THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2023-CP-10-0264

Folly East Indian Co., LLC, ... Appellant,

v.

City of Folly Beach ..... Respondent.

v.

Save Folly's Future ..... Intervenor.

NOTICE OF APPEAL

Appellant Folly East Indian Co., LLC, (hereafter "Appellant") appeals the trial court's order dated March 7, 2024, denying Plaintiff's Motion for Summary Judgment and granting the City of Folly Beach's Motion for Summary Judgment and the April 17, 2024, order denying Plaintiff's Motion to Reconsider the Court's order of March 7, 2024. A copy of the order dated March 7, 2024, is attached hereto as **Exhibit A**. A copy of the order dated April 17, 2024, is attached hereto as **Exhibit B**.

[SIGNATURE ON FOLLOWING PAGE]

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EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2023-CP-10-0264
FOLLY EAST INDIAN CO., LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**ORDER GRANTING DEFENDANT CITY OF FOLLY BEACH'S MOTION FOR SUMMARY JUDGMENT**
	)	
CITY OF FOLLY BEACH,	)	
	)	
Defendant.	)	
	)	
and	)	
	)	
SAVE FOLLY'S FUTURE,	)	
	)	
Intervenor.	)	
	)	

This matter is before the Court on cross Motions for Summary Judgment by Plaintiff Folly East Indian Co., LLC, and Defendant City of Folly Beach. Intervenor Save Folly's Future joins in Defendant's Motion for Summary Judgment. The Court finds that the Petition and Referendum procedure, as set out in South Carolina Code § 5-17-10, *et. seq.*, can be used to create a cap on Short-Term Rental Business Licenses issued by the City. Therefore, the Court grants Defendant City of Folly Beach's Motion for Summary Judgment and denies Plaintiff Folly East Indian's Motion for Summary Judgment and dismisses this action.

FACTS

The relevant facts are not in dispute. Plaintiff owns and operates seven licensed short-term rentals located in the City of Folly Beach. In October 2022, Intervenor Save Folly's Future submitted a Petition to the City to Amend the City's Short-Term Rental Business License Ordinance (hereinafter the "Amendment") to limit the number of short-term rental licenses issued to "Investment Short Term Rentals" to 800. "Investment Short-Term Rentals" are dwelling units

that are not claimed as legal residences. Owner-Occupied Short-Term Rentals are claimed as a legal residence and limited to a set number of rental nights per year and are not subject to the cap. Notably, the Petition "grandfathered" in existing licenses, so it allows Plaintiff to keep its existing licenses and continue its short-term rentals for as long as Plaintiff owns the properties.

The Petition was adopted by the residents of Folly Beach by referendum vote pursuant to South Carolina Code Section 5-17-10, *et seq.*, on February 7, 2023. By force of State law, the Amendment is now part of the City's Business Regulations, codified as Title XI of the City's Code of Ordinances. The City has always regulated short-term rentals through its Business Regulations, not its Zoning Code, contained in Title XV of the City's Code of Ordinances. The Amendment made no changes to the City's Zoning Code, which allows short-term rentals in all the City's zoning districts.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

"[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact[, then] the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Pye v. Estate of Fox,* 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006) (citations omitted). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008) (quoting *Middleborough Horizontal Prop. Regime Council of Co–Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995)).

Since the relevant facts are not in dispute and this matter involves a pure question of law, summary judgment is appropriate.

LEGAL HOLDING

Plaintiff filed this declaratory judgment action to challenge whether the Amendment capping the number of short-term rental business licenses could be adopted by way of a citizens Petition and Referendum procedure, as set out in South Carolina Code § 5-17-10, *et. seq.* This Court finds that the Petition and Referendum procedure can be used to limit the number of short-term rental business licenses issued by a municipality.

As an initial matter, the Court finds that Plaintiff has suffered an "injury in fact" and has standing to bring this lawsuit. *Smiley v. S.C. Dep't of Health & Env't Control*, 374 S.C. 326, 649 S.E.2d 31, 33 (2007).

The State statute governing the Petition and Referendum procedure states:

> The electors of a municipality may propose *any ordinance*, except an ordinance appropriating money or authorizing the levy of taxes. Any initiated ordinance may be submitted to the council by a petition signed by qualified electors of the municipality equal in number to at least fifteen percent of the registered voters at the last regular municipal election and certified by the municipal election commission as being in accordance with the provisions of this section.

S.C. Code Ann. § 5-17-10 (emphasis added).

The Amendment did not appropriate money or authorize the levy of taxes. Thus, based on the plain language of Section 5-17-10, the Amendment capping the number of short-term rental business licenses can be adopted by Petition and Referendum.

Plaintiff attempts to escape the clear language of Section 5-17-10 by relying on the South Carolina Supreme Court case of *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). The Court in *I'On* added a limitation not contained in the explicit language of Section

5-17-10, namely the Court ruled that "*zoning* by initiative and referendum is not allowed in South Carolina." *Id.* at 725 (emphasis added). The Court found that the Petition and Referendum process was not compatible with the South Carolina Comprehensive Planning Act's process for amending zoning ordinances. South Carolina Code § 6-29-760 (setting out procedure for amending zoning regulations or maps). The Court also found that using the Petition and Referendum process to amend a zoning ordinance would nullify the carefully developed rules set forth in the Comprehensive Planning Act. *Id.* at 719-21. The Court clearly limited this ruling to amendments to zoning ordinances. Further, since this court-created exclusion is not contained in the language of Section 5-17-10, it should be read narrowly.

The Amendment in this case is not an amendment to the City's Zoning Ordinance. It changes no language in the City's Zoning Code, contained in Title XV of the City's Code of Ordinances. It only amended the City's existing Business Regulations, contained in Title XI of the City's Code of Ordinances.

In addition, to not being in the City's zoning code, the Amendment looks nothing like a zoning ordinance. The Amendment did not rezone any property, as occurred in *I'On*. The Amendment did not impact the development or use of any property. The Amendment does not impact the development or use of Plaintiff's property. Plaintiff continues to operate short-term rentals on all its properties. The Amendment does not result "in arbitrary decisions and patchwork zoning with little rhyme or reason." *I'On*, 526 S.E.2d at 721. It does not nullify carefully developed rules for adoption of zoning provisions. *Id.*

The Amendment is not a zoning ordinance under state law. Zoning ordinances are adopted "for the general purposes of guiding *development* in accordance with existing and future needs and promoting the public health, safety, morals, convenience, order, appearance, prosperity, and

general welfare." South Carolina Code § 6-29-710(A) (emphasis added). The goals of a zoning ordinance "include the prevention of overcrowding of people, buildings, and traffic; the preservation of historic and ecologically sensitive areas; and the adequate provision of services to residents." *I'On*, 526 S.E.2d at 720. Zoning ordinances address building size, density of development, parking, and buffer areas. *Id.* The Amendment does none of these things.

The Amendment is clearly not a zoning ordinance. The Amendment simply places a limit on the number of short-term rental business licenses that the City can issue. This is a business regulation codified as part of the City's Business Regulations. It regulates how many short-term rental businesses there can be in the City, not where those businesses can be conducted. The cap does not regulate the development of Plaintiff's properties, all of which have already been developed. No state law requires that the City follow the South Carolina Comprehensive Planning Act to amend its Business Regulations.

The Amendment's indirect impact on how some owners (not Plaintiffs) may use their property does not convert the Amendment to a zoning ordinance. The South Carolina Supreme Court has also addressed this issue. *Greenville Cnty. v. Kenwood Enterprises, Inc*., 353 S.C. 157, 577 S.E.2d 428, 432 (2003), *overruled by Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005). In *Kenwood Enterprises*, Greenville County adopted regulations of sexually oriented businesses that included restrictions on the locations of such businesses. Although the County originally prepared the regulations as an amendment to the zoning code, the County changed course and adopted the amendments as business regulations, not a part of its zoning code. *Id.* at 430.

A group of owners of sexually oriented businesses challenged the regulations. Much like the Plaintiff in this case, those businesses claimed that the regulations had to be adopted as part of

the County's zoning code through the procedures set forth in the South Carolina Comprehensive Planning Act. *Id.* at 431-32. The plaintiffs in *Kenwood Enterprises*, like Plaintiff here, also relied upon the *I'On* decision, arguing that *I'On* dictates that any regulation of land use must be adopted in accord with the Comprehensive Planning Act. *Id.* at 433.

The Supreme Court rejected the argument that all ordinances that touch upon the use of land must be adopted as a zoning ordinance. Local governments "may enact ordinances regulating land use in two fashions: one, pursuant to a comprehensive zoning plan, . . . **and** two, pursuant to their police powers . . ." *Id.* at 432 (*quoting Onslow County v. Moore*, 129 N.C.App. 376, 499 S.E.2d 780, *review denied*, 525 S.E.2d 453 (N.C.1998) (emphasis in original). In other words, the Comprehensive Planning Act did not preempt the entire field of business regulations or "completely prohibit any other local enactments from touching upon zoning or land use." *Id.* at 432 (citing *Bugsy's, Inc. v. City of Myrtle Beach*, 340 S.C. 87, 530 S.E.2d 890 (2000)). Rather, local governments are entitled to regulate businesses through their general police powers granted under the Home Rule Act, South Carolina Code § 5-7-30.

The Court in *Kenwood Enterprises* explicitly limited the holding in *I'On*:

> *I'On* does not stand for the proposition that **any** ordinance affecting land use must be part of the comprehensive plan and enacted pursuant to the Comprehensive Planning Act. Instead, *I'On* simply held that land use regulation[1] cannot be effected via the referendum and initiative process. Thus, *I'On* is not dispositive. To accept Platinum Plus and Heartbreakers' expansive reading of *I'On* would necessarily eviscerate a County's ability to exercise its police power if that exercise in any way impacted land use.

Kenwood Enterprises, 577 S.E.2d at 433 (emphasis in original).

[1] Plaintiff asserts that the court's use of the term "land use regulation" encompasses all regulations that conceivably impact land use. That is the opposite of the holding in *Kenwood Enterprises*. Clearly, the Court is using "land use regulation" as a synonym for a zoning ordinance adopted pursuant to the Comprehensive Planning Act.

Thus, even if the Amendment capping business licenses "regards land use" as argued by Plaintiff, this does not make it a zoning ordinance that can only be passed pursuant to the Comprehensive Planning Act. Rather, regulations that regard land use can be adopted pursuant to the general police powers and placed in its Business Regulations, as the City has opted to do. *Kenwood Enterprises*, 577 S.E.2d at 432. Indeed, Plaintiff has admitted that the City could have adopted this cap pursuant to its police powers. Plaintiff's Consolidated Memorandum, Page 2.

Police power regulations that touch upon land use do not need to be adopted pursuant to the procedures of the Comprehensive Planning Act. The City has opted to regulate short-term rentals as part of its Business Regulations, as allowed by *Kenwood Enterprises*. Similarly, the Amendment adopted by Petition and Referendum, can amend the City's Business Code. Since the Amendment does not alter the City's Zoning Code, the ruling in *I'On* does not control this matter.[2]

CONCLUSION

The Petition and Referendum procedure adopted by the South Carolina State legislature allows electors of a municipality to "propose *any ordinance*, except an ordinance appropriating money or authorizing the levy of taxes." S.C. Code Ann. § 5-17-10 (emphasis added). Intervenor Save Folly's Future obtained the requisite signatures of 15% of registered voters of the City. The City then held a vote as *required* by South Carolina Code § 5-17-30, and the majority of residents voted to in favor of the Petition and Referendum capping short-term rental business licenses at

[2] Plaintiff has made brief arguments in its various pleadings regarding vested rights and a potential takings claim. Plaintiff has no vested right here because business licenses do not confer vested rights, *Dantzler v. Callison*, 230 S.C. 75, 94–95, 94 S.E.2d 177, 188 (1956), and the City has not approved a site-specific development plan. S.C. Code § 6-29-1520(9). Likewise, the remedy for a takings challenge is compensation not the declaratory and injunctive relief sought by Plaintiff. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) (holding the Takings Clause of the Fifth Amendment "is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.") (emphasis in original).

800. Pursuant to this procedure, the City's Business Regulations were amended to include the language of the Petition. Since this was a change to the City's Business Regulations and not the City's Zoning Code, the ruling in *I'On* does not control this matter.

Based on the foregoing, the Court grants the City's Motion for Summary Judgment, which Intervenor Save Folly's Future has joined in, and denies Plaintiff's Motion for Summary Judgment. Since this disposes of all issues in this action, the action is dismissed.

Charleston Common Pleas

Case Caption: Folly East Indian Co Llc VS Folly Beach City Of

Case Number: 2023CP1000264

Type: Order/Summary Judgment

So Ordered

s/Paul M. Burch, Judge #2048

FORM 4

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2023CP1000264

Folly East Indian Co Llc
PLAINTIFF(S)

Folly Beach City Of
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

After consideration, Plaintiff's Motion to Reconsider Order Denying Its Motion for Summary Judgment and Granting Defendant City of Follow Beach's Motion for Summary Judgment is DENIED.

ORDER INFORMATION

This order ☑ ends ☐ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/17/2024 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

Charleston Common Pleas

Case Caption: Folly East Indian Co Llc VS Folly Beach City Of

Case Number: 2023CP1000264

Type: Order/Electronic Form 4

So Ordered

s/Paul M. Burch, Judge #2048

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
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Paul M. Burch, Circuit Court Judge

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Folly East Indian Co., LLC, ... Appellant,

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City of Folly Beach ..... Respondent.

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Save Folly's Future ..... Intervenor.

PROOF OF SERVICE

I do hereby certify that on May 16, 2024, I have served all counsel in this action with a copy of the ***Notice of Appeal*** via e-filing to the following email addresses:

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