingent upon all necessary approvals for
25 construction being issued by the appropriate Town of Mt.

1 Pleasant department or entity, is that correct?

2 A Correct.

3 Q You've been in the development business for over
4 20 years, and, with the language of this, you clearly
5 understood that there were decisions that town staff, town,
6 needed to make as they would in any project, is that right?

7 A Yes, sir.

8 Q There was no reservation, in this document, that
9 town staff had to do what they thought was beneficial to you
10 or the contract, is that right?

11 A That's correct.

12 Q Nothing in there. And you had legal counsel, is
13 that right? We've seen multiple letters from Mr. Gray
14 Taylor that you had legal counsel during this entire time,
15 is that right?

16 A Yes, sir.

17 Q And he helped you negotiate it, right?

18 A Yes, sir.

19 Q Before April 8th, 2014, the time that Ordinance
20 14022 was, was approved by, by town council, did town
21 council approve a planned development district for the
22 property?

23 A I don't believe so, no.

24 Q Okay. Did town council approve an impact
25 assessment for the property?

1 A I don't believe so.

2 Q Did the planning commission approve a sketch plan
3 or preliminary plan?

4 A Don't believe so.

5 Q Did you apply to the Board of Zoning Appeals to
6 get a, a variance or a special exception use approval?

7 A No, sir.

8 Q Did you, again, prior to April 8th, 2014, was
9 there any -- were there any final staff approvals and design
10 review board final approvals regarding the commercial design
11 review overlay district application?

12 A I don't believe so.

13 Q Did you get any old -- I don't think you're in the
14 historic district necessarily.

15 A Yes, sir, we are.

16 Q Were there any Old Village historic district
17 commission approved certificates of appropriateness?

18 A A study was required, yes.

19 Q A study, but no certificate of appropriateness, is
20 that right?

21 A I don't know the result of what comes out of the
22 study.

23 Q Were there any staff approved preliminary plats?

24 A Before -- what's the time?

25 Q April 8, 2014?

1 A No, sir.

2 Q Okay. Now, you testified yesterday as to one of
3 Mr. Taylor's letters where Mr. Taylor argued that you had a
4 vested right. Do you remember that?

5 A Yes, sir.

6 Q And you brought up my correspondence where I said,
7 no, sir, we don't believe you have a vested right.

8 A Correct.

9 Q And are you testifying that I was incorrect?

10 A I'm not a lawyer. I relied on the advice of
11 counsel.

12 Q But, but you testified to that, about vested
13 rights, is that correct?

14 A That it was incorporated in the letter that we
15 were discussing. Sure.

16 Q So, all of those things I just referenced to you
17 are in Section 1.5, excuse me, town Ordinance 156049
18 entitled vested rights. You ever read that?

19 A No, sir.

20 Q So, if you didn't have any of those items
21 approved, which is a town council approved plan development
22 district, a town council improved impact assessment, and the
23 like as we went down the list, if you didn't have any of
24 those things approved, and those were required for a vested
25 right, did, did you have a vested right?

1 A I just answered a lot of my counsel's --

2 Q Okay.

3 A ---to assert that right.

4 Q But you agree that you didn't have any of those
5 items approved that I just read directly from the town
6 ordinance, is that right?

7 A Yes, sir.

8 Q What's the fundamental difference between a
9 setback and a build-to line?

10 A I would say a range.

11 Q Well, a setback is it's measured back from the
12 street, that you can build as far back as you want, but no
13 closer than the setback line, is that right?

14 A Yes.

15 Q And a build-to line means you're required to build
16 up to that line. Is that your understanding?

17 A It's reverse engineering, if you will, yes.

18 Q All right. Do you know from where those are
19 measured? For example, property line, edge of pavement?

20 A I believe that the build-to line was back-up curb.

21 Q Excuse me?

22 A I believe it was back-up curb for the build-to
23 line.

24 Q For the build-to line. Did you ever undertake any
25 of those -- you or anybody in your employ ever undertake

1 those measurements prior to your submittal, your plan
2 submittal, in June of 2014?

3 A I did not. I do not know what the architects did
4 or did not do.

5 Q You, you have no evidence in the various decisions
6 that were made by town staff or anyone at the town that any
7 individual was instructed to not cooperate with Shem Creek
8 Development Group in developing the office building garage,
9 is that right?

10 A As a directive from superiors you mean?

11 Q Yes.

12 A No, sir.

13 Q You also agree that every citizen in the Town of
14 Mt. Pleasant, or really any municipality, has the right to
15 petition and lobby government officials, is that right?

16 A Yes, sir.

17 Q There's nothing illegal about that, is there?

18 A No, sir.

19 Q And there's nothing illegal or improper if a -- an
20 elected official listens to the constituents; is that
21 correct?

22 A Yes, sir.

23 Q You agree that there was no vote by town council
24 to take away funding from any budget line for the amount of
25 rent that was proposed in the PLA, is that right?

1 A You're splitting hairs. There was a motion.

2 There was no vote. That isn't accurate.

3 Q Well, I'm, I'm not -- I asked you whether there
4 was a vote.

5 A And I've answered your question.

6 Q Okay. You accuse me of splitting hairs, and those
7 are two very different things, aren't they?

8 A Yes, sir.

9 Q Any one council member can make a motion, is that
10 right?

11 A Yes, sir.

12 Q You agree that there was never a vote by town
13 council to condemn the property where the office building
14 garage was, was built, is that correct?

15 A I'm not a hundred percent sure of this, and I was
16 actually at the meeting where this was going on. I don't
17 remember the procedure. I believe there was a vote to get
18 appraisals or take a step that would be in line to condemn
19 the property, but I---

20 Q Do, do---

21 A ---don't know what the formal procedure was.

22 Q Did you or the property owner receive a letter
23 that the town was intending to condemn that property?

24 A A letter that they were condemning?

25 Q Sure.

1 A No, we hired counsel, but the owner, and we had
2 counsel we hired, by me, to defend the potential
3 condemnation suit.

4 Q You mentioned yesterday that the Save Shem Creek
5 organization that they, at some point, filed a lawsuit to
6 try to derail the project, is that correct?

7 A That's my opinion, yeah.

8 Q Yeah.

9 A Is their motive, yes.

10 Q And they named the Town of Mt. Pleasant in that
11 lawsuit as well, correct?

12 A They did.

13 Q And did the Town of Mt. Pleasant, to your
14 knowledge, take a position to agree with Shem Creek
15 Development Group in that lawsuit that the project should be
16 terminated?

17 A I believe they took the position that their ruling
18 had been appropriate.

19 Q They fought the lawsuit against Shem Creek, Save
20 Shem Creek, is that right?

21 A Yes, sir.

22 Q So, during all this time that you're testifying,
23 from December 2013 until forever forward, you believe that
24 the town did not take certain actions to assist, to help to
25 move the project forward, is that right?

1 A I believe that we were working towards a common
2 goal, and, yes, there were instances in which their
3 discretion would have allowed us to create more parking at
4 the location we have.

5 Q But through certain zoning interpretations, legal
6 bodies and whatnot, the town exactly, precisely took
7 positions that would assist the project with moving forward,
8 isn't that correct?

9 A Can you say that again please?

10 Q The town took positions, whether through
11 interpretations of zoning or legal lawsuits, that would have
12 helped or assist the project to move forward, is that
13 correct?

14 A Yes, they defended the lawsuit, and they made one
15 favorable ruling in the marine district. I agree with that,
16 yes.

17 Q Well, let's talk about those unfavorable decisions
18 that, that you claim, and we, we, we -- we've already
19 covered the vested rights, and, of course, the vested rights
20 decision was never appealed to the, in accordance with town
21 ordinance, to the Board of Zoning Appeals, is that correct?

22 A That's correct.

23 Q Also, the civic use, your, your attorney's
24 argument that the office space garage would be a civic use,
25 is that correct, that was never appealed to the town Board

1 of Zoning Appeals, is that right?

2 A No, that would have very little impact to appeal
3 it. Even if we were successful on appeal, the application
4 of that is discretionary. It would come back to ultimately
5 the staff's opinion, the staff's discretion whether -- you
6 could get approved for the civic use at appeal, and come
7 back and the staff could use discretion to not change any of
8 the things that potentially would have---

9 Q Are you suggesting that the Town's zoning
10 administrator's decisions have never been overturned by the
11 Board of Zoning Appeals?

12 A I, I didn't say that.

13 Q Okay.

14 A You keep saying things that I didn't say.

15 Q Okay. Well, you keep saying that---

16 A I said -- my statement is clear in what I said.
17 I, I don't---

18 Q You're saying an appeal wouldn't have mattered.

19 A Okay. In my opinion, the appeal would have been
20 circular in nature. Had we prevailed, and it was declared a
21 civic use, the civic use application to the project is
22 discretionary to the town staff.

23 Q So, the civic use, what you're saying is, even if
24 there was a civic use category, categorization of this
25 project, that there were no set rules, there were no set

1 rules as to what setbacks you were allowed, is that right?

2 A There were no rules?

3 Q There were no set rules on what specific setbacks
4 or you were allowed.

5 A Staff, I believe, had discretion on all of those
6 things.

7 Q Right.

8 A All design elements of the building. I believe
9 that.

10 Q So, even if it was declared, whether by the Town's
11 zoning administrator, BOZA, or somebody else, that there was
12 a -- it was a civic use, you're not sure whether you could
13 have increased the number of parking spaces at all?

14 A It would have been at the Town's discretion, which
15 we would have relied on as good faith.

16 Q Uncertain.

17 A Fair enough.

18 Q And, again, you had a lawyer writing all of these
19 letters about things such as civic use, vested rights, and
20 whatnot, and they were acting on your behalf, is that
21 correct?

22 A Yes, sir.

23 Q Mr. Flesch, in June -- I'm gonna get the precise
24 date for you. Excuse me. Do you recollect or if I
25 represented to you that the preliminary design plans for,

1 for design review board consideration for the project were
2 submitted on June 3rd, 2014, is that correct?

3 A I don't know the exact date, but I wouldn't
4 dispute on that.

5 Q Is, is it around that time? Fair enough?

6 A Yes, I wouldn't contend that.

7 Q All right. The, the relevant question is, in that
8 submittal, the submittal was made in accordance with the
9 revisions and provisions provided in Ordinance 14022 that
10 was approved in April of that year, is that right?

11 A After the interpretations that we asked for had
12 been done, yes, that -- that's correct.

13 Q So---

14 A We can't submit something that we know would fail.
15 Yes, that's correct.

16 Q Well, you could have submitted something that says
17 this is a civil, civic use in here is how we're gonna do it,
18 is that right?

19 A I believe we communicated fairly clearly that it
20 was a civic use, and, and that was, I believe, the June 5th
21 letter was, was declined. I believe there's a letter
22 declining that assumption or that assertion.

23 Q Do you have -- do you have, sir, in front of you,
24 what your lawyer handed to you as Plaintiff's Exhibit 22---

25 A I'm sure we could find it.

1 Q ---in your stack? I believe it's in there. I
2 missed---

3 A It might take a minute. 22 you said?

4 Q Yes, sir, and it's a letter from Buist Byars &
5 Taylor.

6 A Yeah, I'm sorry. It's just in one of them. It's
7 a lot of paper up here. Well, I found 23. Yes, sir, I
8 found it.

9 Q What's the date of that letter, Mr. Flesch?

10 A June 4th.

11 Q So, assuming if, and I know you said you didn't
12 know, assuming this submittal was made a day before, this,
13 this letter was sent a day after the submittal, is that
14 correct?

15 A Yeah, I don't know the date of the submittal.
16 This is June 4th. That's correct.

17 Q Right. You went and had a fairly lengthy
18 discussion with, with your legal counsel about the ULI
19 parking study, and do you remember that discussion?

20 A Yes, sir.

21 Q And just for reference for the Court, when was the
22 ULI parking study provided to the Town of Mt. Pleasant?
23 Approximately when.

24 A Okay. Is there an exhibit I can reference?

25 Q It was, it was well after the submittal was made

1 in June of '14, is that correct?

2 A I would prefer to see the actual.

3 Q Okay.

4 A If you don't mind. I might have it here, but you
5 have the exhibit. I don't want to speculate. Do you have a
6 number?

7 Q Exhibit 40.

8 A Thank you. All right. On Exhibit 40, it's May 6,
9 2015, is the letter that's attached---

10 Q So---

11 A ---to the discussion of the ULI.

12 Q Roughly almost a year after this submittal, plans
13 submittal was made to the Town of Mt. Pleasant, is that
14 right?

15 A Eleven months, yes, sir.

16 Q And that ULI parking study was not necessarily
17 relevant to achieving the PLA number of 276 spaces, correct?

18 A Yes, sir.

19 Q Okay. That was about how many, how many spaces
20 were necessary for the surrounding businesses and the like,
21 is that right?

22 A Yes, sir.

23 Q Okay. You, you would also agree, and this is just
24 an, an element that I, I'm not sure was clarified, out of
25 the 276 spaces proposed in the PLA, none of them were

1 permitted to be surface parking spaces, is that right?

2 A I believe the PLA, and I, I certainly can look,
3 talks about adjacent surface lots. But let's look at that
4 agreement.

5 Q Sure. If you would---

6 A Can you quote me to the appropriate section?

7 Q Yes, sir, Section 2.01. 201-B.

8 A I'm looking.

9 Q If you -- and that's on Page 4, Mr. Flesch.

10 A Right. I remember this provision. It deals with
11 not granting rights to the -- our adjacent restaurant
12 buildings, the docks, and their property lot.

13 Q So -- and, and what it says is that the premises
14 shall not include surface parking areas, is that right?

15 A Yes, it says for surface parking areas, correct.

16 Q Right. So, none of the proposed number of spaces
17 could have been surface spaces? That would not have
18 satisfied the agreement, is that correct?

19 A Yeah, technically. But I remember this provision
20 being specific to not grant right to the town for the Tavern
21 and Table, Red's location, and his parking lot. Whether
22 that surface parking area would apply to another surfaced
23 lot, it says that. I don't believe that was the intent, but
24 okay.

25 Q But that's what it says, right?

1 A It does say that, yes, sir.

2 Q While, while you have that Parking License
3 Agreement, and while we're there, I'd like to bring your
4 attention to Section 3.02C, and that is on Page 5.

5 A Yes, sir. Yes, sir.

6 Q And, for clarification, I'm looking at, if I
7 didn't mention it, Section -- Subsection C that says parking
8 fees shall be at the rental rates comparable to market rates
9 for similarly situated parking facilities, is that correct?

10 A Yes.

11 Q So, just for clarification, the town, pursuant to
12 the terms of the agreement, would pay rent, but you would
13 still be able to charge a reasonable -- a rental rate
14 comparable to market rates for similarly situated parking
15 facilities, is that correct?

16 A Yes. But I will add the caveat for the potential
17 for rent reduction under 1.07B.

18 Q Sure. On that rent reduction is in -- on Page 3,
19 which is 1.07B2, is that right?

20 A I believe it, it's covered -- it -- no, I believe
21 it's all of B.

22 Q All of B, right?

23 A Yes, sir.

24 Q Okay. And the rent reduction was calculated based
25 on the proposed rent reduction was an annual net operating

1 profit, which is defined in, in Subsection 1, is that right?

2 A Yes, sir.

3 Q And that's gross revenue generated by parking
4 spaces, and, and you would agree there's no reference to
5 number of parking spaces in Section 1, is that correct?

6 A If you'll give me a minute, I'll read through
7 this.

8 Q Sure.

9 A I believe that parking spaces is a defined term.

10 Q Okay. Which parking spaces is defined as 276, is
11 that right?

12 A It's referenced to the premises, 132 and then 144,
13 yes, sir.

14 Q All right. And net operating profit relates to
15 total costs of operation, repairing, lighting, cleaning,
16 maintaining, painting, securing, managing, insuring,
17 management fees, taxes, public charges, assessments, and,
18 and it mentions other things. So, those, those are all
19 expenses that would be offset from net operating profit, is
20 that right?

21 A Yes, sir.

22 Q And operating profit is gross revenue generated by
23 the parking spaces, is that right?

24 A Yes, sir.

25 Q So, gross revenue generated by parking spaces

1 which you testified to a moment ago that that was defined,
2 right?

3 A Yes, sir.

4 Q Looking at Subsection 2 in the example, the last
5 provision of that agreement, the example utilizes 276
6 spaces, is that right?

7 A Yes, sir.

8 Q So, what would fluctuate if the town were to be
9 able to get the rent setoff, the fluctuating elements of
10 this provision would be net operating profit and expenses,
11 is that right?

12 A Can you ask that again please?

13 Q Sure. What would change necessarily from year to
14 year are net operating profit and expenses. Those are fluid
15 numbers, right?

16 A They're variable, that is correct.

17 Q Right. And those are the only variables in this
18 provision?

19 A Sure.

20 Q Okay. You say that the defined number of parking
21 spaces was variable. Is that what you're saying?

22 A Potentially. The formula is here to accommodate a
23 shift in the number of parking spaces based on the
24 conceptual plan. It is a protection for both parties should
25 the parking spaces -- number of parking spaces change, and

1 how you would allocate the net profit. The percentages
2 would change. If there wasn't a necessity for the potential
3 to change the parking spaces, you'd just say in this, 52
4 percent of the, you know, of the profits would go to X and
5 48 would go to Y, whatever the numbers were. This allowed
6 for a calculation based on the number of spaces that ended
7 up in the project.

8 Q It was a calculation based on the amount of the
9 expenses that, that the developer would incur from year to
10 year, is that correct?

11 A That is a component in getting to the net
12 operating.

13 Q Of course, parking spaces is defined as 276
14 though, right?

15 A It refers back to the premises, and it says
16 planned spaces.

17 Q Sure.

18 A So, I don't believe it's definitive, but yes, it
19 does refer---

20 Q Well---

21 A ---back to the premises.

22 Q You, you -- you're going now to Section 1.06 where
23 it says planned?

24 A Yes, sir.

25 Q And Section 105 says a multilevel structured

1 parking garage comprised of 276 total parking spaces, right?

2 A Yes, sir.

3 Q That's what that says.

4 A Yes, sir.

5 Q And, in fact, going to 1.06, you had planned for
6 276 spaces, is that right?

7 A Yes, sir, based on Mr. Betsch's conceptual plan,
8 that is true.

9 Q That's what you planned for.

10 A That's what we were hoping for. Absolutely.

11 Q Well, that's what you told the town you'd provide.
12 That's what you planned for, right?

13 A Yes, sir.

14 Q I'm gonna bring your attention, sir, to
15 Section 6.01 of the agreement, and this is defaults and
16 remedies that you testified to earlier on Page 6.

17 A Yes, sir.

18 Q And 6.01, definitions, I -- I'd like to bring your
19 attention to I believe what is the second to last line, and
20 I believe you've seen this earlier. It says that licensor
21 shall be entitled to bring an action for specific
22 performance or breach of contract against licensee. But
23 agrees that the sole and exclusive remedies shall be the
24 rent payments due under this agreement. Does that read
25 correctly?

1 A Yes, sir.

2 Q You testified to a, to a letter -- as to a letter
3 Mr. Taylor, your attorney, wrote. I believe it was dated
4 June 23rd, 2015, but you believe that that date was
5 incorrect. It was June 23rd, 2016. Is that correct?

6 A May I see the letter please?

7 Q Sure. I have it right here, sir. Hold on a
8 minute. This is Plaintiff's Exhibit 42.

9 A Thank you.

10 Q And is that the letter you discussed earlier?

11 A Yes, sir.

12 Q And that is the letter where Mr. Taylor, on behalf
13 of the licensor, terminated the agreement, correct?

14 A Yes, sir.

15 Q At the time of that letter, let's assume it was
16 June 23rd, 2016, how much rent was due from the Town of Mt.
17 Pleasant?

18 A I believe it was a deposit in the amount of the
19 first year's rent, which would be \$185,000.

20 Q A deposit, and then that, that deposit at least
21 would -- could be converted at the time that the CO was
22 issued, is that correct, Certificate of Occupancy?

23 A I, I will look at that language. I do not -- I
24 don't believe -- I don't remember language that has a
25 conversion feature, but I will be happy to look at it with

1 you.

2 Q Well, there was -- to start paying rent when the
3 Certificate of Occupancy was issued, is that correct?

4 A That's correct, yes.

5 Q Okay. So, once again, let me -- would it -- are,
6 are you aware that the Certificate of Occupancy was issued
7 on July 28th, 2017, almost two years after you-all
8 terminated the agreement?

9 A I believe that's inaccurate.

10 Q Okay.

11 A I believe there was a temporary Certificate of
12 Occupancy issued prior to that allowing for the operation of
13 the garage.

14 Q When was that temporary, sir?

15 A I don't know the exact date. I, I believe it was
16 Spring, March or February, maybe, of 2017.

17 Q Let's assume that that's the case.

18 A Okay.

19 Q That is still after Mr. Taylor's letter, is that
20 correct?

21 A Yes, sir.

22 Q And you would agree that the rent due at that time
23 or at least no rent was scheduled to be paid until, at the
24 very least, a CO, whether temporary or not, was issued, is
25 that right?

1 A I believe the rent deposit was due prior to that.

2 Q Deposit. What, which---

3 A The first year's rent would commence on the
4 Certificate of Occupancy.

5 Q Which was one year or \$185,000 in accordance with
6 this agreement, is that right?

7 A For the first year's rent --

8 Q Right.

9 A -- yes, sir.

10 Q Okay.

11 MR. PAGLIARINI: And, Your Honor, I objected. If
12 I might -- may, I objected to this earlier to the
13 inclusion of an exhibit, and I, I wasn't provided an
14 exhibit number. Just rely on the good graces of
15 Mr. Gaskins. It was a marked up Parking License
16 Agreement that showed red line changes. Exhibit 39 I
17 believe that was entered in over my objection.

18 THE COURT: Yes, sir.

19 MR. PAGLIARINI: And, Your Honor, I believe, at
20 this point, I, I don't want to admit or agree that I'm
21 admitting this, but I'd like to proffer some testimony
22 based on the fact that the witness was asked about it
23 without waiving my objection.

24 THE COURT: Yes, sir, that's fine.

25 BY MR. PAGLIARINI

1 Q Okay. So, do you have Exhibit 39, Mr. Flesch?

2 A Yes, sir. I'm getting them mixed up now.

3 Q Yeah, I understand.

4 A Yeah, these are all Plaintiffs. They're gonna
5 be -- let me get rid of these. Sorry. I should of kept
6 these separate. What was the -- I'm sorry. What was the
7 number again?

8 Q 39 is what I was told. It looks like this.

9 A Yes, it should be PLA marked up. I think -- yes,
10 I have it.

11 Q Okay. And, and it has a -- yours has a cover
12 letter on it, is that correct?

13 A It is, yeah, an email.

14 Q All right.

15 A A copy of an email---

16 Q Right.

17 A ---just saying what it is.

18 Q I'd like -- if you would go to Page 7 of
19 Exhibit 39, and---

20 A Yes, sir.

21 Q Is -- I have a -- in the first paragraph, I have a
22 paragraph -- portions in blue that were crossed out, and I
23 believe you testified earlier that that was the acceleration
24 clause, is that right?

25 A In part, yes.

1 Q Yeah. And you testified earlier that the
2 acceleration clause was not a part of this Parking License
3 Agreement, is that right?

4 A Yes, sir.

5 Q So, there was no rent acceleration is your
6 testimony, is that right?

7 A Right. The payments would have to be made over 15
8 years, I guess, is what you're suggesting.

9 Q Well, there was no acceleration -- you're familiar
10 with a rent acceleration provision?

11 A That all the rent may be due at once?

12 Q Right.

13 A In, in this case, I guess, you could make the
14 payments over 15 years as part of a judgment.

15 Q If there was a breach by either party---

16 A Yeah, I'm just saying---

17 Q ---there was no acceleration of rent, is that
18 correct?

19 A That has been struck here, that is correct.

20 Q That was removed from the agreement, right?

21 A By you, yes, sir.

22 Q And agreed to and signed by you, right?

23 A Absolutely.

24 Q Mr. Flesch, and, again, I'm gonna ask you to dig
25 in your pile---

1 A All right.

2 Q ---for Plaintiff's Exhibit 14 --

3 A I'll find it.

4 Q -- which is the proposed first amendment to the
5 Parking License Agreement, right?

6 A I don't know yet. Sorry.

7 Q Well, you can---

8 A I will find it.

9 Q You may not---

10 A I believe, guess what, it was right there. I got
11 lucky.

12 Q You may not trust me otherwise.

13 A No, I'm---

14 Q But trust me on this one.

15 A ---saying all these times. Yes, sir.

16 Q That is the first -- proposed first amendment to
17 the Parking License Agreement, correct?

18 A It appears to be, yes, sir.

19 Q And, as you testified, this was prepared and
20 considered by town council, is that correct?

21 A It was definitely prepared. I don't believe there
22 was a vote on this.

23 Q The, the town never approved this---

24 A No, sir.

25 Q ---proposal---

1 A Yes.

2 Q ---is that right?

3 A Yes, sir.

4 Q Now, do you know of any provisions in the Parking
5 License Agreement where amendments were required to be
6 considered or voted on by town council?

7 A Specifically to the agreement, no. Are you
8 talking about the composition and the legal --

9 Q Yes, sir, in the Parking License Agreement, which
10 is Defendant's Exhibit 18 that was reviewed.

11 A I don't have an 18. I'll use mine, but go ahead.

12 Q I'm sorry. In the book. 18 in the book.

13 A Okay.

14 Q But you're not aware of any provisions in there
15 which require town council to consider or vote on amendments
16 to the Parking License Agreement, is that correct?

17 A I don't know if the language mandates that they
18 vote on it, but I would assume, for them to enter in the
19 agreement they voted on it previously. I assume it's
20 required to amend it.

21 Q There would be a council vote required to amend
22 it, is that right?

23 A I would think so, yes.

24 MR. PAGLIARINI: All right. Sir, that is all the
25 questions I have for you. Thank you very much for your

1 time.

2 THE WITNESS: We've got some mixed. I don't want
3 to get you guys sideways on exhibits.

4 THE COURT: Yeah, they---

5 THE WITNESS: I'll just---

6 THE COURT: ---all have tags on them.

7 MR. PAGLIARINI: Yeah, you just --

8 THE WITNESS: Well, actually they may all be
9 plaintiffs, but, Brandon, I've left a mess for you up
10 here. These are all out of order. I'll give this,
11 I'll give this back to you or---

12 MR. PAGLIARINI: No. Yes. Yes, sir, I'll take
13 that. Thank you.

14 THE COURT: Mr. Gaskins, how long do you
15 anticipate on redirect?

16 MR. GASKINS: Less than 10 minutes.

17 THE WITNESS: Well, that might be -- will I need
18 those? I'm sorry.

19 MR. GASKINS: You might.

20 THE COURT: Less than 10 minutes? All right. You
21 may proceed.

22 MR. GASKINS: Thank you, Your Honor.

23 THE WITNESS: Did he say less than ten minutes,
24 Your Honor?

25 THE COURT: That's what he said.

1 THE WITNESS: I know I need a restroom break.

2 REDIRECT EXAMINATION

3 BY MR. GASKINS:

4 Q Mr. Flesch?

5 A Yes, sir.

6 Q Let's start back with the questions relating to
7 acceleration.

8 A Yes, sir.

9 Q In your damages calculation, are you seeking to
10 accelerate rent?

11 A We were applying net present value to the entirety
12 of the rent stream, yeah.

13 Q Okay. And under an acceleration clause, the
14 entire amount due over the course of the contract would
15 become due and payable upon the breach, correct?

16 A Yes, sir.

17 Q Okay. And that's not what you're seeking in your
18 damages calculation, is it?

19 A Correct.

20 Q All right. I want to go to the issue of surface
21 parking, and whether that could satisfy the Parking License
22 Agreement. Do you recall that line of questioning from
23 Mr. Pagliarini?

24 A Yes, I -- yes, I do.

25 Q Okay. Let's look at Section 2.01B.

1 A Yes, sir.

2 Q Pull that up, Laura. All right. In there it says
3 the premises shall include only the public spaces and
4 necessary appurtenances specifically include --
5 specifically, specifically granted in this license, and
6 shall not include any adjacent buildings, docks, or surface
7 parking areas.

8 A Yes, sir.

9 Q And so you would, you would agree that surface
10 parking areas is not included in the premises, correct?

11 A Yes, it's -- yes.

12 Q Okay. If we could, let's go to 1.06.

13 A Yes, sir.

14 Q And this defines premises as that portion of the
15 property containing 132 of the 276 total parking spaces
16 planned for the project, correct?

17 A Yes, sir.

18 Q Okay. So, the premises means the public spaces,
19 correct?

20 A Yes, sir, comprising the 132.

21 Q Okay. And then parking spaces is the total amount
22 of spaces, right?

23 A Correct.

24 Q Okay. If we turn back to the 2.01B, it doesn't
25 say the parking spaces shall not include any surface parking

1 areas, does it?

2 A I'm sorry. That section again? I'm sorry.

3 Q 2.---

4 A 11B.

5 Q Yeah.

6 A I got it. I'm sorry. Okay. No, it says the
7 premises, which would reference the 132 of the 276---

8 Q Okay.

9 A ---in the definition.

10 Q And so, if you included surface parking including
11 on-street parking provided by the garage, that could be
12 included in the parking spaces, but not in the public
13 spaces---

14 A Right.

15 Q ---as those terms are---

16 A I don't think you could apply those to, to the
17 public. You could apply them to the total.

18 Q Okay.

19 A That's correct.

20 Q So, if you applied let's say ten surface spaces
21 that were designed on-street, and those were included in the
22 total spaces, what effect would that have on the public
23 spaces that were ultimately designed for the garage?

24 A Ask that again. I'm sorry.

25 Q Yeah. So, if the on-street surface spaces --

1 A Right.

2 Q -- are included in the number of parking spaces --

3 A Uh-huh. (Indicating affirmatively.)

4 Q -- you could take those ten out of the parking
5 garage, correct?

6 A And, and use them for public spaces.

7 Q And so your parking -- your public spaces would
8 increase by the number that was---

9 A Of surface that you're replacing them with, yes,
10 sir.

11 Q Okay. And, again, you provided 117 public spaces?

12 A Yes, sir.

13 Q Okay. And if you add ten on-street spaces to get
14 your total up to ten---

15 A 127.

16 Q ---you would have 127 public spaces, correct?

17 A Yes, sir.

18 Q Okay. And the agreement originally called for
19 132?

20 A That's correct.

21 Q So, you could have delivered 127 out of 132 public
22 spaces?

23 A Under the scenario that you're suggesting, yes,
24 sir.

25 Q Okay. All right. I want to clear it up cause I'm

1 not sure I understood, but I believe that there was some
2 suggestion or questioning from Mr. Pagliarini that stated
3 that or suggested that Ordinance 14022 did not affect the
4 number of spaces that could be delivered in the parking
5 garage. Do you recall anything like that?

6 A He was discussing the width of the building, yes.

7 Q Okay. And, and just to be clear, Ordinance 14022
8 did affect the number of spaces that were ultimately
9 provided in the parking garage, correct?

10 A Yes, sir.

11 Q And that relates to the setbacks that were applied
12 to Church Street?

13 A Correct. Well, I, I say the rear of the building.
14 But yes, it's Church Street.

15 Q Okay. All right. There was also some question
16 about whether town council ever voted to end or defund the
17 project. Do you recall that?

18 A Yes, sir.

19 Q Give me one minute. Do you still have the
20 notebook in front of you for Defendant's Exhibits?

21 A For their exhibits?

22 Q Yeah.

23 A Yes, sir, it's down here.

24 Q If you could turn to Defendant's Exhibit 12?

25 A Yes, sir.

1 Q And -- well, first of all, what does this appear
2 to be?

3 A Tuesday, February 10th, 2015. It looks like
4 minutes from the town council meeting.

5 Q And were you present at this meeting?

6 A I don't recall if I was or wasn't---

7 Q Okay. Have---

8 A ---to be honest with you.

9 Q ---you reviewed the minutes or the video from this
10 meeting?

11 A Oh, yes, I was present. Now I remember that. I,
12 I think I was present at this meeting.

13 Q Okay. And this reflects the action the town
14 council took to endorse Mr. DeMoura's letter, correct?

15 A Yes, sir.

16 Q I want you to turn to Page 9, and look at the
17 bottom of that paragraph.

18 A The last paragraph?

19 Q Yeah.

20 A Yes, sir.

21 Q Can you read the last sentence on the bottom of
22 Page 9 which reflects the comments made by Mr. Gawrych?

23 A Yes, sir. It says this has been going on for a
24 while now, and it has become clear that it cannot be
25 achieved. Town government should not be involved with

1 assisting this project with government money, and this
2 Parking License Agreement should be ended and put to bed.

3 Q And then if you turn to the next page, Mr. Gawrych
4 made a motion to that effect, correct?

5 A Mr. Gawrych moved to deny any new proposal that
6 may be put forward or submitted by the developer/applicant
7 pertaining to this contract, and the motion was seconded by
8 Mr. Glasson.

9 Q And what were Ms. Glasson's comments reflected in
10 the first two para -- two -- first sentences of the next
11 paragraph?

12 A Mr. Glasson said that he appreciated the comments
13 by Mr. Gawrych. If it was not clear to anyone, a vote on
14 the motion will end all, oh excuse me, will end any public
15 dollars going into an office building for parking spaces.
16 There will be zero public dollars spent at any level of this
17 project. He added that any council member or, or the public
18 can call him or email him when an item, when an item is
19 placed on the agenda if they have a question about it.

20 Q That's good.

21 A Okay.

22 Q Thank you, Mr. Flesch. And do these minutes
23 reflect that this motion made by Mr. Gawrych to end
24 government funding of the project was passed unanimously?

25 A It did, at the bottom of that page.

1 Q Okay. And I am going to -- I've got just a couple
2 more questions, and then everybody can then go to lunch.
3 There was a series of questions about the DRB, preliminary
4 design submittal, and when that was.

5 A Yes, sir.

6 Q And I believe that Mr. Pagliarini suggested to you
7 that that was made on June 3rd, 2014. Do you recall that
8 that was the date that he used?

9 A I think I recall. I said I didn't know of the
10 date it was submitted.

11 Q Okay.

12 A Talking about the submittal itself.

13 Q And then he suggested that it was actually
14 submitted before his letter---

15 A The, the letter---

16 Q ---on June---

17 A Yes, sir, I do remember that.

18 Q Okay. If you could bring up Plaintiff's Exhibit
19 No. 45.

20 MR. GASKINS: May I approach, Your Honor?

21 THE COURT: Yes, sir.

22 BY MR. GASKINS

23 Q I've handed you what's been premarked as
24 Plaintiff's Exhibit No. 45.

25 A Yes, sir.

1 Q Do you recognize this document?

2 A Yes, this looks like our submittal for the project
3 to the Design Review Board.

4 Q Okay. Have you seen this document before?

5 A Yes, sir.

6 Q Does it appear to be a complete and accurate copy
7 of the preliminary design review board submittal?

8 A It does.

9 MR. GASKINS: Okay. At this time we would move to
10 admit Plaintiff's Exhibit 45 into evidence.

11 MR. PAGLIARINI: No objection, Your Honor.

12 THE COURT: All right. It's in.

13 *(Whereupon, Plaintiff's Exhibit No(s). 45 marked*
14 *for identification and received in evidence.)*

15 BY MR. GASKINS:

16 Q Okay. And what's the date of this submittal?

17 A June 11, 2014.

18 Q And so that would have been approximately a week
19 after Mr. Pagliarini's letter---

20 A Six days, yes, sir.

21 Q ---denying the relief that you had requested?

22 A Six days, yes, sir.

23 MR. GASKINS: That's all I have. Thank you.

24 THE COURT: You may step down, sir.

25 THE WITNESS: Thank you.

1 THE COURT: Counsels, this is a good time for us
2 to take our lunch break. We'll resume about two
3 o'clock.

4 (Lunch recess.)

5 THE COURT: The parties ready to proceed?

6 MR. GASKINS: Yes, Your Honor.

7 THE COURT: All right. You may call your next
8 witness.

9 MR. GASKINS: The Plaintiff calls Robert Small.
10 Thereupon,

11 ROBERT SMALL
12 was called as a witness, having been first duly sworn,
13 was examined and testified as follows:

14 THE COURT: Your witness.

15 DIRECT EXAMINATION

16 BY MR. GASKINS:

17 Q Good afternoon, Mr. Small. Can you state your
18 name for the record please?

19 A Robert Scott Small, Junior.

20 Q Okay. And do you go by a nickname?

21 A Tex. Been known all my life by Tex.

22 Q Where are you from initially, Mr. Small?

23 A I live at 2306 Palm Boulevard, Isle of Palms in
24 South Carolina.

25 Q Okay. So, you live in Isle of Palms now. Where

1 did you grow up?

2 A Greenville, South Carolina.

3 Q And what is your educational background?

4 A I got a BA from Birmingham University, and an MBA
5 from the University of South Carolina.

6 Q What's your current profession?

7 A Real estate developer.

8 Q And how long have you been in the real estate
9 development business?

10 A Longer than I care to admit, but 1974.

11 Q And what types of projects have you developed?

12 A A broad range of projects including office, and
13 retail, and single family, and multifamily, and warehouses,
14 and medical office building.

15 Q Now, prior to the garage project, which we've been
16 discussing in this trial, had you ever developed any other
17 projects in the town of Mount Pleasant?

18 A I have.

19 Q And which ones?

20 A I developed a retail center on 17 North called The
21 Market at Oakland.

22 Q And when did you develop that project?

23 A Well, it started in about 2003, and didn't get
24 completed until about 2006, '07.

25 Q Okay. And during that project, did you become

1 familiar with the Town's planning staff?

2 A I did indeed.

3 Q I imagine you had to go before them a lot and
4 communicate with them and, and have various discussions
5 about what was needed for that project?

6 A I did.

7 Q Okay. And who were some of the Town's planning
8 staff that you had communications with during that project?

9 A Well, at that time, it was Joel Ford. He was the
10 planning director. And then I also interacted with
11 Christiane Farrell.

12 Q How would you describe, describe the, the
13 relationship that you had with the Town's planning staff at
14 that point in time?

15 A Very professional, very cordial.

16 Q Now, obviously this case involves Shem Creek
17 Development Group as the plaintiff. What is your connection
18 to that entity?

19 A I'm an owner in that group---

20 Q Okay.

21 A ---through a separate entity.

22 Q And does that entity have AVTEX in its name?

23 A It does.

24 Q Okay. And based on earlier testimony, I believe
25 Shem Creek Development Group was formed in 2013. Does that

1 sound correct to you?

2 A Correct.

3 Q And have you been a member of Shem Creek
4 Development Group since it, since it was formed in 2013?

5 A Yes.

6 Q Why was Shem Creek Development Group formed?

7 A It was formed to pursue the possibility of
8 building a garage and an office building at the corner of
9 Coleman Boulevard and Mill Street in Mt. Pleasant.

10 Q Mr. Flesch has testified some about his
11 responsibilities in the operations of Shem Creek Development
12 Group. What were your responsibilities?

13 A Well, they never were formalized, but I, I really
14 had a good relation with the town, and I went to the then
15 mayor and discussed the possibility of a, a public/private
16 partnership, and that discussion led to other events.

17 Q Okay. And were you also involved in the design
18 portion of the project, the early design engaging---

19 A Yeah, I---

20 Q ---Mr. Betsch?

21 A Yes, I initially hired Ken Betsch to do the
22 feasibility concept designs.

23 Q Okay. And were you primarily, primarily
24 responsible for having the communications with the town and
25 its officials and staff?

1 A I was.

2 Q Now, when did the idea of building a parking
3 garage at that location that you just described, when was
4 that first considered?

5 A 2011 as Mr. Flesch testified.

6 Q Okay. And how did you become involved in that
7 project?

8 A He, he and I had done a couple of transactions
9 together, and he had knowledge of the site where the CRAB
10 report that was to revitalize Coleman Boulevard identified
11 that site for a parking garage.

12 Q Okay. And he approached you about this
13 opportunity?

14 A Yes.

15 Q Okay. And when this project was first being
16 considered by you and Mr. Flesch, what role was contemplated
17 for the town?

18 A That they would be a financial partner with us,
19 but we would take the risk of developing a parking garage---

20 Q Okay. And were you---

21 A ---and managing it as well.

22 Q I'm sorry. I didn't mean to---

23 A And managing it---

24 Q Okay.

25 A ---as well.

1 Q And were you interested in parting -- partnering
2 with the town in this type of project?

3 A Yes.

4 Q And why is that?

5 A Well, you always want to do business with a good
6 credit tenant, and the Town of Mt. Pleasant is an excellent
7 credit tenant.

8 Q After you and Mr. Flesch first began considering
9 this concept, did you take it to the town and present it to
10 anyone there?

11 A I did. I went to Mayor Billy Swails who was then
12 the mayor of the Town of Mt. Pleasant, and spoke to him, and
13 he indicated that he had firsthand knowledge of the need for
14 a parking garage there because residents in the Old Village
15 were calling them all the time to get the cars off their
16 streets. So --

17 Q So, when you approached him, did he express
18 interest in pursuing or studying further the, the project?

19 A Yes, he did.

20 Q Okay. And so what did you, Shem Creek Development
21 Group, Tex and Tyler, what did y'all do next to pursue this
22 project?

23 A After discussion with the town, we agreed to
24 jointly fund a feasibility study by the Desman Group out of
25 Chicago.

1 Q Okay. And why was the Desman Group chosen?

2 A National reputation. They had the resources and
3 could do it in the timeframe that we wanted it done.

4 Q Okay. And do you recall who paid for the Desman
5 Associates study?

6 A Yes, we each paid. The town paid half, and we
7 paid half.

8 Q Okay. And what were the conclusions reached by
9 the Desman and -- Desman & Associates when they studied the
10 feasibility of a parking garage at this location?

11 A Well, it's important to note that they were
12 looking at a parking garage that would be 250 cars on it,
13 and two story on the corner. And that, after studying the
14 feasibility, it was not financially feasible. It would lose
15 money.

16 Q And were those conclusions presented to the town?

17 A They were.

18 Q And was the town interested in pursuing the
19 project after receiving that report?

20 A Neither one of us were.

21 Q Okay. So, what happened next?

22 A Well, in that period of time with the economy the
23 way it was, we had to go and do some other projects, and
24 then circle back up and talked about how the Desman report
25 had really identified that there was no demand for weekday

1 parking in the garage, and that was the biggest deficit that
2 the garage had to overcome.

3 But with the economy improving, we saw that
4 there was very little Class A office space in the
5 Greenville -- in the Mt. Pleasant market. So, we decided to
6 study that and came to the conclusion that we could build an
7 office building that would use it in the daytime, and then,
8 on nights and weekends and holidays, the tourists could use
9 it and it would be a good match. So, we looked into that
10 and decided to go back to the town and see if they were
11 interested in that proposal.

12 Q Do y'all -- do you recall when, when this time
13 period when you began considering this -- the project with
14 an office component?

15 A I believe it was like Fall of '12.

16 Q Okay. After you came up with this concept and
17 decided to approach the town, who from the town did you
18 approach about its potential interest in this project?

19 A I went back to Mayor Swails, and I, I believe that
20 that he took it then to several members of the town council,
21 and sort of got the feeling that that was something they
22 wanted to pursue.

23 Q Okay. And did he give you any direction about
24 what steps to take next?

25 A He came back to me and told me to go meet with the

1 town manager, administrator, Eric DeMoura, and work with him
2 on seeing if we could put together a proposal that, that
3 would make sense to the town.

4 Q And did you meet with Mr. DeMoura?

5 A I didn't meet with -- I met with him once around
6 that time, but really I didn't have a proposal to bring him.
7 So, that's when I hired Ken Betsch.

8 Q And who is Ken Betsch?

9 A He's an architect from Greenville, and he was the
10 architect on The Market at Oakland project, the retail
11 project. So, he knew the Town's ordinances, and the staff,
12 and had experience with it, and I felt it was a good fit.

13 Q Beyond your, your past relationship, why was
14 Mr. Betsch chosen to look at this project?

15 A He had built a number of parking garages all over
16 the country. He, he is one of the premier arena, civic
17 arena builders, and with that goes a lot of parking garages.
18 He built the one for the College of Charleston, designed it.

19 Q Okay. And what scope of work was Mr. Betsch given
20 to perform?

21 A I told him -- gave him the site where we
22 identified where the parameters were of the site, and I said
23 see how many parking spots you can get on a two level
24 parking garage, and then I want two levels of office above
25 it. And I don't want it to go past the middle of the deck

1 because the mayor had indicated to me he didn't want any
2 height on the back. So, we didn't want to put any height on
3 the back.

4 Q Okay. And do you recall if you gave him a -- an
5 approximate number of spaces to look at?

6 A 250. That's sort of what Desman had looked at.
7 So, we thought we would go with the same amount.

8 Q Okay. And did the town have any input in the
9 numbers, number of spaces that you asked Mr. Betsch to look
10 at?

11 A They didn't offer any suggestion to anything.
12 They weren't involved in that really.

13 Q Now, at that point in time, had anyone from the
14 town indicated that a minimum number of spaces must be
15 provided for the town to financially support this project?

16 A Not at that time. Not ever.

17 Q Did Mr. Betsch prepare any conceptual drawings?

18 A He did.

19 Q And describe to us the design and layout of the
20 building and garage that he depicted in his conceptual
21 drawings?

22 A He put two stories of office over two stories of
23 parking facing Coleman Boulevard at the corner of Mills and
24 Coleman. And he indicated and we determined that it was
25 about 40,000 feet of office space.

1 Q And did he present to you any other types of
2 conceptual drawings that had different levels of parking?
3 For example, three levels of parking or anything like that?

4 A He did.

5 Q Okay. And what ultimately did you choose to be
6 your preferred concept to take back to the town?

7 A Well, in the concept plan that he gave us, two
8 levels of parking and two of office. It was 276 was his
9 number. That's where the number came from. And then, when
10 we looked at the feasibility of the third floor, he
11 indicated in his drawings even that you might not be able to
12 do it because you couldn't get the height to get to the
13 third floor from the bottom of the office. You would have
14 to raise the office up so much higher to get the ramp up.
15 So, we didn't -- having the Desman study we didn't want to
16 build much more than what he said we could get on two
17 stories.

18 Q And you mentioned that there were 276 spaces in
19 the layout that Mr. Betsch prepared?

20 A That's what he said.

21 Q Okay. Did Mr. Betsch have any involvement in the
22 project beyond preparing these conceptual drawings?

23 A No.

24 Q Okay. And why not?

25 A Well, at that -- the sequence is important

1 because, at that period of time, I had the drawings and I
2 had an indication of what the financials were going to be
3 because Mr. Flesch and I had sat down and done some work on
4 what it was gonna cost to build a parking stall in a
5 structured parking, and we knew about what the building was
6 going to cost, et cetera so we could come back with a
7 financial proposal. So, I went back to the mayor, showed
8 him the drawings and said, look, I'm ready to meet with Eric
9 DeMoura, the town administrator, and he said it looks good,
10 get with him, and see what he thinks of it, and then if --
11 after that, we can take it to the various people on council
12 and see if they are willing to go the next step.

13 Q Did you, in fact, meet with Mr. DeMaura---

14 A I did.

15 Q ---as Mayor Swails suggested?

16 A I did.

17 Q Okay. And do you recall the timeframe of when
18 this would have occurred?

19 A It had to be late in '12, you know, towards the
20 end of the year.

21 Q Okay. And what was Mr. DeMoura's reaction to the
22 concept that you presented him?

23 A He thought it looked good.

24 Q And was he supportive of having further
25 discussions about entering into an agreement?

1 A Yes, everybody was very positive about it.

2 Q Okay. Now, at that point in time, did Mr. DeMoura
3 give you any feedback as to whether he thought 276 spaces
4 were sufficient, not enough, too many?

5 A Not at all.

6 Q And, at that point in time, what did you and the
7 town do to formalize the relationship and the concept that
8 y'all had developed?

9 A We submitted the -- a financial proposal in the
10 Spring that stated that we could build enough parking of the
11 276 to have 132 for public, and 144 for the office
12 component, even though code did not require 144. But we
13 wanted to have ample parking reserved for tenants not
14 knowing which tenants we were going to have, and how many
15 employees they might have.

16 Q Understood.

17 A So, we submitted a financial proposal to him.

18 Q Okay. And did -- were -- was the general concept
19 of having a certain number of spaces reserved for office
20 use, and then other spaces reserved for, for public use, was
21 that acceptable to Mr. DeMoura?

22 A He understood the concept. Yes, it was. And let
23 me say, I want to be very clear with this. I didn't go to
24 him with a picture of the rendering and say this is gonna be
25 a great office building. But I showed him Mr. Betsch's plan

1 that showed the 276 parking spaces in it. So, I showed it
2 to the mayor. I showed it to him. It was part of the
3 overall proposal.

4 Q Okay. So, we've had some discussion about the
5 conceptual plan that was attached to the Parking License
6 Agreement. Did you present that to Mr. DeMoura?

7 A Yeah, that was the conceptual plan.

8 Q Okay.

9 A But there was also a conceptual parking
10 arrangement.

11 Q And that's the one that showed the 276 spaces?

12 A Correct.

13 Q Now, what was contemplated with regards to the
14 Town's financial commitment to reserve the number of spaces
15 that you just testified about?

16 A Well, after negotiation, it came down to what is
17 in the PLA, and that is that they would pay \$185,000 a year
18 for 15 years. And why 15 years? Because that would have
19 paid for those 132 spaces. So, we were basically financing
20 them for the public. And so the -- other than that, we
21 would take all of the risks in building it, making sure that
22 we could build it for the figures that we thought we were
23 gonna get back from the town, and as well as manage the
24 parking because the town had no experience in managing a
25 parking garage at this time.

1 Q Okay. So, it sounds like the, the rental amount
2 was based on a negotiated figure that was originally
3 connected to the cost of construction to those spaces?

4 A It was all perceived costs, yes.

5 Q Okay. And at that point in time, what was the
6 estimated construction cost for the garage portion of this
7 project?

8 A Four and a half to 5 million.

9 Q And how accurate did those projections end up
10 being?

11 A We weren't very good at it.

12 Q Well---

13 A And let me tell you why. The -- it happens that
14 this particular piece of property had once been a dump years
15 and years ago and been filled in. So, when we went to build
16 on it, we had to drive pilings, which is not unusual there,
17 but on that little acre right there, we had to do 385
18 pilings. That was what was unusual.

19 Q Did you go back to town -- go back to the town and
20 say hey, our costs have gone up, you need to pay more?

21 A No.

22 Q All right. So, it sounds like that y'all had
23 reached some, some, I guess, an agreement in principle on
24 the basic deal terms, is that correct?

25 A Correct.

1 Q Okay. So, what were the next steps in formalizing
2 a written agreement with the town?

3 A It was to negotiate, between the lawyers, the
4 language of the agreement.

5 Q And the earlier testimony has been that that was
6 Gray Taylor on behalf of Shem Creek Development Group, and
7 Mr. Pagliarini on behalf of the town?

8 A Correct.

9 Q And did you ultimately finalize an agreement?

10 A In October of '13.

11 MR. GASKINS: Your Honor, may I approach?

12 THE COURT: Yes, sir, you may.

13 BY MR. GASKINS:

14 Q We have a complete mess up here, and I will do my
15 best to locate. I'm handing you what's been already
16 admitted into evidence as Plaintiff's Exhibit No. 7. Are
17 you familiar with this document?

18 A I am.

19 Q And what do you recognize it to be?

20 A It is a Parking License Agreement between Shem
21 Creek Development Corp -- Group, LLC and Town of Mt.
22 Pleasant.

23 Q And what's your understanding of how many spaces
24 were to be included in the parking garage under this
25 agreement?

1 A Based on the concept plan, 276.

2 Q Okay. And of those, how many were intended to be
3 public spaces reserved for public use 24 hours a day?

4 A Negotiated, 132.

5 Q And is your understanding that that number was
6 meant to be a definite exact number with no flexibility?

7 A Not at all. I mean there was no way that you
8 could assume that the concept plan took into consideration
9 all that you might find in the actual development of the
10 project. It was -- there were places in the project that
11 we, at one time, didn't even feel like that we would be able
12 to build part of the garage on when we got started with the
13 footings and all. But there are too many variables to say
14 this was a finite number. It was a working number between
15 two willing parties.

16 Q And do any of the provisions of the Parking
17 License Agreement support that interpretation?

18 A I think it does because there's several places in
19 here substantially similar in language that has been plans
20 instead of actual numbers. They refer to these are the
21 plans. Well, these aren't plans. These are concept plans.
22 The plans would be the actual drawings that would make it a
23 reality.

24 Q Okay. And I don't want to present cumulative
25 testimony and, and waste time. But Mr. Flesch testified

1 about the various provisions that he believed supported that
2 interpretation. Do you agree with his testimony?

3 A I do.

4 Q When this agreement was negotiated, and anytime
5 before, did the town give you any indication that it was
6 absolutely necessary for the garage to contain 276 total
7 spaces?

8 A No, they gave me, you know, every indication that
9 they wanted to cooperate and get as close to that number as
10 we both could.

11 Q What about the number for public spaces, 132, did
12 they give you any indication that that number was absolutely
13 necessary for them to enter into this agreement?

14 A No.

15 Q To your knowledge, did the town conduct any
16 analysis to determine whether 276 total spaces or 132 public
17 spaces were needed to satisfy the parking demand in the
18 area?

19 A I never saw any analysis.

20 Q Now, at the time that the Parking License
21 Agreement was entered into, could Shem Creek Development
22 Group construct the office building as depicted in the
23 conceptual rendering that was attached to the Parking
24 License Agreement?

25 A I think we constructed both a garage and the, and

1 the building given the pallet we had to work with, the
2 amount of land.

3 Q Understood. And -- but I guess my, my question
4 is, and I can ask it better, is that was it feasible, under
5 the existing zoning regulations, in August -- October of
6 2013, to construct the garage and office building as it was
7 depicted?

8 A No, it was not. Not as it was depicted because
9 the overlay district called for having retail on a
10 percentage of the first floor, and it also had a height
11 limitation of 45-feet.

12 Q And because of those limitations, did you need
13 changes in the zoning code to make the project feasible?

14 A To move forward we did.

15 MR. GASKINS: Your Honor, may I approach the
16 witness?

17 THE COURT: Yes, sir.

18 BY MR. GASKINS:

19 Q I'm handing you what's been premarked as
20 Plaintiff's Exhibit 58. Do you recognize this document?

21 A I do.

22 Q What is it?

23 A It is a letter to the chair of the planning
24 committee of the Town of Mt. Pleasant, town council, whereby
25 I request that the planning committee take up the

1 possibility of giving us relief up to 55-feet of height in,
2 in the area that we were in for the garage and the office
3 building. And also to alleviate the requirement to have
4 retail on the first floor. And as a part of that, it was
5 not only the parking, but it also was in a flood plain. So
6 --

7 Q Now, if we look at that first paragraph in the
8 second sentence, it says in order to make it economically
9 feasible for all parties, we have incorporated a proposed
10 office building over the garage. Do you see that?

11 A Yes.

12 Q Okay. Explain to us what you meant by that
13 statement.

14 A Ask that question again.

15 Q Okay. If you look at the second sentence, in
16 order to make it economically feasible for all parties---

17 A Yeah.

18 Q ---we have incorporated a proposed office building
19 over the garage. Please explain to us what you meant by
20 that.

21 A Well, that goes back to the Desman study, and how
22 it wasn't feasible to do a garage. And I think that I was
23 laying that out because not all the members of the planning
24 committee may of known what we were proposing. Although, by
25 this time, they had already voted -- no, they hadn't voted

1 on it yet. So, I was -- we were adding the parking
2 component to make the entire project economically feasible.

3 Q Okay. And you described one of the changes that
4 you were seeking, 55-feet. Were you able to get two levels
5 of office space at the existing height limit of 45-feet at
6 that time?

7 A We were able to get both of them passed because
8 cooperation was unanimous.

9 Q Understood. But you could get it with the change
10 to 55-feet, but could you get two levels of office space
11 with a -- with 45---

12 A No.

13 Q ---with a 45-foot maximum?

14 A No.

15 Q And what was the response from the town after
16 you'd sent this letter and there's been a previous letter
17 that you also sent in July of 2013 that's been admitted into
18 evidence I believe. What was the Town's response to your
19 request?

20 A They were very cooperative and they held hearings
21 and went through the process to amend the ordinance.

22 Q Okay. And did you work with the town, anybody
23 with the town to facilitate the drafting and ultimate
24 approval of these zoning ordinances?

25 A The town did the drafting. I, I met with

1 Christiane. I met with the planning committee. We had
2 hearings at the planning committee, public hearing.

3 Q Okay. And just so the record's clear, because you
4 referred to it earlier, you're referring to Christiane
5 Farrell?

6 A That's correct.

7 Q Okay. Who is Christiane Farrell?

8 A She, at the time, was head of -- the director of
9 planning staff.

10 Q And, at that point in time, did you have a good
11 relationship with Christiane?

12 A I think I still do.

13 Q Okay. And you made it known to her that the
14 reasons for these changes were to maximize the space that
15 you needed for parking?

16 A Yeah, we were working together for the benefit of
17 the community to provide the parking, and this was gonna get
18 us to, to that point.

19 Q And, ultimately, this made its way through the
20 process. Did you attend, attend the meetings where this was
21 considered by planning committee, and later by full town
22 council?

23 A I did.

24 Q Okay. And what were -- what was the, the planning
25 committee and town council's response to, to this request

1 for a zoning change?

2 A Well, they studied the ramifications of it, and
3 they -- there was discussion, but there wasn't opposition.
4 And, ultimately, they saw the vision of trying to bring the
5 public parking there to that location, and this is the way
6 to do it.

7 Q Okay. Was this ordinance, zoning change approved
8 with overwhelming support from the town?

9 A Yes, it was.

10 Q Okay. Now, up until that point, had the town been
11 cooperative in Shem Creek Development Group's efforts to---

12 A Very much so.

13 Q ---develop the project?

14 A Yes.

15 Q Did that ever change over time?

16 A Pretty quickly.

17 Q Okay. When did you first realize it?

18 A Starting in January and certainly in February then
19 we started seeing at the council's meetings, and opposition
20 Save Shem Creek was the name of it, would come during the
21 public comment part of the meeting, and start talking
22 negatively about the project.

23 Q And did you notice that the town took any actions
24 that had a negative impact on the project?

25 A It became apparent that it was moving in that

1 direction.

2 Q Okay. There's been testimony about it, but are
3 you familiar with the zoning changes that were affected by
4 Ordinance 14022, which was adopted in April, 2014?

5 A Yes. Yes, I am.

6 Q And when did you become aware of those changes and
7 the impacts that it would have on the project?

8 A I became apparent -- I mean it became apparent to
9 me that the zoning changes were taking on a life of their
10 own in March, and, and when they were proposed even earlier,
11 as an opportunity for Save Shem Creek to voice their
12 opposition against the parking garage and the office
13 building.

14 Q Okay. What about the actual zoning changes
15 that -- the, the specific changes that impacted the property
16 like the, the change to the setbacks. Were you aware of
17 that prior to their adoption in April of 2014?

18 A Absolutely not.

19 Q Were you aware that they were under consideration?

20 A I was aware that they were looking at the Coleman
21 Boulevard and the setbacks on Coleman and all, and some of
22 the residential components of it. But I was not aware that
23 it was something that would affect our development. And I,
24 when it came to the vote time, I actually called Mr. DeMoura
25 and asked him, do we have a problem here. We got something

1 that's in this that's going to affect us negative, and, and
2 he got back to me and said that, no, it's all residential.

3 MR. PAGLIARINI: Objection, Your Honor.

4 THE WITNESS: It's basically---

5 MR. PAGLIARINI: Hearsay.

6 MR. GASKINS: Your Honor, this is a, a party
7 opponent.

8 MR. PAGLIARINI: No, sir, the town administrator
9 is not a party opponent. He is an employee of the
10 town. The town council speaks for the Town of Mt.
11 Pleasant by vote. So, he's not a party opponent under
12 the law, Your Honor.

13 THE COURT: Please move on.

14 MR. GASKINS: What's that?

15 THE COURT: You can move on.

16 BY MR. GASKINS

17 Q Okay. All right. So, what did you do after you,
18 after you found out that the zoning changes had been
19 enacted?

20 A I was trying to find out and ascertain how and
21 why, and I was never able to do that even though I was told
22 that it was -- they would look into it. The town would look
23 into it.

24 Q Okay. And did you ever get a response?

25 A Yes, it said after talking to staff, that they

1 couldn't find out who or why it was put in there.

2 Q Okay.

3 A And let's be clear. That's not the ordinance.

4 It's that change to the Footnote Number 5. That Footnote

5 Number 5 we relied on in our planning process to develop 276

6 spaces. Footnote Number 5 was changed to do the 20-foot

7 setback, build-to line 20 to 30. So, that was the only --

8 it wasn't a big paragraph in the ordinance. It wasn't

9 something that you would even pick up on. I don't know how

10 we were supposed to. I looked at five and I thought it was

11 the same five, but it wasn't.

12 Q Okay. So, what's your understanding of how those

13 changes that were adopted in April of 2014 affected the

14 project?

15 A It affected our footprint for the parking garage,

16 and, ultimately, for the office building.

17 Q Okay. Did you present any options to the town to

18 minimize the effects or reverse the effects that these

19 changes had on the project?

20 A As Mr. Flesch has testified, we did. We offered a

21 number of them thinking that the town had discretion to make

22 certain adjustments to the lines on either at Church, which

23 we certainly didn't feel was a street at the time. It was a

24 gravel -- at best, a gravel pothole road. But -- so, there

25 was several things that they could have done.

1 Q Okay. And did the town accept any of the
2 proposals or options that you presented to them?

3 A Nope, they did not.

4 Q And so you ultimately continue with the project
5 and, and got a final design of 234 total spaces, and 117
6 public spaces, is that correct?

7 A How many?

8 Q 234 total and 117 public?

9 A Yeah, let's -- I, I would prefer say, at the time
10 we built the project, is that, that design?

11 Q Yeah, that's the design that was ultimately
12 approved, correct?

13 A Correct.

14 Q Okay. And---

15 A We, we proposed 117 public spaces, and 117 met the
16 code requirement for the office building as it was
17 redesigned.

18 Q And what -- and you're just referring to the
19 public spaces, correct?

20 A Right.

21 Q Okay. Did you believe that Shem Creek Development
22 Group was fulfilling its obligations under the Parking
23 License Agreement by the -- by designing the garage with
24 those, with those -- what that number of spaces?

25 A We did.

1 Q Okay. And why is that?

2 A Well, both in spirit and also given the
3 constraints we were given. That's what we could build, and
4 I -- I've heard the questioning that, well, you could build
5 a third floor to the garage. Well, I don't think, after
6 looking at it, you could have. We -- also, we could take
7 that line of thought, we could have gone down and built a
8 vault down. It, it wasn't the plan. It wasn't the
9 feasibility. It wouldn't have met the economic feasibility,
10 either one of them.

11 Q Now, did the town take the same position that, by
12 designing the garage with 234 total spaces and 117 public
13 spaces, that you were satisfying your obligations under the
14 agreement?

15 A No, when we asked for the estoppel, we got a
16 letter back several months later that stated that we did
17 not.

18 MR. GASKINS: Your Honor, may I approach?

19 THE COURT: Yes, sir.

20 *(Whereupon, Plaintiff's Exhibit No(s). 58 marked*
21 *for identification and received in evidence.)*

22 BY MR. GASKINS:

23 Q I'm handing you what has been admitted into
24 evidence as Plaintiff's Exhibit 13. Are you familiar with
25 this document?

1 A I am.

2 Q Okay. And what is this?

3 A It is the letter from the Town of Mt. Pleasant. I
4 guess I can't say the administrator's name any more, can I?

5 Q You can. It's the letter from Mr. DeMoura?

6 A Correct.

7 Q Okay. And he was taking the position that Shem
8 Creek Development Group was not satisfying its obligations
9 or could not satisfy its obligations under the Parking
10 License Agreement, correct?

11 A That's correct.

12 Q Okay. And that was based on the number of spaces
13 that were being provided in the approved design?

14 A Correct.

15 Q What did you do after you received this letter?

16 A I called him.

17 Q And what was the purpose of the call?

18 A To see if there wasn't some way that we can get
19 beyond the difficulties we were having in putting together
20 the parking garage, and the office building there on a
21 public/private basis.

22 Q And what was his response?

23 A He was receptive---

24 MR. PAGLIARINI: Your Honor, same, same objection
25 as far as this is hearsay.

1 MR. GASKINS: Your Honor, this is not being
2 offered to prove the truth of the matter asserted.
3 It's just laying some foundation about what happened in
4 the progress of the building.

5 THE COURT: I'll allow it.

6 BY MR. GASKINS

7 Q Please proceed.

8 A He asked me -- he, he was receptive. He said why
9 don't you get with Mr. Pagliarini, and with Ms. Farrell, and
10 meet with your lawyers, and see if you can't come up with
11 something that would be acceptable. And I said, at the
12 time, I said, well it doesn't seem like a difficult solution
13 if we can just adjust the numbers. So, we did. We met.

14 Q And it sounds like you did meet?

15 A Yes, we did.

16 Q And what was the result of those, those meetings?

17 A We drafted a first amendment to the PLA, the
18 lawyers did.

19 Q And what were -- how would that amendment have
20 modified the executed Parking License Agreement?

21 A It would recognize the reality of the fact that we
22 could only build 234 on site, and that, of those, half would
23 be available to the public full-time, and half would be for
24 the office use during the weekdays.

25 Q Okay. Why did you agree to that proposal?

1 A As previously stated, my, my partner, Mr. Flesch,
2 at this point in time, we had paid hundreds of thousands of
3 dollars for the design, and for the leasing the parcel, and
4 we had probably had close to a million dollars in it right
5 then. And we felt the prudent thing to do was to go ahead
6 and not argue about the, the facts that got us to the point
7 where we were, but rather let's go ahead and provide the
8 spaces that are needed. That's the whole premise that were
9 needed there, and reduce the compensation for those as we
10 reduced the number of spaces.

11 Q Did the town accept this amendment?

12 A Nope.

13 Q And has the town ever paid Shem Creek Development
14 Group any rent?

15 A None.

16 Q Provided an estoppel certificate?

17 A No.

18 Q Okay. And how have the Town's actions affected
19 Shem Creek Development Group?

20 A Well, it had devastating effect on us financially.
21 It -- as testified, we had to sell 85 percent of our
22 position in, in the project in order to raise the equity
23 because the lenders would not give us the amount of money we
24 needed to, to hold on to it without the creditor of the
25 town, and I think that that's enough said there.

1 Q Okay. Mr. Small, in conclusion, do you believe
2 that the design of the garage and Shem Creek Development
3 Group's performance under the Parking License Agreement give
4 the town the benefits that it sought when it agreed to the
5 Parking License Agreement?

6 A I think we see it every week at the Shem Creek
7 area down there, that it has served its purpose to do it
8 because we've operated it for the public. Not that we would
9 have to, but we have so far, and it's been very successful
10 for the restaurants, and by the fact that the 10,000-foot
11 restaurant opened and was able to send patrons to it, and by
12 the fact that there are fewer and fewer people that encroach
13 on the Old Village, which was the object -- objective there.

14 Q Thank you, Mr. Small. Please answer any questions
15 that the Town's lawyers may have.

16 THE COURT: Cross examination.

17 MR. PAGLIARINI: If Mr. Small needs a break, but
18 we're ready to go forward, Your Honor.

19 THE COURT: You need a recess, Mr. Small?

20 THE WITNESS: No, I'm fine right now, but I may
21 call in a minute.

22 CROSS EXAMINATION

23 BY MR. PAGLIARINI:

24 Q Good afternoon, Mr. Small.

25 A Good afternoon.

1 MR. PAGLIARINI: Your Honor, may I approach the
2 witness to hand up the exhibit book?

3 THE COURT: Yes, sir.

4 BY MR. PAGLIARINI:

5 Q Yes, sir, there's plenty up here. Are you ready,
6 Mr. Small?

7 A I am.

8 Q All right. Thank you. So, it was some time in
9 late 2012, early 2013, that you discussed with Mr. Flesch
10 the possibility of developing the office building with a
11 garage component, is that correct, on the time -- from the
12 timeline standpoint?

13 A I think it was more like in the Fall, but, you
14 know, of 2012.

15 Q And you had retained Mr. Betsch in December of
16 2012?

17 A That's right.

18 Q You mentioned that you spoke to Mayor Swails, the
19 mayor of town -- the Town of Mt. Pleasant at the time, and,
20 and you presented a concept to him, is that correct?

21 A Correct.

22 Q And as you previously said, Mayor Swails gave a
23 favorable reaction, but he also encouraged you to put your
24 idea in a form that the town could review. Is that your
25 understanding?

1 A Yes.

2 Q And you understood that Mayor Swails didn't have
3 the right to speak for town council, is that correct?

4 A Of course.

5 Q So, you engaged Mr. Betsch, and was it your
6 intention that you were hiring him to conduct a feasibility
7 study to see if you could build the project on this
8 property?

9 A Correct.

10 Q In fact, when you hired him, in December, 2012,
11 you weren't sure that there would be any architectural
12 services for this property at that time?

13 A Well, initially, when I hired him, it was with the
14 prospect that, if this is the feasible, if it goes on, that
15 I would hire his firm to do the architectural. I mean that
16 was all -- my clear understanding with him. It wasn't in
17 writing.

18 Q I understand. For the purpose so we all -- the
19 Court understands the timeline, Mr. Betsch worked
20 essentially for you and a company from December, 2012 until
21 he was replaced by Mr. Johnston's group some time in October
22 of 2013, is that correct?

23 A I think they were -- you know, we probably had
24 discussions with them in the summer.

25 Q With Mr. Johnston's group?

1 A Correct.

2 Q Okay. Mr. Betsch provided three separate schemes
3 or proposals for the project, is that correct?

4 A For the parking layout.

5 Q Yes. All right. For the parking layout. And,
6 Mr. Small, if, if you would, I'm referring in that large
7 book, for convenience purposes, to Mr. Betsch's Scheme 1,
8 which is Tab 24, and for the Court, Tab 24. Just let me
9 know when you've located that, sir.

10 A Got it.

11 Q Okay. Mr. Small, that is the document that I
12 believe you testified earlier, I'm not gonna go into it in
13 great detail, but that is what's known as Mr. Betsch's
14 Scheme 2, is that correct?

15 A I -- you know, that's what it says here, correct.

16 Q Right. And I, I believe that you testified
17 earlier, that's the, that's the plan you liked with the two
18 floors of parking and the two floors of office that -- well,
19 it had two floors of parking, is that correct?

20 A Correct.

21 Q And as opposed to say, Scheme 3, and if we need to
22 look at that, we will, Scheme 3 would have had additional
23 parking on a third level, is that correct? And if you need
24 to look at Scheme 3, sir, that is No. 22 in the book,
25 Exhibit No. 22.

1 A Okay.

2 Q So, I -- let me, let me ask the question again.

3 Have you seen Scheme 3 now?

4 A Yes.

5 Q Okay. Scheme 3 had one additional or three total
6 parking levels, is that correct?

7 A He showed those, but he, he also pointed out, and
8 we discussed, whether it was -- reality wasn't -- it
9 probably couldn't be built.

10 Q You, you believed, and as you've testified, Scheme
11 2 was the general concept that you were going with, is that
12 correct?

13 A Correct.

14 Q And Scheme 2 provided, based on the numbers that
15 Mr. Betsch provided, 276 parking spaces, is that correct?

16 A That's right.

17 Q And that, I, I believe, is what ultimately you
18 went to and incorporated into the Parking License Agreement,
19 is that correct?

20 A Correct.

21 Q That number, 276, right?

22 A Correct.

23 Q All right. You are aware that Mr. Betsch, when he
24 was drafting that and preparing Scheme 2, he based it on
25 9-foot wide parking spaces, is that correct?

1 A I didn't know what he based it on at the time.
2 But subsequent to that, I think he did.

3 Q So, during that, during the development of Scheme
4 2, and that, that phase of your project, you didn't have any
5 meetings to discuss the feasibility of Scheme 2, is that
6 correct?

7 A With Mr. Betsch?

8 Q No, I'm sorry. No, sir. Let me ask it again so I
9 can be more clear.

10 A Thank you.

11 Q During the time that you were working with
12 Mr. Betsch and he produced Scheme 2, and you, you worked
13 with him on Scheme 2, and before you made your final
14 decision on that, did you discuss the feasibility of Scheme
15 2 with town staff?

16 A No.

17 Q Now, you mentioned earlier in your testimony, and
18 please correct me if I'm wrong, sir, that you said you
19 recollect, at some point prior to the Parking License
20 Agreement, that you provided that Scheme 2 to Mr. DeMoura,
21 is that right?

22 A I was trying to make that point, yeah.

23 Q Okay. Well, I, I, I want to ask you about it. Is
24 it possible that you just discussed financial structure with
25 Mr. DeMoura and not physical structure or plans?

1 A Well, I didn't have plans. I had the concept
2 plans. I mean I didn't give him a physical rendering of
3 elevations and all of that. I gave him what is in the
4 agreement, the PLA, and the Scheme 2 parking layout to show
5 that there were 276. I mean otherwise it would have just
6 been you know -- I guess, he would have thought I just made
7 the number up if I didn't show him.

8 Q Well, at the time you had the conversation with
9 Mr. DeMoura, had you provided the town any of your draft
10 plans?

11 A All right. I'm, I'm not sure I understand,
12 Mr. Pagliarini, because I had several conversations with
13 Mr. DeMoura, and -- but when I came for the proposal,
14 financial proposal, I came with these plans that showed the
15 276 parking layout, and the rendering showing the concept
16 plan.

17 Q Mr. Small, do you recollect, on December 10th,
18 2019, just under two months ago, when we met for your
19 deposition?

20 A Yep.

21 MR. PAGLIARINI: Your Honor, I have the original,
22 December 10th transition I would like to, or excuse me,
23 deposition transcript original.

24 THE COURT: You need to open it?

25 MR. PAGLIARINI: Yes, ma'am, I'd like to. May I

1 approach?

2 THE COURT: Sure.

3 BY MR. PAGLIARINI:

4 Q Mr. Small, I'm gonna hand you this transcript,
5 sir. I'm sorry you have too many documents, but, if you
6 could, on that, go to Page 47, and tell me when you get
7 there.

8 A I'm there.

9 Q And in the margin, on Line 4, I'm gonna ask the
10 question, and the question is, at the time you had that
11 conversation with DeMoura, Mr. DeMoura, had you provided the
12 town with any of your draft plans, and what was your
13 response?

14 A I said, at the time, I can't say with accuracy
15 right now.

16 Q And that was -- you made that statement in
17 December, 2019, is that correct?

18 A That is correct. And I'm trying to look back and
19 see what meeting you're talking about. This discussion is
20 having to do with 2014, and the conversation I had with him
21 after 14022 was passed with a footnote. I, I don't, you
22 know. Now, these draft plans were much later on than what I
23 had been talking about.

24 Q So, your testimony, I want to be clear, your
25 testimony is that you provided Mr. DeMoura a copy of Scheme

1 2 prior to the execution of the, the PLA, the Parking
2 License Agreement? Is that your testimony?

3 A Correct. That was prior to October the 13th.

4 Q And you would agree that Scheme 2, the Betsch
5 draft of Scheme 2, was not included as an exhibit to the
6 Parking License Agreement, is that correct?

7 A I, I do say that's correct because, when the
8 lawyers put it together, it should have been, and there are
9 other errors, errors in that agreement that the lawyers put
10 together. I mean the exhibits are mixed up. They aren't
11 accurate, but, as it turns out, that's exactly right. Only
12 the concept plan is in there.

13 Q Mr. Small, I'd like to -- Mr. Gaskins asked you
14 about a letter that you sent to Ms. Stokes-Marshall. He
15 asked you just a few minutes ago. You, you recollect that
16 letter that you sent?

17 A Yes.

18 Q All right. In, in fact, are, are you aware that
19 there were two letters sent to Ms. Stokes-Marshall at that
20 time?

21 A Yes, I think so.

22 Q All right. The first one, I believe, sir, is
23 dated July 23rd of 2013---

24 A Uh-huh. (Indicating affirmatively.)

25 Q ---and is shown as Exhibit No. 20 in that large

1 book.

2 A So, we're through with this?

3 Q Yes, sir. Yes, sir. For now. So, let, let me
4 know when you get to Exhibit 20.

5 A I'm there.

6 Q Okay. And this is the July 23rd, 2013, letter,
7 and in the third paragraph, after Dear Ms. Stokes-Marshall,
8 it says it is our intent. Can you read that portion into
9 the record?

10 A It is our intent to work with staff to provide
11 open spaces and people oriented design details to ensure the
12 integrity of the activity zones on the adjoining streets.

13 Q All right. Adjoining streets, and is it correct
14 that the adjoining streets on the project---

15 A It's got a plural on it.

16 Q Right. Streets, right?

17 A Yeah.

18 Q And those streets are Coleman Boulevard is one
19 street, correct? Is Coleman Boulevard one street?

20 A Yeah. Yeah. Definitely.

21 Q And Mill Street is another one of those streets,
22 is that correct?

23 A Mill Street is another one of those streets.

24 Q And then, and I'm sorry, if you can't, but I guess
25 we've referred to it, but if you can't see this, let me

1 know. Mill Street and then Church Street or what's known as
2 Ronnie Boals now, is that correct, as well?

3 A Well, at the time I didn't think it was a street.

4 Q All right. You -- as you've testified, you
5 weren't sure that the Church Street, Ronnie Boals was a
6 street?

7 A Yes, sir, I probably didn't include that for sure.

8 Q There's no doubt that your intention in this
9 letter was to ensure the integrity and activity of the
10 activity zones on adjoining streets, is that right, streets
11 with an S at the end?

12 A Okay. I mean it begs the question though,
13 Mr. Pagliarini, as to whether or not there was an activity
14 zone down the entire length of it or if it was, as has been
15 testified, to include, as it came around the corner, to
16 include the lobby area, and that area right there where we
17 had a statue, and we had landscaping, and we had benches.
18 So --

19 Q All right. I will agree it does. I believe we
20 heard Mr. Flesch's testimony on that issue. Now, I'd, I'd
21 ask you also to, in that book, if you would, turn to Exhibit
22 No. 32, if you don't mind, sir, and let me know when you get
23 there.

24 A Okay.

25 Q And this is the -- I believe this is the letter

1 you went over with Mr. Gaskins, and can you tell or explain
2 why you wrote a second letter?

3 A I think I was asked to by the chair of the
4 planning. I don't, I don't recall specifically.

5 Q All right. If you would, Mr. Small, on
6 Exhibit 32, if you would also go to the third paragraph?

7 A Yep.

8 Q And it says it is our intent. Can you read that
9 first sentence into the record please?

10 A It is our intent to work with staff to provide
11 open spaces and people oriented design details to ensure the
12 integrity of the activity zones on our adjoining streets.

13 Q All right. Adjoining streets, plural again, is
14 that correct?

15 A Yeah, there weren't any activity zones on them
16 there other than what we were going to create.

17 Q At this time, and prior to, prior to this
18 August 28th letter, and actually prior to the July letter as
19 well, you had met with Christiane Farrell, the Town's
20 planning director, is that correct?

21 A Sure.

22 Q And you had discussed these items and elements
23 with Ms. Farrell, and that's how you got direction at least
24 to know what to ask for in these letters, is that correct?

25 A Probably so. I would agree with that.

1 Q Now, do you, do you recall who performed the
2 analysis to determine whether zoning amendments such as a
3 height increase would be necessary in order to build the
4 project?

5 A Yes, I, I think it was Stubbs Muldrow.

6 Q Well, let, let me ask you that because your first
7 letter to Ms. Stokes-Marshall was in July of 2013, is that
8 correct?

9 A Right.

10 Q And, and I want to make sure -- I'm not trying
11 to -- I just want to get the dates right. Stubbs Muldrow
12 was not hired until October, but I think you mentioned that
13 you had spoken with him prior to that, is that correct?

14 A Can we get the Court to go back and review your
15 question.

16 Q Oh, sure. I'm happy to ask it again.

17 A No, I want them to say exactly what you said.

18 THE COURT: Yes, you can play it back. Do
19 you recall about how far back it was?

20 MR. PAGLIARINI: I think it was just the
21 previous question, Your Honor---

22 THE WITNESS: Right.

23 MR. PAGLIARINI: ---if I'm understanding Mr.
24 Small.

25 (READ BACK QUESTION)

1 A Correct. You're mixing it up.

2 Q Okay.

3 A You're, you're talking about one thing here. We
4 didn't get to the height until November. I mean we got to
5 that later on.

6 Q Well, okay. I, I don't want to mix it up.

7 A Well, you're right. You're right because we had
8 to go through planning on it.

9 Q Yet you put -- go ahead, sir.

10 A But I -- it may have been that we did our own
11 analysis and came up with that at the time we looked into
12 it. But I can't say with certainty which architect or
13 whether it was Mr. Flesch and I that found that the height
14 limitation was 45-feet, and one of them told us that it had
15 to be higher.

16 Q And there is no doubt that, in your two letters,
17 the July 23rd, 2013, letter, and then the letter later in
18 August, that you had requested that height increase to
19 55-feet?

20 A You're right.

21 Q Is that correct, sir?

22 A You're correct.

23 Q All right. Thank you. Now, Mr. Small, I want to
24 go a, a little bit forward in time. So, again, not to get
25 the dates confused. So, as of the April, 2014 zoning

1 changes, the one that you discussed with Mr. Gaskins that
2 changed the setback to a build-to line on Mill Street in the
3 footnote that you mentioned --

4 A Yep.

5 Q -- prior to that, prior to learning about that,
6 you weren't aware that there was a 20-foot setback
7 requirement on Mill Street, is that correct?

8 A I, I knew that there was a 20-foot setback on Mill
9 Street. However, Footnote 5 gave an opportunity for relief.

10 Q So, prior to the 2014 changes, you were aware that
11 there was a 20-foot requirement, but that you could get to
12 5-feet if you met certain conditions, is that correct?

13 A Correct.

14 Q And you -- in all of this, and I'm, I'm not
15 criticizing, I'm just asking, you were depending on your
16 design architect or engineer to conduct this analysis to
17 determine setback lines, build-to lines, heights, and all
18 those types of things, is that correct?

19 A Obviously, when they had to do the plans, they had
20 to rely on -- I had to rely on them, yes. I relied on them.
21 I'm not sure if that was in the form of a question. But I,
22 I relied on my professional engineers and architects to give
23 us advice.

24 Q You're aware that the second architect,
25 Mr. Johnston's first meeting with the Town of Mt. Pleasant

1 staff, was on April 11th, 2014, is that correct?

2 A That was my understanding, yes.

3 Q Mr. Small, I want to ask you about the height --
4 the amendment for the height change as well as the
5 commercial office on the first floor, and I believe we,
6 we've established that that was -- all took place around the
7 late Summer and Fall of 2013, is that right?

8 A Correct.

9 Q And, as I, I believe you testified to, there were
10 several planning meetings, committee meetings, council
11 meetings, and the like, and that was approved in September,
12 excuse me, December---

13 A December.

14 Q ---2013, is that right?

15 A Correct.

16 Q Now, you may have heard this morning about
17 those -- about that meeting. You were present at the
18 December, 2013 town council meeting, is that right?

19 A I believe that's correct.

20 Q Yes, sir. And that, if you wouldn't mind, those
21 meeting minutes are found on Tab 8 in that binder.

22 A Eight?

23 Q Yes, sir, eight.

24 A Okay. All right.

25 Q Mr. Small, you're -- you are aware that town

1 council approved the zoning amendment, which was Ordinance
2 13077 at that meeting, is that right?

3 A Correct.

4 Q All right. Now, Mr. Small, were you also aware
5 that prior, some time prior in that meeting,
6 Ms. Stokes-Marshall, who I believe you knew as the chair of
7 the planning committee, made a motion to study the
8 relationship between Main Street Revitalization Effort and
9 existing neighborhoods, specifically items such as parking,
10 setbacks, density, building heights, and development
11 standards. Are you believe -- are you aware that she made
12 that motion some time during that meeting?

13 A Did I make the motion?

14 Q No, sir, that Ms. Stokes-Marshall made that motion
15 during that meeting.

16 A That's what the minutes say.

17 Q Okay. Now, is it fair to say, as you moved on,
18 you didn't recollect -- you either didn't recollect that
19 motion or were not aware that those would ultimately become
20 the basis for Ordinance 14022 that was approved in April of
21 2014, is that correct?

22 A I was not aware at all that this would lead to
23 change in Footnote 5. I'll give you that one.

24 Q Well, I'm not trying to get anything that -- I'm
25 just trying to clarify.

1 A No.

2 Q Are you aware that there was a special planning
3 committee meeting on December 19th, just over a week after
4 that motion, to discuss the possible study and changes to
5 the overlay district?

6 A I was not aware. I probably was aware, but I
7 didn't know it had anything to do with our development or
8 could possibly.

9 Q Were you aware that there was a meeting, another
10 special planning committee meeting, on January 10th to
11 discuss the proposal?

12 A Nope.

13 Q Were you aware of a February 19th, 2014, planning
14 commission meeting?

15 A I did not attend it.

16 Q All right. Did you attend any of the meetings, up
17 through the town council meeting on April 8th, 2014, where
18 Ordinance 14022 was given final approval?

19 A I attended most of the town council meetings.

20 Q Well, you testified earlier, and, and about the,
21 about some time, and I don't want to put words in your
22 mouth, but some time after the passage of 13 -- December,
23 2013 amendment that groups and some members of the public
24 began opposing the, the project, is that correct?

25 A Correct.

1 Q And I, I believe what you said is that, that
2 they -- some of these people were coming in meetings and,
3 and voicing their strong opposition to it, is that right?

4 A Correct.

5 Q And I believe your words were that, excuse me,
6 earlier today was that it had taken on a life of their own
7 by March of two -- is that correct?

8 A That's correct. And let me clarify that because I
9 want to be very clear that the person leading that had
10 actually been hired by our architectural firm to do
11 engineering. He worked for engineering and had access
12 throughout everything that we were doing, and he
13 misrepresented our project so much so that he was taking in
14 a building out of -- it looked like out of Charlotte. It
15 was a five-story parking garage, and he put it up on the
16 screen at the council member -- at council meetings and he
17 would say you don't want this to be built, you don't want
18 this to be built, and y'all can't allow this. This is
19 horrible. You're going to ruin Shem Creek. And that went
20 on for at least three months until the April meeting when I
21 got up and spoke in opposition to it.

22 Q Right. So, at least three months prior, but as we
23 just discussed at the December 10th, 2013 council meeting,
24 there was a motion made by town council, by a member of town
25 council to move forward with studying these issues that

1 ultimately, ultimately became Ordinance 14022?

2 A In 14022, Mr. Pagliarini, I will submit to you
3 that, with the exception of maybe one other line, the effect
4 on us was only the, the Footnote Number 5. And all -- the
5 majority of that was all residential concerns about what was
6 going on at Earl Street, and what, what it impacted the Old
7 Village, and if, if you thought I could pick it out, I'm
8 sorry. I'm not that smart.

9 Q Well, no. But let me -- let's say this. You
10 mentioned Earl Street. Is that a reference to the Earl's
11 Court development---

12 A Sure.

13 Q ---that was going on?

14 A Yeah, Earl's Court.

15 Q And, and I don't want, again, to put words in your
16 mouth. Are you saying that the primary opposition and at
17 least the reason that this discussion started was because of
18 Earl's Court, is that correct?

19 A I'm gonna say that Earl's Court was permitted, and
20 they had their permits, and the houses were being built, as
21 was the boulevard, and they didn't, they didn't like either
22 one of them.

23 Q All right.

24 A But we were the next project to come up.

25 Q All right.

1 A So, we got all of the venom from those two put on
2 us, and it wasn't on us. It was on town council.

3 Q And town council was getting a lot of pressure---

4 A That was it.

5 Q ---from these groups?

6 A There's no doubt about it.

7 Q Right. From these other projects, Earl's Court
8 and---

9 A Well, from the opposition to those projects.

10 Q Sure. Sure. But you don't believe that the
11 genesis of Ordinance 14022 was specifically and purposefully
12 to either thwart or negatively affect your project?

13 A I don't know how it got there or who put it there,
14 and nobody at the town can tell me, but it had an effect on
15 our project.

16 Q Okay. I was asking---

17 A A negative effect.

18 Q ---about the genesis of it and, and given the
19 timeline. And when you said that the real public opposition
20 started against your project was, at minimum, a month or two
21 after the whole public process started for 14022, is that
22 correct?

23 A Well, I don't know that they were protesting
24 14022, and I, I think it -- that probably had some rationale
25 in why the town council was willing to look at the portions

1 of the ordinance that they did look at.

2 Q So, Mr. Small, if you could, Ordinance 14022 is
3 Tab Number 26, and if you could take a moment, and turn to
4 that. Just let me know when you get there.

5 A I got it.

6 Q All right. Mr. Small, have you -- and I
7 understand you weren't aware of what was in this prior to
8 its passing, but, since that time, have you had the
9 opportunity to review this ordinance?

10 A I've looked through portions of it, not every bit
11 of it, because I find, like most of these ordinances, this
12 is very difficult to, to read and understand.

13 Q Right. Well, you admit -- specifically mentioned
14 in your earlier testimony Footnote 5, and this is a fairly
15 long ordinance, and that is on Page 21 of 38 of the
16 ordinance. Page 21.

17 A Yes.

18 Q And do you recognize, it's tiny lettering I know,
19 do you recognize Footnote 5 in there, and is that the
20 footnote you were talking about that affected -- negatively
21 affected the project?

22 A Yes.

23 Q Okay. So, in that Footnote, if I might, and tell
24 me if I'm correct, the -- it says the 20-foot setback
25 applies to all side streets except Mills Street where a 20

1 to 30-foot build-to is required, is that correct?

2 A Correct.

3 Q So, as, as we discussed earlier, essentially it
4 went from a 20-foot setback with the possibility of getting
5 a 5-foot setback to a 20 to 30-foot build-to line, is that
6 correct?

7 A Correct.

8 Q All right. Now, Mill Street is sort of on the
9 side of the parking garage, is that right?

10 A Correct.

11 Q And so it would have -- that ordinance would have
12 affected, if, if it did, the width of the building, is that
13 right?

14 A Yes.

15 Q Because the front of the building was on Coleman.
16 Is that---

17 A Yes.

18 Q ---fair?

19 A Yeah.

20 Q All right. Later on in the process, are you aware
21 that a decision came out of the Town's zoning department
22 that the building -- that the building could be moved over
23 toward the creek away from Mill Street up to an additional
24 30-feet?

25 A I'm aware of the---

1 Q Okay.

2 A ---what the ruling was on the marine district---

3 Q Right.

4 A ---and the office use.

5 Q All right. So, the, the footnote itself, and
6 that -- and the requirement therein did not affect the width
7 of the building from the time of your additional design
8 until you submitted it to the Town of Mt. Pleasant, is that
9 correct?

10 A Well, it's not correct. I mean it immediately
11 affected our plans that, that we had. So, as has been
12 testified to by Mr. Flesch, we had to take extreme measures
13 to go negotiate with other tenants who had control of that
14 area to pay them more money, to pay a quarter of a million
15 dollars to fix their parking lot for them, and to do other
16 things, and we were not able to use that entire amount of
17 30-feet.

18 Q From the time you had your conceptual drawings
19 until the time, ultimately, what was submitted to the town,
20 the building width did not substantially change, is that
21 correct?

22 A I don't know that to be true.

23 Q And it did not affect the building width, whatever
24 changes it may of had, did not affect the number of parking
25 spaces that you were able to put in the structure that was

1 derived from Mr. Betsch's Scheme 2, is that correct?

2 A No, it's not correct. I think we had an, an early
3 plan that took Mr. Betsch's concept plan for it, and we
4 looked at it, and got very close to 276.

5 Q But it wasn't -- I, I understand, not talking
6 about the width of the building, and so as not to confuse
7 the Court or you---

8 A Well, there are two, there are two components to
9 width---

10 Q Sure.

11 A ---is depth and width.

12 Q So, the depth, if we talk about depth, that -- on
13 one side was Coleman. On the other side was Church.

14 A Correct.

15 Q All right. And we, we do know that the, the depth
16 may have been affected and the number of spaces may have
17 been affected, and I'm not, I'm not disputing that. I'm not
18 here to argue with you about that right now. I'm talking
19 about the width.

20 A Yeah, but you related it all back to numbers. So,
21 I want to get---

22 Q Okay.

23 A I mean it's, it's fine you -- anyway.

24 Q Well---

25 A It is what it is.

1 Q I can only go by what you-all have testified to,
2 and what your architect has testified to, and I'm trying to
3 find out, cause we can't, how this footnote, Footnote 5,
4 that affected Mill Street --

5 A Yes.

6 Q -- had any affect on the depth of the building?

7 A No, it, it didn't. I'm not saying that it did.
8 Although other decisions on Church Street, Ronnie Boals,
9 whatever you want to call it, those decisions did affect,
10 and any time you affect one part, you have other
11 ramifications. You've got to get circulation and everything
12 else, the, the steepness of, of the ramp when you shorten it
13 becomes a lot steeper, that -- all kind of ramifications.
14 So, I don't know that I can support your premise.

15 Q All right.

16 A I know we got less parking out of it.

17 Q You're talking about a number of decisions and
18 applications of town ordinance. Not just Footnote 5 when
19 you make that answer though, is that correct?

20 A Well, Footnote 5 was the major one. It
21 financially costs us. It delayed us. It did a lot of
22 things.

23 Q You negotiated initially with Mr. DeMoura, the
24 Town of Mt. Pleasant, and I believe you have already
25 testified the number in the agreement, the Parking License

1 Agreement, was 276, is that correct?

2 A That's in the agreement, correct.

3 Q And the rent was -- the fixed rent was \$185.000 a
4 year for 15 years, is that correct?

5 A On a 30-year term, correct.

6 Q Right. Now -- but you started at a higher rent
7 number than that, is that correct, when you started
8 negotiations?

9 A We did.

10 Q And the town had started at a lower number, is
11 that right?

12 A That's correct.

13 Q And that \$185,000 was the negotiated amount of
14 rent based on---

15 A Correct.

16 Q ---based on those parking spaces, is that correct?

17 A Correct.

18 Q Now, you, you testified earlier about, about a
19 proposed amendment down the line. There was a proposed
20 amendment to change the agreement with the number of parking
21 spaces to 234 as well as change the rent, is that correct?

22 A You were party to it, yes.

23 Q Okay. You're right. You said the lawyers worked
24 on that one, right?

25 A Correct.

1 Q And that was not approved by town council or that
2 was never voted on by town council, is that correct?

3 A There was an ultimate rejection of anything to do
4 with financial support. So, I, I take it that it was
5 rejected.

6 Q Additional financial support, is that correct?

7 A No, it was any financial support.

8 Q So, is it your testimony that the Town of Mt.
9 Pleasant town council declined to honor the agreement if 276
10 spaces would have been provided? Is that your testimony?

11 A That wasn't in the motion that I heard.

12 Q So, as long as 276 was met, the town would have
13 been obligated to meet the terms of the agreement, is that
14 right?

15 A That is what you're saying. That's not part of
16 the motion that -- in, in the meeting that's---

17 Q You're---

18 A ---in February.

19 Q It's your---

20 A Huh?

21 Q In February of when, sir?

22 A I guess it'd be '16, wasn't it? I don't---

23 Q The Town of Mt. Pleasant---

24 A I don't remember exactly, but it was when -- you,
25 you read it just recently.

1 Q Sure. Okay.

2 A Mr. Flesch did.

3 Q All right. I understand. As of February, 2016,
4 you already submitted your plans which had been approved for
5 234 spaces, is that correct?

6 A Yeah. Yes.

7 Q And, at that time, there was no plan to increase
8 to 276 spaces or more spaces?

9 A Well, it wouldn't have been in '16. It would have
10 been in '15---

11 Q All right.

12 A ---because they, they rejected the amendment.

13 Q All right.

14 A And when they rejected the amendment, there was
15 nothing in the motion to reject that to say, if it had been
16 276, we would have accepted it.

17 Q You had already submitted plans and the plans---

18 A That wasn't -- wait a minute.

19 Q Okay.

20 A You want me to agree that that was in it. I'm not
21 gonna agree that was in it.

22 Q Well, let's, let's talk about what was in it or
23 what happened. As of Fall of 2014, the town planning
24 department and planning had approved the garage plans for
25 234 spaces.

1 A Correct.

2 Q Is that right?

3 A Yes.

4 Q And, beyond that, you never submitted any
5 amendment. Now, when I use the term amendments or plan
6 changes to increase the number of parking spaces after that
7 approval, is that correct?

8 A That's correct.

9 Q So, you would agree that it's clear that you never
10 intended to change the plans after that point, after the
11 plans were approved to increase the number of spaces, is
12 that right?

13 A There was no financial feasibility to increase the
14 number of spaces given the new size of the buildable area
15 that we had.

16 Q Mr. Small, did you receive a copy of the
17 termination letter, the contract termination letter, sent by
18 the company's legal counsel, Mr. Gray Taylor, that was dated
19 June 23rd, 2015, but probably 2016?

20 A I saw it.

21 Q Okay. And did you review and approve this letter
22 prior, prior to it being sent to the Town of Mt. Pleasant?

23 A I did not.

24 Q Would that have been your partner?

25 A Yes.

1 Q And you agree, by that letter, the developer, your
2 company, terminated the parking license agreement, is that
3 correct?

4 A Yes.

5 MR. GASKINS: Your Honor, he just testified
6 that he didn't review it. He didn't approve it.

7 MR. PAGLIARINI: I'm sorry. He said he reviewed
8 it. He said he didn't approve it, but, either way. I
9 think the letter speaks for itself. No further
10 questions, Your Honor. Thank you.

11 THE WITNESS: Thank you.

12 THE COURT: Mr. Gaskins.

13 MR. GASKINS: Yes, I'll be brief.

14 THE WITNESS: I hope so cause I may need to take
15 that break soon.

16 REDIRECT EXAMINATION

17 BY MR. GASKINS:

18 Q Do you still have your deposition in front of you?

19 A Yeah.

20 Q I believe---

21 A I do.

22 Q ---Mr. Pagliarini was looking at Page 47, and this
23 was in the context of him asking you whether you had
24 provided Mr. Betsch's plans to Mr. DeMoura. Do you recall
25 that?

1 A Yes, I do.

2 Q All right. I'm gonna read the question and you
3 read the answer starting at Line 4. At the time you had
4 that conversation with Mr. DeMoura, had you provided the
5 town any of your draft plans?

6 A I can't say with accuracy right now.

7 Q Well, let's assume you hadn't. How would anyone
8 at the town be aware that amendment would have affected your
9 plans?

10 A Oh, because it affected Mill Street. It's only
11 one of the two streets.

12 Q How did, how did anyone at the town know what your
13 plans were at the time?

14 A As I said, they may have known. I mean, you said
15 yourself that the first meeting was in April or some time.
16 I don't know if it was before this ordinance was passed or
17 not.

18 Q Well, let's assume final reading was at the---

19 A I don't want to assume anything. I want facts.

20 Q Sure. All right. Well, what are the facts
21 surrounding when you, Stubbs Muldrow, or anyone involved
22 with your team would have provided the town either
23 preliminary plans or any sort of sketch to reflect what the
24 project would look like?

25 A I mean, have you taken the deposition of Johnston?

1 Q Stop there. Mr. Small, what was being discussed
2 there were the plans prepared by Stubbs Muldrow Herin,
3 correct?

4 A Correct.

5 Q Not the plans that were discussed or prepared by
6 Mr. Betsch?

7 A Exactly.

8 Q I want you to turn back to the Defendant's
9 Exhibit 22, and turn to the last page, and you and
10 Mr. Pagliarini reviewed this -- these two schemes earlier,
11 correct?

12 A Correct.

13 Q Okay. And at the bottom -- at that top of Scheme
14 2 and at the bottom of Scheme 3, Scheme 3 is three levels of
15 office space, is that correct?

16 A Correct.

17 Q Okay. And Scheme 3 was not chosen, was it?

18 A No, it was not.

19 Q Did you ever agree to build Scheme 3 or anything
20 substantially similar to Scheme 3?

21 A No, I did not.

22 Q Okay. If you look at the bottom, right next to
23 where it says Section -- Scheme 3, what does that say?

24 A It says low clearance is an issue.

25 Q Okay. And what does that reflect to you? What do

1 you understand that to mean?

2 A That means, in order to get to another level of
3 parking, Level 3, you'd have to ramp from Level 2, and
4 because of the office building and all, it would be too
5 tight to get through.

6 Q Okay. So, you don't even know if Scheme 3 was
7 physically feasible, do you?

8 A I do not know.

9 Q And going back to earlier testimony, Mr. Betsch's
10 conceptual plans were based on a zero lot line, correct?

11 A Correct.

12 Q Okay. So, what happens when you apply the
13 setbacks? What happens to that clearance issue? Does it
14 get better or does it get worse?

15 A It gets worse.

16 MR. GASKINS: That's all I have. Thank you.

17 THE COURT: Okay. You may step down, sir. Thank
18 you.

19 THE WITNESS: Thank you.

20 THE COURT: We'll take about a ten-minute break
21 before we move on to our next witness.

22 (Break)

23 THE COURT: You ready to proceed?

24 MR. GASKINS: Yes, Your Honor.

25 THE COURT: All right. You may call your next