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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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

City of North Myrtle Beach,

Appellant,

v.

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

Respondents.

INITIAL REPLY BRIEF OF APPELLANT

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REPLY TO RESPONDENTS' STATEMENT OF THE FACTS[1]

This appeal concerns the Dormant Commerce Clause relative to Respondents' ownership and use of a special exception residential amenity known as a cabana house. Specifically, the primary issue in this appeal is whether certain City ordinances regulating a cabana house—which, as an amenity, does ***not*** involve the exchange of a commodity, good, or—constitute regulation of a noneconomic activity or an economic activity and, if the latter, whether such regulation has a substantial effect on interstate commerce. Although phrased differently than the City's, Respondents' Statement of Issues on Appeal largely mirrors the City's. Further, none of the issues on appeal cited by either the City or Respondents concern or require factual background on the historical ownership and use of the particular Cabana House at issue in this appeal. Despite this general agreement on the analytical focus of this appeal, Respondents indulge in a number of immaterial and irrelevant "facts" concerning the prior ownership and use of the Cabana House and Respondents' initial, but unnoticed use of the Cabana House. The Dormant Commerce Clause analysis does ***not*** turn on these alleged "facts." Because Rule 208(b)(4) of the South Carolina Appellate Court Rules contemplates the inclusion of only "salient facts" for appellate briefing, this Court should ignore Respondents' recitation of "facts" related to these issues. *Cf.* Rule 12(f), SCRCP (allowing the striking of any immaterial matter). To the extent these "facts" have any limited salience, they nevertheless require correction.

First, Respondents state "the City never checked to see if Pan, LLC conveyed the Property to a homeowners' association after the special exception was approved." (Resp. Initial Br., p. 11.)

[1] This Reply Brief does not respond to issues the City believes were adequately discussed in its opening brief, and the City intends no waiver of these issues by not expressly reiterating them herein. To the extent this Court requires further briefing or oral argument on any issue not adequately addressed, the City is prepared to provide such briefing and argument. Additionally, all capitalized terms used herein, unless otherwise defined in this Reply Brief, shall have the same meanings as those provided in the original Brief of Appellant.

Although that may be true in a vacuum, this statement lacks important context. The City testified that in developing a project, "when [property developers] get to a certain point in their progress of their development, then and only then do they turn over ownership to the homeowners[']association," meaning it is "quite common that it could be months [or] years before that transfer to an actual homeowners['] association is actually done." (Tr. Vol. I, p. 469, l. 18 – p. 470, l. 4.) The City relies on property developers specifically, and citizens more generally, to adhere to its ordinances; after all, it is a governmental entity with limited resources. (Tr. Vol. I, p. 281, l. 23 – p. 282, l. 1.) Indeed, the City's Zoning Department only consists of three individuals who operate as a "complaint based" office that does not "actively hunt for zoning ordinance violations." (Tr. Vol. I, p. 281, ll. 9–22.) Thus, verification is unnecessary and immaterial, because the City relies upon and expects a property developer, pursuant to its approved special exception application, to convey ownership of the cabana house amenity to an HOA once the appropriate point in the project development occurs. (Tr. Vol. I, p. 470, ll. 6–8.) Respondents' efforts in distorting the facts were successful, as the Circuit Court's Order adopted Respondents' flawed reasoning by suggesting the "City did not require or specify that Pan, LLC deed the property to [a] homeowners' association as a condition of operations." (Order of Nov. 23, 2023, p. 6, ¶ 17.) The record refutes this finding, as the City's ordinances require owners of any cabana house to be an HOA and the City expects property developers to convey such amenities to an HOA at the appropriate time.

Second, Respondents aver the City "knowing[ly] acquiesce[d] to almost 12 years of ownership by entities that were not homeowners' associations." (Resp. Initial Br., p. 14.) This statement is patently false. The City's current Zoning Administrator expressly testified that the City does not "track ownership," meaning it does not actively track when a property changes hands, (Tr. Vol. I, p. 304, ll. 4–10), which means the City would not have known whether the

original developer transferred it to another owner that was not an HOA and that intended to use it without complying with the City's ordinances regulating cabana houses. Further, the City's former Zoning Administrator testified the City never received any complaints of ordinance violations relative to the Cabana House prior to Respondents' ownership and use and did not know of any ordinance violations on the Property at the time of its sale to Respondents. (Tr. Vol. I, p. 391, l. 24 – p. 392, l. 4; p. 333, l. 2 – p. 334, l. 3.) Indeed, the City's former Zoning Administrator stated in a letter that he believed the Property had been "legally used as a [cabana house] since construction," (App. Trial Ex. 29), which completely undermines the allegation the City knowingly acquiesced to an illegal use for nearly a dozen years.[2] Again, Respondents' efforts in abusing the facts were successful, as the Circuit Court's Order erroneously adopted this allegation without any reference to the record and, worse still, in direct contradiction to the overabundant weight of evidence. (Order of Nov. 23, 2023, p. 8, ¶ 25.)

Third, Respondents contend the City had "knowledge" of and "cooperat[ed]" with the prior owner selling of the Property to Respondents. (Resp. Initial Br., p. 13.) Not only do Respondents' references to the record fail to support this alleged "fact," but the City's former Zoning Administrator expressly testified that he did not know the prior owner was trying to sell the Property. (Tr. Vol. I, p. 365, ll. 7–10.)

Fourth, Respondents state "[b]etween May 3, 2019, and September 2, 2021, the RV Resort

[2] Likewise, even following Respondents' purchase of the Cabana House, the City's current Zoning Administrator testified he did not become aware of Respondents' ordinance violations until receipt of a complaint submitted on behalf of Sea Cloisters I and Sea Cloisters II, the neighboring residential communities on each side of the Cabana House. (App. Trial Ex. 68; Tr. Vol. I, p. 277, ll. 9–13.) Respondents rely upon the testimony of a prior owner not being aware of ordinance violations as well as a Technical Review Committee meeting the City conducted to suggest the City became aware of the Cabana House's use as a private beach club by its prior owner; however, the meeting minutes expressly state a "Private beach club use [is] not allowed in R-4," (Resp. Trial Ex. 32), meaning the City informed the prior owner such use was not allowed and expected the prior owner to comply with the City's ordinances.

operated the [Cabana House] for its guests, without any complaints from the City." (Resp. Initial Br., p. 14.) Although mostly true, this "fact" lacks significant context. As discussed above, the City was unaware of Respondents' ordinance violations prior to receipt of the complaint from Sea Cloisters I and Sea Cloisters II. (Tr. Vol. I, p. 263, l. 3 – p. 266, l. 1, p. 277, ll. 9–13, p. 333, l. 2 – p. 334, l. 3, p. 391, l. 24 – p. 392, l. 4.) It bears repeating the City's Zoning Department operates as a "complaint based" office that does not "actively hunt for zoning ordinance violations." (Tr. Vol. I, p. 281, ll. 9–22.) Further, neighbors testified that Respondents' initial use of the Cabana House was limited both in the summer of 2019 as the RV Resort was still undergoing construction and in the summer of 2020 as COVID-19 restrictions were in effect. (Tr. Vol. I, p. 71, l. 15 – p. 72, l. 11, p. 86, ll. 6–18, p. 153, l. 22 – p. 156, l. 3, p. 199, l. 9 – p. 200, l. 200.) More striking, Respondents' own records and internal communications admit and acknowledge the significant increase in intensity of use anticipated at the Cabana House and that eventually occurred at the Cabana House. (App. Trial Exs. 26, 27, 31, 36, 37, 61, and 62.) Therefore, it was not until the summer of 2021 when Respondents' intense use of the Cabana House led to complaints from neighbors and inquiry into Respondents' violations of City ordinances. The City simply would not have had any reason to contact or take action against Respondents prior to when the City received actual notice of an allegation of ordinance violations by Respondents' ownership and use of the Cabana House.[3] Similar to the prior "facts" alleged by Respondents, the Circuit Court's Order erroneously adopted this allegation as well. (Order of Nov. 23, 2023, p. 8, ¶ 27.)

What is remarkable about Respondents' statements here is that none of them are used in

[3] Of note, after the City's receipt on or about July 12, 2021 of the complaint from Sea Cloisters I and Sea Cloisters II, (App. Trial Ex. 68), the City Manager attempted to contact the RV Resort multiple times prior to September 2, 2021 in order to resolve Respondents' ordinance violations, (Tr. Vol. I, p. 263, l. 3 – p. 266, l. 1). Thus, the City attempted to "complain" to Respondents prior to September 2, 2021, but Respondents were unresponsive. (Tr. Vol. I, p. 263, l. 3 – p. 268, l. 4.) Their unresponsiveness underscores the importance of the HOA requirements in this appeal.

support of any of their arguments. Indeed, nowhere in Respondents' Initial Brief (or in the Circuit Court's Order for that matter) is there a description of the relevance of the foregoing "facts." The explanation is simple: they are not relevant. The facts are that the City was not aware of the ordinance violations committed by prior owners of the Cabana House and the City took action immediately upon actual notice of ordinance violations committed by Respondents. Any implication that waiver or laches apply is simply wrong and does not affect the Dormant Commerce Clause analysis. Further, the inclusion of these "facts" illustrates Respondents' proclivity to distort the factual narrative and underscores how Respondents have similarly attempted to distort the legal analysis, which is addressed below.

ARGUMENTS IN REPLY

I. The City's Three Separate and Independent Ordinance Requirements for Cabana Houses Are Not Inextricably Linked and Do Not Constitute a Residency Requirement

Respondents' argument suffers from a flawed premise present at the outset of their brief. Respondents allege Sections 23-2 and 23-22 of the City's Zoning Ordinance create a "residency requirement," which "requires a cabana house located in the R-4 District to be owned by a homeowners' association and used exclusively by an affiliated 'project' located in the City." (Resp. Initial Br., p. 2.)[4] This premise is wrong. Further, it distorts the legal analysis and it infects the entirety of Respondents' argument.

Section 23-2 of the City's Code of Ordinances defines a "cabana house" as:

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

[4] Like the Circuit Court's Order, Respondents fail to explain what words within the City's ordinances comprise the "residency requirement." Thus, as set forth in the City's Initial Brief, the vagueness of this "residency requirement" requires remand at minimum. (App. Initial Br., p. 49.)

North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-2 (1984) (emphasis added). Section 23-22 requires that "a ***homeowner's association shall have been established for the project*** and a maintenance agreement has been submitted to the planning department." North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-22(4)(d)(1) (1984) (emphasis added). Neither Section 23-2 nor Section 23-22 uses the term "residency." Instead, there are three separate requirements that Sections 23-2 and 23-22 create that are pertinent here:

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

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

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

North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, §§ 23-2, 23-22(4)(d)(1) (1984).[5] None of these requirements relate to residency, whether viewed independently or in tandem. The owner(s) of the project may reside anywhere as long as the project is located in the City; likewise, the HOA may exist outside of the City as long as it owns and maintains the Cabana House. Indeed, even Respondents recognize an HOA's governing documents must be recorded in the in the Register of Deeds office in the county where the property owned by the association is located, pursuant to South Carolina Code Ann. § 27-30-130(A)(1). (Resp. Initial Br., p. 37.) The implication is that an HOA does ***not*** have to reside in the City, or even Horry County; the only requirement is the HOA must record its governing documents in Horry County.[6]

[5] Respondents also claim, without support, that these requirements are "unique." (Resp. Initial Br., p. 10.) However, as the City testified at trial, there are a number of commonly-owned amenities, like swimming pools and playgrounds, that are required to be owned and operated by an HOA pursuant to the City's ordinances. (Tr. Vol. I, p. 296, l. 12 – p. 297, l. 3.)

[6] In fact, the HOA may even exist outside of the State of South Carolina. For example, the City is

Respondents create further confusion by tying all three of these separate requirements together, claiming they are "inextricably linked," (Resp. Initial Br., p. 37), and then distinguishing them from what Respondents term the "operational considerations," such as ensuring the appropriate number of parking spaces and utilizing the Cabana House in substantial harmony with the zoning district in which it is located, (Resp. Initial Br., pp. 16–17). These "operational conditions," as Respondents label them, are found in different sub-provisions of the City's ordinances from the ones cited in the preceding paragraph:

> 2. That at least eight (8) parking spaces per zoning standards be established on site and that more spaces may be required by the board if there is no other means to limit the number of cars traveling to the property provided such as a shuttle service to and from the property to the project.
> 3. That the use of the house be limited to bathing and change of clothing facilities, and occasional use as guest quarters and other similar uses.
> 4. That the special exception will be in substantial harmony with the area in which it is to be located.
> 5. That the special exception will not be injurious to the adjoining property.
> 6. That the special exception will not discourage or negate the use of surrounding property for use(s) permitted by right.

North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-22(4)(d) (1984) (emphasis added). Respondents claim the City "continues to argue on appeal[] that restrictions on the operational conditions for a cabana house is the regulation at issue," and imply the City is misconstruing the issue. However, these "operational considerations" are ***not*** at issue in this appeal

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so close to the North Carolina border that Respondents shuttle guests to downtown Calabash, North Carolina, which is located less than 10 miles from the City. (Tr. Vol. II, p. 246, l. 10 – p. 247, l. 5; App. Trial Ex. 48; Resp. Memo. Support of Renewed Mot. Partial Summ. J., p. 32 & n.37.) Contrary to Respondents' conclusory allegation that an HOA cannot own a cabana house in the City, (Tr. Vol. I, p. 39, l. 24 – p. 40, l. 4), and setting aside the Project Requirement (as it is independent of the HOA Ownership and Maintenance/Establishment Requirements), there is no reason why an HOA existing in Calabash, North Carolina cannot satisfy the HOA requirements in the City's ordinances.

and the City said so in its Initial Brief. (App. Initial Br., p. 6, n.2.) The City specifically referred to these "operational conditions" in subparagraphs 3., 4., and 5. above—which would equally apply to subparagraphs 2. and 6.—as "Additional Use Requirements." (App. Initial Br., p. 6, n.2.) The City expressly stated "they are not at issue in this appeal," because the Circuit Court ruled they were constitutional and fully enforceable. (App. Initial Br., p. 6, n.2.) Notably, the City ***never*** claimed at trial, or at any time, that Respondents violated subparagraph 2. Further, the City only grouped these Additional Use Requirements together under one moniker because they are not at issue in this appeal. For Respondents to argue the City is contesting these Additional Use Requirements, when it expressly stated it is not, is a further example of Respondents' attempts to obfuscate.

More importantly, Respondents' willingness to separate the Additional Use Requirements from what they refer to as the "residency requirement," implicitly supports the City's position, which is that all of these requirements are independent, severable, and should be viewed and analyzed separately. Respondents candidly recognize the independency of the Additional Use Requirements (or "operational conditions" as they call them) from other ordinance provisions. Yet Respondents offered no viable justification for tying the three separate requirements—the Project Requirement, the HOA Ownership Requirement, and the HOA Maintenance/Establishment Requirement—under a single analytical framework. In essence, Respondents cite to South Carolina Code Ann. § 27-30-130(A)(1) and unilaterally term these three requirements as being a single, unitary "residency requirement," in the hope this Court will accept this framework at face value. There is no valid basis for accepting Respondents' conflation of these three separate requirements. After all, the City could have designed its ordinances to require cabana houses to be used by projects located in the City, but not have any ownership or maintenance requirement;

likewise, the City could have designed it in an opposite manner, with the HOA Ownership Requirement in place, but the Project Requirement not included. Indeed, the City testified to viewing these requirements separately. (Tr. Vol. I, p. 476, l. 13 – p. 477, l. 13.) Therefore, this Court should adopt the City's framework and determine whether the Dormant Commerce Clause is separately violated by one or more of the three requirements, i.e. the Project Requirement, the HOA Ownership Requirement, or the HOA Maintenance/Establishment Requirement.

II. This Court Must Apply the *Lopez-Morrison* Four-Factor Test, Which Respondents Failed to Analyze

Respondents throw a jab at another analytical framework. Respondents recognize "the City relies heavily on the so-called 'factors' deduced from *Lopez* and *Morrison* to argue that the regulated activity at issue . . . is a non-economic activity." (Resp. Initial Br., p. 20.) Respondents then argue "the Supreme Court in *Lopez* and *Morrison* did ***not*** articulate a 'factor-based test' as the City contemplates" in its Initial Brief. (Resp. Initial Br., p. 20, n.9 (emphasis added).) Thus, the City can only surmise Respondents chose to ignore the the Fourth Circuit Court of Appeals case cited by the City in its Initial Brief—*United States v. Buculei*—which held the United States Supreme Court "***enumerated four factors*** for lower courts to consider in analyzing whether an activity substantially affects interstate commerce." 262 F.3d 322, 328 (4th Cir. 2001) (emphasis added) (citing *United States v. Morrison*, 529 U.S. 598 (2000)). Those four factors are as follows:

> (1) whether the statute relates to an activity that has something to do with " 'commerce' or any sort of economic enterprise, however broadly one might define those terms";
>
> (2) whether the statute contains an "express jurisdictional element which might limit its reach" to activities having "an explicit connection with or effect on interstate commerce";
>
> (3) whether congressional findings in the statute or its legislative history support the judgment that the activity in question has a substantial effect on interstate commerce; and

> (4) whether the link between the activity and a substantial effect on interstate commerce is attenuated.

Id. (quoting *Morrison*, 529 U.S. at 610–13); *United States v. Gibert*, 677 F.3d 613, 624 (4th Cir. 2012) (same).

The Fourth Circuit is not alone in finding this four-factor test to be the appropriate analytical framework to use in determining whether the regulated activity substantially affects interstate commerce, as federal Courts of Appeal across the country hold the same. *See, e.g.*, *United States v. Morales-de Jesus*, 372 F.3d 6, 10 (1st Cir. 2004) ("Drawing on its reasoning in *Lopez*, the *Morrison* Court identified four factors to consider . . . ."); *United States v. Harris*, 358 F.3d 221, 222 (2d Cir. 2004) (noting there were "four factors in *Morrison*"); *United States v. Jimenez*, 256 F.3d 330, 337 (5th Cir. 2001) ("[T]he *Morrison* Court identified four factors informing the constitutional analysis . . . ."); *Norton v. Ashcroft*, 298 F.3d 547, 556 (6th Cir. 2002) ("*Morrison* derived its four-factor framework directly from *Lopez* . . . ."); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1174 (9th Cir. 2011) ("In *Lopez* and *Morrison*, the Supreme Court articulated four factors to consider . . . ."); *United States v. Grimmett*, 439 F.3d 1263, 1272 (10th Cir. 2006) (considering "the four factors delineated by the Supreme Court" in *Morrison* and *Lopez*); *United States v. Peters*, 403 F.3d 1263, 1272 (11th Cir. 2005) ("The Supreme Court reiterated the four *Lopez* factors in *United States v. Morrison* . . . .").

In an attempt to avoid application of this four-factor test, Respondents suggest "the real lesson[s]" from *Lopez* and *Morrison* is that "[1] the substantial effect on interstate commerce analysis hinges almost entirely on whether the local activity being regulated is economic or non-economic in nature, and [2] that the Court need not resort to the considerations identified in *Lopez* and *Morrison* if the regulated activity is economic." (Resp. Initial Br., pp. 20–21.) Contrary to the former so-called lesson, the Supreme Court has ***not*** "treated any one of these four *Lopez*/*Morrison*

factors as dispositive." *Peters*, 403 F.3d at 1273. Likewise, in direct contradiction to the latter of Respondents' so-called lesson, courts "***are bound*** to inquire" into the four foregoing factors. *Buculei*, 262 F.3d at 328 (emphasis added); *see also Gibert*, 677 F.3d at 624 ("We previously have observed that the decisions in *Lopez* and *Morrison* stated four factors that courts ***must*** consider in analyzing whether there is a rational basis for concluding that an activity substantially affects interstate commerce.") (emphasis added).

Clearly, Respondents' jab missed its mark. More importantly, Respondents' apparent desire to avoid the full burden of this four-factor test is because this factor test does not weigh in their favor. Indeed, Respondents fail to address any of the factors in their Initial Brief. Their failure is fatal. Likewise, the Circuit Court's failure to make factual findings as to these four factors and apply these four factors as a matter of law demonstrates error as well, that must be corrected under this Court's *de novo* review. Ultimately, Respondents' deliberate omission and refusal to address these factors should be viewed as a concession that the City's position as to all four factors is meritorious.[7]

III. The Ownership and Use of a Cabana House, as an Amenity, Does Not Constitute an Economic Activity Based on Bootstrapping Tangential and Independent Services

With the correct analytical frameworks in hand—i.e. the ordinance requirements at issue

[7] *See, e.g.*, *First Union Nat. Bank of S.C. v. FCVS Commc'ns*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (noting a "failure to respond to [an] argument in its brief could amount to a concession"), *rev'd in part on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997); 5 Am. Jur. 2d *Appellate Review* § 477 ("An appellee's response to an issue must consist of more than a conclusory statement that the appellant's proposition has no merit. If an appellee fails to respond to an issue in its brief, the court may treat the failure to respond as a confession that the appellant's position is correct, reverse the judgment on that issue if the appellant establishes prima facie error, or determine the issue on the merits."); *see also United States of Am. ex rel. Vitale v. MiMedx Grp., Inc.*, 381 F. Supp. 3d 647, 655–56 (D.S.C. 2019) (compiling cases); *In re Gregory*, 635 B.R. 460, 466 (Bankr. D.S.C. 2022) (holding party conceded an issue by "fail[ing] to present any contrary factual arguments contesting" the issue); *Butler v. Fluor Corp.*, 511 F. Supp. 3d 688, 713 (D.S.C.) (citing *Alvarez v. Lynch*, 828 F.3d 288, 295 (4th Cir. 2016)), *aff'd sub nom. Pennington v. Fluor Corp.*, 19 F.4th 589 (4th Cir. 2021).

and the appropriate factor test to be used—this Court should run the separate requirements through the four-factor test. In doing so, however, the Court should be mindful that the critical inquiry under the first *Lopez-Morrison* factor is whether the City's ordinances regulating cabana houses relate to "commerce" or some "sort of economic enterprise." *Buculei*, 262 F.3d at 328 (quoting *Morrison*, 529 U.S. at 610–13). As set forth in the City's Initial Brief, these phrases are defined as "the production, distribution, and consumption of ***commodities***," *Gonzales v. Raich*, 545 U.S. 1, 25 (2005) (emphasis added), and the "***exchange of goods and services***, esp[ecially] on a large scale involving transportation between cities, states, and countries," *Commerce*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). A commodity is defined as "[a]n article of trade or commerce"; it "embraces only tangible goods, such as products or merchandise" and is also defined as an "economic good, esp[ecially] a raw material or an agricultural product." *Commodity, Black's Law Dictionary* (11th ed. 2019). A good in this context is defined as a "chattel, ware, piece of merchandise, or other product." *Good*, *Black's Law Dictionary* (11th ed. 2019). Service is defined as "[***l***]***abor performed*** in the interest or under the direction of others; specif[ically], ***the performance of some useful act or series of acts*** for the benefit of another, usu[ally] for a fee . . . In this sense, service denotes an intangible commodity in the form of human effort, such as ***labor***, skill, or advice." *Service*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added).

A cabana house is clearly ***not*** a commodity. Further, a cabana house is neither a good nor a service. Instead, it is an amenity, which is defined as "[s]omething tangible or intangible that increases the enjoyment of real property, such as location, view, landscaping, security, or ***access to recreational facilities***." *Amenity*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). With all these definitions in mind, a cabana house is clearly an amenity. Even Respondents agree; they refer to the Cabana House as an amenity in their Initial Brief. (Resp. Initial Br., pp. 6, 14, 24,

29.) Despite these candid acknowledgments by Respondents, Respondents attempt to conflate the ownership and use of a cabana house amenity with "services" provided that are associated with that type of recreational facility. For instance, Respondents claim restrooms, meeting spaces, and air conditioning constitute "a valuable service in furtherance of the [RV Resort's] operations and, therefore, an economic activity." (Resp. Initial Br., p. 25.) The cleaning expenses associated with restrooms and meeting spaces and the air conditioning expenses associated with a special exception residential amenity, such as the free-of-charge Cabana House that is one of over thirty amenities affiliated with the RV Resort, simply do not substantially affect interstate commerce. (App. Tr. Exs. 33 & 34; Tr. Vol. II, p. 178, l. 6 – p. 181, l. 24.)[8] It strains the imagination to envision any guest choosing to reserve a site at the RV Resort due to the RV Resorts' cleaning services and air conditioning at the Cabana House. At minimum, Respondents provided no evidence at trial of any expenses incurred associated with the Cabana House. Further, the City has only ever had five cabana houses at most during the existence of these ordinances. (Tr. Vol. I, p. 466, l. 24.) There is simply no evidence or reason to believe the City's ordinances regulating the ownership and use of a special exception cabana house affect the price of cleaning services or air conditioning, even in the aggregate, like regulations on wheat production/consumption and milk distribution that directly affect the prices of those goods. *See Wickard v. Filburn*, 317 U.S. 111 (1942) (wheat); *Dean Milk Co. v. City of Madison, Wisconsin*, 340 U.S. 349 (1951) (milk).

Respondents also suggest the shuttle service provided by the RV Resort has an economic value. (Resp. Initial Br., p. 25.) But Respondents fail to prove, much less even address, how

[8] Respondents allege a cabana house is a popular amenity or feature amenity based upon Tidewater's deposition. (Resp. Initial Br., p. 28.) However, Respondents fail to mention Barefoot disagreed a cabana house was its most popular amenity, because it testified its resident's club was the most popular amenity. (Ct. Ex. 5, Barefoot Dep., p. 26, ll. 21–25.) Regardless, Respondents failed to prove the relative popularity of the Cabana House compared to all of its other amenities. In fact, the record demonstrates the Cabana House was not that popular. *See infra* n.9.

shuttling to one particular location, i.e. the Cabana House, substantially affects interstate commerce, especially in light of the fact Respondents shuttle guests to various destinations across the Grand Strand and even to downtown Calabash, North Carolina. (Tr. Vol. II, p. 246, l. 10 – p. 247, l. 5; App. Trial Ex. 48.) Indeed, Respondents intended to shuttle guests to public access points to the beach prior to their purchase of the Cabana House and Respondents shuttled guests to multiple public access points to the beach during the closure of the Cabana House to RV Resort guests due to the pendency of the Consent Order. (Tr. Vol. II, p. 79, ll. 7–22; p. 181, l. 25 – p. 182, l. 17; p. 247, ll. 15–18; p. 249, l. 6 – p. 250, l. 5.) Clearly, the possession of the Cabana House amenity bears no significance on whatever effect, if any, the completely separate and independent shuttling service has on interstate commerce. Regardless, the City's ordinances regulating the ownership and use of cabana houses do not affect the price of shuttling services (which, like access to the Cabana House, are completely free for RV Resort guests). Therefore, the City's ordinances are unlike the waste flow control ordinance (in other words, an ordinance regulating "shuttling" or "transportation") in *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383 (1994). In *C & A Carbone*, the court held:

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

Id. at 389 (emphasis added). The City's ordinances do not drive up the costs of shuttling, nor do they prohibit Respondents from shuttling guests to the beach or guests visiting the City or its beaches on their own. If Respondents contend there is a substantial effect on interstate commerce relative to shuttling services, Respondents should have introduced evidence of how their shuttling

service costs increased or would increase or how they would be deprived of access to the City's beaches. Respondents failed to do so. Thus, Respondents cannot prevail under this theory.

As a last ditch effort, Respondents argue in a footnote "the purchase of a cabana house is a significant investment," implying this activity also affected interstate commerce. (Resp. Initial Br., pp. 25–26, n.14.) However, the purchase of property is analytically different from the access to and possession of a recreational facility in a particular zoning district. For example, in *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court of the United States considered the constitutionality of the Gun-Free School Zones Act, which made it a federal offense for any individual knowingly to possess a firearm at a place the individual knew or had reasonable cause to believe was a school zone. *Id.* at 551. The Supreme Court held the statute was a criminal one that had "nothing to do with 'commerce' or any sort of economic enterprise." *Id.* at 562. More to the point, the Supreme Court never focused on the statute affecting the purchase price of the property (i.e. a firearm) at issue. Instead, the Supreme Court focused on whether the possession of that property in a particular zone substantially affected interstate commerce. Similarly, this Court should analyze whether the City's ordinances regulating the possession and use of the Cabana House in the R-4 residential district substantially affects interstate commerce, rather than the purchase price of that property.

Additionally, from a policy perspective, the Supreme Court found that if it were to find the Gun-Free School Zones Act constitutional, it would be "hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* at 564. Likewise, should this Court uphold the Circuit Court's ruling, it would result in the use of the Dormant Commerce Clause as a "roving license" for courts, rather than municipalities, to decide what activities are appropriate for local governments to undertake and what activities must be the province of private market

competition. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007). Such a result would create chaos on the validity of zoning ordinances and zoning plans not only statewide, but nationwide, and burden the courts with matters for which they are less equipped to manage than local governments.

In sum, the City's ordinances do ***not*** relate to commerce or any sort of economic enterprise, because a cabana house is an amenity, rather than a commodity, good, or service. Respondents' attempts to bootstrap services independent of the ownership and use of an amenity are without merit. This Court must follow the City's analysis in its Initial Brief of analyzing the City's ordinances regulating a cabana house as a free-of-charge amenity through the four-factor test; in so doing, the natural conclusion of this analysis is the ownership and use of a special exception residential amenity do ***not*** constitute an economic activity.

IV. Neither Can Bootstrapping to the Activity of an RV Resort or Tourism More Broadly Suffice for the Ownership and Use of an Amenity to Constitute Economic Activity

Because Respondents cannot bootstrap tangential services independent of the amenity at issue nor the purchase of the amenity to prove a substantial effect on interstate commerce, much less any effect at all, Respondents approach this analysis from a different angle as well. Although failing to acknowledge they are taking an inconsistent and alternative approach, Respondents conflate the ordinance requirements regulating a narrow and specific type of special exception residential amenity with larger activities, like the RV Resort or tourism even more broadly.

First, Respondents expatiate on the tourism industry in the Grand Strand, even going so far as to require Destination NMB, an affiliate of the North Myrtle Beach Chamber of Commerce, to testify as to the importance of the tourism industry to the Grand Strand and describe the number of visitors to the Grand Strand. (Resp. Initial Br., p. 8.) But these are facts the City has never disputed; even Respondents recognize the City Manager acknowledged as much at trial. (Resp.

Initial Br., p. 34.) Next, Respondents assert the Circuit Court "correctly compared the RV Resort to hotels and short-term rental providers . . . that offer their guests goods and services that are consumed locally and utilize the services provided, such as the Beach Club [i.e. the Cabana House]." (Resp. Initial Br., p. 24; Order of Nov. 23, 2023, p. 14.)

Respondents' next move is revealing. Respondents extrapolate from the larger tourism industry to claim the RV Resort, like hotels and short-terms rental providers, "comprise a significant part of the tourism economy in the Grand Strand [and] clearly are economic activities and ***the regulation of such activities necessarily have a substantial effect on interstate commerce***." (Resp. Initial Br., p. 24 (emphasis added).) This is wrong. The activity at issue is ***not*** the RV Resort. If this appeal were about whether the RV Resort could provide goods and services, the City would concede the RV Resort affects interstate commerce. However, the activity at issue is much more specific and narrow than an RV Resort; instead, the activity being regulated by the City's three separate ordinances is the ownership, use, and maintenance of a cabana house. This Court should reject the notion regulation of a cabana house substantially affects interstate commerce, because an RV Resort, as a whole, substantially affects interstate commerce.

It bears noting that a more appropriate way perhaps to prove an effect on interstate commerce is to prove Respondents' guests chose to reserve a site at the RV Resort exclusively or in large part due to the ability to access the Cabana House. Respondents reference the percentage of out-of-state guests that made reservations at the RV Resort and even stated more than 90,000 reservations were made at the RV Resort from the beginning of its operations to the time of trial in the fall of 2023. (Resp. Initial Br., p. 7.) However, Respondents failed to establish how many of those reservations were made exclusively or in large part due to the Cabana House. More directly, Respondents failed to articulate the percentage of its guests that ever utilized the Cabana House.

First, Respondents admit shuttling to the Cabana House only occurred during the summer months and acknowledge the Cabana House does not receive many, if any, visitors outside of the summer months, meaning all of the reservations to the RV Resort outside of the summer months have nothing to do with access to the Cabana House amenity. (Tr. Vol. II, p. 169, ll. 2–13.) Second, in comparing Respondents' log of guests in the summer of 2021 with the number of reservations that summer, it is clear the number of guests utilizing the Cabana House was insignificant and insubstantial compared to the number of total reservations at the RV Resort. (*Compare* App. Trial Ex. 87 *with* App. Trial Ex. 62.) As the City argued at trial, the several dozen RV Resort guests that visited the Cabana House, although creating a huge intensity of use for a relatively small pool area at the Cabana House, was proportionally insignificant compared to the several hundred reservations at the RV Resort. (Tr. Vol. II, p. 296, l. 19 – p. 297, l. 19.)[9] Third, as the City set forth in clear detail in its Initial Brief, to which Respondents completely and utterly fail to acknowledge

[9] The record is clear that only a small portion of the RV Resort's hundreds-of-thousands of annual guests ever visited the Cabana House. Moreover, Respondents even testified and marketed to their guests that with all the amenities provided on-site at the RV Resort, their guests never have to leave the RV Resort if they did not want to. (Tr. Vol. II, p. 181, ll. 10–21; App. Trial Ex. 101.) When examining the City's Trial Exhibit 87, between May 2021 and September 2021, Respondents' total occupied site nights at their RV resort was 83,178. This number does not include families or friends that stayed with the person reserving the site; it only accounts for the number of people who had reservations at the RV Resort each night during this timeframe. However, when examining the City's Trial Exhibit 62, the number of people who visited the Cabana House during this timeframe was a mere fraction: 8,763.7 When dividing 8,763 by 83,178, the percentage of the people making a reservation at the RV Resort who used the Cabana House during this timeframe is roughly ten percent (10%). But even this low percentage is artificially inflated, because again, it does not consider the multiplier required—many if not most of its occupied site nights would be filled not just with one person, but with families, such that the 83,178 should have some multiplier effect (whether 1.5x, or 2x, or even 3x) which would drastically reduce the percent of users of the Cabana House. Further, this low percentage does not take into consideration that no one uses the Cabana House during the months outside of the peak season. More importantly, it also does not factor the number of RV Resort guests who, even without the Cabana House, would nevertheless make a reservation and travel across state lines to the RV Resort, especially if given the opportunity to shuttle to public beach access points or drive themselves to public beach access points. (App. Mot. and Memo. to Reconsider, pp. 16–17.)

and respond, the RV Resort's reservations, revenue, and normalized occupancy rate have all ***increased*** despite the closure of the Cabana House for RV Resort guests due to the Consent Order. (App. Initial Br., pp. 31–34.) Thus, even if it were tie the effect on interstate commerce by the Cabana House to the RV Resort (which is not appropriate and there is no authority to support), it is clear the RV Resort's commercial activity has ***not*** been affected by the closure of the Cabana House amenity. If Respondents cannot demonstrate any effect on their own financial bottom line, then there has not and cannot be a substantial effect on interstate commerce as a whole.

Once again, Respondents' attempts at bootstrapping are without merit. The facts that (1) the RV Resort's own bottom line was not impacted in the slightest by the closure of the Cabana House, and (2) Respondents fail to acknowledge or respond to this critical fact, are damning and should not go unnoticed by this Court.

V. *Camps Newfound* and *Hignell-Stark* Are Inapposite and Inapplicable

Much like Respondents failure to address critical facts about the insignificant impact the Cabana House had on the RV Resort, Respondents similarly fail to address or analyze the copious amount of case law analyzed by the City in its Initial Brief, (App. Initial Br., pp. 34–41), which directly counter Respondents' arguments, *see, e.g.*, *McBurney v. Young*, 667 F.3d 454 (4th Cir. 2012), *aff'd*, 569 U.S. 221 (2013). Instead, Respondents rely heavily upon two cases: (1) *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me*., 520 U.S. 564 (1997), and (2) *Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (5th Cir. 2022). Neither is analogous to this appeal.

Camps Newfound concerned a property tax exemption statute for charitable institutions, which singled out institutions that served mostly state residents for beneficial tax treatment and penalized those institutions that did principally interstate business. *Camps Newfound*, 520 U.S. at 568. The camp at issue was not eligible for the property tax exemption and any charitable tax

exemption at all, because most of its campers came from out of state and its weekly tuition was roughly four hundred dollars ($400). *Id.* at 568–69. Further, there was nowhere the camp could locate in the state in order to become eligible for the beneficial tax treatment, because it was a "generally applicable state property tax" that applied across the state. *Id.* at 567–68. Despite being a nonprofit organization, the camp was directly engaged in commerce, because it (rather than one of its underlying amenities) was a "provider of goods and services." *Id.* at 572–73. The *Camps Newfound* Court found "camps are comparable to hotels that offer their guests goods and services," like at issue in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 247 (1964) (characterizing a hotel as a business establishment), and that "interstate commerce is substantially affected by the ***activities*** of a hotel." *Id.* at 573. Specifically, the Court found the "attendance of [its] campers necessarily generates the transportation of persons across state lines that has long been recognized as a form of 'commerce.'" *Id.* at 573.

Camps Newfound is not applicable here. As discussed above and at trial, if this case were about regulations (like taxes) directly imposed on the RV Resort, there would be no question the RV Resort engages in interstate commerce. The camp in *Camps Newfound* is analogous to the RV Resort in this case, but it is ***not*** analogous to one of its amenities, the Cabana House. There is a clear distinction of a special exception or accessory use being at issue rather than an establishment like a camp or RV resort being at issue. In the aggregate, all the provision of goods and services and the corresponding interstate transportation generated from a camp or an RV resort naturally will affect interstate commerce; but a cabana house, being just one type of a free amenity (as opposed to a good or service) does not substantially affect interstate commerce. After all, the Cabana House does not in-and-of-itself solicit "through various national advertising media," nor have Respondents proven what, if any, effect access to the Cabana House has on generating

transportation of RV Resort guests across state lines. *Cf. id.* The RV Resort engages in that activity, not the Cabana House.

Further, there was no tax implemented against one of the camp's goods or services or amenities or anything accessory; instead, the tax was applied to the entire camp. Thus, the closest analogy to *Camps Newfound* in this case would be if the City prohibited RV resorts altogether from operating within its city limits or if the City prohibited RV resorts that catered to out-of-state tourists rather than City residents; but the City has not implemented such a restriction. It is merely regulating zoning, under which this amenity is a special exception. The comparison of a camp or the RV Resort to a hotel, like in *Heart of Atlanta*, is actually illustrative, but not in the way Respondents intend. The comparison begs the question: Does the average person choose to reserve a room at one hotel over another based on one of its amenities, like its pool? Of course not. Using one's common sense and ways of the world, most hotel reservations are based on a number of higher priority factors than one of its amenities, like a pool, including but not limited to price, location, pet-friendliness, and number of beds. (Tr. Vol. II, p. 325, ll. 3–20.)

As set forth more fully above, Respondents recognize this distinction between a business establishment like a hotel and RV resort versus an amenity, because they attempt multiple avenues of bootstrapping to make a claim interstate commerce is substantially affected. Contrary to authority, this bootstrapping induced the Circuit Court to issue a conclusory statement in its Order that "the services that the RV Resort provides, which includes access to the Beach Club [i.e. the Cabana House] . . . have a substantial effect on interstate commerce."[10] (Order of Nov. 23, 2023,

[10] Respondent's successfully, albeit inappropriately, shifted the burden to the City in arguing to the Circuit Court that "the City has not conducted any study or analysis as to how [its municipal] interests are furthered" by the Project Requirement. (Resp. Initial Br., pp. 10–11; Order of Nov. 23, 2023, p. 5, ¶ 15.) However, on the threshold issue, Respondents did not present any study or analysis regarding whether a cabana house has a substantial effect on interstate commerce, which is the critical question in this appeal. Instead, as discussed *infra*, Respondents inappropriately

p. 14.) This conclusion is in error, because it improperly widens the aperture of the issue at hand; again, the question is whether the ordinances governing cabana houses substantially affect interstate commerce and not whether the RV Resort and the aggregation of all the goods and services it provides substantially affect interstate commerce.

Hignell-Stark v. City of New Orleans, 46 F.4th 317 (5th Cir. 2022), is also inapplicable to the case at bar. As background, *Hignell-Stark* concerned an ordinance requiring a license to operate short-term rental properties. *Id.* at 321. However, in order to obtain a license, the ordinance imposed a residency requirement such that "no person could obtain a license to own such an STR [i.e. short term rental] unless the property was also 'the owner's primary residence.'" *Id.* (quoting the municipality's ordinance).[11] Thus, the Fifth Circuit found there to be discrimination against out-of-state property owners who wished to use property owned inside the municipality as a short-term rental. *Id.* at 325–29. The primary reason *Hignell-Stark* is not applicable goes back to the definition of "commerce" discussed above. A short-term rental property, much like a commodity such as milk, has an intrinsic value as a good or service that is directly exchanged in the open market. If an out-of-state property owner is completely excluded from operating a short-term rental property in a market that allows for residents to operate short-term rental properties, then the out-of-state property owner faces a complete inability to generate revenue and engage in commerce in this manner inside the municipal boundaries. This situation is much like in *Dean Milk*, in which the municipality prohibited the selling of milk inside the city that was not also pasteurized within five miles of the city. All milk producers that pasteurized outside of this five-

bootstrapped the cabana house to the RV Resort in order to demonstrate a substantial effect on interstate commerce and have induced the Circuit Court to accept the same. This Court should refrain from making the same mistake.

[11] This Court should note the difference in the *Hignell-Stark* ordinance that directly references residency to the City's ordinances in this appeal, none of which reference or even implicate residency.

mile radius were completely excluded from being able to exchange their good (i.e. milk) on the open market.

Respondents have not established nor can they establish, they are completely excluded from the City, whether via ownership of a commercial recreational facility in another zoning district in the City or via shuttling their guests to and from public beach access points in the City. Comparing an amenity with a short-term rental unit that generates revenue is an inapt comparison. Instead, the closest analogy for a cabana house is an accessory use. An "accessory use" is a "use that is dependent on or pertains to a main use." *Use*, *Black's Law Dictionary* (11th ed. 2019). There is no substantive difference between special exception cabana houses and accessory uses that the City and other municipalities allow. After all, accessory uses—such as a detached garage at a residence, classroom space or a kitchen at a church, or a pool at a hotel—are uses that are restricted to owners and users of properties within the municipality and within the zoning district. The only difference is that accessory uses are generally co-located with the dominant use, whereas the special exception cabana house is in close proximity to the beach with the project being further inland and not co-located. (Tr. Vol. I, p. 425, l. 6 – p. 428, l. 9.)

In conclusion, neither *Camps Newfound* nor *Hignell-Stark* are analogous. Instead, by contrast, these two cases actually support the opposite conclusion from Respondents' argument. An amenity cabana house is dissimilar to a camp or short-term rental; therefore, these cases support that an amenity like the cabana house at issue in this appeal cannot constitute an economic activity.

VI. The Legislative History and the City's Testimony Outweigh Interrogatory Responses

Respondents argue interrogatory responses supplied well before fulsome discovery had occurred show the City admitted the purpose behind the City's ordinance requirements is economic protectionism. (Resp. Initial Br., p. 38.) Respondents again fail to provide context. As the City testified at trial, the interrogatory responses at issue were submitted ***prior*** to the City being able to

obtain, produce, and examine the legislative history in this case. (Tr. Vol. I, p. 473, l. 10 – p. 475, l. 9.) Case law holds, "[a]s a general rule, an answer to an interrogatory does not conclusively bind the answering party . . . ." *Marcoin, Inc. v. Edwin K. Williams & Co., Inc.*, 605 F.2d 1325, 1328 (4th Cir. 1979). Further,

> [a]nswers to interrogatories must often be supplied before investigation is completed and can rest only upon knowledge which is available at the time. When there is conflict between answers supplied in response to interrogatories and answers obtained through other questioning, either in deposition or trial, the finder of fact must weigh all of the answers and resolve the conflict.

Victory Carriers, Inc. v. Stockton Stevedoring Co., 388 F.2d 955, 959 (9th Cir. 1968). Here, the City expressly testified to not finding any history of economic considerations in the legislative history once it was able to review it. (Tr. Vol. I, p. 443, l. 19 – p. 444, l. 23.) Therefore, the City should not be bound to responses served before being able to obtain, produce, and examine the legislative history. Even in weighing those responses, they incorporate by reference another interrogatory response, which discusses how the City's ordinances support the homogeneous and harmonious uses of the property alongside adjacent properties, all of which are, after all, located within a residential district. (Tr. Vol. I, p. 473, l. 10 – p. 475, l. 9.) As the legislative history and testimony from the City demonstrate, the City's ordinance requirements support all of the legitimate municipal interests set forth at trial and in the City's Initial Brief. (App. Initial Br., pp. 28–31, 45–49.) Therefore, this Court should give the interrogatory responses upon which Respondents rely little, if any, weight, because the overwhelming weight of the evidence supports the City's position.

VII. Respondents' Arguments Regarding Failure to Preserve Issues for Appeal Are Without Merit and Should Be Roundly Rejected

Lastly, Respondents aver the City failed to preserve a number of arguments for this Court's

review by claiming the City never presented the ordinance requirements as separate requirements nor presented legislative history as an important factor. (Resp. Initial Br., pp. 29 n.16, 39–40.) Regarding the separateness of the ordinance requirements, the City did so both pre-trial, during trial, and post-trial. For example, in opposition to Respondents' Motion for Partial Summary Judgment, the City, both in briefing and in the hearing, presented argument to the Court that the ordinance requirements were separate and distinct. (App. Memo. Opp. Resp. Renewed Mot. for Partial Summ. J., pp. 11–14, 29–36; Tr. of Aug. 9, 2023 Hearing, p. 41, ll. 10–24.) Likewise, the City testified to, argued on, and referenced these ordinances being treated separately at trial. (Tr. Vol. I, p. 28, l. 11 – p. 29, l. 3; p. 476, l. 13 – p. 477, l. 13; Tr. Vol. II, p. 294, l. 22 – p. 295, l. 1.) Finally, the City did so again post-trial as well. (App. Motion and Memo. to Reconsider, pp. 10–14.) Regarding legislative history, the City testified to, argued, and presented briefing on this matter during the trial as well. (Tr. Vol. I, p. 412, l. 24 – p. 415, l. 21; p. 443, l. 19 – p. 444, l. 23; Tr. Vol. II., p. 286, ll. 5–12; App. Trial Ex. 6; App. Bench Br. Regarding Dormant Commerce Clause, p. 11, ¶ 40.) Respondents, true to form to the very end, misconstrue the record and fail to provide context. Their arguments regarding the alleged failure to preserve should be rejected.

CONCLUSION

Throughout their brief, Respondents misconstrue and distort both the facts and the law. This Court should not fall for Respondents' traps. Instead, this Court must apply the *Lopez-Morrison* test, which Respondents continue to avoid. The necessary result of this analysis is that the City's the three separate requirements—the Project Requirement, HOA Ownership Requirement, and HOA Maintenance/Establishment Requirement—do ***not*** violate the Dormant Commerce Clause. Because Respondents' arguments are unavailing, this Court should reverse the Circuit Court's Order and overturn the unwarranted expansion of the Dormant Commerce Clause.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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

City of North Myrtle Beach,

Appellant,

v.

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

Respondents.

PROOF OF SERVICE

The undersigned certifies serving the Initial Reply Brief of Appellant the City of North Myrtle Beach on the following counsel of record for Respondents via e-mail on August 30, 2024:

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