

The Supreme Court of South Carolina

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Re Dunes West Golf v. Town of Mt. Pleasant

Dear Counsel:

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows:

Appellant	15 minutes
Respondent	15 minutes
Appellant in Reply	5 minutes

This case is scheduled for hearing on Tuesday, April 3, 2012 at 10:30 a.m.

Very truly yours,

Daniel E Shearouse, Clerk

By Debbie M. Hopkins

Administrative Assistant

DES/dmh

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-3723

Dunes West Golf Club, LLC,

Appellant,

v

Town of Mount Pleasant,

Respondent

APPELLANT'S INITIAL BRIEF

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SC Supreme Court

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STATEMENT OF ISSUES ON APPEAL

- I Did the lower court err in granting summary judgment and determining there is no proof of a compensable taking under the state and federal constitutions where the Town of Mount Pleasant in 2006 changed the zoning of 256 acres owned by Appellant from a PDD allowing single family residential to park, recreation, and open space, despite facts in the record that support all elements of a takings claim including that the Appellant's purchase of the property was primarily for residential development of the substantial acreage around the golf course and that this acreage was rendered essentially valueless?

- II Did the lower court err in granting summary judgment and determining there is no evidence of a violation of Appellant's right to substantive due process under the state and federal constitutions where Appellant had a cognizable property interest under state law and there was proof that the ordinance creating the new conservation, recreation, and open space zoning district as well as the rezoning of Appellant's 256 acres in 2006 would not substantially advance the purported objectives recited for the zoning district?

- III Did the lower court err in granting summary judgment and determining there is no evidence of a violation of Appellants' right to equal protection under the state and federal constitutions where, after the rezoning of Appellant's land in 2006, the Town relieved another similarly situated property owner of the conservation, recreation, and open space zoning district to allow it roughly 50 residential housing units but applied a different standard to deny Appellant's 2009 application for similar relief asking to re-zone portions of its land to allow residential use?

STATEMENT OF THE CASE

This appeal arises from the downzoning by the Town of Mount Pleasant (“Town”) on June 14, 2006, of 256 acres owned by Appellant that converted land then zoned as part of a planned development district, or PDD, allowing residential uses as a matter of right into park, recreation, and open space. The Town accomplished this re-zoning by adopting an ordinance establishing a new zoning district known as the Conservation Recreation – Open Space District (“CRO Ordinance”) Town of Mount Pleasant, Ordinance No. 06031, Town of Mount Pleasant, Zoning Code § 156.331. At the same meeting Town Council immediately rezoned Appellant’s 256 acres from PDD allowing residential uses, to CRO (the “Dunes West Ordinance”) Town of Mount Pleasant Ordinance No. 06035.

Appellant contends that the Dunes West Ordinance was unconstitutional, constituted an unlawful taking of Appellant’s land without just compensation under the state and federal constitutions, and violated Appellant’s rights to substantive due process under the state and federal constitutions. Appellant further asserts that the Town’s refusal to rezone a small portion of this land to allow residential use in June of 2009 violated its state and federal rights to equal protection.

On June 12, 2009, Appellant, Dunes West Golf Club, LLC (“DWGC” or Appellant), filed this action against the Town for declaratory relief and damages. The Complaint includes causes of action for an unconstitutional exaction (first cause of action), for an unconstitutional taking without just compensation (second cause of action), for inverse condemnation (third cause of action), for a declaration that the Dunes West Ordinance is invalid since it accomplishes an unconstitutional taking of Appellant’s land without just compensation (fourth cause of action), for deprivation of Appellant’s constitutional rights to substantive due process (fifth cause of

action), for a declaration that the Dunes West Ordinance is invalid since it violates Appellant's rights to substantive due process (sixth cause of action) and for deprivation of Appellant's constitutional rights to equal protection (seventh cause of action) **(Compl)**

The Town filed its Answer on July 15, 2009, denying liability The Town's affirmative defenses include failure to exhaust administrative remedies, ripeness, limitations, and waiver **(Answer)**

The Town filed its Motion for Summary Judgment on April 6, 2011 **(Def 's Mot for Summ J)** On April 13, 2011, the Town served a Supplement to Motion for Summary Judgment that stated the particular legal grounds for the motion that had been omitted from the initial motion **(Def 's Supplement to Mot for Summ J)**

The Honorable R Markley Dennis, Jr , Circuit Court Judge, conducted a hearing on the Town's motion on May 9, 2011 **(Order)** After considering the record, arguments, and briefs by the parties, the circuit court granted summary judgment in favor of the Town The lower court entered its order on May 23, 2011 **(Order)**

DWGC received written notice of entry of the judgment on May 27, 2011 Dunes West filed and served its Notice of Appeal on June 24, 2011 Because DWGC's Complaint included a challenge to the constitutionality of a municipal ordinance, this appeal was filed in this Court pursuant to Rule 203(d)(1)(A)(ii), SCACR

STATEMENT OF FACTS

This Court has addressed the constitutional principles applicable to this case many times Never before, however, have the evolving constitutional doctrines applicable to takings and due process claims been presented in the context of facts such as these The foremost fact differentiating this case is the sheer volume of land rendered valueless by the rezoning - 60

acres

What also distinguishes this case is its timing. In its last several cases interpreting the application of the takings and due process clauses of the Fifth Amendment to the United States Constitution, the Supreme Court of the United States has clarified the proper constitutional analyses. This Court has not had the opportunity to consider and apply all these developing clarifications. This emerging precedent from the United States Supreme Court questions the mechanical application of the “parcel as a whole” doctrine under the takings clause and rejects courts blindly giving deference to legislative findings in a substantive due process challenge.

As is evident from a reading of the Order below, the lower court weighed facts and made the equivalent of factual findings. It is improper for a court to render findings in ruling on a motion for summary judgment. Shirley's Iron Works, Inc. v. City of Union, 387 S. Ct. 389, 397, 693 S. E. 2d 1, 4 (S. Ct. App. 2010). Instead, all factual inferences are taken in the light most favorable to the party opposing summary judgment. Rule 56, S. Ct. R. Civ. P., Foreign Academic & Cultural Exch. Servs., Inc. v. Tripon, 2011 WL 3804832, at *2 (S. Ct. Aug. 29, 2011). Applying the settled standard for summary judgment and the governing principles for assessing the constitutional questions raised by this case, this Court should reverse and remand for trial.

Dunes West and the Property in Question

The land at issue is within a planned community in Mount Pleasant known as Dunes West. In 1990, the Mount Pleasant Town Council annexed Dunes West and adopted as the project's zoning the Dunes West PDD, a mixed use planned development on 4518 acres (**Farrell Dep. Exs. 1, 2**). The Dunes West PDD included R-1, Low-Density Residential District, R-3, Medium-Density Residential District, RTH, Townhouse Residential District, MF, Multi-Family Residential District, OP, Office Professional District, TC, Town Center District,

C, Commercial District, and CO, Conservation-Open Space District (**Farrell Dep Ex 2**)

The subject property consists of six tax map parcels identified by Charleston tax records as TMS Nos 540-00-00-38, 039, 040, 041 and 594-03-00-154 and 161 (**Deed dated Mar 5, 2005**) The six parcels encompass approximately 256 acres (**Ex A to Deed dated Mar 5, 2005**) A golf course, clubhouse, and related facilities occupy approximately 196 acres (**Popson Dep Ex 10 at p 12**) The remaining 60 acres were available for any of the uses as a matter of right permitted under the Dunes West PDD Those available, permitted uses for the land included two residential uses, R-1(low density residential) and R-3 (medium density residential)

In 2002 John Wieland Homes & Neighborhoods, Inc and John Wieland Homes and Neighborhoods of the Carolinas, Inc (jointly referred to as “John Wieland Homes”) purchased most of the remaining developable land at Dunes West and became the master developer of Dunes West (**Popson Dep 13 19, Wieland Dep 6 25-7 4**) John Wieland Homes is primarily engaged in homebuilding, including developing residential communities (**Wieland Dep 13 6-7**) Appellant, Dunes West Golf Club, LLC (“DWGC”), is affiliated with John Wieland Homes, the entities are under the common ownership and control of John Wieland (**Pl’s Answers to Def’s First Set of Interrogs , No 5, Wieland Dep 5 2-19**)

John Wieland Homes Enters a Contract to Purchase the Property Because the Dunes West PDD Allows the Subdivision and Residential Development of the Extensive Land Adjacent to the Golf Course

At the time of John Wieland Homes’ acquisition in 2002, an entity known as Scratch Golf owned the six parcels that included the golf course In 2004 Scratch Golf put the property on the market

John Wieland Homes decided to purchase the property but did so only in expectation of subdividing lots and building houses on portions of the sixty acres adjacent to the golf course

John Wieland Homes' core business is residential development, not golf courses and hospitality services

John Wieland, the founder and owner of John Wieland Homes, considers himself a developer and a homebuilder by trade, he testified he hates golf courses (**Compl ¶ 2, Wieland Dep 5 3-6, 13 6-8**) "You know, I don't play golf and they all lose money" (**Wieland Dep 13 8-9**) Notwithstanding his disdain for golf courses, John Wieland was willing to proceed with the purchase only because of the residential development potential of portions of the 60 acres of this property arrayed in location around the golf course (**Wieland Dep 13 6-9, Popson Dep 25 25-26 8, 30 5-6**) "[I]t was a nice opportunity for us, if anything, to just sell, develop lots to people to be on the golf course" (**Popson Dep 25 21-23**) The entire property including the non-golf 60 acres was zoned for residential use as a matter of right under the Dunes West PDD (**Popson Dep 30 5-11**)

The record includes abundant proof that John Wieland Homes proceeded to purchase the property in full reliance on the PDD zoning, confirmed by the Town's planning department, that permitted it to subdivide and build residential units on portions of the acreage arrayed in different locations around the golf course Wieland testified he identified the developable dirt outside the golf course play area and that he purchased the course for that developable dirt (**Wieland Dep 13 14-23, 17 9-10**) He further testified he wouldn't pay \$4 million to lose money on a golf course operation alone (**Wieland Dep 18 17-18**) Rather, he was willing to pay \$4 million for the 256 acres for "the residual land around – the play – the out-of-bounds markers, if you would, of the golf course There was residual land that we, as a developer and a homebuilder, could go in there and cut out and either create lots to sell to individuals or build homes to sell to individuals" (**Popson Dep 25 25-26 8, 30 5-6**)

John Wieland testified that “we purchased the big tract so that what we were calling the clubhouse and the 18 things with the flags and – you know, could operate, you know, over here, and then we could take the good dirt and use our floating zoning to develop the good dirt” **(Wieland Dep 13 14-19)** When asked whether he identified the 57 or so acres of good dirt before he purchased the property, he testified, “absolutely” **(Wieland Dep 13 20-23)** and that he purchased the course “[f]or the 57 acres” **(Wieland Dep 17 9-10)**

As part of John Wieland Homes’ due diligence, on November 23, 2004, only one day after entering the contract to purchase the property, its Charleston division president, Kevin Popson, and its civil engineer and planner, Stuart Whiteside, met with the then-Town Planning Director, Joel Ford, to confirm that those 60 acres outside the golf course were developable **(Popson Dep 32 19-34 25, Ex 2, Whiteside Dep 5 13-18, 14 10-23, 16 9-17)** Ford confirmed to Popson and Whiteside that the Dunes West PDD allowed residential development on the property **(Popson Dep 33 11-24, Whiteside Dep 13 11-14 1)** Christiane Farrell, the current planning director for the Town, agreed that the PDD zoning at the time of purchase allowed residential use on the property **(Farrell Dep 25 3-26 2, 115 25-116 17)**

Popson frequently dealt with Town Planning staff when preparing to develop a new section of Dunes West **(Popson Dep 17 24-19 10)** Before presenting subdivision plats for approval, he would “always try to meet and just make sure we weren’t doing anything wrong, we were abiding by the ordinances And maybe a quick review with [Town planning staff] Christiane and/or Joel saying here is what we want to do, is there anything we are missing, whatever Sort of try to get their thoughts so as we progressed through construction drawings or whatever, we kind of eliminated any possible mistakes or errors that we would have to deal with later” **(Popson Dep 17 24-19 10)** These meetings in advance of submitting a development

application were no different from the meeting Popson had with Ford as part of the purchaser's due diligence before agreeing to close on the 256 acres, which included approximately 196 11 acres of golf course and 60 4 acres of developable land outside the golf course play areas (**See Compl ¶¶ 5-7, Popson Dep 32 19-34 13**)

John Wieland Homes enlisted Whiteside to assist with development concepts for the undeveloped land around the golf course when Wieland put the land under contract (**Whiteside Dep 14 2-15**) Well before the closing on the purchase, Whiteside worked with John Wieland Homes' team to determine "where residential development could occur" "on the undeveloped portion" of the property (**Whiteside Dep 14 2-20**) Under the Dunes West PDD, staff approval was all that was required to subdivide lots for the residential development of the land (**Popson Dep 33 8-15, Whiteside Dep 13 11-14 1, Ford Dep 16 10-20 11, Farrell Dep Ex 7**) Master plans for developing the acreage surrounding the golf course were created and in late 2004 Whiteside began showing conceptual layouts to the Town (**Whiteside Dep 14 21-15 5**)

On December 3, 2004, three months before closing, Popson ordered surveying of possible lots around the golf course (**Popson Dep Ex 2**) On December 28, 2004, Southeastern Surveying surveyed potential lots around the golf course (**Popson Dep Ex 2**)

DWGC Purchases the Property and Continues with its Plans for Residential Development of Portions of the Land Around the Golf Course

John Wieland formed DWGC to buy the property In March 2005, DWGC closed on the property paying \$4 million to Scratch Golf (**Deed dated Mar 5, 2005**)

"[Whiteside and Popson] started showing some conceptual layouts to the Town And then for the following year-and-a-half or so, we did a lot of varying different lay-outs" (**Whiteside Dep 14 21-15 5**) These varying lay-outs were done pursuant to Ford's recommendation "When we met with Joel Ford originally, he said he didn't have a problem

with coming back with the additional lots, but we need to go through the process – the sketch plan process. And he advised before we came back with the sketch plan to get – for Wieland to get support of the homeowners association ” (Whiteside Dep 15 6-14) Whiteside testified that Ford said that an impact assessment was not required to move ahead with the residential development of portions of the acreage surrounding the golf course (Whiteside Dep 15 24-16 4)

Although sketch plans existed and evolved from the time Whiteside and Popson met with Ford in November of 2004, DWGC refrained from formally submitting a development application to the Town because “[Whiteside and Popson] were advised that – by the Town to proceed with getting the homeowners’ approval or support before we made the formal submittal ” (Whiteside Dep 24 18-22) Pursuant to the Town’s directive, “for a year and a half or so, Kevin Popson with Wieland was working with the HOA to negotiate or to review the different lots. So during that process as issues arose, we would revise the layout ” (Whiteside Dep 15 14-18, 18 11-19 24, 24 6-22, Exs 2-6)

The Town Rezones the Property, Over the Objection of the Owner, Without Studies or Analyses to Determine Whether Rezoning this Property to CRO was Necessary or Reasonably Related to Accomplishing the Purported Objectives Recited in the CRO Ordinance

Around February 2006, a directive came down to Town Planning Staff from Town Council about golf courses within the Town. As explained by Ford, “Plain and simple. It was, more or less, a directive from Council that staff investigate and prepare the classification to protect golf course facilities – from being turned into dwelling units, just plain and simple ” (Ford Dep 20 16-21) “[T]he intent was to make sure that these golf courses and facilities were protected from being developed into housing” with the “specific purpose” of preventing “undesirable development ” (Ford Dep 22 20-25, 27 18-19)

Although it issued this directive, Town Council neither requested nor conducted any studies to substantiate Council's fear that golf courses might be converted to residential use **(Ford Dep 30 25-31 23, 39 21-25, 40 1-5, 41 23-42 16)** Ford testified that prior to the Town's rezoning of DWGC's parcels as well as those of other owners of lands containing golf courses in the Town, not one of those owners had communicated to the Town the slightest intent to close down the golf course and convert it to residential use – no imminent threat was posed on the Town by any owner of a Mount Pleasant golf course **(Ford Dep 43 13-22)** The record is devoid of any facts before Council that golf courses within the Town were in danger of being forever closed, that all golf courses within the Town were necessary to handle the volume of golf play, that the golf courses within the Town were vital to containing possible flood waters within the Town, or what constituted so-called “undesirable development,” much less that golf courses in the Town were in imminent peril of this undefined “undesirable development ” **(Ford Dep 29 14-30 2, 30 25-32 23, 33 4-14, 34 10-25, 36 3-21, 39 21-42 16, 43 13-22)**

The Dunes West PDD, the zoning then in place, virtually assured that the Dunes West golf course would remain open space and would not be converted to residential use In its provision addressing open space, the Dunes West PDD specified that the Town would accept title to 59 acres, reserved for park and recreation space, and that “the Phase I golf course fulfills the other open space requirements [for the project] ” **(Farrell Dep Ex 2 at p 3-12, § 10)** Despite this protection against conversion in the Dunes West PDD, the Town persisted in its effort to rezone all 256 acres to park and recreation area **(Farrell Dep 33 4-34 3)¹**

¹ Since it did not have any expectation of converting the golf course to residential use and always intended to have a golf course at Dunes West, DWGC does not make a claim for the downzoning of the golf course itself that could have been converted to residential use under the Dunes West PDD DWGC's claims and damages relate only to the inclusion of the considerable surrounding acreage in the down zoning of the property

In its haste to rezone the five courses in the Town to CRO, Town Council failed to direct planning staff to investigate whether or not the TMS parcels in the Town that included golf courses included significant acreage outside the areas occupied by the golf courses that were available for other uses and possible future development without closure of the golf course **(Farrell Dep 55 20-56 4)** Town staff neither investigated nor walked around the Town's courses to see how much land beyond the golf courses exceeded the golf course footprint **(Farrell Dep 78 25-79 12)**² No one examined the properties which would be subject to the new CRO designation to determine whether the amount of acreage in each was comparable to what would normally be expected for a golf course **(Farrell Dep 48 3-8)** The current planning director testified that the amount of acreage of the DWGC property that was later rezoned was not adjudged by its play area but rather by the tax map parcels – which went well beyond what was necessary to preserve the golf course **(Farrell Dep 20 22-21 19)**

The owners of the parcels with golf courses within the Town expressed their concerns and objections to the anticipated downzoning of their lands to CRO in the months leading up to the rezoning of these lands on June 13, 2006 **(Farrell Dep Exs 6, 7, 10, 13, 17)** The questionable legality of rezoning the TMS parcels that included the golf courses had been brought to Town Council's attention at least two months before, in April of 2006 **(Farrell Dep Ex 6)** Despite the expression of concerns and objections by the owners and notice of its questionable legality, the Town did not conduct any studies or investigate further the numerous issues implicated by the CRO Ordinance or the rezoning of DWGC's property before using its

² However, Town Planning staff would have driven out by the golf course "to try to take pictures to include in our presentations And it would have been just right here at the clubhouse and that sort of stuff And when we posted the signs for the rezoning, I would have been out there for that " **(Farrell Dep 79 16-21)**

zoning power to convert private developable lands outside the golf courses to parks

The Town rejects DWGC's Later Applications to Rezone Portions of the Property to Permit the Residential Uses Previously Allowed under the Dunes West PDD

In January of 2008, Dunes West applied to rezone some of its developable acreage around the golf course, but then withdrew its application after it was rejected by the Town's Planning Commission **(Popson Dep 67 8-19, Exs 26 and 27 to Farrell Dep)** The reason for withdrawal was that "[t]he planning commission voted to not recommend, that we felt the council probably wasn't going to vote for it, so we thought, let's step back, let's go back to the homeowners and see if we can't win their support" **(Popson Dep 68 4-8)** Upon this withdrawal, Dunes West was required to wait one year before reapplying to Town Council **(Popson Dep Ex 2)**

On April 1, 2009, DWGC submitted two applications to the Town to rezone 17 86 acres of the property One requested rezoning of 10 73 acres to R-3, the other requested rezoning of 6 56 acres to R-1 **(Applications attached as Ex 18 to Def 's Mem in Supp)** The Dunes West PDD that had been in effect since 1990 until abrogated by the CRO rezoning of the property allowed for both the R-3 and R-1 uses that were requested in the 2009 application DWGC presented to the Planning Commission, Council, and others a conceptual layout of the lots around the golf course if the application were granted, these were six large single family lots (R-1) and 26 smaller lots (R-2) **(Ex 19 to Def 's Mem in Supp)**

On April 22, 2009, the Planning Commission voted not to recommend Dunes West's rezoning request for the 17 86 acres **(Popson Dep Ex 2)** On May 12, 2009, counsel for Dunes West provided a detailed powerpoint to the Town Council before its final decision, which made clear that even with the proposed development (by then whittled down to 17 86 acres), there would be 676 acres of green and open space 400 acres of wetlands and buffer, 196 acres of golf

course, and 20 acres of developable land Dunes West would donate as open space (**Popson Dep Ex 10 at p 3, 5, Ex 19 to Def's Mem in Supp**) On June 9, 2009, Town Council voted to deny the applications for rezoning (**Exs 28, 30, and 33 to Farrell Dep**)

The Town Acknowledges the 60 Acres Surrounding the Golf Course No Longer Have Any Material Economic Value to DWGC and that the Loss as of the Date of the Downzoning was Around \$6,000,000

DWGC's appraiser, Christopher Donato, testified that, applying a valuation date of June 15, 2006, the value of the non-golf course land prior to the re-zoning that eliminated residential uses was \$6,642,000 (**Donato Dep 58 2-4**) The Town's appraisers estimated the loss of value of the non-golf course land for residential use as of the time of the 2006 rezoning at a similar amount The Town stripped out this value when it adopted zoning requiring all 256 acres to remain an open space and golf course

The Town acknowledged in the following exchange at the hearing that the downzoning of the outside acreage to CR-O rendered it valueless and that the loss to DWGC was in the neighborhood of \$6,000,000

14 (Ms Cantwell) Granted, I would be the first to admit
15 that they could develop these twenty-five acres
16 -- it's not sixty acres , it 's twenty- five
17 acres The 30(b) (6) witness says, 'That's all
18 that we've got , twenty-five acres It isn't
19 sixty ' That's why it's been a moving target
20 But I would admit to you that if they
21 -- yeah, you could probably get up to six
22 million dollars, I think is what their
23 appraiser said, in 2006, that those properties
24 were worth My appraiser says something close
25 to that

23 THE COURT Let me ask you a
24 question From your example, -- if we had to
25 take it as a whole, I would agree with you

1 But if you don't, then isn't that example that

2 there is something that is lost?
3 MS CANTWELL If you accept that
4 ---
5 THE COURT I mean, isn't that the
6 crux of this
7 MS CANTWELL Yeah I think that
8 if you accept that the
9 THE COURT Because, I mean,
10 everybody would agree -- just based on your
11 argument and his argument that if I am twenty-
12 five -- twenty- five or sixty, whatever it is
13 the value of that property itself can't be
14 recovered, it's lost
15 MS CANTWELL Yes , sir,
16 THE COURT They've lost that
17 property
18 MS CANTWELL --- if you consider
19 it separate and apart

(Mot for Summ J Tr 54 14-25, 55 23-56 19)

The Lower Court's Ruling

The lower court granted summary judgment in the Town's favor on all claims In so doing, the trial court relied heavily on precedent that zoning ordinances are presumptively valid **(Order at 8)** The lower court deferred entirely to the recitals and findings in the ordinances at issue and found them legitimate on their face irrespective of any other evidence

Relying on the "the parcel as a whole" doctrine, the lower court found the 256 acres still had economic value as a golf course regardless of the elimination of value for the surrounding acreage and held there could be no categorical or partial taking as a matter of law **(Order at 16-17)** In so ruling, the lower court questioned whether DWGC's primary expectation concerning the use of the parcels was affected at all **(Order at 18-19)** The lower court relied on the facts that the property was used as a golf course at the time of purchase, no land had been subdivided out of the parcels for residential development, DWGC never intended to develop the golf course itself, and all the property had been mortgaged based on an appraisal that valued it as a golf

course **(Order at 18-19)**

In denying the substantive due process claims, the lower court held that DWGC did not have a vested interest in the residential development of the property **(Order at 11)** The lower court also held that DWGC cannot complain of a denial of substantive due process since it could have applied for residential development for portions of the property up until June 30, 2007, when a possible vested right to pursue residential development expired, but did not do so **(Order at 11-13)**

As for the claim for denial of equal protection based on the Town's rejection of its request for rezoning in 2009, the lower court held that the application for rezoning from CRO to residential approved by Town Council for the owner of the Snee Farm golf course was distinguishable because it was supported by a segment of owners at Snee Farm and did not alter the golf course very much The lower court also found there was no proof of any intent to discriminate against DWGC **(Order at 9-10)**

STANDARD OF REVIEW

Summary judgment is appropriate where "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 and that the moving party is entitled to a judgment as a matter of law" S C R Civ P 56(c) Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law Carolina Chloride, Inc v S C Dept of Transp., 391 S C 429, 434, 706 S E 2d 501, 504 (2011) Further, summary judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusions to be drawn therefrom MacFarlane v Manly, 274 S C 392, 264 S E 2d 838 (1980)

In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party Carolina Chloride, Inc., 391 S C at 434, 706 S E 2d at 504 All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant Staubes v City of Folly Beach, 331 S C 192, 197, 500 S E 2d 160, 163 (S C Ct App 1998)

“Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues ” Murphy v Tyndall, 384 S C 50, 54, 681 S E 2d 28, 30 (S C Ct App 2009) In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment Hancock v Mid-S Mgmt Co., 381 S C 326, 330-31, 673 S E 2d 801, 803 (2009)

“In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right ” Sloan v S C Bd of Physical Therapy Exam'rs, 370 S C 452, 466-67, 636 S E 2d 598, 605-06 (2006)(internal citations omitted) “The question of a taking is one of law ” Ex Parte Brown, 393 S C 214, 711 S E 2d 899, 904 (2011)

ARGUMENT

The Town invoked its police power to zone to compel the landowner in this case to provide a park on its private property for the benefit of the public without compensating the landowner The purported aim of the ordinance, putting aside the window dressing of stated

objectives, was to preserve the golf course and related facilities that cover approximately 196.11 acres. The downzoning was not necessary to preserve the golf course. The Dunes West PDD's specific reference to the golf course as satisfying the project's open space requirements virtually assured the golf course's preservation. Even so, the legislative preservation of the golf course could easily have been accomplished without eliminating all economic productivity from the adjoining 60 acres. The downzoning of this property to CRO does not rationally advance the stated objectives of the ordinance that in themselves lack factual underpinning.

In the Order the lower court remarked that the developable land was less than 60 acres, focusing on the acreage that was subject to the 2009 rezoning request (17 acres) and that was used in DWGC's damages calculation (25 acres). Although DWCG never filed a request to rezone all 60 acres and did not calculate its damages based on the residential development of all 60 acres, all 60 acres were in fact rezoned to park space and rendered economically valueless under the Dunes West Ordinance.

The lower court committed reversible error for the following reasons:

First, the lower court failed to consider the relevant portions of the property in its analysis of whether a categorical regulatory taking occurred under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). The lower court also misapplied the factual balancing test set forth in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

Genuine issues of material fact preclude summary judgment on the takings claim. The record establishes both a compensable categorical taking under Lucas and a compensable partial taking under Penn Central.

The record also establishes that the CRO district as applied to this property denies DWGC substantive due process. The Dunes West PDD already required the preservation of the

golf course as open space and DWGC had no intent to convert the golf course to residential use. The record shows the Dunes West Ordinance's other purported purposes are without factual basis.

Finally, the lower court failed to compare the Town's decision to deny Dunes West its request to rezone with the Town's decision to grant Snee Farm's request to rezone against the backdrop of the purposes of the CRO zoning district. There was no difference between the two residential rezoning requests vis a vis the purposes of the CRO district. There is also evidence to support the reasonable inference that the Town intended to discriminate against DWGC by imposing a more stringent standard on it. These genuine issues of material fact prevent the granting of summary judgment on DWGC's equal protection cause of action.

I There is evidence that the Town's downzoning of sixty acres from residential use to park space constitutes a compensable taking under the takings clauses of the state and federal constitutions

[N]or shall private property be taken for public use without just compensation U S Const amend V

"Except as otherwise provided in this Constitution private property shall not be taken for private use without the consent of the owner nor for public use without just compensation being first made for the property" S C Const art I, § 13(A)

"Both the United States Constitution and the South Carolina Constitution provide that if the government takes private property for public use, then it must compensate the owner for the value." Byrd v City of Hartsville, 365 S C 650, 656, 620 S E 2d 76, 79 (2005). "[W]hen the government interferes with a private citizen's property rights and this interference is not related to any legitimate public interest, the government has acted beyond the scope of its authority." Id. at 663, 620 S E 2 at 83 (Toal, J, dissenting) (citing Lucas v S C Coastal Council, 505 U S 1003, 1016, 112 S Ct 2886, 120 L Ed 2d 798 (1992)).

To establish an unconstitutional taking via inverse condemnation, this Court requires the proof of two elements (1) affirmative conduct of a government entity, and (2) the conduct effects a taking, *i.e.*, damage Byrd, 365 S C at 657, 620 S E 2d at 79 Inverse condemnation exists where, as here, the government takes property without just compensation by imposing limitations which amount to a taking Id. at 656, 620 S E 2d at 79

The first element, affirmative conduct, requires the Town to enact and rule upon a zoning ordinance which restricts the use of land Id. at 657, 620 S E 2d at 79 “The determination that an act is affirmative, positive, and aggressive depends on the facts and circumstances of the particular case ” White v County of Newberry, S C., 985 F 2d 168, 173 (4th Cir 1993) It is undisputed the first element is met in this case

This Court has adopted the tests applied by the United States Supreme Court when evaluating the second element – whether the government conduct effects a taking If the regulation deprives the owner of all viable economic use of the land, then the analysis is under Lucas v South Carolina Coastal Council, 505 U S 1003, 112 S Ct 2886 (1992) If the owner is left with some economically viable use, then the analysis is guided by the principles enumerated in Penn Central Transportation Co v City of New York, 438 U S 104 (1978) “If Lucas does not apply, then Penn Central does ” Byrd v City of Hartsville, 365 S C 650, 660, 620 S E 2d 76, 81 (2005)

The lower court committed reversible error when it held that the Dunes West Ordinance constituted neither a categorical total taking nor a partial taking of DWGC’s land as a matter of law

The Supreme Court of the United States has held that “the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual

question ” City of Monterey v Del Monte Dunes at Monterey, Ltd., 526 U S 687, 721, 119 S Ct 1624, 1644, 143 L Ed 2d 882 (2005) It is undisputed that the downzoning eliminated all material economic value of the sixty acres surrounding the golf course There is abundant evidence the owner had reasonable, economic-backed expectations that it could proceed with the residential development of portions of the land next to the course when it purchased the property

a The parcel as a whole doctrine does not bar DWGC’s claim for a categorical taking

The lower court incorrectly decided there was no evidence the Dunes West Ordinance constituted a categorical taking under Lucas v South Carolina Coastal Council, 505 U S 1003, 112 S Ct 2886 (1992) The court premised its decision on (1) a legal determination that the relevant parcel to evaluate in a takings analysis is the parcel as a whole, and (2) a factual determination that the entire 256 acres within the 6 tax map parcels purchased by DWGC constitute the parcel as a whole

The United States Supreme Court has questioned the parcel as a whole doctrine, insinuating that by no means must it apply in every instance of an alleged categorical taking Indeed, courts from around the nation have rejected the parcel as a whole doctrine in instances where the affected acreage is substantial and there is evidence that the affected acreage could have been subdivided for separate economic use from the remainder of the parcel The few cases relied upon by the lower court as its basis for applying the doctrine involve instances where the land attempted to be segregated was small or *de minimus* Those cases where this Court has employed the doctrine have also involved instances where the portion of the parcel that the owner sought to have separately considered was small – nothing even remotely close to 60 acres

As the United States Supreme Court has noted, “[r]egrettably, the rhetorical force of our ‘deprivation of all economically feasible use’ rule is greater than its precision, since the rule does

not make clear the ‘property interest’ against which the loss of value is to be measured ” Lucas, 505 U S at 1016 n 7, 112 S Ct at 2894 “When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole ” Id In other words, the Supreme Court stated in Lucas that there are instances where application of the parcel as a whole doctrine may be unreasonable and unfair and therefore inapplicable This is just such a case

Nine years later in Palazzolo v Rhode Island, 533 U S 606, 121 S Ct 2448, 150 L Ed 2d 592 (2001), the United States Supreme Court again expressed skepticism about the parcel as a whole approach Palazzolo owned 22 acres of coastal land 18 of these were wetlands that he asserted the state was taking from him if it would not allow him to fill them On appeal, Palazzolo raised for the first time the argument that the upland parcel was distinct from the wetlands portions and should not be considered in determining whether a categorical taking occurred as to the 18 wetland acres Palazzolo asserted that the deprivation analysis should focus on the wetlands acreage without regard to his usable upland acreage The Court responded

[t]his contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators Whatever the merits of these criticisms, we will not explore the point here Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari The case comes to us on the premise that petitioner's entire parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails

Palazzolo, 533 U S at 631-32, 121 S Ct at 2465 The Supreme Court went as far as the facts of the case would allow in expressing its “discomfort with the logic of the rule ” If the parcel as a whole doctrine were a hard and fast rule, then the Supreme Court could easily have said so

In determining the “predominantly factual question” of whether an owner has been deprived “of all economically viable use of his property,” numerous courts applying United States Supreme Court precedent have allowed less than all the land to be considered as a separate parcel under some circumstances or have pronounced examples of where land could be considered as a separate parcel Like the rest of regulatory takings law, courts engage in a fact specific inquiry when defining the relevant parcel in evaluating a categorical Lucas takings claim Giovanella v Conservation Comm'n of Ashland, 447 Mass 720, 726, 857 NE 2d 451, 456 (2006)

For example, in Loveladies Harbor, Inc v United States, 28 F 3d 1171 (Fed Cir 1994), the Federal Circuit severed the land for the purposes of a categorical, Lucas takings analysis The court rejected the government’s contention that the “relevant parcel” was all 250 acres The court instead looked to the 12 5 acres the landowner was prevented from developing under laws passed after the landowner purchased the property and developed parts of it

Invoking the Lucas observation that “the rhetorical force of [the] deprivation of all economically feasible use’ rule is greater than its precision” (Lucas, 505 U S at 1016 n 7, 112 S Ct at 2894), the court modeled itself after the “flexible approach” proffered by precedent that, by design, would account for factual nuances Loveladies, 28 F 3d at 1181 Evaluating the 12 5 acres for which the landowner sought a permit, the court held that its remaining value was *de minimis* Id The court expressly held that “[t]his is not, then, a case of a partial taking, involving linedrawing between noncompensable ‘mere diminution’ and compensable partial taking

Rather this is a case in which the owner of the relevant parcel was deprived of all economically feasible use ” Id at 1181-82 The court upheld the trial court decision that the permit denial for those 12.5 acres “was effectively a total taking of the property owner’s interest ” Id at 1182

Other examples are in accord In Nectow v City of Cambridge, 277 U S 183, 48 S Ct 447, 72 L Ed 842 (1928), the United States Supreme Court severed the smaller, 29,000 square-foot tract from the larger, 140,000 square-foot tract for the purposes of its takings analysis There, no less than the United States Supreme Court held that the government invasion on the smaller tract was an abuse of its police power See also Am Sav & Loan Ass'n v Marin County, 653 F 2d 364, 366 (9th Cir 1981) (stating adjacent parcels under a common owner may be considered separately if it can be shown the owner treated the parcels separately), Florida Rock Indus v United States, 791 F 2d 893, 904 (C A Fed 1986) (finding a taking where the government’s refusal to allow limestone mining on a proposed 98-acre tract was only part of the owner’s original 1560 acre purchase), Giovanella v Conservation Comm'n of Ashland, 447 Mass 720, 728, 857 N E 2d 451, 458 (2006) (identifying whether the land is put to the same use or different uses as a factor in determining the relevant parcel), Twain Harte Assocs v County of Tuolumne, 217 Cal App 3d 71, 85, 265 Cal Rptr 737 (Cal Ct App 1990) (holding the nature of the particular land use regulation has been recognized as potentially creating separate parcels for “taking” purposes), John E Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U CHI L REV 1535 (1994) (stating that where the total restrictions on development affect a significant enough segment of land that it could be independently developed for a profit, the principles of fairness and justice underlying the Fifth Amendment require that the owner be compensated for this loss)

As this substantial judicial precedent shows, the law does not demand that the entire 256

acres be treated as a “whole” in an “as applied” inverse condemnation suit for purposes of the Lucas analysis. The 60 acres, or more precisely the 25 acres of land where subdivision and development were feasible and legally permissible before the downzoning, is the relevant parcel for the categorical takings analysis.

Prior South Carolina inverse condemnation cases discussing the parcel as a whole approach involved relatively insignificant acreage in comparison to the acreage at issue in this case. In Beard v. South Carolina Coastal Council, 304 S.C. 205, 207-08, 403 S.E.2d 620, 622 (1991) cited by the lower court, the landowners sought a permit to construct a bulkhead that was approximately 205 feet in length across four lots of beachfront property. The land allegedly taken was a mere 18.5 feet on two lots and 23.9 feet on a 3rd lot. The owner in Beard was not deprived of developing 32 residential lots, as occurred here.

The quantity of affected land in this case is in no manner comparable to that involved in the other case relied upon by the lower court, Quirk v. Town of New Boston, 140 N.H. 124, 663 A.2d 1328 (NH 1995). Quirk involved the application of the town’s zoning ordinance to the landowner’s campground. The town enacted a buffer zone requirement for the recreational campground which prevented certain land development within a minimum distance of campground perimeters. Id. at 128, 663 A.2d at 1330-31. The ordinance prohibited buildings, recreational facilities, trailer spaces, campsites, and tent sites in the 200-foot buffer zone. Id. at 128, 663 A.2d at 1331. The inner 100 feet could be used for any other purpose, including underground utilities and the outer 100 feet had to contain natural vegetation. Id. The campground owner sued on the grounds that the buffer zone requirement effected an unconstitutional taking of his property. Id.

The New Hampshire Supreme Court recognized that “Focusing on a discrete portion of a larger tract may be appropriate where the land owner has fragmented the property for distinct development or uses. A narrower focus may also be proper where portions of the larger tract have already been dedicated to benefit the public.” Id. at 131, 663 A.2d at 1332-33. However, in upholding the trial court’s finding that there was no taking, the court held that “[i]n the present case, we find no compelling reason to view the perimeter as a discrete segment of campground.” It is clear from the court’s opinion that had the campground owner possessed a “compelling reason”, *i.e.*, facts that demonstrated the land owner intended to fragment the property for distinct development and uses, the court would likely have reached a different outcome. The 32 residential lots that were taken in this case bear no reasonable relationship to the unusable 100’ buffer around the campground allegedly taken in Quirk. The acreage in the present case qualifies for severance under the rationale of Quirk, DWGC fully intended to fragment the non-golf course acreage for residential use.

The regulatory limitations imposed by the rezoning in the present case bear an eerie and uncanny resemblance to the restrictive regulatory effect in Lucas. The nature of the deprivation of use is identical. There the Supreme Court of the United States flatly rejected the state’s argument that the land retained economic value as a picnic area and recreational site once residential use was prohibited. The Town’s downzoning of the sixty acres to a park in this case meets the standard for a *per se* taking applied by the United States Supreme Court in Lucas as a matter of law.

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Case closed

The categorical rule set forth in Lucas has been reiterated several times by the United States Supreme Court – and remains largely unchanged. Compensation is required when a regulation deprives an owner of *all* economically viable uses of his land. Tahoe-Sierra Pres Council, Inc v Tahoe Reg'l Planning Agency, 535 U S 302, 330, 122 S Ct 1465, 1483, 152 L Ed 2d 517 (2002). Lucas applies in the extraordinary circumstance, such as the present case, where no productive or economically beneficial use of land is permitted under the Dunes West Ordinance. Id. The government “must pay just compensation for such ‘total regulatory takings,’ except to the extent that background principles of nuisance and property law’ independently restrict the owner’s intended use of the property.” Lingle v Chevron U S A Inc., 544 U S 528, 538, 125 S Ct 2074, 2081, 161 L Ed 2d 876 (2005) (quoting Lucas, 505 U S at 1026-1032, 112 S Ct at 2886). The determinative factor in a Lucas analysis continues to be “the complete elimination of a property’s value.” Id. at 539-40, 125 S Ct at 2082. The Lingle Court reiterated “that total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.” Id. (quoting Lucas, 505 U S at 1017, 112 S Ct at 2894). The Palazzolo Court held that

[t]he determination whether an existing general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed. A law does not become a background principle for subsequent owners by enactment itself. Lucas did not overrule our holding in Nollan, which, as we have noted, is based on essential Takings Clause principles.

Palazzolo v Rhode Island, 533 U S 606, 630, 121 S Ct 2448, 2464, 150 L Ed 2d 592 (2001).

The proof in the record goes well beyond establishing a genuine issue of material fact as to whether the Dunes West Ordinance amounted to a Lucas taking. It establishes it as a matter of law. The rezoning converted the sixty acres surrounding the golf course to park and open space.

and destroyed \$6,000,000± in its development value. The Town concedes that DWGC is permanently deprived of all viable economic use of the surrounding acreage separate and apart from the golf course (**Mot for Summ J Tr 54-56**). For the foregoing reasons, summary judgment as to the Lucas takings analysis should be reversed. The downzoning constituted a *per se* takings under Lucas as a matter of law.

b There is ample evidence to support a compensable taking under the fact intensive inquiry mandated by Penn Central Transportation Co v City of New York, 438 U S 104 (1978)

In the addition to a Lucas taking, there is evidence of a taking under the *ad hoc*, fact-sensitive balancing test set forth in Penn Central Transportation Co v City of New York, 438 U S 104, 98 S Ct 2646, 57 L Ed 2d 631 (1978).

Three factors are typically balanced to decide whether the public benefit from a regulation or law outweighs the private harm to the landowner: (1) the character of the government action, (2) the economic impact of the regulation on claimant, and (3) the degree to which the regulation/law has interfered with distinct investment-backed expectations. If the public benefit outweighs the harm to the landowner, there is no taking and the government need not pay compensation.

Sea Cabins on Ocean IV Homeowners Ass'n v City of North Myrtle Beach, 345 S Ct 418, 430 S Ct 548, 595, 601 (2001) (citing Penn Cent., 438 U S 104, 98 S Ct 2646).

As this Court held in Byrd v City of Hartsville, *supra*, if Lucas does not apply, then Penn Central does Byrd, 620 S E 2d at 81. In Byrd, this Court also “overrule[d] our prior suggestions that a property owner cannot demonstrate a taking unless he has been denied all economically viable use of his property.” 620 S E 2d at 81 n 11.

The Penn Central analysis is fact driven. “Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by ‘essentially ad hoc, factual inquiries,’ designed to allow ‘careful examination and weighing of all the relevant circumstances.’” Tahoe-Sierra Pres Council, Inc v Tahoe Reg'l Planning Agency, 535 U S 302, 322, 122 S Ct 1465,

1478, 152 L. Ed. 2d 517 (2002) (quoting Penn Central, 438 U.S. at 124, 98 S. Ct. at 2646) “The general rule is that regulatory-takings cases require ‘essentially ad hoc, factual inquiries,’ balancing all relevant circumstances to determine whether the government has taken property.” Byrd, 365 S. Ct. at 658-59, 620 S. E. 2d at 80 (quoting Penn Central, 438 U.S. at 124, 98 S. Ct. at 2569)

Because the Penn Central analysis is fact intensive, it is inherently unsuitable for determination on summary judgment if there is proof to support the claim. “At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact.” S.C. Prop. & Cas. Guar. Ass’n v. Yensen, 345 S. Ct. 512, 518, 548 S. E. 2d 880, 883 (S. Ct. App. 2001)

In this instance the lower court handpicked certain proof and ignored other proof and came up with findings. Examples include “The Bank of America appraisals, each rendered post-zoning, identified a golf course as the highest and best use for the parcels and attributed significant value to the parcels when so used” (**Order at 18**), “The evidence demonstrates significant value in the parcels, as currently zoned and used” (**Order at 19**), “And, because the Golf Club never intended to develop the whole course, the Rezoning Ordinance does not interfere with the Golf Club’s anticipated future use of the parcels, all of which brings into question whether the primary expectation concerning the use of parcels has been affected at all” (**Order at 19**). A court has this prerogative in deciding a matter after a merits trial. But, at the summary judgment stage, the circuit court is required to view the evidence in the light most favorable to the party opposing the motion, which it did not do.

Further the lower court erred in holding that DWGC cannot establish a taking under Penn Central if there is some value remaining in the property. “If, after application of the regulation,

the claimant is left with beneficial use of his property, there is no regulatory taking ” (Order at 17) The lower court also mistakenly concluded that the beneficial use of the property taken remains because “[a]ll evidence reveals that the application of the CRO and Zoning Ordinances to the six parcels has not rendered them valueless or without beneficial use ” (Order at 18)

As stated earlier, this Court in Byrd overruled its prior suggestions there could be no taking unless the owner was denied all economically viable use of his property Byrd, 620 S E 2d at 81 n 11 A Penn Central taking always involves something less than a total deprivation of the value of the property See Tahoe-Sierra, 535 U S at 330, 122 S Ct at 1483 (quoting Lucas, 505 U S at 1019-1020 n 8, 112 S Ct 2886) (stating that “[a]nything less than a ‘complete elimination of value,’ or a ‘total loss,’” requires the Penn Central analysis)

In 2005, the United States Supreme Court clarified the Penn Central test by holding that two factors, the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate investment-backed expectations, are now the primary factors to be considered Lingle v Chevron U S A , Inc., 544 U S 528, 548 (2005) The character of the government action, while still relevant, is a secondary consideration Id at 539 This Court is in accord in attributing the most weight to these two factors

The general rule is that regulatory-takings cases require “essentially ad hoc, factual inquiries,” balancing all relevant circumstances to determine whether the government has taken property **Two circumstances are especially important (1) “the economic impact on the claimant, and, particularly, the extent to which the [government] has interfered with distinct investment-backed expectations,” and (2) “the character of the governmental action ”**

Byrd, 365 S C at 658-9, 620 S E 2d at 80 (quoting Penn Central, 438 U S at 124, 98 S Ct at 2659) (emphasis added)

Voluminous evidence in favor of the owner, some of which is recited in the Statement of Facts, supports these two primary factors

As to the regulation's economic impact, it is undisputed the downzoning permanently deprived the owner of all viable economic use of the surrounding acreage separate and apart from the golf course. In the light most favorable to DWGC, the non-moving party DWGC easily puts forth proof to meet the first Penn Central factor.

The circuit court found that DWGC did not have any distinct investment-backed expectations because it did not intend to develop the golf course. In so ruling, the lower court ignored the flood of proof that DWGC purchased the land only because of the surrounding land's potential for residential development and made a factual finding completely at odds with the testimony of Wieland, Popson, Whiteside, and Ford when viewed in the light most favorable to DWGC.

As recited in the Statement of Facts, the owner met with the Town's planning director, engaged its engineer-planner, and came up with a conceptual layout of lots before closing. After closing but before the downzoning was on the horizon, DWGC put together an extensive 13-page pro-forma that identified in detail the anticipated revenues, expenses, and profits of this residential development of the property (**Popson Dep Ex 3**). DWGC expected to develop 32 lots for, roughly, a \$10 million profit (**Popson Dep 49 23-50 22, Ex 3**). Although more of the land could have been developed, Dunes West was satisfied with "dialing down to that" (**Popson Dep 49 23-50 22, Ex 3**).

As to the remaining factor, the character of the government action, the circuit court paid no attention to the confiscatory nature of the Town's rezoning. The trial court incorrectly looked to the recitals of the ordinances and their stated purposes instead of focusing on the character of the *effect* of rezoning, what is now required by takings jurisprudence.

The character of the government action is simple. The Town's downzoning of PDD to

park deprived the owner of any viable economic development within the sixty acres adjacent to the golf course. The legislative findings have nothing to do with the effect of the rezoning. These findings may explain the Town's motive but do nothing to mitigate the knock-out punch of the rezoning.

The trial court made legal errors in its Penn Central analysis. In addition, the overwhelming evidence presents plenty of proof that a taking under Penn Central occurred. The lower court's order granting summary judgment to the Town as to a compensable taking under Penn Central should be reversed.

II There are genuine issues of material fact that DWGC had a protected property interest and that the CRO Ordinance and the Dunes West Ordinance deprived DWGC of its rights to substantive due process under the state and federal constitutions

No person shall be deprived of life liberty or property without due process of law U S Const amend V

The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged nor shall any person be deprived of life liberty, or property without due process of law nor shall any person be denied the equal protection of the laws S C Const art I, § 3

The Due Process guarantee of the Fifth Amendment to the United States Constitution resides in a separate clause from its takings prohibition. The substantive due process analysis is different from the takings analysis. The Due Process Clause of the Fifth Amendment requires that, to be valid, a law or regulation must substantially advance a legitimate state interest sought to be achieved. See Lingle v. Chevron U S A Inc., 544 U S 528, 540, 125 S Ct 2074, 2083, 161 L Ed 2d 876 (2005). The standard is no longer that the government could rationally have decided that the measure adopted might achieve the government's objective. Nollan v. Cal Coastal Comm'n, 483 U S 825, 836 n 3, 107 S Ct 3141, 3148, 97 L Ed 2d 677 (1987).

The lower court granted summary judgment on the substantive due process claim, holding that DWGC had to hold a vested right to develop the land and that the recitals of purpose in the Ordinances express legitimate government land use interests and, therefore, are beyond challenge and further inquiry. The lower court never considered whether the rezoning “substantially advanced” the stated objectives in the Ordinances. Both grounds for the ruling are contrary to the applicable law.

A substantive due process claim requires only a protected property interest, not a vested right to proceed with a particular development. DWCG, as owner, has a protected property interest.

Under recent takings jurisprudence, government regulations are no longer shielded from substantive due process challenges simply because they recite legitimate government objectives. The new standard of review, not applied by the lower court, dissolves the “fairly debatable” presumption governments have been accustomed to enjoy. The United States Supreme Court now calls on judicial bodies to take a closer look at the legislative enactment and decide (1) whether there is a legitimate factual basis supporting blanket recitals of stated purposes, and (2) if those stated purposes are factually legitimate, whether there is a rational relationship between those stated purposes and the application of the law to a particular piece of property.

A Due Process violations under the Fifth Amendment only require deprivation of a property interest, not a vested property interest

The Fifth Amendment protects property rights. A property right does not have to be “vested” to be protected by the Constitution. Property rights are legally distinct from vested rights, which are by definition benefits conferred to property owners from the government. See Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 833 n. 2, 107 S. Ct. 3141, 3147, 97 L. Ed. 2d 677 (1987) (“But the right to build on one's own property—even though its exercise can be subjected

to legitimate permitting requirements - cannot remotely be described as a 'governmental benefit'") The type of property interest protected by the Constitution is "any significant property interest" Fuentes v Shevin, 407 U S 67, 86, 92 S Ct 1983, 1997, 32 L Ed 2d 556 (1972)

In this case, when DWGC acquired the 256 acres of land, it possessed a cognizable property right in its land that was subject to reasonable regulation As to the sixty acres of land not included in the golf course, DWGC had a sufficient property interest

[A] ban on potential uses not yet established may destroy market value as effectively as does a ban on activity already in progress The ban does not shed its retrospective quality simply because it affects only prospective uses What explains, then, the universal understanding that only those nonconforming uses are protected which were demonstrably afoot by the time the regulation was adopted? The answer seems to be that actual establishment of the use demonstrates that the prospect of continuing it is a discrete twig out of his fee simple bundle to which the owner makes explicit reference in his own thinking, so that enforcement of the restriction would, as he looks at the matter, totally defeat a distinctly crystallized expectation

Frank I Michelman, *Property Utility and Fairness Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV L REV 1165, 1233 (1967)

There can be no question that the development rights which have been totally abrogated by the local law are, standing alone, valuable components of the "bundle of rights" making up their fee interests [D]evelopment rights "are an essential component of the value of the underlying property" and that "they are a potentially valuable and even a transferable commodity and may not be disregarded in determining whether the ordinance has destroyed the economic value of the underlying property "

Seawall Assocs v City of New York, 74 N Y 2d 92, 109, 542 N E 2d 1059 (1989) Whether or not that right was vested, which DWGC contends it was (*see infra*), is irrelevant to a substantive due process analysis All that is required by the Fifth Amendment is a property right It also bears pointing out that the United States Supreme Court has held that the one of the inherent rights of ownership is the right to develop land in some manner See Palazzolo v Rhode Island,

533 U S 606, 626-27, 121 S Ct 2448, 2462, 150 L Ed 2d 592 (2001) (rejecting the idea that the right to develop property is a right created by the state and holding “[t]he State may not put so potent a Hobbesian stick into the Lockean bundle”)

B The question of whether an ordinance substantially advances the legitimate state interest sought to be achieved is inherently factual

“Whether a land-use decision substantially advances legitimate public interests within the meaning of our regulatory takings doctrine involves an essential factual component,” City of Monterey v Del Monte Dunes at Monterey, Ltd., 526 U S 687, 721, 119 S Ct 1624, 1644, 143 L Ed 2d 882 (2005)

The “fairly debatable”³ presumption of validity no longer applies for federal due process analysis. To determine whether a stated objective is legitimate, courts must look beyond the facial recitals of legitimacy proffered in an ordinance. Lucas v S C Coastal Council, 505 U S 1003, 1025 n 12, 112 S Ct 2886, 2898, 120 L Ed 2d 798 (1992).⁴ Here the circuit court erred in refusing to look beyond the facial recitals of legitimacy to determine whether they substantially advance the stated objectives, especially here where there is evidence that the facial recitals are unsupported by the facts.

a The United States Supreme Court does not give validity to facial findings created by law-making bodies such as the Town. The United States Supreme Court demands a heightened factual inquiry that goes beyond recitals of stated purposes of the legislative enactment in question

³“If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.” Vill of Euclid, Ohio v Ambler Realty Co., 272 U S 365, 388, 47 S Ct 114, 118, 71 L Ed 303 (1926)

⁴ Moreover, because the Town has a financial interest in enacting these regulations (as opposed to having condemned the property, and paid for the property, outright via eminent domain proceedings), “complete deference to a legislative assessment of reasonableness and necessity is not appropriate.” U S Trust Co of New York v New Jersey, 431 U S 1, 26, 97 S Ct 1505, 1519, 52 L Ed 2d 92 (1977). After all, “[a] governmental entity can always find a use for extra money.” Id.

In recent decisions, the United States Supreme Court has abandoned its deferential approach to government land use decisions. See First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), Lucas v. S.C. Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

The United States Supreme Court has cautioned against viewing justifications pontificated by a law-making body at face value. “Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.” Id. at 1025 n. 12, 112 S. Ct. at 2898.

The Lucas Court emphasized that legislative findings are less important than the facts which support the justification for the government action. The Court remanded the case and articulated the state’s burden.

We emphasize that to win its case South Carolina must do more than proffer the legislature’s declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. As we have said, a “State, by *ipse dixit* may not transform private property into public property without compensation.”

Id. at 1031, 112 S. Ct. at 2901 (internal citation omitted).

The law requires a factual inquiry into the validity of the legislative findings when those findings accomplish a taking. In this case the lower court refused to make the factual determinations mandated by Lucas and Lingle and simply accepted the Town’s declaration of the reasons for the Ordinances. Accordingly, the lower court erred in rejecting DWGC’s substantive due process challenge on the ground the recitals set forth legitimate governmental concerns.

- b The United States Supreme Court further requires that there be a sufficient nexus between application of the ordinance to the particular parcel of property and the legislative objectives for which the ordinance was designed to achieve**

A critical component of the standard set forth in Nollan v California Coastal Commission applies in regulatory takings cases as well as physical takings cases to determine “whether there is a sufficient nexus between the effect of the ordinance and the objectives it was supposed to advance ” Yee v City of Escondido, Cal., 503 U S 519, 530, 112 S Ct 1522, 1530, 118 L Ed 2d 153 (1992) (citing Nollan, 483 U S at 834–35, 107 S Ct at 3147–48) (stating that in the context of a regulatory taking, which was not properly before the court, the effect of the rent control ordinance at issue “may shed some light may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance”)

In Nollan, the United States Supreme Court recognized the inherent power of states to exert police power on private developments Nollan, 483 U S at 843, 107 S Ct at 3151 However, the Court also recognized that government action may be a valid exercise of the police power and still violate specific provisions of the Constitution Id at 845 n 1, 107 S Ct at 3153 The Court noted that while constitutional challenges are reviewed under varying standards depending on the challenge at issue, a separate standard of review must be applied when addressing “the threshold issue of rationality of government action ” Id

In Nollan, the court formulated the following example of the nexus required in the exaction context

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was The purpose then becomes, quite simply, the

obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of “legitimate state interests” in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but “an out-and-out plan of extortion.”

Id. at 837, 107 S. Ct. at 3148-49 (internal citations omitted). For the Town’s actions to withstand a substantive due process challenge, there must be a nexus between the stated purposes of the ordinance and its application to the 257 acres of land downzoned from PDD to CRO. In this case DWGC put forward proof that there was no required nexus between the rezoning of the entire property and the accomplishment of the purposes stated in the recitals of the Ordinances. This proof creates a genuine issue of material fact preventing summary judgment.

c. South Carolina precedent maintains that the police power is not without limits

The lower court held that the Dunes West Ordinance is bottomed on legitimate, land use considerations. Putting aside the proof the rezoning was not legitimate regulatory land use, even where police power is grounded on legitimate land use considerations, it is not without limits.

The standard by which the validity of an ordinance enacted under the exercise of police power is tested is that the exercise of the power should extend only to reasonable and necessary measures. On this point we quote from 11 Am. Jur., at page 1074: “*** Too much significance cannot be given to the word ‘reasonable’ in considering the scope of the police power in a constitutional sense, for the test used to determine the constitutionality of the means employed by the Legislature is to inquire whether the restrictions it imposes on rights secured to individuals by the Bill of Rights are unreasonable, and not whether it imposes any restrictions on such rights. It has been said that the only limitation upon the exercise of the police power is that such exercise must be reasonable. The validity of a police regulation therefore primarily depends on whether under all the existing circumstances the regulation is reasonable or arbitrary and whether it is really designed to accomplish a purpose properly falling within the scope of the police power.”

McCoy v. Town of York, 193 S. C. 390, 8 S. E. 2d 905, 907 (1940). A classification of property is unconstitutional where such classification is unnecessary or confiscatory. Bear Enter. v. County of Greenville, 319 S. C. 137, 141, 459 S. E. 2d 883, 886 (S. C. Ct. App. 1995). See also Ewing v.

City of Springfield, 449 S W 2d 681, 684 (Mo Ct App 1970) (“It is well established that a valid general zoning ordinance may be so arbitrary and unreasonable in its application to a particular tract as to tend toward confiscation, and when that is true the ordinance infringes the rights of the owners under the due process provisions of both the federal and state constitutions)

Even if the applicable ordinances were grounded on fact-based objectives, which Appellant contends – and the evidence shows – they were not, there is evidence the exercise of police power in this instance was excessive and lacks the essential nexus required to withstand constitutional scrutiny

C There is an abundance of proof in this case that the rezoning of all 257 acres was not in furtherance of the recited purposes of the applicable ordinances

The circuit court ignored the plethora of evidence covered in the Statement of Facts when it found that “[t]he Record contains no evidence of a due process violation ” **(Order at 14)** DWGC put forward evidence the overly broad Dunes West Ordinance does not substantially advance the stated legislative objectives There is proof that the downzoning does not bear a rational relationship to the public health, safety, morals or welfare, as intimated by the trial court **(Order at 10)**

First, DWGC put forward proof of an inadequate factual basis to support the findings in the Ordinances The stated purposes of the Dunes West Ordinance are

- (1) To provide for, and permit, an appropriate valuation by the tax assessor and/or land appraiser that reflects the conservation, recreation, and/or open space use of land
- (2) To ensure the preservation of conservation, recreation and/or open space use of land against undesirable development,
- (3) To lessen the hazards and loss of property, life, and reduction of health and safety due to the periodic inundation of flood waters, by restricting or prohibiting uses in these areas
- (4) To provide opportunities for improved public and/or private recreation activities

- (5) To provide for a community-wide network of open space, buffer zones, and recreation spaces

With respect to the first stated purpose, allowing for tax assessors and land appraisers to appropriately value the land, then-Town Planner Joel Ford stated, “I have no idea where that came from When you handed me this ordinance, I looked at it, and I was like, what in the hell does that mean? So that’s my answer ” **(Ford Dep 36 10-13)**

As to the second stated purpose, protecting the land from undesirable development, then-Town Planner Joel Ford recognized that, for the most part, “undesirable” is entirely subjective and, if he could go back in time, he would probably have eliminated this purpose altogether **(Ford Dep 33 24-34 1, 35 21-24)**

Notably, there is no proof of any study or assessment conducted to link the third, fourth, and fifth stated purposes of the Ordinance to evidence a need to draft the Ordinance No particular study was referred to by planning staff dealing with the “inundation of floodwaters” when drafting the Ordinance **(Ford Dep 39 21-25, 40 1-5)** Nor were specific studies conducted regarding the volume of golf course play, and there was no determination as to whether or not there were sufficient or insufficient facilities for playing golf in the Town **(Ford Dep 30 25-31 23)** Nor was a study or analysis conducted concluding that golf courses needed to remain golf courses for there to be an adequate community-wide network of open space, buffer zones, and recreation space **(Ford Dep 41 23-42 16)**

Absent from these stated purposes is the actual purpose of the ordinance to prevent the conversion of golf courses to residential development within the Town **(Ford Dep 40 6-10)** Yet, the record establishes that no golf course owner within the Town, including DWGC, was considering such conversion **(Ford Dep 29 24-30 2, 43 13-22)**, and that the Dunes West PDD adequately preserved the golf course as open space There was also proof that there was much

more open space at Dunes West than required by the PDD. Even with the proposed development in select areas around the golf course, there would be 400 acres of wetlands and buffer in addition to the golf course and 20 acres of developable land Dunes West would donate as open space (Popson Dep Ex 10 at p 3, 5)

There were multiple genuine issues of material fact whether the Ordinances application to this property substantially advanced legitimate interests of the Town

D Although a vested right is not required for the purposes of due process analysis, the circuit court legally erred in its interpretation of the South Carolina Vested Rights Act⁵ under the plain meaning rule

The circuit court's Order suggests Dunes West had a duty to act in contravention of (1) the instructions of Town Planning staff, and (2) the Town's ordinances which affirmatively downzoned the subject property from Dunes West PDD to CRO on June 13, 2006. The lower court ruled that DWGC cannot complain of a denial of substantive due process since it did not pursue a zoning change before July 1, 2007. In so doing, the lower court implied that the Town might have been compelled to grant the zoning change if DWGC had a vested right under S C Code Ann. §§ 6-29-1510 *et seq.* at that time. All the proof in the record, however, supports the opposite conclusion – that an application for a zoning change made before July 1, 2007, would have been rejected just the same as the applications for a change in the zoning to allow limited residential use in January 2008 and April 2009.

Passed in 2004, the Vested Rights Act (the Act) became effective on July 1, 2005. S C Code Ann. §§ 6-29-1510 *et seq.* The Act compelled local governments to adopt ordinances in conformity with the Act by July 1, 2005. S C Code Ann. § 6-29-1530. The Act defines a “vested right” for its purposes as, “**the right to undertake and complete the development of**

⁵ Notably, the Vested Rights Act does not affect the Takings analysis or the Due Process

property under the terms and conditions of a site specific development plan or a phased development plan as provided in this article and in the local land development ordinances or regulations adopted pursuant to this chapter” S C Code Ann § 6-29-1520(10) (emphasis added)

The Act specifies that a planned unit development is a “site specific development plan ” S C Code Ann § 6-29-1520 (emphasis added) and specifically established in an owner a two-year vested right effective upon its adoption for all approved site specific development plans

(A)(1) A vested right is established for two years upon the approval of a site specific development plan

(2) On or before July 1, 2005, in the local land development ordinances or regulations adopted pursuant to this chapter, **a local governing body must provide for**

(a) the establishment of a two-year vested right in an approved site specific development plan,

S C Code Ann § 6-29-1530(A)(1) and (2)(a)(emphasis added) See Town of Mount Pleasant, Zoning Code § 156 049(C)(1) (“Approved site specific development plans shall be vested for a period of two years from the date of final approval by the local governing body ”)

The Dunes West PDD was an approved Site Specific Development Plan on the effective date of the Act, July 1, 2005 Per the express terms of the Act, the lower court reasoned DWGC had a *statutory* vested right to proceed with the residential development authorized by the Dunes West PD for two years, until July 1, 2007 Before July 1, 2007, DWGC did approach the Town about developing some of the land around the golf course **(Farrell Dep Exs 6, 7, 9, 10)** Up to and at the time of the adoption of the ordinances, DWGC pointed out to council that it had the right to develop land around the golf course and that downzoning this surrounding acreage was unnecessary **(Farrell Dep Exs 6, 7, 10)** The Town ignored DWGC’s assertion of its rights and went full speed ahead in passing the ordinance, **(Farrell Dep Exs 6, 7, 9, 10)** downzoning

all the property

There is no proof that the Town would have granted a request by DWGC to change the zoning if the application had been made before July 1, 2007. The proof is to the contrary. The Planning Commission rejected DWGC's request in January 2008. Town Council rejected DWGC's 2009 application. A landowner is not required to submit futile applications for permission to develop as a prerequisite to its constitutional claims. Palazzolo v. Rhode Island, 533 U.S. 606, 626, 121 S.Ct. 2448, 2462, 150 L.Ed.2d 592 (2001) (in context of takings claim).

In addition, and more importantly, whether an owner applies for a change in zoning and when is irrelevant to the substantive due process analysis. Substantive due process focuses on what the legislative body did, not what the owner may have done in response.

III DWGC presented evidence that Snee Farm was substantially similar to DWGC, that there was no rational basis for the Town's granting its rezoning request and denying DWGC's, and that the Town imposed a more stringent standard on DWGC, creating an inference of intent to discriminate

There are factual issues that prevent the entry of summary judgment on Appellant's claim for denial of its right to equal protection.

"The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." Grant v. S.C. Coastal Council, 319 S.Ct. 348, 354, 461 S.E.2d 388, 391 (1995). For example, in Weaver v. South Carolina Coastal Council, 309 S.Ct. 368, 423 S.E.2d 340 (1992), the property owner applied for a permit to construct a recreational dock which encroached upon the river. The state Coastal Council denied the property owner's permit but granted permits to similarly situated persons. The Court found that the existence of the property owner's dock "would create no effect distinguishable from that occasioned by the other three existing docks." Id. at 375, 423 S.E.2d at 344. The property owner was "entitled to be treated in the same manner as the other applicants." Id. For these reasons, the Court held that

the Coastal Council denied the property owner's equal protection rights by conferring benefits on others and denying the same benefit to the property owner

The Town rezoned the golf courses at Snee Farm and Dunes West to CRO at the Council meeting on June 13, 2006 Town of Mount Pleasant Ordinance Nos 06033 & 06035 Appellant's equal protection claim is based on the Town's granting Snee Farm's later request for rezoning from CRO to allow residential development on portions of the land adjacent to the golf course (**Farrell Dep Exs 22, 23**) but denying DWGC's similar request (**Farrell Dep Ex 30**) even though there was no difference between the two when measured against the so-called legitimate objectives of the CRO zoning district See Town of Mount Pleasant Ordinance No 07008

The lower court held that there was a reasonable basis for distinguishing between the two applications for rezoning (**Order at 10**) The facts the circuit court looked to primarily dealt with the extent of alteration of the golf course and other specifics of the Snee Farm plan (**Order at 9**)

The pertinent inquiry, however, is not the differences in these two owners' respective plans for residential use The focus is whether granting Snee Farm's rezoning request to allow residential use carried out the stated objectives of the CRO District while granting DWGC's request would have violated those objectives The test is to measure both applications against the CRO District's objectives The distinctions relied upon by the lower court had nothing to do with these purposes ⁶ (**Order at 9**)

⁶ The stated purposes of the Conservation – Recreation Open Space District are (1) To provide for, and permit, an appropriate valuation by the tax assessor and/or land appraiser that reflects the conservation, recreation, and/or open space use of land, (2) To ensure the preservation of conservation, recreation and/or open space use of land against undesirable development, (3) To lessen the hazards and loss of property, life, and reduction of health and safety due to the

The lower court justified the Town's decision granting Snee Farm's application because the rezoning applied to 20 contiguous acres, to allow for the development of 58 units, monies generated from sales were to be applied to razing the clubhouse and reconstructing a new one, making improvements to tennis courts, and constructing a new pavilion, pool, and practice green with an expanded driving range, the rezoning would have resulted in minimal alterations to area of play of the course, politically, the Snee Farm community was essentially split as to the merits of the proposal **(Order at 9)**

By contrast, the lower court found that DWGC's 2009 application for rezoning was dissimilar to Snee Farms' because the DWCG's proposal was to rezone approximately 18 acres and develop 32 units, the acreage was not contiguous, the rezoning would have resulted in alterations to the 10th hole fairway, the relocation of cart paths, the shortening of a hole from a par four to a par three and moving tee boxes⁷, the monies generated from the sales were to have been applied to unspecified on-course improvements, and to off-course improvements, politically, the rezoning proposal was not embraced by the Dunes West community **(Order at 9)**

The lower court failed to point out any distinction, though, on the effect of the two applications on the purposes of the CRO district. When measuring both applications against the CRO District's objectives, it is clear that similarly situated property owners were disparately

periodic inundation of flood waters, by restricting or prohibiting uses in these areas, (4) To provide opportunities for improved public and/or private recreation activities, and (5) To provide for a community-wide network of open space, buffer zones, and recreation spaces **(Farrell Dep Ex 12)**

⁷ Indeed, there is proof that the final development plan involved minimal changes to the golf course. These minimal changes to the golf course would not change its Arthur Hills designation, in fact, Arthur Hills endorsed the Dunes West plan. "We wish you success with the renovation. We are, of course, delighted to hear that the course is in great shape and that remarkable things are happening. Sounds like your group is the savior!" **(Popson Dep Ex 10)**

treated in violation of the state and federal equal protection clause Granting the limited residential use requested by DWGC, just like that of Snee Farms', would have had no adverse effect on the stated purposes for the CRO district The limited residential use would have had no adverse bearing on tax assessor valuations, on lessening the hazards and loss of property, life, and the reduction of health and safety due to the periodic inundation of flood waters, on the preservation of the golf course (The ordinance's objectives did not required that the golf course never be altered, only that the golf remain as golf, contrary to what the lower court implied), on the opportunities for improved public and/or private activities, or, on a "community-wide network of open space, buffer zones, and recreation spaces "

The effect of granting the DWGC application on the stated purposes to be accomplished by the CRO district is indistinguishable from the effect of granting the Snee Farm application In fact, the Dunes West proposal involved fewer units than the Snee Farm proposal (**Farrell Dep Exs 20, 30**) There are therefore genuine issues of material fact that the two applications for rezoning were similarly situated

Moreover, there was proof that gives rise to a reasonable inference that the Town intended to discriminate against DWGC when it denied the DWGC application but granted the similarly situated Snee Farm application (**Farrell Dep Ex 24**) The Planning Commission and Town Council rejected the Dunes West 2009 Application based on a Town Ordinance that supposedly pertains to all requests to change zoning that the Town neither considered nor applied to the Snee Farm application (**Farrell Dep Exs 23, 30**)

In its application, DWGC sought to amend the Dunes West Planned Development District Ordinance to allow for 32 lots 6 R1 lots and 26 R3 lots (**Farrell Dep Ex 30**) "The Planning Commission held a public hearing on this and recommended denial based on the

declaration of policy found within the zoning code and specifically referenced 156031D”

(Farrell Dep Ex 30) The text of the zoning ordinance referred to by Council states

(D) *Declaration of policy* As a matter of policy no request to change the text of the ordinance or the map shall be acted upon favorably, except

- (1) Where necessary to implement the Comprehensive Plan, or
- (2) To correct an original mistake, a manifest error in the regulations or map, or
- (3) To recognize substantial change or changing conditions or circumstances in a particular locality, or
- (4) To recognize changes in technology, the style of living, or manner of doing business

Section 156 031(D) of the Town of Mount Pleasant Zoning Ordinances

The testimony establishes the Town invoked this policy to deny the DWGC application, but did not even mention it when approving the Snee Farm application **(Farrell Dep Exs 22, 23)** This disparate treatment of similar applications creates a reasonable inference of intent to discriminate, contrary to the lower court’s ruling

Questions of intent should not be decided on summary judgment See Wallace v Day, 390 S C 69, 76, 700 S E 2d 446, 450 (S C Ct App 2010) (holding that the determination of the parties’ intent at the time they executed a contract was a question of fact that should not have been decided on summary judgment) Such questions of state of mind and intent are “preeminently factual issues for the triers of the facts ” Starkey v Bell, 281 S C 308, 315 S E 2d 153 at 156 (S C Ct App 1984) The lower court committed reversible error when it stepped in as the fact-finder Moreover, the lower court erred by misapplying the standard of review, which requires that all inferences being drawn from the facts be viewed in the light most favorable to the non-moving party

CONCLUSION

This Court need look no further than the United States Supreme Court’s ruling in Lucas

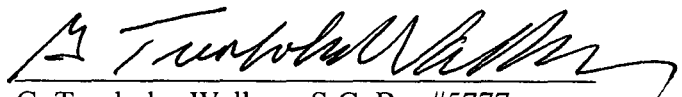
to decide this appeal. The Town downzoned 60 acres of DWGC's land, much of which was available for residential development, to a park. The downzoning had the identical effect as the state's statutes and regulations in Lucas. If this Court were to invoke the parcel as a whole doctrine despite its undermining by the Supreme Court in Lucas and Palazzolo and its rejection by courts where the parcel has separate development potential and is capable of severance, then DWGC satisfies the requirements for a compensable taking under the fact intensive analysis of Penn Central.

DWGC also put forward proof that established the elements for its separate claim for denial of substantive due process. In granting summary judgment as to this claim, the lower court committed legal errors and disregarded DWGC's factual showing.

Finally, as to the Town's rejection of DWGC's application in 2009 to rezone 17 acres from CRO to allow residential use, taken in the light most favorable to DWGC, the record contains proof to support the elements of its claim for denial of due process.

Based on the foregoing, Dunes West respectfully requests the South Carolina Supreme Court REVERSE the circuit court's order granting summary judgment on these causes of action.

Respectfully submitted,



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September 7, 2011
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

SEP 12 2011

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S C Supreme Court

R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-3723

Dunes West Golf Club, LLC,

Appellant,

v

Town of Mount Pleasant,

Respondent

**APPELLANT'S DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal

Orders

- 1 Order entered May 23, 2011

Pleadings

- 2 Complaint dated June 12, 2009
- 3 Answer dated July 15, 2009

Transcripts

- 4 Motion for Summary Judgment Transcript dated May 11, 2011 (entire transcript)

Motions, Briefs

- 5 Defendant's Motion for Summary Judgment dated April 6, 2011
- 6 Defendant's Supplement to Motion for Summary Judgment dated April 13, 2011

7 Defendant's Memorandum in Support of Summary Judgment dated May 6, 2011

8 Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment dated May 9, 2011

Discovery

9 Deposition of John Wieland, cover page, pp 5-7, 13, 17-20

10 Deposition of Kevin Popson, cover page, pp 8-13, 17-19, 22-26, 29-30, 32-39, 42-46, 48-61, 64-73, 76-89
Exhibits 2, 3, 10

11 Deposition of Stuart Whiteside, cover page, pp 5, 13-16, 18-19, 24
Exhibits 2, 3, 4, 5, 6

12 Deposition of Joel Ford, cover page, pp 4-6, 13-54, 58, 60-63

13 Deposition of Christiane Farrell, cover page, pp 6-14, 17-22, 25-26, 28-57, 61-70, 73-79, 87-107, 113, 115-116
Exhibits 1, 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 15, 17, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 33

14 Deposition of Chris Donato, cover page, p 58

15 Defendant's Answer to Plaintiff's Request to Admit, No 5

16 Plaintiff's Answers to Defendant's First Set of Interrogatories with attachment, November 16, 2009

Other Relevant Portions of the Record Considered on Motion for Summary Judgment

17 Exhibit 14 to Defendant's Supporting Documents for Memorandum In Support of Summary Judgment, Application for Rezoning, January 2, 2008, Bates Numbered 000775-000776

18 Exhibit 18 to Defendant's Supporting Documents for Memorandum In Support of Summary Judgment, Application for Planning Commission Approval of Rezoning, April 1, 2009, Bates Numbered 000741-000747

19 Exhibit 19 to Defendant's Supporting Documents for Memorandum in Support of Summary Judgment, Presentation to Town Council on May 12, 2009

September 7, 2011



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STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-03723

Dunes West Golf Club, LLC

Appellant,

v

Town of Mount Pleasant

Respondent

RESPONDENT'S INITIAL BRIEF

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SC SUPREME COURT

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STATEMENT OF ISSUES ON APPEAL

- 1 Did the lower court err in awarding summary judgment on the state and federal constitutional takings claims?
- 2 Did the lower court err in awarding summary judgment on the state and federal substantive due process claims?
- 3 Did the lower court err in awarding summary judgment on the state and federal equal protection claims?

STATEMENT OF THE CASE

On June 12, 2009, Appellant Dunes West Golf Club, LLC (herein “Golf Club”) commenced this action against Respondent Town of Mount Pleasant (herein “Town” or “Town Council”) in the Court of Common Pleas for Charleston County. The suit arises from two ordinances enacted by the Town in June 2006. One ordinance created a new zoning category, that being the Conservation Recreation Open-Space (CRO) district (herein “CRO Ordinance”). The other applied the CRO district designation to the Golf Club’s property in the Dunes West Planned Development (herein “Rezoning Ordinance”).

The Golf Club claimed the Rezoning Ordinance, as applied to its property, constituted an unlawful exaction under the State and Federal Constitutions, that the Rezoning Ordinance, as applied to its property, constituted a total taking of some of its property, that the Rezoning Ordinance, as applied to its property, constituted a regulatory taking of some of its property, and that the Rezoning Ordinance, as applied to its property, resulted in a violation of its rights to substantive due process. The Golf Club also contended that its rights to equal protection had been violated. The Golf Club sought declaratory relief and damages.

The Town filed its Answer to the Complaint on July 16, 2009. Discovery ensued, and on April 6, 2011, the Town filed a Motion for Summary Judgment.

The Motion for Summary Judgment was heard by the Honorable R. Markley Dennis, Jr. on May 9, 2011. At the hearing, the Golf Club withdrew its cause of action based on an unlawful exaction. After considering the argument and reviewing the exhibits and evidence presented, Judge Dennis awarded summary judgment to the Town. A written order was entered on May 23, 2011. This appeal followed.

STATEMENT OF FACTS

This case contests the actions of the Town Council that rezoned the six (6) separate but contiguous parcels of land upon which the golf course at Dunes West was constructed (herein “Golf Course Tracts” or “Tracts”) to the CRO zoning district. The Complaint sets out numerous causes of action, to wit: that the Rezoning Ordinance constituted an unlawful exaction (First Cause of Action), that the Rezoning Ordinance constituted a permanent and regulatory taking of property (Second and Third Causes of Action), that the Rezoning Ordinance, being excessive, was arbitrary in violation of substantive due process rights (Fifth Cause of Action), and that, because the Town rezoned a portion of another golf course having the CRO zoning designation, the its refusal to rezone a portion of the Golf Club’s course violated its rights to equal protection (Seventh Cause of Action). The Golf Club seeks declaratory relief (Fourth and Sixth Causes of Action) and damages.

Significant is what the Golf Club is not contending. The Golf Club is not contending that the Rezoning Ordinance resulted in a taking, regulatory or otherwise, of the Golf Course Tracts. The Golf Club is not contending that the Golf Course Tracts have been rendered economically idle by the Rezoning Ordinance or that the Tracts do not have substantial value. The Golf Club is

not contending the CRO Ordinance is facially defective (or if it is, then this contention is made to this Court in the first instance) The Golf Club is only contending that the Rezoning Ordinance, as applied to portions of its property, has resulted in the alleged violations of its constitutional rights

Dunes West is a planned development located in the Town of Mount Pleasant The community was originally laid out and planned in the County In 1990, the vast majority of the community was annexed to the Town When it was annexed, the Town carried forward, with but slight modifications, the planned development zoning (PD) designation that had existed in the County (R , Ford Dep , p 64, lines 10-18)

A golf course was constructed in the Dunes West PD before the community was annexed to the Town The course was constructed over six (6) separate, contiguous tracts of land in the Dunes West community, the Golf Course Tracts Each of the Golf Course Tracts has a separate tax map number The Golf course Tracts contain, in the aggregate, approximately 256 acres The configuration of the course over the Tracts has not changed in any substantial manner since its initial construction, and the Tracts have only been used for recreational purposes, both before and after annexation (R Prause Dep , p 50, lines 2-20, Popson Dep , p 83, line 8 – p 84, line 23)

The Dunes West PD allowed various uses and permitted the developer flexibility to site those uses across the community so long as the density caps for the specific uses were not exceeded (R , Court Ex 1, (Tab 9), PD Sec 3 03, 3 04) Contrary to the assertion of the Golf Club on page 10 of its brief that the PD “ virtually assured that the Dunes West golf course would remain open space and would not be converted to residential use”, conversion could have

occurred by the developer satisfying open space requirements elsewhere within the community (R , Prause Dep , p 50, line 21 – p 51, line 17)

John Wieland Homes and Neighborhoods, Inc (herein “JWHN”) is a privately held corporation controlled by John Wieland (herein “Wieland”) In 2002, JWHN purchased the undeveloped portions of the Dunes West community with the exception of the Golf Course Tracts (R , Court Exhibit 1 (Tab 4), Answer to Interrogatory 5, Complaint, p 2)

In the latter part of 2004, Wieland learned that the Golf Course Tracts were going on the market Wieland put the Tracts under contract Wieland then formed Dunes West Golf Club, LLC, and in March 2005, the Golf Club purchased the Golf Course Tracts for the asking price of \$4 million The purchase was financed by way of an intercompany loan from JWHN The Golf Club’s Rule 30(b)(6) witness testified the Club intended to maintain a course at Dunes West He testified the \$4 million asking price was a fair price for the course, with the residual Claimed Developable Lands being a “gift” John Wieland also acknowledged the Tracts, as a course, had value The Golf Club has operated a golf course on the Tracts since their acquisition (R , Court Exhibit 1 (Tab 10) Deed, Popson Dep , p 29, line 4 – p 30, line 11, p 47, lines 4-23, Wieland Dep p 17, lines 9-17, McMickle Dep , p 7, line 4 – p 8, line 7)

Prior to closing and for some time thereafter, the Golf Club created various in-house development scenarios that contemplated putting portions of the Golf Club Tracts to single family and townhouse uses When these scenarios were being developed, the Golf Course Tracts were zoned Dunes West PD and residential uses were permitted on the Tracts as a matter of right Representatives of the Golf Club also met with the Town planning director and shared with him the potential development schemes The planning director acknowledged that the PD zoning allowed the construction of homes on the Golf Course Tracts and advised the Golf Club

to share their ideas with neighbors and to attempt to garner neighborhood support. This occurred in February 2005, prior to the Golf Club closing on the property. (R , Popson Dep , p 31, line 7 – p 38, line 1)

Over a year later, in the spring of 2006, the Town Council, on its own initiative, instructed its staff to review the zoning applicable to all golf courses in the Town. During this time, golf course conversions were becoming a hot issue along the coast. Course were being converted in the Myrtle Beach area, conversion was being contemplated at the King's Grant course in Charleston County, and the owner of a course in the Town had made inquires regarding the conversion of some portion of its course. Staff's report revealed that the majority of the golf courses in the Town, including Dunes West, could be converted to other uses with little, if any, Town oversight. (R , Farrell Dep , p 9, line 22 – p 11, line 2, Prause Dep , p 10, line 6 – p 11, line 15, Farrell Dep , Ex 3, Ex 4, Ex 6, Ford Dep , p 31, line 24 – p 32, line 23, Popson Dep , p 64, line 14 – p 65, line 1)

Council responded to this report by enacting the CRO Ordinance so as to establish a process whereby golf course conversions could be more effectively evaluated and controlled (Court Ex 1 (Tab 3), CRO Ordinance)

Among the purposes of the CRO district are to provide and maintain a community-wide network of green and recreational spaces, to lessen hazards posed by periodic flooding associated with development and to guard against the introduction of inappropriate uses on existing recreational lands. In tandem with the creation of CRO district, Town Council enacted ordinances rezoning all golf courses in the Town of Mount Pleasant, both public and private, to the CRO district. The Golf Club at Dunes West was rezoned to CRO by Ordinance 06035

effective as of June 14, 2006, the Rezoning Ordinance (R , Court Ex 1 (Tab 3), CRO Ordinance, Court Ex 1 (Tab 4), Rezoning Ordinance, Dep Farrell, p 12, line 22 – p 13, line 9)

The Rezoning Ordinance was applied to the six tax map parcels where the Dunes West Golf Course was located. At the time of the rezoning, the Town's Comprehensive Plan designated these parcels as open space. At the time of the rezoning, these parcels were being used solely for golf course and recreational purposes (R , Court Ex 1, (Tab 4), Rezoning Ordinance, Dep Farrell, p 112, line 24 – p 113, line 7)

When the CRO and Rezoning Ordinances were under consideration, the Golf Club contended the tax parcels comprising the golf course included lands not required for golf course play. The Golf Club represented that some 60 of the 256 acres within the tax parcels were outside areas of play and not needed for the golf course operations (herein “ Claimed Developable Lands”) No plat or survey of the Claimed Developable Lands then existed, and no graphic or other pictorial depiction of the Lands was presented to the Council (R , Court Ex 1 (Tab 13), Council Minutes, 6/13/06), Popson Dep , p 35, line 18 – p 37, line 2, p 58, line 22 – p 59, line 5, Wieland Dep , p 13, line 11 – p 15, line 4) The purported “survey” ordered from Southeastern Surveying was not a survey at all and was never presented to the Town. As explained by the Club's Rule 30(b)(6) witness

Q I see that you ordered a survey of possible lots along the golf course.
Did you ever get that survey?

A What I wanted to know was - - you could walk like the 10th hole and you could see the white sticks or you could see the out of bounds, whatever. You knew just by playing golf or looking at it, you could see the land outside the golf course if you were on the golf course.

But there were some sections where some of this land butted up to property owners. And that, I didn't know where the line was. So, for example, on the 18th hole, there was three lots we wanted to do Pignatelli. Those three lots butted up to a homeowner there, so I sort of needed to know where that property was, you know, to see what land I had there, whether it be on lot I could fit in there, two lots or three lots.

So it wasn't a detailed boundary of all of the residual land, it was more of wherever it butted up to an original homeowner so I didn't sort of get into their lot.

Q And Southeastern Survey did that for you?

A Yes.

Q Where are those documents?

A If I had them I would have made copies and sent them over to you.

Q Who would have them if you don't, Southeastern?

A Southeastern.

Q Did you ever share that with the Town or leave on with the Town?

A I don't believe so.

(R , Popson Dep , p 35, line 18 – p 36, line 25)

In 2008, the Golf Club filed an application to rezone to residential use approximately 18 acres of the Golf Course Tracts. The location of the acreage sought to be rezoned fell within areas of play of the golf course and would have required alterations to the course, to include relocating cart paths and the fairway of the 10th hole. The rezoning also contemplated the

abandonment of an easement not owned by the Golf Club. The application sparked spirited public debate. The Planning Commission recommended to the Council that the rezoning application be denied. The Golf Club withdrew its application prior to it reaching the Council (R , Court Ex 1, (Tab 14), 2008 Rezoning Application, Court Ex 1 (Tab 15), Planning Commission Minutes, 1/23/08, Court Ex 1 (Tab 16), Planning Committee Minutes, 2/4/08, Court Ex 1 (Tab 17), Letter of Withdrawal)

In 2009, the Golf Club again applied to have a portion of the Golf Course Tracts rezoned. Like the 2008 proposal, the 2009 rezoning application included acreage within areas of play that would have required alterations to the golf course, to include the reconfiguration of the fairway of the 10th hole, shortening a hole, moving tee boxes and the relocation of numerous cart paths. (R , Court Ex 1 (Tab 18), 2009 Rezoning Application, Court Ex 1 (Tab 19), Power-Point Presentation, Court Ex 1 (Tab 20), LaFoy Report, Court Ex 1 (Tab 49), Forsberg Report)

The application came before the Planning Commission on April 29, 2009. Spirited public debate again ensued. The Planning Commission voted to recommend to Council that the rezoning be denied. (R , Court Ex 1, (Tab 21), Planning Commission Minutes, 4/22/09)

The application then moved to the Planning Committee of Town Council. The Committee voted to recommend that Council defer action for 30 days. At the Council meeting held on May 12, 2009, numerous residents appeared in opposition to the rezoning. Council deferred the issue. At its meeting held on June 9, 2009, Town Council denied the rezoning by refusing to give first reading to an ordinance that would have authorized it. (R , Court Ex 1 (Tab 22), Planning Committee Minutes, 5/5/09, Court Ex 1 (Tab 23), Council Minutes, 5/12/09, Court Ex 1 (Tab 24), Council Minutes, 6/9/09)

In 2008, after the rezoning, the Golf Club, along with two (2) other entities controlled by Wieland, borrowed nearly \$9 million from Bank of America. The loan was collateralized by the Dunes West Golf Course and two other golf courses in the Atlanta area owned by Wieland.¹ Wieland apportioned the debt equally to the three courses resulting in approximately \$3,000,000.00 being allocated to the Dunes West course. The appraisal commissioned by Bank of America valued the Dunes West Golf Course at \$4.9 million, or some \$900,000 more than the Golf Club's purchase price. The appraisal noted the Golf Course Tracts were zoned CRO, and thus restricted to recreational use. The appraisal noted the highest and best use of the Tracts, if vacant and as improved, was a golf course. The Rule 30(b)(6) witness of the Golf Club on financial matters testified that this appraisal was low, in his opinion. (R., Court Ex. 1 (Tab 25), Commitment Letter, Court Ex. 1 (Tab 26), Appraisal Excerpts, Dep. McMickle, p. 7, line 4 – p. 12, line 12)

The Bank of America loan was restructured in 2010. The appraisal used in conjunction with the restructuring valued the Tracts, with the CRO zoning, at \$3.5 million. The Golf Club's Rule 30(b)(6) witness on financial matters attributed the drop in value from the 2008 appraisal to the economy. (R., Court Ex. 1 (Tab 28), Appraisal Excerpts, Dep. McMickle, p. 13, line 16 – p. 16, line 16)

The Bank of America loan proceeds were not used to repay the intercompany loan owed by the Golf Club to JWHN. Instead, a \$3,000,000.00 cash distribution was made by the Golf Club to Wieland, its owner. (Dep. McMickle, p. 41, line 6 – p. 42, line 1)

¹ Mr. Wieland's apparent personal distaste of golf courses has not deterred his company from constructing them in new neighborhoods. The Atlanta courses used as collateral for the Bank of America note were being constructed by JWHN. And that a golf course serves as an asset to a community was readily acknowledged by the Golf Club's Rule 30(b)(6) witnesses. (McMickle Dep. p. 56 line 16 – p. 57 line 3; Popson Dep. p. 26 line 24 – p. 29 line 16)

The Golf Club's Rule 30(b)(6) witness on financial operations testified that, for accounting purposes, the 3 golf courses owned by Wieland are combined and borrow from one another so that all reflect a positive cash flow. As for Dunes West, he testified that it performs better than the other Wieland courses in Atlanta and that it generates a positive cash flow (Court Ex 1 (Tab 31), Dep McMickle, p 16, line 16 – p 17, line 6, Court Ex 1 (Tab 32) Dep McMickle, p 54, line 15 – p 57, line 3)

In its complaint and brief, the Golf Club alleges there are some 60 acres of the Golf Course Tracts that are developable and rendered economically idle by the Rezoning Ordinance. In its complaint and throughout its representations to the Council, the Golf Club asserted that these Claimed Developable Lands were outside areas of play of the course.

The Rule 30(b)(6) witness proffered by the Golf Club to offer testimony as to the existence and location of Claimed Developable Lands testified that no plat or survey of these Lands was drawn either before or after closing, and that the location of these Lands was estimated on the basis of walk-thru of the Tracts and making note of where out-of-bounds markers were staked. He testified that no other portions of the Tracts were claimed to be developable other than those shown on Exhibits 6 and 7 to his deposition. Those exhibits showed between 25 and 26 acres of Developable Land. There is no exhibit in the Record showing or substantiating either the existence or location of 60 acres of Claimed Developable Land (R , Popson Dep , p 31, line 7 – p 37, line 14, p 57, line 14 – p 58, line 8, p 61, lines 1-10, Popson Dep , Ex 6 and 7)

The Rule 30(b)(6) witness also testified that the Claimed Developable Lands, did, in fact, impinge on areas of play of the course and would have encroached on easements owned by others, the permission for which to do so having not been obtained. The report compiled by

Daniel Forsberg as to the nature and location of the Claimed Developable Lands cogently brings this point home (R , Popson Dep , p 59, line 18 – p 60, line 25, Court Ex 1 (Tab 49) Forsberg Report, to include lot layout)

In its Statement of Facts, the Golf Club sets out its characterization of Judge Dennis' Order So that it is not to be assumed that the Town agrees with that characterization, suffice it to say that the Order speaks for itself

STANDARD OF REVIEW

Summary judgment is warranted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law Rule 56(b), SCRPC

In determining whether any triable issues of fact exist, the evidence and all inferences from it must be viewed in the light most favorable to the nonmoving party Koester v Carolina Rental Ctr, 313 S C 490, 493, 443 S E 2d 392, 394 (1994)

In cases where the preponderance of the evidence is the burden of proof, the nonmoving party is required to submit a scintilla of evidence to withstand a motion for summary judgment In cases requiring a heightened burden of proof or in cases applying federal law, the nonmoving party must submit more than a scintilla of evidence to withstand a motion for summary judgment Hancock v Mid-South Management Co , Inc, 318 S C 325, 330-331, 673 S E 2d 801, 803 (2009)

Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the nonmoving party must come forward

with specific facts showing a genuine issue for trial Petersen v West American Ins Co, 336 S C 89, 94, 518 S E 2d, 608, 610 (Ct App 1999)

Entry of summary judgment is mandated, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and upon which that party will have the burden of proof at trial, because a failure of proof of an essential element of the nonmoving party's case necessarily renders all other facts immaterial Celotex Corporation v Catrett, 477 U S 317 (1986), Baugham v American Telephone and Telegraph Co, 306 S C 101, 116, 410 S E 2d 537, 545 (1991)

A zoning ordinance is presumptively valid and the party attacking it must show its invalidity by clear and convincing evidence Town of Scranton v Willoughby, 306 S C 421, 412 S E 2d 424 (1999)

There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application Harbit v City of Charleston, 382 S C 383, 675 S E 2d 776 (Ct App 2009)

ARGUMENT

I THE LOWER COURT DID NOT ERR IN AWARDING SUMMARY JUDGMENT ON THE STATE AND FEDERAL TAKINGS CLAIMS

The Golf Club seeks compensation under the State and Federal Constitutions on two theories (1) that the Rezoning Ordinance constitutes a categorical taking of the Claimed Developable Lands, and (2) the Rezoning Ordinance constitutes a regulatory taking of the Claimed Developable Lands

Whether a taking has occurred, categorical or otherwise, is an issue decided by the court Cobb v South Carolina Department of Transportation, 365 S C 360, 365, 618 S E 2d 299, 301 (2005) (*Accordingly in an inverse condemnation case the trial judge will determine whether a*

claim has been established. The issue of compensation may then be submitted to a jury at either party's request. Whether the theory of recovery is based on a categorical or regulatory taking, the initial issue for determination by the court is what constitutes the relevant parcel against which the regulation is measured, sometimes referred to as the “denominator problem”

Keystone Bituminous Coal Association v DeBenedictis, 480 U S 470, 497 (1987) (*Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property whose value is to define the denominator of the fraction (citation omitted).*) As this matter was before the lower court on a motion for summary judgment that no taking had occurred, a ruling on that motion necessitated that the lower court determine what the relevant parcel was. A ruling on the motion necessitated the lower court evaluating facts in the Record pertaining to the issue of relevant parcel.

Golf Club posits that the relevant parcel is the portion of the Golf Club Tracts it intended to develop into residential uses when it purchased the Tracts, and that the lower court erred in holding that all of the Golf Course Tracts constituted the relevant parcel for purposes of evaluating the takings claims.² The lower court did not err.

Both federal and state takings jurisprudence require that, when weighing the confiscatory effects of a regulation, the “parcel as a whole” must be considered.

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been abrogated. In deciding whether a particular governmental action has affected a taking, this Court focuses rather on both the character of the action and on the manner and extent of the interference with rights in the parcel as a whole.

² In its brief, the Golf Club asserts the Claimed Developable Lands amount to 60 acres. The Record has no evidence to substantiate this assertion. The Golf Club Rule 30 (b) (6) witness on this issue testified the Claimed Developable Lands amounted to 25 or 26 acres, and that was all the acreage subject to this suit. (Popson Dep. p. 31 line 7 – p. 37 line 14; p. 57 line 14 – p. 58 line 8; p. 61 lines 1–10; Popson Dep. Ex. 6 and 7).

Penn Central Transportation Co , et al v New York City, et al, 438 U S 104, 130-131 (1978),
Beard v South Carolina Coastal Council, 304 S C 205, 207, 403 S E 2d 620, 622 (1991)

Here, the Golf Club is not contending that the Rezoning Ordinance has effected a taking of the entirety of the Golf Course Tracts Rather, the Golf Club is contending the Ordinance has effected a taking of only a part of the Tracts Its takings claims are based on the premise that the acreage it claims it intended to develop is conceptually severable from the parent tracts, primarily due to its purported size

When more than one parcel is at issue or when the claimant contends only a portion of a tract or tracts has been taken, as is the case here, courts consider various factors to determine the relevant parcel Germane is the degree of contiguity among the parcels, the dates of acquisition, the extent to which the parcels have been treated as a single unit, the extent to which the restricted lots benefit the unregulated lots and whether there exists a compelling reason to support conceptual severance District In town Properties Limited Partnership v District of Columbia, 198 F 3d 874, 889 (D C Cir 1999), Quirk v Town of New Boston, 140 N H 124, 132, 553 A 2d 1328, 1333 (1995)

On the issue of the relevant parcel, the evidence in the Record reveals the following

- 1 The Golf Club Tracts consist of six separate, contiguous parcels (R , Court Ex 1 (Tab 49), Forsberg Report and lot layout)
- 2 When the Golf Club put the parcels under contract in late 2004, the parcels were being used solely as a golf course, with supporting amenities, and they had been so used since their initial development (R , Popson Dep , p 38, line 11 – p 39, line 20)
- 3 Prior to closing, the Golf Club informally identified areas of the Tracts that could potentially be put to residential uses (R , Popson Dep p 31, line 7 – p 37, line 14)

- 4 Prior to closing, the Golf Club met with the Town's planning director to confirm the PD zoning allowed for the Tracts to be used for residential purposes (R , Popson Dep , p 31, line 7 – p 38, line 1)
- 5 The Golf Club never intended to convert all of the Tracts to residential uses The Golf Club bought the Tracts for use as a golf course and for residential purposes (R , Popson Dep , p 29, line 4 – p 30, line 4, p 65, lines 2-5)
- 6 The Golf Club Tracts were purchased in one transaction (R , Court Ex 1 (Tab 10), Deed)
- 7 The Golf Club Tracts are carried on the books of the Golf Club as a single asset and were financed as a single asset (McMickle, Dep , p 8, line 25 – p 9, line 13, p 38, line 22 – p 39, line 17, Dep Ex 7, 8, 9, 10, 11, first 2 pages, Balance Sheets)
- 8 After being purchased by the Golf Club, the Tracts continued to be used only for recreational purposes (R , Popson Dep , p 38, line 11 – p 39, line 20)
- 9 Between the time of acquisition of the Tracts in March 2005 and the enactment of the Rezoning Ordinance in June 2006, no application to subdivide or legally partition the claimed Developable Lands from the Golf Club Tracts was made (R , Popson Dep , p 58, line 22 – p 59, line 5, Prause Dep , p 23, line 14 – p 24, line 15)
- 10 The Golf Club did not seek to develop or subdivide the claimed Developable Lands prior to the enactment of the Rezoning Ordinance because it was attempting to garner neighborhood support (R , Popson Dep , p 32, line 13 – p 35, line 14)
- 11 The Golf Club did not seek to develop or subdivide the Claimed Developable Lands prior to the enactment of the Rezoning Ordinance because the longer the Claimed Developable Lands were held off the market, the more profit their sales would generate (R , Wieland Dep , p 22, line 2 – p 24, line 5)
- 12 No application to develop or subdivide the Claimed Developable Lands was made until 2008 and no application to develop or subdivide the Claimed Developable Lands was carried through to finality until 2009 (R , Popson Dep , 58, line 22 – p 59, line 5, Prause Dep , p 23, line 14 – p 24, line 15, Court Ex 1 (Tab 14) (Tab 17), (Tab 18)
- 13 Each application made to rezone Claimed Developable Land included land within areas of play of the course (R , Court Ex 1 (Tab 15), (Tab 18) (Tab 19), (Tab 20), (Tab 49)

On the basis of this evidence, the lower court determined the relevant parcel to be the entirety of the Golf Club Tracts, not slivers of them. In arriving at this conclusion, the lower court analyzed the issue employing the factors enunciated in the District In town Properties and Quirk decisions (Order, p. 16). That analysis revealed that the Tracts were purchased simultaneously, in one transaction, that they are contiguous and had been developed for use as a golf course, that the Golf Club continued the use of the Tracts as a golf course and financed the Tracts as a unit, as a golf course. The Golf Club does not contend the lower court erred in applying these factors to the evidence. The Golf Club simply disagrees with the legal effects of that exercise.

That the Golf Club may have intended to develop a portion of the Tracts for residential use does not carry the day for purposes of determining the relevant parcel. The conduct of the Golf Club with respect to the Tracts is as relevant, and its objective acts clearly demonstrate that it has always treated and used the Tracts as an entity, and held back on developing portions of the Tracts to maximize profits. (R., Popson Dep., p. 38, line 6 – p. 39, line 20, McMickle, Dep., p. 8, line 25 – p. 9, line 13, p. 38, line 22 – p. 39, line 17, McMickle Dep. Ex. 7, 8, 9, 10, 11, first 2 pages, Balance Sheets, Wieland Dep., p. 22, line 2 – p. 24, line 5)

The facts of the cases cited by the Golf Club to support conceptual severance of the Golf Course Tracts are readily distinguishable from the facts of this case. In Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994), the Federal Circuit Court rejected the government's contention that the 12.5 acres for which the landowner sought compensation should be considered part of the initial 250-acre tract the owner originally purchased. Its reasoning for doing so was because, before the contested regulation was enacted, 199 of the 250 acres had already been developed. As to the remaining 51 acres, 38.5 of them had been subjected

to a conservation restriction as a condition of a state permit. Thus, there remained but 12.5 acres available for development. In the words of the Court:

It would seem ungrateful in the extreme to require Loveladies to convey to the public the rights in the 38.5 acres in exchange for the right to develop 12.5 acres, and then to include the value of the grant as a charge against the givers. *Id.* at 1181.

The court found the deprivation of the fill permit would, under the circumstances of that case, constitute a categorical taking because without it, the acreage had no economically feasible use.

Here, the facts are much different. The Rezoning Ordinance had no effect on the existing use of the Golf Club Tracts. And significantly, the Rezoning Ordinance did not render the Golf Club Tracts economically idle. The evidence on this issue is not refuted. Two, independent Bank of America appraisals of the Golf Club Tracts valued the Golf Club Tracts, after the Rezoning Ordinance was in place, in the multiple millions of dollars. The 2008 appraisal valued the Tracts at \$4.9 million. The 2009 appraisal valued the Tracts at \$3.5 million. (Court Ex. 1 (Tab 26), 2008 Bank of America Appraisal, Court Ex. 1 (Tab 28), 2009 Bank of America Appraisal.) The Town's appraisal was consistent. (Court Ex. 1 (Tab 47) (Tab 48), Marlow Appraisals.)

In Nectow v. City of Cambridge, 277 U.S. 183 (1928) the contested regulation was struck down on the basis of its not being in furtherance of the public health, safety, and welfare. Under modern jurisprudence, this case was decided using precepts pertaining to substantive due process, not takings. See Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540 (2005), where the United States Supreme Court held that whether a regulation substantially advances a legitimate state interest is a matter of substantive due process and has no place in takings jurisdiction. The analysis of a substantive due process claim differs from a taking analysis. A substantive due process claim is bottomed on a property interest rooted in state law being arbitrarily and

capriciously denied. As will be addressed hereafter, the Rezoning Ordinance did not violate the Golf Club's rights to substantive due process. The reasoning of Nectow is not applicable to Golf Club's takings clauses.

Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986) is also distinguishable. At issue in Florida Rock was the denial of a permit by the United States Army Corps of Engineers to mine limestone from a 98 acre portion of a 1,560 acre tract. Florida Rock Industries sought a permit to mine the entire tract, but the Army Corps refused to process a permit for more than 98 acres. Thus in Florida Rock, the government defined the relevant parcel by refusing to process a permit for the entire parcel. Here, the opposite is true. The Golf Club does not seek to convert all of its Golf Club holdings. It concedes the Tracts have value as a golf course. It attempts to avoid this consequence by proffering a definition of the relevant parcel based solely on its subjective intentions.

The Golf Club's reliance on Twain Harte Associates Ltd. v. County of Tuolumne, 265 Cal. Rptr. 737, 217 Cal. App. 3d 71 (1990) is misplaced. As an initial matter, in the State of California, a defendant moving for summary judgment must disprove an essential element of every cause of action of the plaintiff's case or prove a valid affirmative defense. *Id.* at 80. In South Carolina, the moving party is not required to "disprove" the opponent's case. The moving party is required to demonstrate that an essential element of the cause of action that the nonmoving party has the burden of proving lacks evidentiary support. When that occurs, the burden shifts to the nonmoving party to make a showing of specific evidence to support the claim because "failure of proof of an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Baugham v. American Telephone and Telegraph Co., 306 S.C. at 116, 410 S.E.2d at 545. Moreover, in Twain Harte, the governing body, itself, had

impliedly severed the contested 1.7 acre tract from the parent 8.5 acre tract by zoning the two portions of the tract differently. Here, one zoning category was applied to all parent tracts, and the evidence is unrefuted that, with this zoning in place, the Golf Course Tracts retained substantial value. While it is true the Golf Club stood to make more money had the Claimed Developable Lands been severed from the parent tracts, under South Carolina zoning jurisprudence, a landowner is not entitled to the highest and best use of his property, but only a reasonable use. Moore v. Sumter County Council, 300 S.C. 270, 272, 387 S.E.2d 455, 457 (1980) [FN 2]. The Golf Course Tracts maintained a value in excess of \$3 million after the rezoning and during the height of a national recession. A taking is measured by the value of the property that remains after application of the regulation. Keystone Bituminous Coal Association v. DeBenedictis, *supra*. Value in excess of \$3 million dollars is hardly a token value that could support a finding that a taking, either categorical or regulatory, has occurred.

The other cases cited by the Golf Club with respect to factors used to determine the relevant parcel are in lockstep with the factors used by the lower court. American Savings and Loan Association v. Marion County, 653 F.2d 364 (9th Cir. 1981) is cited for the proposition that parcels under common ownership may be considered separately if it can be shown that the owner treated the parcels separately. Here, all the evidence is that the Golf Club treated the Golf Club Tracts as a unit. Giovanella v. Conservation Comm'n of Ashland, 447 Mass. 720, 857 N.E.2d 451 (2006) is cited for the proposition that whether land is put to same or different uses is a factor in determining the relevant parcel. Here, the Golf Club did not put any of the Tracts or any portions of them to different uses.

Contrary to the assertion in its brief, the lower court did not find the Golf Club lacked distinct investment backed expectations. The lower court noted that the use to which property is

put is indicative of the owner's expectation with regard to the property and bears consideration for determining the extent of interference that that expectation. This is a correct statement of the law Penn Central, *supra*, 438 U S at 136

Relevant to the consideration of the character of the government action are the purpose and importance of the contested regulation. Among the avowed purposes of the CRO Ordinance are the protection and enhancement of recreational and open space opportunities in the Town and the guarding against hazards posed by periodic flooding due to development. The importance of these purposes is self-evident. It is gainsaid to contend a golf course is not recreational space or doesn't contribute aesthetically to a neighborhood or community or doesn't play a significant role in drainage and stormwater management. The creation of the CRO zoning district and its application to golf courses established a means by which the introduction of non-recreational uses on golf courses could be controlled. The character of the government action is unassailable.

The Golf Club's takings claims are wholly dependant on the Claimed Developable Lands being viewed as separate and distinct from the parent tracts. If this premise fails, so do its takings claims because uncontradicted evidence reveals the parent tract, the Golf Club Tracts, maintained significant value after the Rezoning Ordinance was enacted.

The Town moved for summary judgment on the takings claims on the basis that the Golf Course Tracts constituted the relevant parcel, and that the Tracts retained significant value post-rezoning. The determination of the relevant parcel is a matter for the court. Evidence on this issue was fully developed in discovery and is set out in the Record. The Golf Club did not present any additional evidence on this issue. The Order of the lower court reveals it decided the issue of relevant parcel using factors commonly employed in relevant parcel analyses. The Golf Club does not contend otherwise. It merely disagrees with the legal conclusion the lower court

drew from the facts. The Order of the lower court correctly analyzed and decided the issue of the relevant parcel, and its Order awarding summary judgment on the takings claims should be affirmed.

II THE LOWER COURT DID NOT ERR IN AWARDING SUMMARY JUDGMENT ON THE STATE AND FEDERAL SUBSTANTIVE DUE PROCESS CLAIMS

The Golf Club contends its rights to substantive due process were violated because the application of the Rezoning Ordinance to all of the Golf Club Tracts was arbitrary and excessive, resulting in the loss “ of its vested and entitled rights to develop” the Claimed Developable Lands for residential purposes. (R , Complaint, Paragraph 51) ³

For the Golf Club to survive summary judgment on the issue of substantive due process, the Record must contain evidence that the Golf Club was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. This being a zoning case, the evidence must demonstrate the Council’s actions had no foundation in reason and were but arbitrary and irrational exercises of power with no relationship to the public health, morals, safety or welfare. The evidence must demonstrate the purpose behind the Ordinances had no conceivable rational relationship to the exercise of traditional police power through zoning. Sylvia Development Corp. v. Calvert County, 48 F.3d 810, 827 (1995), Harbit v. City of Charleston, *supra* 82 S.C. at 394, 675 S.E.2d at 782.

In its review of a substantive due process challenge to a zoning ordinance, the court must determine whether the ordinance bears relationship to any legitimate governmental interest.

³ The Golf Club contends the lower court applied the incorrect standard in its evaluation of the substantive due process claims because of the use of the term “vested” in its discussion of property interests protected by due process. This is the term attributed to those rights in the Complaint. Regardless, a review of the Order of the lower court reveals its evaluation of substantive due process claims centered on property interests protected under state law, the standard applicable to due process analyses under both State and Federal law.

Harbit v City of Charleston, *supra*, 382 S C at 394, 395, 675 S E 2d at 782 Due process is not denied simply because a legislative body does not permit a landowner to make the most beneficial use of its property Bear Enterprises v County of Greenville, 319 S C 137, 141, 459 S E 2d 883, 886 (Ct App 1995)

To withstand a motion for summary judgment, the Golf Club must submit more than a scintilla of evidence on each element of its claims because the claims require the application of federal law and, because the validity of a zoning regulation is at issue, the claims require a heightened burden of proof under state law Hancock v Mid-South Management Co , *supra* Town of Scranton v Willoughby, *supra*

The Golf Club argues it possessed a protected property interest to develop the Claimed Developable Lands for uses other than recreational At the summary judgment hearing, it advanced three theories in support of this contention, those being (1) the PD zoning, (2) rights bestowed by S C Code Ann § 6-29-1510, *et seq* (Supp 2010), the Vested Rights Act, and (3) common law vesting In its brief, the Golf Club relies on the PD zoning as the basis of its protected property interest, and contends the lower court erred in its application of the Vested Rights Act As no argument was made with respect to interests vesting under the common law, this ground must be deemed as abandoned S C Farm Bureau Mutual Insurance Co v Oates, 356 S C 378,382, 588 S E 2d 643,645 (Ct App 2003) [FN 1] To the extent the issue of common law vesting is deemed in play, the Order of the lower court correctly decided this issue, as there is no evidence in the Record of the Golf Club using, or applying to use, its lands for any purpose other than recreational when the Rezoning Ordinance was enacted

As to the PD zoning, the law in this State is clear zoning, alone, creates no rights A property owner, like the Golf Club, must demonstrate something more than an expectation that

his zoning will continue Friarsgate, Inc v Town of Irmo, 290 S C 266, 273, 349 S E 2d 891, 895 (Ct App 1986) (*a landowner has no right to insist that property not be restricted by zoning regulation absent a showing that he has prior to the effective date of the regulation established a nonconforming use* 101(a) C J S Zoning and Planning 70 (1979)

All the evidence in the Record reveals the Claimed Developable Lands were always used for recreational purposes, and no other The Golf Club did not establish a protected property interest for any other use allowed by the PD

The Vested Rights Act became effective on July 1, 2005 Its effect was to protect development rights authorized by approved site specific development plans from subsequent changes in the law, for discreet periods of time Such rights were protected from changes in the law for two years, and were subject to being protected on an annual basis thereafter for up to five years, so long as there had been no change in the law in the interim that would have precluded the development authorized by the site specific development plan See S C Code Ann § 6-29-1530(A)(2) (Supp 2010) Local governments were required to implement the Act's directives or they would become effective by default See S C Code Ann § 6-29-1560 (Supp 2010) In its implementation of the Act, the Town recognized planned developments as site specific development plans (R , Court Ex 2, Prause Affidavit)

As applied here, the Vested Rights Act bestowed to the Golf Course a protected property interest in its PD zoning for two years, commencing on the effective date of the Act (July 1, 2005), and ending two years thereafter (June 30, 2007) The enactment of the Rezoning Ordinance during this two year timeframe (June 2006) did not deprive or interfere with the Golf Club's right to develop under the PD The Act contemplates this circumstance and provides "a change in the zoning district designation made subsequent to vesting that affect real property

does not operate to affect, prevent or delay development of the real property under a vested right site specific development plan without the consent of the land owner” S C Code Ann § 6-29-1540 (13) (Supp 2010) Thus, despite the Rezoning Ordinance, the Golf Club maintained vested rights to its PD zoning until June 30, 2007

The Golf Club did not act on the protection accorded it by the Vested Rights Act It never applied to subdivide or develop the Claimed Developable Lands until its vested rights in the PD had expired Its proffered excuses for not doing so ring hollow That the Golf Club advised the Town of its rights to develop when the Rezoning Ordinance was under consideration is not tantamount to acting on those rights That the Town’s planning director suggested that the Golf Club seek neighborhood support for its project, while sage advice, did not, under the law, tie the hands of Council concerning matters of legislation, like rezoning And the contention that the Record lacks proof that such an application would have been approved is a naked one, based purely on surmise, because the Golf Club sat on its rights and never brought the issue to the Council That the Council denied its rezoning application after vested rights had expired has no bearing on what the Council may have done, or what the law protected, when those rights were in effect For purposes of substantive due process, the issue is whether the effect of the Rezoning Ordinance was to nullify a protected property interest of the Golf Club It did not, as a matter of law

The Golf Club contends the issue of whether an ordinance substantially advances the legitimate state interest sought to be achieved is a heightened factual inquiry Such is not the case

In due process challenges, the findings of the legislature are given deference To set them aside, the evidence must reveal the purposes behind the Ordinance had no conceivable

rational relationship to the exercise of traditional police power through zoning, Sylvia Development, *supra* 48 F 3d at 827 (federal standard), or that the Ordinance bore no relationship to any legitimate governmental interest, Harbit, *supra* 675 S E 2d 782 (state standard)

The CRO and Rezoning Ordinances are not arbitrary, either on their face or as applied to the Golf Club Tracts. The protection and preservation of open space, the provision of a community-wide network of recreational areas and protection against periodic flooding are inescapably legitimate governmental interests, traditionally addressed by way of zoning

City of Monterey v Delmonte Dunes at Monterey, Ltd, 526 U S 687 (1995) provides no safe harbor for the Golf Club. Delmonte Dunes included federal claims based on equal protection, inverse condemnation and substantive due process. The district court reserved to itself the substantive due process claim and submitted the equal protection and inverse condemnation claims to the jury. The takings claim was submitted because at the time, the State of California did not have a compensatory remedy for a temporary regulatory taking. The Delmonte Dunes landowner sought damages under 42 U S C 1983 for the unconstitutional denial of just compensation. The Delmonte court duly noted that damages for a constitutional violation are a legal remedy. Delmonte Dunes, at 710. Even more fundamental, when Delmonte Dunes was decided, takings jurisprudence required consideration of both the confiscatory effects of a regulation and whether the regulation substantially advanced the state interest sought to be achieved, the standard enunciated in Agins v City of Tiburon, 447 U S 255 (1980). The Delmonte Dunes court recognized that the “substantially advanced” prong of the Agins test as a mixed question of law and fact and thus narrowly circumscribed this question for the jury, limiting it to whether the denial by the City of Monterey for rejecting the multiple development applications bore a reasonable relationship to its proffered justifications for the

denial Delmonte Dunes, at 721 Neither the court nor the jury looked behind the reasoning for the regulation, as suggested by the Golf Club

In 2005, the landscape changed with the decision rendered in Lingle v Chevron USA, Inc., 544 U S 528 (2005) In Lingle, a takings claim was before the United State Supreme Court based solely on the “substantially advances” prong of the Agins takings test The Court severed that prong from a takings analysis, determining this consideration to be one imbued in principles of substantive due process One of the reasons it did so was because the “substantially advances” test of Agins could be read to demand heightened scrutiny of legislative regulations The Court was clear in stressing that the deference accorded legislative findings in substantive due process claims persisted

the “substantially advances” formula is not only doctrinally untenable as a takings test – its application as such would also present serious practical difficulties The Agins formula can be read to demand heightened means-ends review of virtually any regulation of private property If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations – a task for which courts are not well suited Moreover, it would empower - and might often require - courts to substitute their predictive judgments for those of elected legislatures and expert agencies

The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here Id at 544-545

In Byrd v City of Hartsville, 365 S C 650, 658, 620 S E 2d 76, 80 (2005), this Court followed suit and severed the Agins “substantially advances” prong from state takings claims (*Byrd s regulatory-inverse-condemnation action is governed by Penn Central To the extent that some of our previous cases have applied Agins alone or both Agins and Penn Central we overrule them*)

The cases cited by the Golf Club seemingly requiring heightened scrutiny of legislative findings are all takings cases which predate Lingle. None are substantive due process cases. The law with respect to substantive due process is, and has been, whether the legislation bears a reasonable relationship to any legitimate government interest. Sunset Cay, LLC v. City of Folly Beach, 257, S. C. 414, 430, 593 S. E. 2d 462, 470 (2004) (*The standard for reviewing all substantive due process challenges to municipal ordinances including economic and social welfare legislation is whether the ordinance bears a reasonable relationship to any legitimate interest of government*) Sylvia Development Corporation v. Calvert County, Maryland, *supra*, 48 F3d at 837 (*the Supreme Court has narrowed the scope of substantive due process protection in the zoning context so that such a claim can only survive if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning*) The purposes set out in the CRO Ordinance are all widely-recognized, legitimate local government interests. It goes without saying that preservation and protection of green space, the provision of a community-wide network of recreational opportunities, the prevention of flooding and the establishment of a process by which the conversion of recreational lands may be evaluated and controlled are quintessential legitimate government interests.

That Mr. Ford, the former planning director, could not vouch for all of the findings in the CRO Ordinance or that the Town did not commission a study specific to golf courses is of no moment. The Lingle court was clear to acknowledge that deference is given to legislative judgments when weighing substantive due process challenges.

Along the way, the court determined that the State was not entitled to enact a prophylactic rent cap without actual evidence that oil companies had charged, or would charge, excessive rents. We find these proceedings below remarkable, to say the least, given that we

have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation (*citations omitted*) Lingle, 544 U S at 545

This Court, as well, has always deferred to legislative judgment and has imposed a heightened burden on a challenger to demonstrate the invalidity of zoning measures by clear and convincing evidence Town of Scranton v Willoughby, *supra*

Nor is the Record devoid of evidence in support of the Council's regulation The Record reveals the Town had previously studied its recreational needs and had conducted extensive drainage studies and implemented town-wide stormwater regulations (R , Ford Dep , p 26, line 10 – p 29, line 23, Ford Dep , p 37, line 3 – p 39, line 25) The Golf Club's own witness testified that drainage issues were associated with some of the Claimed Developable Lands (Whiteside Dep , p 34, line 14 – p 38, line 5) The CRO and Rezoning Ordinances are, in the purest sense, valid and subsisting police power measures traditionally exercised by zoning

The Golf Club's discussion of the sufficiency of nexus between the application of a regulation and the legislative objectives sought to be achieved by the regulation has no place in a substantive due process analysis All cases cited by the Golf Course relating to nexus are takings cases, exaction cases to be more accurate None dealt with due process The Lingle decision is again instructive

Both Nollan and Dolan involved Fifth Amendment takings challenges to adjudicative land-use exactions - specifically, government demands that a landowner dedicate an easement allowing access to her property as a condition of obtaining a development permit In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a per se physical taking The question was whether the government could, without paying compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny The Court in Dolan answered in the affirmative, provided the exaction would substantially advance the same government interest that would

furnish a valid ground for denial of the permit. The court further refined this requirement in *Dolan*, holding that an adjudicative exaction requiring dedication of property must also be “‘roughly proportiona[l]’ both in nature and extent to the impact of the proposed development.” In neither case did the Court question whether the exaction would substantially advance some legitimate state interest. Rather, the issue was whether the exaction substantially advanced the same interests that land-use authorities asserted would allow them to deny the permit altogether. (*internal citations omitted*)

The nexus and proportionality tests apply to takings exactions, not to due process claims.

This case does not involve a takings based on exactions.

Any implication that the Rezoning Ordinance was excessively applied to the Tracts must not be sanctioned. The process of applying the CRO Ordinance to the courses in the Town was uniform: the parcels upon which courses were constructed were rezoned. And, the Claimed Developable Lands were not identified or identifiable at the time of the rezoning. There was no other basis upon which the Council could have acted.

The Golf Club cannot establish that it had a protected property interest that was denied by the Rezoning Ordinance. Even if it could, it cannot establish that either the Rezoning Ordinance or the CRO Ordinance failed to advance a legitimate state interest. The substantive due process claim fails as a matter of law, and the lower court’s holding to this effect should be affirmed.

III THE LOWER COURT DID NOT ERR IN AWARDING SUMMARY JUDGMENT ON THE EQUAL PROTECTION CLAIMS

The Golf Club contends it was denied equal protection of the law because a rezoning was approved for the Snee Farm golf course, another course in the Town that had been subjected to the CRO Ordinance.

For the Golf Club to survive summary judgment on the equal protection claim, there must be evidence the Golf Club is similarly situated to Snee Farm, that its rezoning application was

treated differently from that of Snee Farm without rational basis, and that the difference in treatment was the result of intentional, invidious discrimination. Simply because a benefit is bestowed to one but denied to another is not sufficient evidence to sustain an equal protection claim. A violation is established only if a plaintiff can prove the governing body intended to discriminate. Whaley v. Dorchester County Board of Zoning Appeals, 337 S. C. 568, 575-576, 524 S. E. 2d 404, 408 (1999), Sylvia Development Corporation v. Calvert County, Maryland, *supra*, 48 F. 3d at 819 (4th Cir. 1995).

Because the equal protection claims require the application of federal law and require a heightened burden of proof under state law, the Record must contain more than a scintilla of evidence in support of each element of the claims. Hancock v. Mid-South Management Co., *supra*, Harbit v. City of Charleston, *supra*.

The evidence in the Record reveals that, like the Golf Course Tracts, the tracts containing the Snee Farm golf course were rezoned to the CRO classification in June 2006. In the later part of that year, the owner of the Snee Farm course filed an application with the Town to rezone approximately 20 acres from the CRO district to a PD, planned development district. The 20 acres sought to be rezoned were contiguous. The proposal was to construct 58 units, with the monies generated from sales being applied to razing and reconstructing the clubhouse, improving the tennis courts, and constructing a new events pavilion, pool, and practice green with an expanded driving range. The development plan implicated minimal alteration to areas of play of the course. The development plan included a layout of lots, a street grid, and the identity of green areas and included a drainage and traffic analysis (R, Court Ex. 1 (Tab 37), Snee Farm PD, Prause Dep., p. 32, line 23 – p. 34, line 4, Prause Dep., p. 38, line 25 – p. 40, line 9).

The proposal of the Golf Club was to rezone approximately 18 acres and develop 32 units. The acreage sought to be rezoned was not contiguous. The development plan called for significant alteration to the 10th hole fairway and the relocation of numerous cart paths. The proposal required the shortening a hole from a par four to a par three and moving a number of tee boxes. Monies generated from sales were to have been applied to unspecified on-course and importantly, off-course improvements. (R , Prause Dep , p 39, line 12 – p 40, line 9, Court Ex 1 (Tab 20), LaFoy Report)

Admittedly, the Snee Farm and Golf Club rezoning requests were similar to the extent that each involved a request to rezone property from the CRO district to a residential classification. That, however, is where the similarity ends.

The Snee Farm proposal presented a compact, contiguous, unified site design that caused minimal alteration to the areas of play of the golf course. The Golf Club proposal contemplated spattering new lots throughout the Golf Course Tracts, and required far more alterations to areas of play. (R , Court Ex 1, (Tab 37), Snee Farm PD, Court Ex 1 (Tab 18), 2009 Rezoning Application)

The Record reveals the existence of rational basis for the difference in treatment. The two proposals are simply different. The Snee Farm proposal presented a clear picture to the Town and the neighborhood of what was in store. The Snee Farm proposal set out a definite number and layout of lots. The Snee Farm proposal identified and designated buffers and open space. The Snee Farm proposal addressed drainage and traffic. The Snee Farm proposal identified specific course improvements. The Golf Club proposal was neither as unified nor as definite nor as informative. The Golf Club West proposal did not commit to a particular development scheme and offered no information relative to matters such as drainage. The Golf

Club proposal did not specify course improvements. From a zoning and land use perspective, the Snee Farm proposal was far more cohesive and definitive, a circumstance that provides a rational, and thus legal, justification for difference in treatment.

The Golf Club argues the lower court erred in noting the differences between the applications, contending it should have compared the effects of each application against the purposes of the CRO Ordinance as a basis for determining unequal treatment. The lower court did not err. The differences between the applications underscore how they stacked up against the CRO Ordinance. The Snee Farm application intruded less on areas of play than did the Golf Club application. The Snee Farm application addressed drainage. The Golf Club application did not. The Snee Farm application identified recreational improvements to be made. The Golf Club application did not. As measured against each other and the criteria of the CRO Ordinance, the two applications differed.

But even if it is assumed that Snee Farm and the Golf Club are similarly situated and that the Golf Club application was treated differently without rational basis, the equal protection claim still fails as a matter of law, because there is no evidence in the Record that the difference in treatment was motivated by any ill will, or purposeful intent to harm or otherwise discriminate against the Golf Club. Every witness proffered by the Golf Club testified that in dealings with the Town, they had always been treated fairly and professionally. John Wieland, perhaps, put it most cogently: “nobody picked on us” (R., Popson Dep., p. 17, line 16 – p. 20, line 10, Whiteside Dep., p. 8, lines 3-21, Wieland Dep., p. 32, lines 1-4). Absent proof of intentional, invidious discrimination, there is no viable equal protection claim. Sylvia Development Corporation v. Calvert County, Maryland, *supra*, 48 F.3d at 820, Butler v. Town of Edgefield, 328 S.Ct. 238, 251, 493 S.E.2d 838, 845 (1997).

The Golf Club's attempt to create an issue of fact on the issue of intentional discrimination is for naught. Broken down to its bare essentials, the Golf Club contends that because the staff presentation to Council on its application made reference to the Town ordinance relied upon by the planning commission that set out the policy criteria for rezoning, but that it made no such reference in the Snee Farm presentation, an inference of intent to discriminate - on the part of the Council - is raised. Respectfully, this contention is a stretch. The Golf Club would have the judiciary discern discriminatory intent of a legislative body on the basis of how a staff report is made. The law assumes that public officials discharge their duties fairly, in good faith and with good judgment. CJS Evidence § 246. Simply because a staff report mentioned the law applicable to the matter under consideration in one instance and not another does not overcome the presumption that public officials act fairly. And the planning director explained the reason for the differences in presentation, that being a change put in place by staff at the request of the planning commission. (R, Farrell Dep, p 95, line 19 – p 96, line 24, Farrell Dep, p 99, line 23 – p 102, line 19). But more to the point, the very policy criteria the Golf Club contends were not stressed to the Council by its staff were stressed to the Council at the public comment period. (R, Court Ex 1 (Tab 23), pp 6-7).

When all is said and done, the evidence viewed most favorably to the Golf Club merely reveals its application to rezone from the CRO classification was denied, and Snee Farm's was granted. Differences existed between the proposals that provided a rational basis for the Council to have approved one and denied the other. But should this Court deem otherwise, there is no evidence that the Golf Club was targeted or was the subject of intentional, invidious discrimination. Without this proof, the equal protection claims fail. The lower court's ruling on the equal protection claims should be affirmed.

CONCLUSION

For the foregoing reasons, it is submitted that the Order of the lower court awarding the Town summary judgment should be affirmed

Respectfully submitted,

Charleston, South Carolina

November 7, 2011



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NOV 10 2011

STATE OF SOUTH CAROLINA

In The Supreme Court

SC SUPREME COURT

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-03723

Dunes West Golf Club, LLC,

Appellant,

v

Town of Mount Pleasant,

Respondent

RESPONDENT'S DESIGNATION OF MATTERS
TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent designates the following matters to be included in the Record on Appeal

- 1 Order of the Honorable R Markley Dennis, Jr , dated May 23, 2011,
- 2 Complaint, dated June 12, 2009,
- 3 Answer to the Complaint, dated July 15, 2009,
- 4 Notice of Motion and Motion for Summary Judgment on behalf of the Town of Mount Pleasant, dated April 6, 2009,
- 5 Supplement to Motion for Summary Judgment on Behalf of the Town of Mount Pleasant, dated April 13, 2011,

6 Town of Mount Pleasant's Memorandum in Support of Summary Judgment, dated May
6, 2011,

7 Dunes West Golf Club, LLC's Memorandum in Opposition to Defendant's Motion for
Summary Judgment, dated May 9, 2011,

8 Entire transcript of Summary Judgment hearing, dated May 9, 2011,

EXHIBITS

a Court Exhibit 1 – Town of Mount Pleasant's Supporting Documents for
Memorandum in Support of Summary Judgment, Tabs 1 - 49,

b Court Exhibit 2 – Town of Mount Pleasant's Supplemental Memorandum in
Support of Motion for Summary Judgment, dated May 9, 2011, to include Affidavit of Kent
Prause, dated May 9, 2011, with attachment,

c Court Exhibit 3 – Deposition Excerpts from

i Christiane Farrell, cover page, pp 9-11, 12-13, 95-96, 99-102, 112-113,
Deposition Exhibits 3, 4, 6,

ii Joel Ford, cover page, pp 26-29, 31-32, 37-39, 64

iii J T McMickle, cover page, pp 7-8, 7-12, 13-16, 16-17, 38-39, 41-42,
54-57, Deposition Exhibits 1, 7 through 11, first 2 pages, Balance Sheets

iv Kevin Popson, cover page, pp 6, 17-20, 26-29, 29-30, 31-38, 38-39, 47, 57-
58, 59-60, 61, 64-65, 83-84, Deposition Exhibits 1, 6, 7

v Walter Kent Prause, cover page, pp 10-11, 23-24, 32-34, 38-40, 50, 50-51

vi John Wieland, cover page, pp, 13-15, 18, 22-24, 32

vii Stuart Whiteside, cover page, pp 8, 34-38

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CERTIFICATION

I certify that this designation contains no matter which is irrelevant to this appeal

Charleston, South Carolina

November 7, 2011

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NOV 10 2011

SC SUPREME COURT

COPY

STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-03723

Dunes West Golf Club, LLC,

Appellant,

v

Town of Mount Pleasant,

Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that on the 7th day of November, 2011, a true and correct copy of the Respondent Town of Mount Pleasant's Initial Brief and Designation of Matters to be Included in the Record on Appeal was placed in an envelope with first class postage prepaid affixed thereto and mailed to the following

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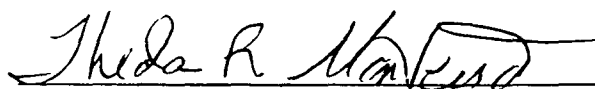
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SC SUPREME COURT

Charleston, South Carolina

November 7, 2011



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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-3723

Dunes West Golf Club, LLC,

Appellant,

v

Town of Mount Pleasant,

Respondent

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INTRODUCTION

This fact-driven case involves a downzoning by Respondent, Town of Mount Pleasant (Respondent or “Town”) eliminating all economic value of approximately 60 acres owned by Dunes West Golf Club, LLC (“DWGC” or Appellant) that was zoned for residential use at the time of the downzoning. Notwithstanding the factual issues, the lower court granted summary judgment even though further inquiry into the facts was necessary in order to clarify application of the law, even though disputed material facts existed precluding the lower court from giving weight (or not giving weight) to the evidence favorable to DWGC, and even though disputes as to conclusions to be drawn from the facts remained.

In its brief, the Respondent fails to address the substance of Appellant’s alternative takings claim under Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). The Penn Central analysis is an inherently fact-specific inquiry unsuited for summary judgment, especially in the face of DWGC’s extensive proof in this case of the Penn Central factors. As for the categorical takings claim, the parcel as a whole doctrine does not bar this takings claim as a matter of law. Further, the cases cited by Respondent demonstrate that the determination of the relevant parcel is a question of fact. In this case, there is considerable proof that the lower court ignored supporting the determination that the relevant parcel is the acreage outside the golf course for purposes of the categorical takings claim.

Turning to the substantive due process claim, the Respondent admits in its brief Appellant had a vested right to residential use at the time of the 2006 downzoning. Since all that is necessary to wage a substantive due process claim is a protected

property interest, a vested property interest more than satisfies this criterion. As to the merits of the claim, the Town is not entitled to a conclusive presumption of validity of the ordinance when the record taken in the light most favorable to DWGC supports the conclusion that the CRO Ordinance and the 2006 ordinance rezoning the Property (the "Dunes West Ordinance") does not substantially advance the purported purposes of the CRO District.

As for the denial of equal protection claim based on the Town's rejection of DWGC's 2006 rezoning application, the record includes evidence that the Town granted rezoning relief to another similarly situated golf-course owner and that the refusal to grant similar relief to DWGC was accompanied by an intent to discriminate.

For the reasons stated in DWGC's initial brief and this reply brief, the lower court committed legal errors and disregarded genuine issues of material fact in granting the Town summary judgment, and its ruling should be reversed.

REPLY STATEMENT OF FACTS

A few important clarifications to the Town's rendition of the facts are warranted.

The Town asserts that the developer theoretically *could* have converted the golf course to residential use and satisfied the Dunes West PD's open space requirements with other land in the community (**Respondent's Initial Brief at 3-4**). However, there was no evidence the developer ever considered converting the Dunes West golf course to residential lots nor that there was other sufficient open space available in other locations that would satisfy the Dunes West PD's mandatory requirements for open space.

The Town refers to the statement by DWGC's 30(b)(6) witness Popson that the residual land was a "gift" **(Respondent's Initial Brief at 4)** The omitted context of this statement is that John Wieland would not have authorized the purchase of the Property were it not for the potential for residential development of the acreage surrounding the golf course **(Wieland Dep 13 14-23, 17 9-10, 18 17-18)** In its brief the Town endorses the reasonableness of Wieland's reliance on, and expectation of, residential development of this surrounding acreage by acknowledging that residential use was a matter of right under the Dunes West PD at the time of the 2006 rezoning **(Respondent's Initial Brief at 4)**

The Town makes unsubstantiated assertions regarding golf course conversions happening along the coast **(Respondent's Initial Brief at 5)** The Town states that golf course conversion was a "hot issue" along the coast and alleged an owner of a golf course within the town had made inquiries but there is no proof that any golf course owner intended to close its course and build houses on it

The Town asserts that Council responded to this report [of an inquiry] by enacting the CRO Ordinance so as to establish a process whereby golf course conversions could be more effectively evaluated and controlled " **(Respondent's Initial Brief at 5)** The Town's statement as to the substance of the CRO Ordinance is inaccurate The CRO Ordinance did not provide a mechanism for evaluating and controlling golf course conversions It prohibited them absolutely by eliminating residential use as a permissible use

It is irrelevant that the Town's Comprehensive Plan may have designated the six parcels as open space at the time of rezoning **(Respondent's Initial Brief at 6)** See

Petersen v City of Clemson, 312 S C 162, 170, 439 S E 2d 317, 322 (Ct App 1993) (zoning controls over non-binding comprehensive plan) Nor does the absence of an approved subdivision plat make the excess land any less developable at the time that land was rezoned **(Respondent's Initial Brief at 6-7)** The then existing zoning allowed its residential development DWGC had proceeded with conceptual layouts and development designs even before closing The absence of an approved subdivision plat does not eliminate the DWGC's intent and expectations at the time of acquisition, which are at the core of DWGC's alternative takings claim

The minimal changes to the layout of the golf course are irrelevant to the equal protection claim that is premised on the Town's denial of the 2009 rezoning application **(Respondent's Initial Brief at 8)** The modifications to the golf course associated with the 2009 rezoning request were minimal and approved by the golf course designer/architect **(Popson Dep Ex 10)** Slight adjustments to the cart paths and layout of a hole of the golf course would not alter its use as a golf course, nor have any adverse effect of the purported purposes of the CRO district The CRO district did not prohibit alterations of the golf courses In fact, the CRO district allows golf courses to be completely eliminated as long as the remaining use was park, open space, or recreation!

The appraisals of the golf course initiated by Bank of America (*after the downzoning*) do not mean that the acreage surrounding the golf course had no value for residential use before the rezoning **(Respondent's Initial Brief at 9)** As detailed in DWGC's initial brief, the record includes abundant evidence from DWGC it would not have purchased the Property if the acreage surrounding the golf course could not be

developed for residential use and that it considered the real value of the land to it to be in the development of select residential lots around the golf course

The Town incorrectly asserts that there is no proof in the record that the total area surrounding the golf course areas of play that was downzoned was 60 acres **(Respondent's Initial Brief at 10 & 13 n 1)** In the power point presentation delivered to the Town of Mount Pleasant Planning Commission on April 29, 2009, an acreage calculation map (prepared by Seamon Whiteside & Associates) included the breakdown of the 256 acres into golf course acreage and other acreage It shows that under the then proposed development there would have been 196 11 acres of golf course, 17 86 acres to be excluded from rezoning, and 42 55 remaining developable acres outside the golf course 17 86 plus 42 55 equals 60 41 acres of land outside the golf course play area **(Popson Dep Ex 10 at p 3, 5, Ex 19 to Def 's Mem in Supp)**

DWGC did not base its taking damages on the potential residential development of all 60 acres but instead on approximately 81 lots comprising roughly 25 acres The Town confuses the 60 acres around the golf course with the 25 acres of those 60 that were encompassed by DWGC's development plan that was the basis for the damages calculation for the takings claim

As to the Town's assertions regarding easements identified by the Town's engineer, the presence of a drainage easement on a couple of the proposed lots does not mean that the lot could not be subdivided The easement could conceivably affect the value of that lot Popson testified that to the extent a drainage easement encumbered a lot, he believed he could obtain the necessary consent to develop that

lot (Popson Dep 44 7-23 & 61 11- 63 23) ¹ The effect of the drainage easement on the market value of the hypothetical lots is a factual issue related to damages and has no bearing on the liability issues associated with any of the DWGC's claims

I The parcel as a whole doctrine does not preclude DWGC's takings claims as a matter of law There are genuine issues of material fact as to both the total and partial taking claims

The lower court incorrectly applied the parcel as a whole doctrine in granting summary judgment on DWGC's takings causes of action Both the lower court's order and the Town's brief ignore the significance of the decision of the United States Supreme Court in Palazzolo v Rhode Island, 533 U S 606, 121 S Ct 2448 (2001) The lower court's ruling and Town's position effectively eliminates all United States Supreme Court jurisprudence approving takings claims for partial takings and temporary takings The Town asserts that if there is any residual economic value attributable to a portion of a legal parcel there can be no unconstitutional taking as to other portions of that parcel rendered valueless by a governmental entity's regulation, regardless of the size and development potential of that other acreage before the regulation

The Town asks this Court to affirm the lower court's error of law and incorrectly applies the parcel as a whole doctrine in this case to bar both a regulatory categorical or

¹ As a general matter, there is no such thing as impingement on an easement The easement continues and the owner has to abide by its terms and conditions In this respect the easement relates to damages – the easement's effect, if any, on price -- not feasibility of residential use nor the DWGC's reasonable economic expectations at the time it purchased the Property

total taking (i.e., Lucas²) and a regulatory partial taking (i.e., Penn Central³). This Court has previously held that if Lucas does not apply, then Penn Central does. Byrd v. City of Hartsville, 365 S. Ct. 650, 660, 620 S. E. 2d 76-81 (2005).

Not only do the Town and lower court incorrectly apply the parcel as a whole doctrine but they also overlook that it does not eliminate DWGC's Penn Central takings claim. Indeed, in its brief the Town barely even addresses the grounds for reversal based on DWGC's Penn Central takings claim discussed in DWGC's initial brief. See Appellant's Initial Brief at 27-31.

Federal and state takings law does not **require** application of the "parcel as a whole" doctrine as argued by the Town. Putting aside whether it applies in a Penn Central takings claim, Palazzolo seriously questioned its application even in the context of a Lucas claim. Palazzolo v. Rhode Island, 533 U.S. 606, 631-32, 121 S. Ct. 2448, 2465, 150 L. Ed. 2d 592 (2001).

Under a Penn Central analysis, the relevant parcel is not outcome determinative. Rather, partial takings claims, where a deprivation of less than the total value of the property may require just compensation, are adjudged by the three factors set forth in Penn Central: (1) the character of the government action, (2) the economic impact of the regulation on claimant, and (3) the degree to which the regulation/law has interfered with distinct investment-backed expectations. Sea Cabins on Ocean IV Homeowners

² If the regulation deprives the owner of all viable economic use of the land, then the analysis is under Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886 (1992).

³ If the owner is left with some economically viable use, then the analysis is guided by the principles enumerated in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

Ass'n v City of North Myrtle Beach, 345 S C 418, 430 548 S E 2d 595, 601 (2001)
(citing Penn Cent, 438 U S 104, 98 S Ct 2646)

Pursuant to the 2005 Lingle decision of the United States Supreme Court, the following two factors are given the most weight the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate investment-backed expectations Lingle v Chevron U S A , Inc , 544 U S 528, 548 (2005) The character of the government action, while still relevant, is a secondary consideration Id at 539

Significantly, the Town does not contend in its brief that DWGC did not establish an issue of fact as to the Penn Central factors The Town's assertion that DWGC's takings claims "are wholly dependent on the Claimed Developable Lands being viewed as separate and distinct from the parent tract" is incorrect **(Respondent's Initial Brief at 20)**

While the ultimate issue of whether a compensable taking has occurred is decided by the court rather than a jury in South Carolina, the predominant question on this appeal is whether there was any evidence creating issues of fact that would prevent the court from making its determination on a motion for summary judgment Because there are genuine issues of material fact as set forth in DWGC's initial brief, summary judgment should not have been granted These genuine issues of material fact require the court to decide the case with findings of fact and conclusions of law after a trial on the merits In addition to there being genuine issues of material fact, the lower court erred since its summary judgment ruling on DWGC's takings claims was also premised on errors of law

What constitutes the relevant parcel is a question of fact Am Sav & Loan Ass'n v Marin County, 653 F 2d 364, 371-72 (9th Cir 1981) "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact" S C Prop & Cas Guar Ass'n v Yensen, 345 S C 512, 518, 548 S E 2d 880, 883 (S C Ct App 2001) The relevant parcel should not have been decided on summary judgment Indeed, the Town acknowledges that this determination was "necessitated the lower court evaluating *facts* in the Record pertaining to the issue of the relevant parcel " **(Respondent's Initial Brief at 13)** Yet, in its order on the Town's motion for summary judgment, the lower court prematurely found facts and weighed evidence without regard to, and in contravention of, the standard governing summary judgment

- a **DWGC's takings claims do not stand or fall depending on the determination of the relevant parcel, i.e., the parcel as a whole doctrine The factors the Town argues guide the determination of the relevant parcel illustrate that it is a fact driven analysis that prevents summary judgment given the evidence put forward by DWGC**

The relevant parcel determination is a question of fact See Walcek v United States, 303 F 3d 1349, 1354 (Fed Cir 2002) ("This court reviews the Court of Federal Claims' legal determinations completely and independently, and examines its factual findings for clear error The trial court's determination of the relevant parcel for purposes of regulatory takings analysis is one such fact, reviewed for clear error ")

A number of state and federal courts have rejected blind application of the parcel as a whole doctrine In this case it is undisputed that residential use was permitted as a matter of right before the rezoning for the acreage not being used as a golf course **(Ford Dep 46-48)** The record also establishes proof that 81 residential lots in

compliance with the Town's lot standards could be legally subdivided, but for the rezoning from the Property while still maintaining the golf course **(Popson Dep 33 20)** The Town characterizes this case as one of "conceptual" severance of the developable land. It is much more than that. In this case 81 lots were legally feasible and could have been developed.

The United States Supreme Court recognizes partial takings entail fact-specific inquiries. The Town cites to Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497, 107 S. Ct. 1232, 1248, 94 L. Ed. 2d 472 (1987) to support its contention that the denominator, i.e., the relevant parcel, is the initial issue for determination in both a Penn. Central and a Lucas takings case. Keystone pre-dates the United States Supreme Court's ruling in Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448 (2001) which expressly called into question the logic of Keystone and its proposition that the deprivation is measured against the value of the parcel as a whole. Palazzolo v. Rhode Island, 533 U.S. 606, 631, 121 S. Ct. 2448, 2465, 150 L. Ed. 2d 592 (2001). As noted by one court after Palazzolo: 'a parcel might be severed from contiguous land where an owner proposes truly different uses for separate portions, or shows that the property is treated as separate, distinct economic units.' Giovanella v. Conservation Comm'n of Ashland, 447 Mass. 720, 729, 857 N.E.2d 451, 458 (2006).

Factors that may be considered are not limited to those listed by the Town as "germane" to the relevant parcel inquiry. See Giovanella v. Conservation Comm'n of Ashland, 447 Mass. 720, 728-31, 857 N.E.2d 451, 457-59 (2006), **(Appellant's Initial Brief at 23)**

However, “the most significant factor to consider in overcoming the presumption in favor of contiguous property” is “[a]n owner’s treatment of property as a distinct economic unit ” Giovanella, 447 Mass At 729-30, 857 N E 2d at 458-59 In Giovanella, the court recognized that “occasionally” this inquiry involves evidence of “ongoing established uses,” however, “[m]ore often, though, courts are presented with an owner’s assertion that the intended use was to divide the property into separate economic units ” Id “[W]e consider an owner’s intended use to be an important factor when deciding whether property should be protected as a distinct unit under the takings clause ’ Id

The record in this case is clear the owner would not have bought the property without the right to divide the property into separate economic units -- the residential lots and the golf course (**Wieland Dep 13 14-23, 17 9-10, 18 17-18**), the developer, the civil engineer, and the planning director met within a day of signing the contract to purchase the Property to go over its residential development (**Popson Dep 32 19-34 25, Ex 2, Whiteside Dep 5 13-18, 14 10-23, 16 9-17**), the developer determined that 81 residential lots could be developed but did not proceed with the development immediately heeding the advice of the Town Planner who suggested the developer get the neighborhood on board first (**Popson Dep 33-34**) The evidence is uncontroverted as to the DWGC’s intended residential use for the 60 acres outside of the golf course play area

Another relevant factor is the treatment of the property under state or local law Id In this case, evidence that the property was zoned PD allowing residential use at the time of the rezoning is uncontested

Viewing the facts in the light most favorable to DWGC, even the legal precedent proffered by the Town to discern “the relevant parcel” prevents summary judgment. The Town’s recital of the factors applied to the relevant parcel analysis in these cases admits that the relevant parcel determination entails a factual inquiry **(Respondent’s Initial Brief, at 14-15)**

For example, in Dist. Intown Properties Ltd. P’ship v. Dist. of Columbia, 198 F.3d 874 (D.C. Cir. 1999),⁴ the district court looked to, and the appellate court upheld, the following factors: (1) the degree of contiguity, (2) the dates of acquisition, (3) the extent to which the parcel has been treated as a single unit, and (4) the extent to which the restricted lots benefit the unregulated lot. Dist. Intown Properties Ltd. P’ship v. Dist. of Columbia, 198 F.3d 874, 880 (D.C. Cir. 1999).

Applying these factors to the record before this Court brings out factual issues that preclude summary judgment. As to the first factor in Intown (the degree of

⁴ Intown dealt with an apartment building and landscaped lawn on Connecticut Avenue across from the National Zoo in Washington, D.C., purchased by the owner in 1961. In 1988, the owner subdivided the property into nine contiguous lots and the following year all nine lots were declared historical landmarks. Several years later the Mayor denied the owner’s request for construction permits to build eight townhouses on eight of the nine lots because such construction was incompatible with the property’s landmark status. The owner sued the District of Columbia for an unconstitutional taking. In Intown, unlike the present case, “all relevant and subjective factors” supported the court’s conclusion that the relevant parcel for the takings analysis was the entire property held by the owner. There, even when the property was severed, the landowner could not show a ‘total taking’ under *Lucas*. In this case, the Town has conceded that when the property is severed, a total taking exists. **(Mot. for Summ. J. Tr. 54-56)** Nor could the owner in Intown show a Penn. Central “partial taking” – the record did not show that the owner’s investment-backed expectations for development were entirely thwarted. “[The owner in Intown] could not have had any reasonable investment-backed expectations of development given the background regulatory structure⁴ at the time of the subdivision.” *Id.* at 877. In this case the record is brimming with proof of the DWGC’s well-founded investment-backed expectations of development at the time it put the Property under contract and later when it closed.

contiguity), unlike the spatially and functionally contiguous lots in Intown, functional contiguity is absent in this case – the 196 acre golf course play area is functionally severable from the remaining 60 acres, 25 of which DWGC planned to develop

As to the second factor in Intown (the dates of acquisition), unlike Intown where the land was treated as a single, indivisible property by the same owner for more than 25 years, DWGC has submitted a plethora of evidence showing that the primary reason it acquired the Property was to subdivide residential lots from the significant acreage around the golf course. The evidence shows that even before closing on the property, DWGC consulted the Town with respect to the feasibility of its plans to develop the surrounding acreage. The evidence shows that DWGC's actions in the extend period following the closing, DWGC worked with the Town and neighbors to come up with a development plan agreeable to all – settling on a plan to develop only 25 of the 60 developable acres surrounding the golf course.

As to the third factor in Intown, the extent to which the parcel has been treated as a single unit, the evidence shows DWGC consistently treated the parcel as two separate units – the golf course and the intended residential lots – from the time of the entry of the contract to purchase forward. That the owner continued to operate the golf course and hoped it would make a profit, facts relied upon heavily by the Town, does not diminish the un rebutted testimony of DWGC's treatment of the Property as separate units. The reason there was no subdivision of the Property to allow the residential lots is that DWGC honored the Town's request to attempt to garner community support and, in the meantime, the Town downzoned the Property to eliminate residential use.

As to the fourth factor in Intown (the extent to which the restricted lots benefit the unregulated lot), the evidence in this case shows that the 60 acres that have never been golf course play area and were zoned PD do not benefit the golf course play area. No one has ever played golf on the 60 acres surrounding the golf course, at least not intentionally.

As explained in DWGC's Initial Brief, the rationale of Quirk v. Town of New Boston, 140 N.H. 124, 663 A.2d 1328 (N.H. 1995) also supports the conclusion that the non-golf course acreage that DWGC would have turned into residential lots is severable from the golf course acreage for purposes of the takings analysis.

The Town is incorrect in its statement that "[t]he Golf Club does not contend the lower court erred in applying these factors to the evidence [in its relevant parcel analysis]. The Golf Club simply disagrees with the legal effects of that exercise" (Respondent's Initial Brief at 16). DWGC contends that the lower court erred in concluding that the relevant parcels were the six TMS parcels as a matter of law. There were issues of fact as to what were the relevant parcels for purposes of the Lucas takings claim.

It is clear that even applying the factors proffered by the Town, there were multiple genuine issues of material fact that precluded granting summary judgment.

- b The cases proffered by DWGC and distinguished by the Town were cited for the premise that the parcel as a whole is not absolute and that the relevant parcel may be less than the whole. Each of those cases stands for the proposition that the determination of the relevant parcel turns on a case's peculiar facts and reiterates the overarching rule of law that takings analysis is inherently a factual inquiry.**

The proper focus in a Just Compensation Clause analysis is the impact on the owner which is a fact-driven inquiry. As shown by all of these cases *infra* – the rules are not hard and fast. This case, too, deals with peculiar facts atypical of any other fact pattern previously before this Court. This Court has never held that the parcel as a whole doctrine eliminates a per se takings claim where the regulatory restriction imposed deprived the owner of 81 legally feasible residential lots.

The Town misses the point of Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994), another example of the flexible approach taken by courts to determine the relevant parcel based on the particular facts. The existing legal boundaries of the parcel at the time of the regulatory restriction are not conclusive as the Town argues and the lower court held in its order in this case. “Our precedent displays a flexible approach, designed to account for factual nuances.” *Id.* at 1181.

The Town argues that Loveladies supports conceptual severance only where the entire acreage is left with no economically feasible use. Not so. Based on the factual nuances of that case, the court in Loveladies went beyond finding a Penn Central partial taking and instead opted for a Lucas total taking of 12.5 acres. These 12.5 acres were not a separately subdivided parcel but instead part of a 51-acre tract that in turn was one of the tracts comprising the 250 acres in question. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1174 (Fed. Cir. 1994). The unsubdivided 12.5 acres was deemed to be the relevant parcel and in that case, like our case, the relevant parcel “was deprived of all economically feasible use.” Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181-82 (Fed. Cir. 1994).

While the facts of our case and Loveladies are different (as are most fact patterns which arise in takings jurisprudence), the fact-driven, flexible approach that must be applied is not distinguishable. The lower court erred in weighing the evidence and adopting the Town's view of the preponderance of the evidence on a motion for summary judgment when there was evidence to support that the relevant parcel for purposes of the Lucas takings claim was comprised of the legally feasible residential lots prohibited by the downzoning.

The Town's interpretation of other cases cited by DWGC similarly misses the point. Although due process and takings analysis have been severed by recent jurisprudence (as fully discussed in DWGC's Initial Brief and *infra*), Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928) is an example of the United States Supreme Court considering less than an entire legal parcel as the relevant parcel for its takings analysis.

The Federal Circuit's decision in Florida Rock Indus. v. United States, 791 F.2d 893, 904 (C.A. Fed. 1986), cited at length by the Town in its brief, is simply another example of a case where the government attempted to spin the takings analysis by lumping in additional property with value so it could argue no categorical taking occurred. There, the mining company brought a taking claim against the United States Army Corps of Engineers that had denied a permit to mine 98 acres out of a 1560 acre tract.⁵ The Army Corps argued that no taking occurred because the permit denial

⁵ In its cross-appeal, Florida Rock tried to argue that the entire 1560 acre tract was taken because the 98-acre taking established a precedent and had that argument succeeded, their damages would have increased from about \$1 million to about \$10 million. The appellate court rejected the argument but allowed the takings claim to proceed as to the 98 acres.

applied only to 98 acres out of the 1560 acre tract. The Federal Circuit disagreed and determined that the relevant parcel was the 98 acres for which Florida Rock was denied the mining permit. Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 904-05 (Fed. Cir. 1986).

Just as in Florida Rock, there is evidence in this case that the relevant parcel is not the entirety of the Property. DWGC never intended to develop the entire 256 acre tract for residential use, only select portions of the acreage surrounding the golf course that would have been developed as residential lots under the Dunes West PD but for the downzoning in 2006.

Twain Harte Assocs. v. County of Tuolumne, 217 Cal. App. 3d 71, 265 Cal. Rptr. 737 (Cal. Ct. App. 1990), also relied upon by the Town, is yet another example of a court's decision that a parcel need not be treated as a whole. Id. at 87 ("Accordingly, we decide the law does not demand the entire 8.5-acre parcel be treated as a whole in an 'as applied' inverse condemnation analysis. Rather, whether the ordinance 'went so far' in its economic consequences as to effect a 'taking' of the 1.7-acre undeveloped plot is an issue of fact.")

The Town asserts that "value in excess of \$3 million is hardly a token value that could support a finding that a taking, either categorical or regulatory, has occurred." The Town's argument skirts the takings analysis as well as the proof in the record. The issue is not whether the golf course has value. The question is whether the 60 acres outside the golf course have any material value after the 2006 downzoning. The real estate appraisers for both sides agreed that the value of the lots the owner cannot now develop was around \$6 million. This \$6 million is over and above the value of the golf

course DWGC is not arguing it is entitled to the highest and best use for the land under the golf course, but rather that the Town has deprived it of all economic value with respect to the land outside the golf course play area. The Town concedes that the acreage separate and apart from the golf course has no material economic value **(Mot for Summ J Tr 54-56)**

The Town's contention in its brief and the lower court's finding that all the evidence is that DWGC treated the Property as a single parcel is incorrect **(Respondent's Initial Brief at 19)** Exhaustive evidence in the record, and highlighted in DWGC's Initial brief, proves that DWGC treated the golf course property and the surrounding acreage separate and apart from one another **(Appellant's Initial Brief at 4-9)** The lower court erred in ruling the physical use of the parcel without regard to the DWGC's intent, expectations, and steps towards other uses, was conclusive as a matter of law as to its use for purposes of the relevant parcel analysis. DWGC agrees with the Town however that the Town would be entitled to summary judgment only if "all the evidence" supported its contention which is far from the case.

The Ninth Circuit in Am. Savings & Loan Association v. Marin County, 653 F.2d 364, 371-72 (9th Cir. 1981) discussed the factual nature of the relevant parcel analysis and the other considerations associated with deciding a takings claim. The Ninth Circuit found that the determination as to what constitutes the parcel for the takings analysis is "in part, a factual issue" and that "[s]ummary judgment was therefore inappropriate." Id. at 371. In reversing and remanding the district court's decision there was no taking, the Ninth Circuit explained:

Should it be necessary to reach the merits of the case, we offer the following as guidance for the district court. Appellant [the landowner] must

initially bear the burden of showing that the Spit and Point have been, or would be, treated separately when its development plans are submitted and considered. If appellant makes this showing, the Spit must be analyzed as a separate parcel for taking purposes.

The determination as to whether the Spit has been taken depends upon the nature and extent of the interference with the appellant's rights. In determining the nature of that interference, the court must determine whether the appellant has actually been deprived of rights or whether those rights have instead been transferred to other property. Once appellant has shown separate treatment at the classification and development stages, the burden is on the County to show a transfer of development rights. The court must also consider whether any diminution in market value is compensated by any benefits conferred by the zoning ordinance.

Once the court has taken all of these considerations into account, it must determine whether justice and fairness require that appellant's loss be compensated by the government. This is essentially an ad hoc factual inquiry. It turns upon "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations." More precise delineation depends upon the facts of a particular case.

Am. Sav. & Loan Ass'n v. Marin County, 653 F.2d 364, 371-72 (9th Cir. 1981) (citing Penn. Central and Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980) among others).

The record and controlling law demonstrate that the lower court prematurely and erroneously granted summary judgment as to both DWGC's Lucas and Penn. Central takings claims.

II The lower court's failure to apply the proper legal standards to DWGC's substantive due process claim and the existence of factual issues related thereto require that the granting of summary judgment be reversed

The proper focus in a substantive due process analysis is whether the legislation substantially advances a legitimate governmental purpose. The United States Supreme Court's decision in Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S.Ct. 2074 (2005)

does not support the Town's argument that the Town's ordinances are presumptively correct and not subject to judicial scrutiny in the face of a due process challenge that the ordinance deprives the plaintiff of a protected property interest. Lingle held that the substantially advances formula is not part of the takings analysis. Id. at 545, 125 S. Ct. 2085-86. Lingle teaches us that the "substantially advances inquiry [that] probes the regulation's underlying validity" is central to the substantive due process analysis. Id. at 543, 125 S. Ct. 2084. "No amount of compensation" authorizes government action that is arbitrary where substantive due process is violated. Id.

Contrary to the Town's assertions that the substantially advances due process standard applies only in exaction cases, Lingle "implicitly reinterpreted the Nollan ruling to be a substantive due process-based decision." 1 Subdivision Law and Growth Mgmt. § 3.7 (emphasis added). Even assuming the Town's legal analysis is correct (which it is not), a rational relationship between the ordinance and the furtherance of the objective must be established. The lack of nexus is proof the ordinance does not substantially advance the ordinance's stated purposes/findings.

As a matter of law, the United States Supreme Court has determined that legislative findings are not entitled to the deference the Town suggests. See First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), Lucas v. S.C. Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). While the legislative findings may be entitled to deference for the takings analysis (i.e., a court is not going to look behind them), that is not true for the substantive due process analysis.

)

DWGC's protected property interest was its ownership interest in the Property. Substantive due process does not require a *vested* property interest to develop the property in a particular manner as argued by the Town. The Town cites no cases that hold that an owner asserting that a law deprived the owner of its substantive due process rights must establish that it has a *vested* right under state law to develop the property in a particular manner. Even though an owner is not required to have a vested right to mount a substantive due process challenge to a law, the Town concedes that the owner had a vested right under the SC Vested Rights Act at the time the property was rezoned in 2006 **(Respondent's Initial Brief at 23-24)**

The rights of the adverse parties are determined at the time the alleged wrong occurs. See Satterfield v. City of Mauldin, 2007 WL 2736310 (D S C Sept 17, 2007) (providing in the qualified immunity context that to ascertain whether an official violated clearly established law the Court looks to the law at the time the alleged offense was committed so long as the law is established with some particularity) (citing Harlow v. Fitzgerald, 457 U S 800, 818 (1982) and Anderson v. Creighton, 483 U S 635, 640). Likewise in this case, DWGC's substantive due process claim turns on its rights at the time of the 2006 rezoning.

The substantive due process analysis focuses on whether the regulation or law that caused the alleged injury to the property owner substantially advances a legitimate governmental objective. The analysis does not focus on the conduct of the owner. The owner's failure to pursue a subdivision of the Property for residential lots after the downzoning is irrelevant to substantive due process. In addition, such application would have been useless. The rezoning prohibited the owner from obtaining approval of a

subdivision plat for residential uses even if it had a vested right. An owner/litigant is not required to do a futile act. See Shupe v. Settle, 315 S. Ct. 510, 515, 445 S. E. 2d 651, 654 (Ct. App. 1994) ('It is well settled law that equity will not require the doing of a futile act'), Palazzolo v. Rhode Island, 533 U.S. 606, 621, 121 S. Ct. 2448, 2459, 150 L. Ed. 2d 592 (2001) ("Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision.")

The Town misstates the key issue in a substantive due process analysis. It is not, as suggested by the Town, "whether the effect of the Rezoning Ordinance was to nullify a protected property interest of the Golf Club. It did not, as a matter of law." **(Respondent's Initial Brief at 24)** For the purposes of summary judgment, the threshold inquiry is whether there is evidence the ordinances (CRO and rezoning) were arbitrary and capricious, and in this case there was evidence supporting this conclusion when taken in the light most favorable to DWGC. **(Appellant's Initial Brief at 38-40)**

The Town is correct in its statement that the ordinance's professed purposes are legitimate public purposes **(Respondent's Initial Brief at 27)**, but the substantive due process factual question is whether the rezoning of the Property to CRO substantially advances the objectives in the CRO Ordinance. There was no proof in the record of any link between the Town's alleged drainage and recreational studies to warrant the conclusion that the rezoning of the golf courses was necessary to fulfill the town's golf and drainage needs, as suggested by the Town. **(Respondent's Initial Brief at 27)** The only proof is that Town at one time conducted an unrelated recreation study and an unrelated drainage study. The CRO Ordinance did not refer to either **(CRO Ordinance)**

In conclusion, the federal law governing a substantive due process claim under these circumstances does not stop the inquiry if there is a recital of legitimate governmental purposes in the ordinance, as argued by the Town. The law in question that abridges the property right of the owner must substantially advance the stated objectives of the law. In this case DWGC put forward proof that the rezoning of its land to CRO did not substantially advance the CRO Ordinance's stated purposes, thereby creating a genuine issue of material fact that precludes summary judgment as to this claim.

III The lower court misapplied both the law and the standard of review on summary judgment as to DWGC's Equal Protection claim

As set forth in the Appellant's initial brief, the proper focus in an Equal Protection analysis is whether the government applied the law equally when considering the similar rezoning requests of similarly situated applicants. The evidence shows that Appellant's 2009 application for rezoning was measured against a different, more rigorous standard from that applied to the similar rezoning application of Snee Farm that the Town granted. This disparate treatment through the application of a more rigorous standard to DWGC supports an inference, and hence an issue of fact, of the intent of the Town to discriminate against DWGC's rezoning application. Additionally, there is no evidence that the refusal to grant DWGC's application while at the same time granting Snee Farm's rezoning request both furthered the purposes of the CRO Ordinance.

As set forth DWGC's initial brief, there were genuine issues of material fact that prevented entry of summary judgment as to DWGC's Equal Protection claim.

CONCLUSION

Summary judgment should not be granted if there are genuine issues of material fact. In its brief the Town argues only the select facts that it believes support its position and the order of the lower court. The Town purposely excludes referring to the abundant evidence in the record covered by DWGC in its initial brief and this brief that support DWGC's claims. These facts, coupled with the applicable law, establish genuine issues of material fact that preclude summary judgment.

For the foregoing reasons and those DWGC's initial brief, DWGC respectfully submits the order of the lower court granting summary judgment should be reversed.

Respectfully submitted,



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Katie F Monoc - S C Bar # 78131

Pratt-Thomas Walker, P A

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ATTORNEYS FOR APPELLANT

November 28, 2011
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-3723

Dunes West Golf Club, LLC,

Appellant,

v

Town of Mount Pleasant,

Respondent

**APPELLANT'S SUPPLEMENTAL DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal

Discovery

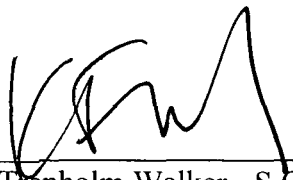
- 1 Deposition of Kevin Popson, pp 62-63
- 2 Deposition of Joel Ford, pp 46-48

November 28, 2011

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DEC 5 2011

S.C. SUPREME COURT



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IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-3723

Dunes West Golf Club, LLC,

, Appellant,

v

Town of Mount Pleasant,

Respondent

CERTIFICATION

Pursuant to Rule 209(c) SCACR, counsel for Appellant hereby certifies that Appellant's Supplemental Designation of Matter to be Included in the Record on Appeal contains no matter which is irrelevant to the Appeal

November 28, 2011



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The South Carolina Supreme Court

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BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
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PHONE NO. 734 1080

To G. Trenholm Walker Esquire
Katie F. Monoc Esquire
From Daniel E. Shearouse
Date February 17, 2012
RE April Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the April 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of April 3, 4, 5, 17, and 18. Please notify this office in writing prior to February 24, 2012, as to any scheduling conflicts for the April term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Dunes West Golf v. Town Mt. Pleasant



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
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To Frances I. Cantwell Esquire
From Daniel E. Shearouse
Date February 17, 2012
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Dunes West Golf v. Town Mt. Pleasant



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
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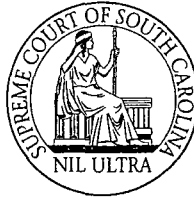
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To David G. Pagliarini, Esquire
From Daniel E. Shearouse
Date February 17, 2012
RE April Preliminary List

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Dunes West Golf v. Town Mt. Pleasant



The Supreme Court of South Carolina

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February 9, 2012

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Suite 1-A
Charleston, SC 29412

Re Dunes West Golf v Town Mt Pleasant

Dear Counsel

When the roster for March 2012 term of Court was prepared, the above referenced case was not scheduled. Our records indicate that you are counsel of record in this case.

This case will be placed on the April 2012 Preliminary List of Cases. Court will meet the days of April 3, 4, 5, 17 and 18.

Very truly yours,

Daniel E Shearouse
CLERK

DES/lda

PROFESSIONAL ASSOCIATION

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January 30, 2012

Hon Daniel E Shearouse
South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

Re Dunes West Golf v Town of Mt Pleasant
Case Tracking # 2011-194211
Our File No 1895 010

Dear Mr Shearouse

I am writing in response to your notice communicating that this appeal may be scheduled for oral argument on March 6, 7, 8, 20, and 21 2012. You have asked that we advise the court of any potential conflicts.

I am currently scheduled for a hearing before the Administrative Law Court for one day, March 20. I would therefore ask that the argument not be set on that date.

With kind regards, I am
RECEIVED
JAN 31 2012
SC SUPREME COURT

Sincerely

PRATT-THOMAS WALKER, P A



G Trenholm Walker

GTW/njdm

c Frances I Cantwell, Esq
David G Pagliarini Esq

Law Offices
Regan and Cantwell LLC
William B Regan (Dec)
Frances I Cantwell

January 27, 2012

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Clerk, South Carolina Supreme Court
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tel 843 762 8282
fax 843 762 8284

RE Dunes West Golf Club, LLC Town of Mount Pleasant
Case No 2009-CP-10-03723
Case Tracking No 2011-194211

Dear Mr Shearouse

I am in receipt of your letter dated January 24, 2012 as to the March Preliminary List This office has no scheduling conflicts with the proposed dates

With kind regards, I am

Yours truly,



Frances I Cantwell

FIC/trm

cc G Trenholm Walker Esq (w/encls)
Katie F Monoc, Esq (w/encls)
David G Pagliarini, Esq (w/encls)

RECEIVED
JAN 30 2012
S.C. SUPREME COURT



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

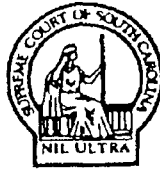
P.O. BOX 11330
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PHONE NO. 734 1080

To G. Trenholm Walker Esquire
Katie F. Monoc Esquire
From Daniel E. Shearouse
Date January 24, 2012
RE March Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the March 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of March 6, 7, 8, 20, and 21. Please notify this office in writing prior to January 31, 2012, as to any scheduling conflicts for the March term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Dunes West Golf v. Town Mt. Pleasant



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Frances I. Cantwell Esquire
From Daniel E. Shearouse
Date January 24, 2012
RE March Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the March 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of March 6, 7, 8, 20, and 21. Please notify this office in writing prior to January 31, 2012, as to any scheduling conflicts for the March term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Dunes West Golf v. Town Mt. Pleasant



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To David G. Pagliarini Esquire
From Daniel E. Shearouse
Date January 24, 2012
RE March Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the March 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of March 6, 7, 8, 20, and 21. Please notify this office in writing prior to January 31, 2012, as to any scheduling conflicts for the March term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Dunes West Golf v. Town Mt. Pleasant

PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON SC 29403PO DRAWER 22247
CHARLESTON SC 29413 2247PHONE 843 727 2200
FAX 843 727 2238

WWW.P-TW.COM

E-MAIL gtw@ptw.com
DIRECT DIAL 843 727 2208
DIRECT FAX 843 727 2231

E DOUGLAS PRATT THOMAS

G TRENHOLM WALKER

W ANDREW GOWDER JR

JON L AUSTEN

LINDSAY K SMITH YANCEY (SC NC)

THOMAS H HESSE (SC GA)

IAN W FREEMAN (SC CA)

DANIEL S McQUEENEY JR

KATHLEEN FOWLER MONOC

January 17, 2012

U S MAIL [X] FACSIMILE [] FEDERAL EXPRESS []

The Honorable Daniel E Shearouse
Clerk of Court
The Supreme Court of South Carolina
P O Box 11330
Columbia SC 29211Re Dunes West Golf v Town Mt Pleasant
Case Tracking # 2011-194211
Our File No 1895 010

Dear Mr Shearouse

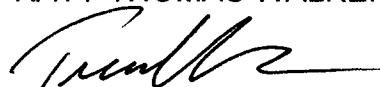
Enclosed please find for filing with the Court, the following

- 1 Original unbound and 14 copies of Appellant's Brief with Certificate of Counsel
- 2 Original unbound and 14 copies of Appellant's Reply Brief with Certificate of Counsel
- 3 Proof of Service of Appellant's Brief and Reply Brief on opposing counsel,
- 4 One unbound and 14 copies of the Record On Appeal (Volumes I, II, and III) with Certificate of Counsel, and
- 5 Certificate of Compliance

With kind regards, I am,

Sincerely

PRATT-THOMAS WALKER, P A



G Trenholm Walker

GTW:njdm

Enclosures

c Frances I Cantwell, Esq
R Allen Young Esq

S.C. SUPREME COURT

JAN 18 2012

RECEIVED

11

RECEIVED

Law Offices
Regan and Cantwell LLC
William B Regan (Dec)
Frances I Cantwell

January 17, 2012

RECEIVED
JAN 18 2012
S.C. SUPREME COURT

105 wappoo creek drive
suite 1 a
charleston sc
29412

Hon Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, South Carolina 29211

tel 843 762 8282
fax 843 762 8284

RE Dunes West Golf Club, LLC v Town of Mount Pleasant
Case No 2009-CP-10-03723
Case Tracking No 2011-194211

Dear Mr Shearouse

In regard to the above matter, enclosed is an original unbound and fourteen (14) bound copies of the Respondent's Final Brief The Certificate of Counsel is located on page 36 of the Brief Also enclosed for filing is a Certificate of Service on counsel

Please note that the Town of Mount Pleasant attorney R Allen Young has retired and in his stead is David G Pagliarini, Esq

By copy hereof, I am serving counsel of record

With kind regards, I am,

Yours truly,



Frances I Cantwell

FIC/trm

Enclosures

cc G Trenholm Walker, Esq (w/encls)
Katie F Monoc, Esq (w/encls)
David G Pagliarini, Esq (w/encls)

e mail fcantwell@birch.net
trmonteiro@birch.net

PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON SC 29403PO DRAWER 22247
CHARLESTON SC 29413 2247PHONE 843 727 2200
FAX 843 727 2238

WWW.P.TW.COM

E DOUGLAS PRATT THOMAS

G TRENHOLM WALKER

W ANDREW GOWDER JR

JON L AUSTEN

LINDSAY K SMITH YANCEY (SC NC)

THOMAS H HESSE (SC GA)

IAN W FREEMAN (SC CA)

DANIEL S McQUEENEY JR

KATHLEEN FOWLER MONOC

MAIL 1 1 11
AIR MAIL 8 1/2 2/08
RE FAX 5 7 24

December 27, 2011

U S MAIL ☒ FACSIMILE ☐ FEDERAL EXPRESS ☐The Honorable Daniel E Shearouse
Clerk of Court
The Supreme Court of South Carolina
P O Box 11330
Columbia, SC 29211Re Dunes West Golf v Town Mt Pleasant
Case Tracking # 2011-194211
Our File No 1895 010

Dear Mr Shearouse

Please find enclosed Appellant's Proof of Service of the Record on Appeal By copy of this letter I am serving Frances I Cantwell and R Allen Young, attorneys for Respondent with one copy of the Record

With kind regards, I am

Sincerely

PRATT-THOMAS WALKER P A



G Trenholm Walker

GTWnjdm
Enclosurec Frances I Cantwell Esq
R Allen Young, Esq**RECEIVED**

DEC 29 2011

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-3723

RECEIVED

DEC 29 2011

S.C. SUPREME COURT

Dunes West Golf Club, LLC,

Appellant,

vs

Town of Mount Pleasant,

Respondent

PROOF OF SERVICE

I Nancy Jane D Murphy, an employee of Pratt-Thomas Walker P A , hereby certify that I have placed this 28th day of December, 2011, one copy of the **Record On Appeal** to counsel of record by placing the same in the United States mail, first-class postage pre-paid, to

Frances I Cantwell, Esq
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, SC 29412

R Allen Young, Esq
Town of Mount Pleasant
100 Ann Edwards Lane
Mount Pleasant, SC 29465


Nancy Jane D Murphy

16 CHARLOTTE STREET
CHARLESTON SC 29403

PO DRAWER 22247
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PHONE 843 727 2200
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EMAIL gtw@prattwalker.com
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DIRECT FAX 843 727 2238

E DOUGLAS PRATT THOMAS

G TRENHOLM WALKER

W ANDREW GOWDER JR

JON L AUSTEN

LINDSAY K SMITH YANCEY (SC NC)

CLAYTON B McCULLOUGH

THOMAS H HESSE (SC GA)

IAN W FREEMAN (SC CA)

FRANCIS M ERVIN II (SC MA)

DANIEL S McQUEENEY JR

JAMIE A KHAN

KATHLEEN FOWLER MONOC

November 28 2011

U S MAIL [X] FACSIMILE [] FEDERAL EXPRESS []

The Honorable Daniel E Shearouse
Clerk of Court
The Supreme Court of South Carolina
P O Box 11330
Columbia, SC 29211

RECEIVED

DEC 9 2011

S.C. SUPREME COURT

Re Dunes West Golf v Town Mt Pleasant
Case Tracking # 2011-194211
Our File No 1895 010

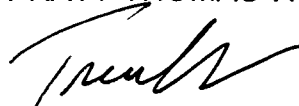
Dear Mr Shearouse

Our firm represents the Appellant in the above appeal Please find enclosed Appellant's Initial Reply Brief and Supplemental Designation of Matter As evidenced by the enclosed Proof of Service, I am serving Frances I Cantwell, Esq and R Allen Young Esq attorneys for Respondent with copies of same

With kind regards I am

Sincerely,

PRATT-THOMAS WALKER P A



G Trenholm Walker

GTWnjdm
Enclosure

c Frances I Cantwell, Esq
R Allen Young, Esq

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-3723

Dunes West Golf Club, LLC,

Appellant,

v

Town of Mount Pleasant

Respondent

PROOF OF SERVICE

I Nancy Jane D Murphy, an employee of Pratt-Thomas Walker P A , hereby certify that I have placed a copy of the **Appellant's Reply Brief** to counsel of record this 28th day of November, 2011, by placing the same in the United States mail, first-class postage pre-paid, to

Frances I Cantwell Esq
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, SC 29412

RECEIVED

DEC 5 2011

S.C. SUPREME COURT

R Allen Young, Esq
Town of Mount Pleasant
100 Ann Edwards Lane
Mount Pleasant SC 29465


Nancy Jane D Murphy

The Supreme Court of South Carolina

Dunes West Golf Club, LLC, Appellant,

v

Town of Mount Pleasant, Respondent

The Honorable R Markley Dennis, Jr
Charleston County
Trial Court Case No 2009-CP-10-03723

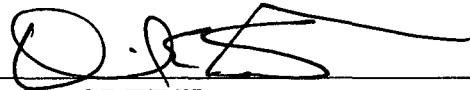
ORDER

The request for an extension to serve and file the initial reply brief is granted and extended until November 28, 2011

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

November 15, 2011

cc G Trenholm Walker, Esquire
Katie F Monoc, Esquire
Frances I Cantwell, Esquire
R Allen Young, Esquire

PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON SC 29403

PO DRAWER 22247
CHARLESTON SC 29413 2247

PHONE 843 727 2200
FAX 843 727 2238

WWW.P.TW.COM

RECEIVED
DIRECT FAX 843 727 2231

E DOUGLAS PRATT THOMAS
G TRENHOLM WALKER
W ANDREW GOWDER JR
JON L AUSTEN
LINDSAY K SMITH YANCEY (SC NC)
CLAYTON B McCULLOUGH
THOMAS H HESSE (SC GA)
IAN W FREEMAN (SC CA)
FRANCIS M ERVIN II (SC MA)
DANIEL S McQUEENEY JR
JAMIE A KHAN
KATHLEEN FOWLER MONOC

November 11 2011

U S MAIL ☒ FACSIMILE ☐ FEDERAL EXPRESS ☐

The Honorable Daniel E Shearouse
Clerk of Court
The Supreme Court of South Carolina
P O Box 11330
Columbia SC 29211

RECEIVED

NOV 15 2011

Re Dunes West Golf v Town Mt Pleasant
Case Tracking # 2011-194211
Our File No 1895 010

S.C. SUPREME COURT

Dear Mr Shearouse

Our firm represents the Appellant in the above appeal I am writing to request an extension of ten (10) days for the service and filing of our initial reply brief and designation of matter They are currently due on Monday, November 17 With the extension the due date would be Sunday November 27 thus the next business day Monday November 28 2011

I have discussed the extension with Frances Cantwell opposing counsel who has no objection

I have enclosed our firm's check for \$25 If anything further must be submitted to accomplish the extension, please let me know

With kind regards, I am,

Sincerely

PRATT-THOMAS WALKER, P A



G Trenholm Walker

GTWnjdm

Enclosure (Check)

c Frances I Cantwell, Esq
R Allen Young, Esq

Law Offices
Regan and Cantwell LLC
William B Regan (Dec)
Frances I Cantwell

November 8, 2011

RECEIVED

11/16/11

SC SUPREME COURT

105 wappoo creek drive
suite 1 a
charleston sc
29412

Hon Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, South Carolina 29211

tel 843 762 8282
fax 843 762 8284

RE Dunes West Golf Club, LLC v Town of Mount Pleasant
Case No 2009-CP-10-03723
Case Tracking No 2011-194211

Dear Mr Shearouse

In regard to the above matter, I am enclosing for filing the Respondents' Designation of Matters to be Included in the Record on Appeal, which I inadvertently omitted from the previous mailing of the Initial Brief. Also enclosed is a copy of the Certificate of Service on counsel, which was mailed with the brief.

By copy hereof, I am serving counsel of record.

With kind regards, I am,

Yours truly,



Theda R. Monteiro
Legal Assistant to Frances I Cantwell

Enclosures

cc G Trenholm Walker, Esq (w/encls)
Katie F Monoc, Esq (w/encls)
R Allen Young, Esq (w/encls)

e mail fcantwell@birch.net
tmonteiro@birch.net

Law Offices
Regan and Cantwell LLC
William B Regan (Dec)
Frances I Cantwell

November 7, 2011

105 wappoo creek drive
suite 1 a
charleston sc
29412

tel 843 762 8282
fax 843 762 8284

Hon Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, South Carolina 29211

RE Dunes West Golf Club, LLC v Town of Mount Pleasant
Case No 2009-CP-10-03723
Case Tracking No 2011-194211

Dear Mr Shearouse

In regard to the above matter, I am enclosing for filing the Respondents' Initial Brief and Designation of Matters to be Included in the Record on Appeal Also enclosed for filing is a Certificate of Service on counsel

By copy hereof, I am serving counsel of record

With kind regards, I am,

Yours truly,



Frances I Cantwell

FIC/trm

Enclosures

cc G Trenholm Walker, Esq (w/encls)
Katie F Monoc, Esq (w/encls)
R Allen Young, Esq (w/encls)

RECEIVED
NOV 09 2011
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-03723

Dunes West Golf Club, LLC,

Appellant,

v

Town of Mount Pleasant,

Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that on the 7th day of November, 2011, a true and correct copy of the Respondent Town of Mount Pleasant's Initial Brief and Designation of Matters to be Included in the Record on Appeal was placed in an envelope with first class postage prepaid affixed thereto and mailed to the following

Attorneys for Appellant

G Trenholm Walker, Esq

Katie F Monoc, Esq

Pratt-Thomas Walker, PA

P O Drawer 22247

Charleston, South Carolina 29413-2247

Charleston, South Carolina

November 7, 2011

A handwritten signature in black ink, reading "Theda R. Monteiro". The signature is written in a cursive style with a horizontal line extending from the end of the name.

Theda R. Monteiro, Legal Assistant

Regan and Cantwell, LLC

105 Wappoo Creek Drive, Suite 1-A

Charleston, South Carolina 29412

Tel 843-762-8282

Fax 843-762-8284

The Supreme Court of South Carolina

Dunes West Golf Club, LLC, Appellant,

v

Town of Mount Pleasant, Respondent

The Honorable R Markley Dennis, Jr
Charleston County
Trial Court Case No 2009-CP-10-03723

ORDER

For good cause having been shown, the time for serving and filing the Initial Brief of Respondent and Designation of Matter in the above entitled matter is hereby extended until November 7, 2011

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

October 3, 2011

cc G Trenholm Walker, Esquire
Katie F Monoc, Esquire
Frances I Cantwell, Esquire
R Allen Young, Esquire

Law Offices
Regan and Cantwell LLC
William B Regan (Dec)
Frances I Cantwell

September 30, 2011

105 wappoo creek drive
suite 1 a
charleston sc
29412

tel 843 762 8282
fax 843 762 8284

Hon Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, South Carolina 29211

RE Dunes West Golf Club, LLC v Town of Mount Pleasant
Case No 2009-CP-10-03723
Case Tracking No 2011-194211

Dear Mr Shearouse

In regard to the above matter, I am enclosing an original and six (6) copies of a Motion for Extension of Time to file Respondent's Initial Brief and Designation of Matters to be Included in the Record on Appeal Also enclosed are the \$25 00 filing fee and a Certificate of Service on counsel Workload necessitates this request

Counsel for Appellant does not object to this motion

I would appreciate your taking this up with the Court at your earliest convenience

With kind regards, I am,

Yours truly,



Frances I Cantwell

FIC/trm

Enclosures

cc G Trenholm Walker, Esq (w/encls)
Katie F Monoc, Esq (w/encls)
R Allen Young, Esq (w/encls)

e mail fcantwell@birch net
tmonteiro@birch net

RECEIVED
OCT 09 2011
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-03723

Dunes West Golf Club, LLC,

Appellant,

v

Town of Mount Pleasant,

Respondent

RESPONDENT'S MOTION FOR EXTENSION OF TIME IN
WHICH TO FILE INITIAL BRIEF AND INITIAL DESIGNATION
OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

The Respondent Town of Mount Pleasant hereby moves for a thirty (30) day extension of time, until November 7, 2011, to file its Initial Brief and Designation of Matter to be Included in the Record on Appeal in the within matter. This is the first extension sought and is necessitated due to the workload of counsel.

Counsel for Appellant does not object to this motion.

RECEIVED

OCT 03 2011

Respectfully submitted,

S C SUPREME COURT

Charleston, South Carolina

September 30, 2011

Frances I Cantwell

Frances I Cantwell, Esq
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, South Carolina 29412
Tel 843-762-8282
Fax 843-762-8284

R Allen Young, Esq
Town of Mount Pleasant
100 Ann Edwards Lane
Mount Pleasant, South Carolina 29464
Tel 843-849-2020
Fax 843-388-1078

Attorneys for Respondent
Town of Mount Pleasant

STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-03723

Dunes West Golf Club, LLC,

Appellant,

v

Town of Mount Pleasant,

Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that on the 30th day of September, 2011, a true and correct copy of the Respondent Town of Mount Pleasant's Motion for Extension of Time to File Initial Brief and Initial Designation of Matters to be Included in the Record on Appeal was placed in an envelope with first class postage prepaid affixed thereto and mailed to the following

Attorneys for Appellant

G Trenholm Walker, Esq

Katie F Monoc, Esq

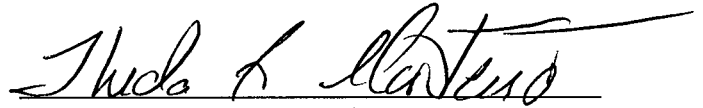
Pratt-Thomas Walker, PA

P O Drawer 22247

Charleston, South Carolina 29413-2247

Charleston, South Carolina

September 30, 2011

A handwritten signature in black ink, reading "Theda R. Monteiro", written over a horizontal line.

Theda R. Monteiro, Legal Assistant
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, South Carolina 29412
Tel 843-762-8282
Fax 843-762-8284

PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON SC 29403

PO DRAWER 22247
CHARLESTON SC 29413 2247

PHONE 843 727 2200
FAX 843 727 2238

WWW.P.TW.COM

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SEP 12 2011
SC SUPREME COURT

E DOUGLAS PRATT THOMAS

G TRENHOLM WALKER

W ANDREW GOWDER JR

JON L AUSTEN

LINDSAY K SMITH YANCEY (SC NC)

CLAYTON B McCULLOUGH

THOMAS H HESSE (SC GA)

IAN W FREEMAN (SC CA)

FRANCIS M ERVIN II (SC MA)

DANIEL S McQUEENEY JR

JAMIE A KHAN

KATHLEEN FOWLER MONOC

September 7, 2011

U S MAIL [X] FACSIMILE [] FEDERAL EXPRESS []

The Honorable Daniel E Shearouse
Clerk of Court
The Supreme Court of South Carolina
P O Box 11330
Columbia SC 29211

Re Dunes West Golf v Town Mt Pleasant
Case Tracking # 2011-194211
Our File No 1895 010

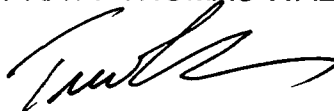
Dear Mr Shearouse

Enclosed please find Appellant's Initial Brief Designation of Matter and Proof of Service on all counsel of record

With kind regards I am

Sincerely

PRATT-THOMAS WALKER P A



G Trenholm Walker

GTW\njdm
Enclosures (As Stated)
c Frances I Cantwell Esq
R Allen Young, Esq

RECEIVED

SEP 12 2011

SC SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

SEP 12 2011

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S C Supreme Court

R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-3723

Dunes West Golf Club LLC,

Appellant

vs

Town of Mount Pleasant,

Respondent

PROOF OF SERVICE

I, Nancy Jane D Murphy, an employee of Pratt-Thomas Walker P A , hereby certify that I have placed this 7th day of September 2011 a copy of the **Appellant's Initial Brief and Designation of Matter** to counsel of record by placing the same in the United States mail first-class postage pre-paid to

Frances I Cantwell Esq
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, SC 29412

R Allen Young, Esq
Town of Mount Pleasant
100 Ann Edwards Lane
Mount Pleasant, SC 29465


Nancy Jane D Murphy

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-3723

Dunes West Golf Club, LLC,

Appellant,

v

Town of Mount Pleasant,

Respondent

CERTIFICATION

Pursuant to Rule 209(c) SCACR, counsel for Appellant hereby certifies that Appellant's Designation of Matter to be Included in the Record on Appeal contains no matter which is irrelevant to the Appeal

September 7, 2011



G Trenholm Walker - S C Bar #5777

Katie F Monoc - S C Bar # 78131

Pratt-Thomas Walker, P A

Post Office Drawer 22247

Charleston, SC 29413-2247

(843) 727-2208

ATTORNEYS FOR APPELLANT

RECEIVED

SEP 12 2011

S.C. SUPREME COURT

The Supreme Court of South Carolina

Dunes West Golf Club, LLC, Appellant,

V

Town of Mount Pleasant, Respondent

The Honorable R Markley Dennis, Jr
Charleston County
Trial Court Case No 2009-CP-10-03723

ORDER

For good cause having been shown, the time for serving and filing the Appellant's Initial Brief and Designation of Matter in the above entitled matter is hereby extended until September 7, 2011

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY Shanda I Shealy
Chief Deputy CLERK

Columbia, South Carolina

August 16, 2011

cc G Trenholm Walker, Esquire
Clayton B McCullough, Esquire
Frances I Cantwell, Esquire
R Allen Young, Esquire

PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON SC 29403PO DRAWER 22247
CHARLESTON SC 29413 2247PHONE 843 727 2200
FAX 843 727 2238

WWW.P-TW.COM

MAIL ROOM
DIRECTOR
JULY 2008E DOUGLAS PRATT THOMAS
G TRENHOLM WALKER
W ANDREW GOWDER JR
JON L AUSTEN
LINDSAY K SMITH YANCEY (SC NC)
CLAYTON B McCULLOUGH
THOMAS H HESSE (SC GA)
IAN W FREEMAN (SC CA)
FRANCIS M ERVIN II (SC MA)
DANIEL S McQUEENEY JR
JAMIE A KHAN
KATHLEEN FOWLER MONOC

August 15 2011

U S MAIL [X] FACSIMILE [] FEDERAL EXPRESS []

The Honorable Daniel E Shearouse
Clerk of Court
The Supreme Court of South Carolina
P O Box 11330
Columbia, SC 29211Re Dunes West Golf v Town Mt Pleasant
Case Tracking # 2011-194211
Our File No 1895 010

RECEIVED

AUG 15 2011

SC SUPREME COURT

Dear Mr Shearouse

Our firm represents the Appellant in the above appeal I am writing to request a second extension of fourteen (14) days for the service and filing of our initial brief and designation of matter They are currently due on Wednesday, August 24 With the extension the due date would be Wednesday September 7 2011

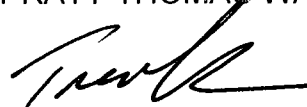
I have discussed the extension with Frances Cantwell opposing counsel who has no objection

I have enclosed our firm's check for \$25 If anything further must be submitted to accomplish the extension please let me know

With kind regards I am,

Sincerely

PRATT-THOMAS WALKER P A



G Trenholm Walker

GTW/njdm

Enclosure (Check)

c Frances I Cantwell Esq
R Allen Young EsqCheck # 72129
\$25.00

The Supreme Court of South Carolina

Dunes West Golf Club, LLC, Appellant,

v

Town of Mount Pleasant, Respondent

The Honorable R Markley Dennis, Jr
Charleston County
Trial Court Case No 2009-CP-10-03723

ORDER

The request for an extension to serve and file the Initial Brief of Appellant and Designation of Matter is granted and extended until August 24, 2011

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY

Shonda J. Shealy
Chief Deputy CLERK

Columbia, South Carolina

July 13, 2011

cc G Trenholm Walker, Esquire
Clayton B McCullough, Esquire
Frances I Cantwell, Esquire
R Allen Young, Esquire

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July 12, 2011

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W ANDREW GOWDER JR
JON L AUSTEN
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CLAYTON B McCULLOUGH
THOMAS H HESSE (SC GA)
IAN W FREEMAN (SC CA)
FRANCIS M ERVIN II (SC MA)
DANIEL S McQUEENEY JR
JAMIE A KHAN
KATHLEEN FOWLER MONOC

The Honorable Daniel E Shearouse
Clerk of Court
South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

RE Dunes West Golf Club, LLC v Town of Mt Pleasant
Our File No 1895-001

Dear Mr Shearouse

Please be advised that our firm represents the Appellant in the above-referenced appeal I am writing to request a 30-day extension for the filing and service of Appellant's Initial Brief, which is currently due on July 25, 2011 With the extension, the brief would be due on August 24, 2011 There has been no previous request for an extension

I have enclosed our firm's check in the amount of \$25 00 If anything further must be submitted to accomplish the extension, please let me know

Thank you for your consideration and attention to this matter With regards, I am,

Sincerely yours,

PRATT-THOMAS WALKER, P A



Katie Fowler Monoc

/jas
enclosure

c Francis I Cantwell, Esq
R Allen Young, Esq
F Robert Parker, Esq

RECEIVED

JUL 13 2011

SC SUPREME COURT

PROFESSIONAL ASSOCIATION

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June 27 2011

U S MAIL ☒ FACSIMILE ☐ FEDERAL EXPRESS ☐

Clerk of Court
Attn DEBBIE
Supreme Court of South Carolina
P O Box 11330
Columbia, SC 29211

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JUN 29 2011
S C SUPREME COURT

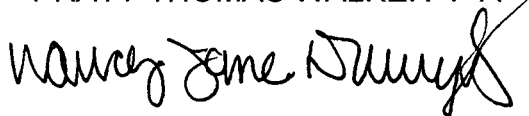
Re Dunes West Golf Club, LLC v Town of Mount Pleasant
Case No 2009-CP-10-3723
Our File No 1895 010

Dear Debbie

Enclosed please find the \$100 filing fee on the above-referenced appeal Thank you for the call today and I apologize for the inconvenience of having to return the \$150 fee sent with the Notice

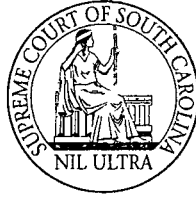
Sincerely,

PRATT-THOMAS WALKER P A



Nancy Jane D Murphy
Legal Assistant to G Trenholm Walker

\njdm
Enclosure (Check)



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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June 28, 2011

G Trenholm Walker, Esquire
Clayton B McCullough, Esquire
Pratt-Thomas & Walker, PA
P O Drawer 22247
Charleston, SC 29413-2247

Re Dunes West Golf v Town Mt Pleasant
Case Tracking No 2011-194211

Dear Counsel

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

CLERK

DES/dmh

Enclosure

Dunes West Golf v Town Mt Pleasant
Page Two
June 28, 2011

cc Frances I Cantwell, Esquire
R Allen Young, Esquire

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R Markley Dennis, Jr Circuit Court Judge

Case No 2009-CP-10-3723

RECEIVED
JUN 27 2011
S C SUPREME COURT

Dunes West Golf Club, LLC,

Appellant,

vs

Town of Mount Pleasant,

Respondent

NOTICE OF INTENT TO APPEAL

Dunes West Golf Club, LLC, appeals the Order Granting Summary Judgment of the Honorable R Markley Dennis, Jr , filed May 23, 2011, copy attached hereto Because Appellant's complaint challenges the constitutionality of a municipal ordinance, this appeal is filed in the South Carolina Supreme Court pursuant to Rule 203 (d)(1)(A)(ii), SCACR Appellant received written notice of entry of this Judgment on May 27 2011

June 24 2011


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ATTORNEYS FOR APPELLANT

Other Counsel of Record

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(843) 762-8282
ATTORNEYS FOR RESPONDENT

R Allen Young, Esq
Town of Mount Pleasant
100 Ann Edwards Lane
Mount Pleasant, SC 29465
(843) 849-2020

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-3723

RECEIVED
JUN 27 2011
SC SUPREME COURT

Dunes West Golf Club LLC,

Appellant,

vs

Town of Mount Pleasant,

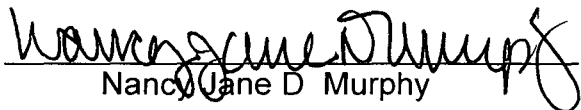
Respondent

PROOF OF SERVICE

I, Nancy Jane D Murphy, an employee of Pratt-Thomas Walker, P A , hereby certify that I have placed this 24th day of June 20, 2011, a copy of the **Notice of Intent to Appeal** to counsel of record by placing the same in the United States mail first-class postage pre-paid, to

Frances I Cantwell Esq
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, SC 29412

R Allen Young, Esq
Town of Mount Pleasant
100 Ann Edwards Lane
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Nancy Jane D Murphy

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KATHLEEN FOWLER MONOC

June 24, 2011

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The Honorable Daniel E Shearouse
Clerk of Court
Supreme Court of South Carolina
P O Box 11330
Columbia, SC 29211

Re Dunes West Golf Club, LLC v Town of Mount Pleasant
Case No 2009-CP-10-3723
Our File No 1895 010

RECEIVED
JUL 27 2011
SC SUPREME COURT

Dear Mr Shearouse

I have enclosed the original of the Notice of Appeal by the Defendant Dunes West Golf Club LLC in the above matter, with Proof of Service on opposing counsel and \$150 filing fee Appellant has received the transcript from the court reporter

Thank you for your courtesies in accomplishing this filing With kind regards, I am

Sincerely

PRATT-THOMAS WALKER P A



G Trenholm Walker

GTW/njdm

Enclosures (As noted)

c Julie Armstrong Clerk of Court
Frances I Cantwell Esq
R Allen Young, Esq
Rob Parker

PROFESSIONAL ASSOCIATION

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KATHLEEN FOWLER MONOC

June 24, 2011

U S MAIL [X] FACSIMILE [] FEDERAL EXPRESS []

Julie Armstrong
Clerk of Court, Charleston County
100 Broad Street
Charleston, SC 29401

Re Dunes West Golf Club, LLC v Town of Mount Pleasant
Case No 2009-CP-10-3723
Our File No 1895 010

Dear Julie

I have enclosed a copy of the Notice of Appeal by Dunes West Golf Club in the above matter, with Proof of Service on opposing counsel

Thank you for your courtesies in accomplishing this filing With kind regards, I am

Sincerely

PRATT-THOMAS WALKER P A



G Trenholm Walker

GTW\mjdm

Enclosure (As noted)

c Hon Daniel E Shearouse
Frances I Cantwell Esq
R Allen Young, Esq
Rob Parker

RECEIVED
JUN 27 2011
SC SUPREME COURT

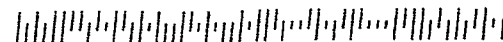
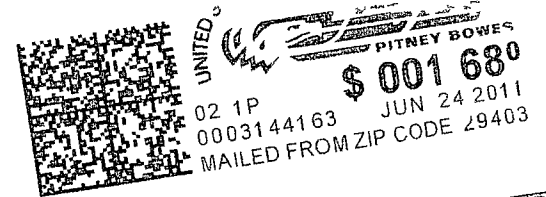
PRATT-THOMAS | WALKER

ATTORNEYS AT LAW

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The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P O Box 11330
Columbia SC 29211



STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
DUNES WEST GOLF CLUB, LLC,)
)
Plaintiff,)
)
vs)
)
TOWN OF MOUNT PLEASANT,)
)
Defendant)
_____)

IN THE COURT OF COMMON PLEAS

CASE NO 2009-CP 10-3723

ORDER GRANTING
SUMMARY JUDGMENT

This matter is before me on Defendant Town of Mount Pleasant's motion for summary judgment. A hearing was held on May 9, 2011. After having reviewed the pleadings and the Record produced by the parties¹ and having considered the argument and legal memoranda of counsel, I grant the motion. My reasoning follows.

In the 2005-2006 timeframe, a number of golf courses along coastal South Carolina were converted to residential uses, to include the Kings Grant Course on Dorchester Road in Charleston County. In response to those events, the Town Council of Mount Pleasant instructed its planning staff to review the zoning applicable to every golf course in the Town and to prepare a report on the potential for unilateral conversion of the courses to other uses. The staff report revealed that the zoning on most of the courses in the Town allowed for the conversion of golf courses to other uses with little, if any, Town oversight. (Court Ex 1, Tab 1, Dep Farrell, p 9, line 22 – p 13, line 9, Tab 2, Staff report)

¹ The Record consists of Court Exhibits 1, 2 and 3 and the depositions of J. T. McMickle, John Wieland, Kevin Popson, Stuart Whiteside, Christopher Donato, Christiane Farrell, Walter Kent Prause III, Joel Ford, Michael Robinson, Richard Marlow and Daniel C. Forsberg, along with the exhibits to these depositions.

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JULIE ARBUSTROG
CLERK OF COURT
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To provide a process to control golf course conversions, the Town Council enacted an ordinance creating a new zoning district, the Conservation Recreation Open Space district (CRO) (herein "CRO Ordinance") Uses permitted in the CRO district are recreationally based, and include golf courses, tennis courts, swimming facilities, playing fields and accessory uses Among the purposes of the district are to provide and maintain a community wide network of green and recreational spaces, to lessen hazards posed by periodic flooding associated with development and to guard against the introduction of inappropriate uses on existing recreational lands In tandem with the creation of CRO district, Town Council enacted ordinances rezoning all golf courses in the Town, both public and private, to the CRO district The Golf Course at Dunes West was rezoned CRO by Ordinance 06035 effective as of June 14, 2006 (herein "Rezoning Ordinance") (Court Ex 1, Tab 3, CRO Ordinance, Tab 4, Rezoning Ordinance, Tab 5, Dep Farrell, p 12, line 22 – p 13, line 9)

Dunes West is a planned community The community was initially developed in unincorporated Charleston County The vast majority of the community was annexed to the Town in 1990 Upon annexation, the Town carried forward the planned development zoning applied by the County, with minor modifications When annexed, the golf course was already constructed (Court Ex 1, Tab 7, Tab 8, Ford Dep , p 64, lines 10-18)

The golf course at Dunes West is laid out over six (6) contiguous tax map parcels The course was laid out in the early 1990's and has been continuously used as a golf course since that time Little, if any changes have been to the course since its initial construction (Court Ex 1, Tab 7, Prause Dep, p 50, lines 3-20, Tab 8, Popson Dep , p 83, line 8 – p 85, line 2)

RWD2

The Town's Comprehensive Plan designated these parcels as open space. The Rezoning Ordinance was applied to all these parcels (Court Ex 1, Tab 4, Rezoning Ordinance, Tab 6, Dep Farrell, p 112, line 24 – p 113, line 7)

John Wieland Homes and Neighborhoods (herein "JWHN") is now the master developer of Dunes West, having purchased these rights and the undeveloped portion of the Dunes West community in 2002. JWHN is a privately held corporation controlled by John Wieland (herein "Wieland")

In the latter part of 2004, the Dunes West Golf Course came on the market. Wieland put the course under contract, formed Dunes West Golf Club, LLC (herein "Golf Club"), and in March 2005, the Golf Club purchased the six tax map parcels that comprised the golf course from Scratch Golf Company for the asking price of \$4 million. The purchase was financed by an intercompany loan to the Golf Club from JWHN. When purchased, the six parcels were subject to the Dunes West Planned Development (herein "Dunes West PD"). Though the six parcels were then used for golf and recreational pursuits, under the Dunes West PD, single and multi family houses were allowed uses on the parcels (Court Ex 1, Tab 9 Dunes West PD, Tab 10, Deed, Tab 11, Answers to Interrogatories, Tab 12, Dep McMickle, p 7, line 4 – p 8, line 7)

Wieland testified the course was bought primarily for its development potential (Dep Wieland, p 13, line 2 – p 14, line 24). Kevin Popson, the designated Rule 30(b)(6) witness on matters pertaining to the acquisition of the course, testified that it was purchased not just for development potential, but to gain control of the course to avoid its being "run into the ground" by a third party to the detriment of other Wieland holdings in the neighborhood. Mr Popson testified that it was never the intent of the Golf Club to develop the entire course. Mr Popson testified that the Claimed Developable Lands consisted only of the 25.16 acres shown on Court

RMS3

Exhibit 1, Tab 44 As for the purchase price, Mr Popson testified the \$4 million was considered a fair price for the course with the Claimed Developable Lands being a gift J T McMickle, the Rule 30(b)(6) witness designated to testify on finances, testified that, as for golf courses, Wieland entities purchased or constructed courses not to make money, but as amenities to Wieland neighborhoods (Court Ex 1, Tab 45, Tab 46, Court Ex 3, Popson Dep Excerpts, Court Ex 1, Tab 27)

When the CRO and Rezoning Ordinances were under consideration, the Golf Club appeared before Town Council and contended that the tax map parcels comprising the golf course included lands not required for golf course play The Golf Club claimed that some 60 of the 256 acres contained within the tax map parcels were not needed for the golf course operations (herein " Claimed Developable Lands") No plat identifying the Claimed Developable Lands then existed and no graphic or other pictorial depiction of the Lands was presented to the Council The Town Council enacted the Rezoning Ordinance, applying it to the entirety of the six tax map parcels (Court Ex 1, Tab 13, Council Minutes, 6/13/06)

In January 2008, the Golf Club petitioned to rezone approximately 18 acres of the golf course tax map parcels to residential use The location of the acreage sought to be rezoned fell within areas of play of the golf course If developed for residential use, alterations to the golf course would have been necessary, to include relocating cart paths and the fairway of the 10th hole Residential development on the acreage sought to be rezoned also contemplated the abandonment of an easement not owned by the Golf Club The rezoning request sparked spirited public debate The Planning Commission recommended to Council that the rezoning not be approved Shortly thereafter, the Golf Club thereafter withdrew its application (Court Ex 1,

RMSY

Tab 14, 2008 Rezoning Application, Tab 15, Planning Commission Minutes, 1/23/08, Tab 16, Planning Committee Minutes, 2/4/08, Tab 17, Letter of Withdrawal)

In April 2009, the Golf Club again applied to have a portion of the golf course tax map parcels rezoned. The 2009 rezoning request also included acreage within areas of play that would have required alterations to the golf course, to include reconfiguring of the fairway of the 10th hole, shortening a hole, moving tee boxes and relocating numerous cart paths. (Court Ex 1, Tab 18 2009 Rezoning Application, Tab 19, Power Point Presentation, Tab 20, LaFoy Report, Tab 49, Forsberg Report)

The application came before the Planning Commission on April 29, 2009. Public debate was again spirited. The Planning Commission voted to recommend to Town Council that the rezoning not be approved. (Court Ex 1, Tab 21, Planning Commission Minutes, 4/22/09)

The application then came before the Planning Committee of Town Council. The Committee voted to recommend that Council defer action for 30 days. At the Council meeting held on May 12, 2009, numerous residents appeared in opposition to the rezoning. Council deferred the issue. At its meeting held on June 9, 2009, Town Council denied the rezoning by refusing to give first reading to an ordinance that would have authorized it. (Court Ex 1, Tab 22, Planning Committee Minutes, 5/5/09, Tab 23, Council Minutes, 5/12/09, Tab 24 Council Minutes, 6/9/09)

In 2008, the Golf Club, along with two (2) other entities controlled by Wieland, borrowed approximately \$8.7 million from Bank of America. The loan was collateralized by the Dunes West Golf Course and two other golf courses in the Atlanta area owned by Wieland. The debt was apportioned equally to the three courses resulting in approximately \$3 million being allocated to the Dunes West Golf Club. In undertaking this financing, Bank of America retained

RMS

Cushman and Wakefield to appraise the courses. The appraisal valued the Dunes West Golf Course at \$ 4 9 million. The appraisal noted the Golf Course was zoned CRO. The appraisal concluded the highest and best use of the property if vacant, and if improved, was a golf course. Mr. McMickle testified this appraisal, in his opinion, was low. (Court Ex. 1, Tab 25, Commitment Letter, Tab 26, Appraisal Excerpts, Tab 27, Dep. McMickle, p. 7, line 4 – p. 12, line 12)

The Bank of America loan was restructured in 2010. The Cushman and Wakefield appraisal used in conjunction with this transaction valued the course, with the CRO zoning in place, at \$3 5 million. Mr. McMickle testified the drop in value from the 2008 appraisal was attributable to the economy. (Court Ex. 1, Tab 28, Appraisal Excerpts, Tab 29, Dep. McMickle, p. 13, line 16 – p. 16, line 16)

The Bank of America loan proceeds were not used to pay down the intercompany loan owed by the Golf Club to JWHN. The loan proceeds were used to make a \$3 million cash distribution by the Golf Club to Wieland, its owner. (Court Ex. 1, Tab 39, Dep. McMickle, p. 41, line 6 – p. 42, line 1)

Mr. McMickle testified that, for accounting purposes, the 3 golf courses owned by Wieland are combined on the books, and are permitted to borrow from one another so that each reflects a positive cash flow. As for Dunes West, he testified that this golf course performs better than the other Wieland courses in Atlanta and that it generates a positive cash flow. (Court Ex. 1, Tab 31, Dep. McMickle, p. 16, line 16 – p. 17, line 6, Tab 32 Dep. McMickle, p. 54, line 15 – p. 57, line 3)

On June 12, 2009, this action was commenced. The Golf Club contests the validity of the CRO and Rezoning Ordinances as applied to its property, claims the Ordinances constitute a

RMD 6

taking of Claimed Developable Lands, alleges constitutional violations of due process and equal protection and seeks declaratory relief and damages

STANDARD OF REVIEW

Summary judgment is warranted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law Rule 56(b), SCRPC

In determining whether any triable issues of fact exist the evidence and all inferences from it must be viewed in the light most favorable to the nonmoving party Koester v Carolina Rental Ctr 313 S C 490 493 443 S E 2d 392 394 (1994)

In cases where the preponderance of the evidence is the burden of proof, the nonmoving party is required to submit a scintilla of evidence to withstand a motion for summary judgment In cases requiring a heightened burden of proof or in cases applying federal law, the nonmoving party must submit more than a scintilla of evidence to withstand a motion for summary judgment Hancock v Mid South Management Co., Inc 318 S C 325, 330-331, 673 S E 2d 801, 803 (2009)

Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case the nonmoving party must come forward with specific facts showing a genuine issue for trial Petersen v West American Ins Co., 336 S C 89, 94, 518 S E 2d 608, 610 (Ct App 1999)

Entry of summary judgment is mandated, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and upon which that party will have the burden of proof at

RMD7

trial, because a failure of proof of an essential element of the nonmoving party's case necessarily renders all other facts immaterial Celotex Corporation v Catrett, 477 U S 317 (1986)

APPLICABLE LEGAL PRINCIPLES

Rezoning is a legislative function Leonardis v City of Greenville, 316 S C 471, 450 S E 2d 597 (Ct App 1994)

There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application Harbit v City of Charleston, 382 S C 383, 675 S E 2d 776 (Ct App 2009)

A zoning ordinance is presumptively valid and the party attacking it must show its invalidity by clear and convincing evidence Town of Scranton v Willoughby, 306 S C 421, 412 S E 2d 424 (1999)

EQUAL PROTECTION

The Golf Club's equal protection claim is bottomed on the circumstance of a rezoning being approved at Snee Farm, another golf course in the Town that had been rezoned CRO. The Golf Club contends it is similarly situated to Snee Farm, and the denial of its application for a rezoning violated its rights of equal protection (Ex 33, Complaint, Seventh Cause of Action)

To establish an equal protection claim, a claimant must show that it was treated differently from others similarly situated without rational basis, and that the difference in treatment was the result of intentional, invidious discrimination. A benefit bestowed to one but denied to another does not give rise to an equal protection claim. A violation is established only if a claimant can prove the governing body intended to discriminate Whaley v Dorchester

RMD &

County Board of Zoning Appeals, 337 S C 568, 575 576, 524 S E 2d 404, 408 (1999), Sylvia Development Corporation v. Calvert County, Maryland, *supra*, 48 F 3d at 819 (4th Cir 1995)

In 2006, the owner of the Snee Farm golf course filed an application with the Town to rezone approximately 20 acres from the CRO district to a PD, planned development district. The rezoning applied to 20 contiguous acres, to allow for the development of 58 units. Monies generated from sales were to be applied to razing the clubhouse and reconstructing a new one, making improvements to tennis courts, and constructing a new events pavilion, pool, and practice green with an expanded driving range. The rezoning would have resulted in minimal alteration to areas of play of the course. Politically, the Snee Farm community was essentially split as to the merits of the proposal. (Court Ex 1, Tab 37, Snee Farm PD, Tab 38, Dep Prause, p 32, line 23 – p 34, line 4, Tab 39, Dep Prause, p 38, line 25 – p 40, line 9)

The Golf Club's proposal was to rezone approximately 18 acres and develop 32 units. The acreage was not contiguous. The rezoning would have resulted in alterations to the 10th hole fairway, the relocation of cart paths, the shortening a hole from a par four to a par three and moving tee boxes. The monies generated from sales were to have been applied to unspecified on course improvements, and to off course improvements. Politically, the rezoning proposal was not embraced by the Dunes West community. (Court Ex 1, Tab 40, Dep Prause, p 39, line 12 – p 40, line 9, Tab 20, LaFoy Report)

From a land use perspective, the Snee Farm proposal presented a compact, contiguous, unified site design that caused little alteration to the areas of play of the golf course. The Dunes West proposal contemplated spattering new lots throughout the golf course tracts that caused multiple alterations to the areas of play. (Court Ex 1, Tab 37, Snee Farm PD, Tab 18, 2009 Rezoning Application, Tab 34, Dep Prause, p 39, line 12 – p 40, line 9)

The differences between the proposals substantiate that there existed a rational basis for approving one rezoning and not the other. But even if this issue was for a jury, the equal protection claim fails as a matter of law because there is no evidence in the Record that the difference in treatment was motivated by any ill will, or purposeful intent to harm or otherwise discriminate against the Golf Club. The testimony in the Record is that in dealings with the Town, the Golf Club has been treated fairly and professionally. In the words of John Wieland, "nobody picked on us" (Court Ex 1, Tab 41, Dep Popson, p 17, line 6 – p 20, line 10, Tab 42, Dep Whiteside, p 8, lines 3-21, Tab 43, Dep Wieland, p 32, lines 1-4). Absent proof of intentional, invidious discrimination, there is no viable equal protection claim. Sylvia Development Corporation v Calvert County, Maryland, supra, 48 F 3d at 820, Butler v Town of Edgefield, 328 S C 238, 251, 493 S E 2d 838, 845 (1997). Because there is no evidence of intentional discrimination, the equal protection claim fails, entitling the Town to summary judgment.

DUE PROCESS

The Golf Club contends its due process rights were violated because the application of the CRO zoning district to the six tax parcels that comprise the golf course was arbitrary and excessive, resulting in the loss of its vested right to develop its land. (Complaint, Fifth Cause of Action)

A denial of substantive due process requires evidence of an arbitrary or capricious deprivation of a cognizable property interest rooted in state law. This being a zoning case, there must be evidence that the Council's actions had no foundation in reason and were but arbitrary and irrational exercises of power, with no relationship to the public health, morals, safety or welfare. There must be evidence that the purpose behind the Ordinances had no conceivable

RMH/TO

rational relationship to the exercise of traditional police power through zoning Sylvia Development Corp v Calvert County, *supra*, 48 F 3d at 827, Harbit v City of Charleston, *supra*, 382 S C at 394, 675 S E 2d at 782

Due process is not denied simply because a legislative body does not permit a landowner to make the most beneficial use of his property Bear Enterprises v County of Greenville, 319 S C 137, 141, 459 S E 2d 883, 886 (Ct App 1995)

The Golf Club contends it had vested rights to residentially develop its property by virtue of the zoning in place at the time of purchase and by virtue of S C Code Ann § 6-29 1510, *et seq* (Vested Rights Act) I disagree

Zoning, in and of itself, creates no vested rights To establish a vested right to zoning, a landowner must show something more than a mere expectation that zoning will not change He must demonstrate that he had, at the time of the rezoning, established a use rendered nonconforming by the rezoning effort Friarsgate, Inc v Town of Irmo, 290 S C 266, 273, 349 S E 2d 891, 895, (Ct App 1986), (‘ a landowner has no right to insist that property not be restricted by a zoning regulation absent a showing that he has, prior to the effective date of the regulation, established a nonconforming use 101(a) C J S Zoning and Planning, Section 70 (1979)) Per the Record, the Golf Club has made no such showing

The Record reveals that when the Rezoning Ordinance was passed, all of the Golf Club’s properties were being used only for golf course and recreational uses No other use had been established (Court Ex 1, Tab 35, Dep Popson, p 38, line 11 – p 39, line 20) Even if the Claimed Developable Lands were within the rezoned parcels, the Record demonstrates that such lands were not being used in a manner inconsistent with the CRO Ordinance regulations Under the law, the Golf Club’s expectation that its zoning would not change does not rise to the level of

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a vested right As the Golf Club cannot demonstrate that when the CRO and Rezoning Ordinances were enacted it was using its properties for residential uses, it had no vested development rights to such uses and thus no cognizable property interest rooted in state law

The Golf Club's claim of the deprivation of a property right under the Vested Rights Act is also unavailing

The Vested Rights Act became law on July 1, 2005 The Act provided for a two (2) year vested right in approved site specific development plans as defined per the Act The Act required municipalities to provide a process to allow a landowner with a vested right to apply for an extension of the right at the end of the vesting period A municipality is required to grant up to five (5) extensions of the right, provided there has been no amendment to land regulations that would prohibit the approval S C Code Ann § 6-29-1530 (A) (1) and (2)

The Act specifically provides that no change in zoning made subsequent to vesting that affects property subject to a vested sight specific development plan operates to "affect, prevent or delay development of the real property under a vested sight specific development plan" S C Code Ann §6-29-1540 (13)

) The Town amended its Land Development Regulations and Zoning Code to incorporate provisions of the Act The Town Land Development Regulations and Zoning Code recognize a planned development as a site specific development plan (Court Ex 2, Affidavit of Prause)

Per the facts here, the Golf Club can establish that as of July 1, 2005, it had a vested right in a sight specific development plan, that being its planned development zoning Per the Act, that right to zoning was vested for two years, or until June 30, 2007 The CRO and Rezoning Ordinances were passed in June 2006 As the Vested Rights Act affirmatively provides that a change in zoning does not affect or prevent development of property subject to an approved site

Amended

specific development plan, neither the CRO nor Rezoning Ordinance resulted in any deprivation of the right of the Golf Club to proceed with development under its planned development zoning through June 30, 2007

The Record reveals the Golf Club did not avail itself of its right under the Vested Rights Act. No subdivision or other application was made with respect to the golf course property until January 2008, and this application was ultimately withdrawn. The only application carried to completion was made in April 2009. By then, the Golf Club's vested right in the planned development zoning had expired.

There is no evidence in the Record to substantiate that the Golf Club had any rights vested under common law. To establish vesting under this theory, there must be evidence of reliance on the zoning in place, either by acting under a permit or having by-right entitlement to a permit based on a complete application on file when the change in regulations occurred. Whitfield v Seabrook, 259 S C 66, 70, 190 S E 2d 743, 745 (1972) (*The building permit issued to the appellant created no vested right, it merely authorized him to act if he, at a time when it was lawful, exercised the privilege granted him, he thereby acquired a property right which would be protected*), Pure Oil Division v City of Columbia, 254 S C 28, 34, 173 S E 2d 140,143 (1970) (*We have recognized the rule, that, when a zoning or building permit has been properly issued and the owner has incurred expenses in reliance thereon, he acquires a vested property right therein. In the present case, the owner was not issued a permit but acted in reliance on the ordinance as it existed at the time of his application for the permit. We see no sound reason to protect vested rights acquired after a permit is issued, and to deny such protection to similar rights acquired under an ordinance as it existed at the time of a proper application*). Predevelopment expenditures for plans and specifications do not establish a vested

right until a permit is issued or a proper application for a permit has been submitted. The Record does not contain evidence of either circumstance.

The CRO and Rezoning Ordinances are not arbitrary, facially or as applied. The protection and preservation of open space, the provision of community recreational areas, and the protection against periodic flooding are all legitimate governmental interests traditionally advanced by way of zoning and land use regulations.

And the application of the Ordinances to the Golf Club's property was wholly consistent with how its property, even the Claimed Developable Lands, was then being used. That the Golf Club may not have the most beneficial or financially lucrative use of its property simply does not support a due process claim. Bear Enterprises v. County of Greenville, *supra*.

The Record contains no evidence of a due process violation.

TAKINGS

The Golf Club contends the CRO and Rezoning Ordinances deprive it of all economic or beneficial use of the Claimed Developable Lands, resulting in a categorical or regulatory taking of its property (Complaint, Second and Third Causes of Action).² The only property the Golf Club claims to have been "taken" by the Ordinances is the roughly 25 acres shown on Court Ex 1, Tab 44, not 60 acres as originally contended. The Golf Club does not dispute the application of the Ordinances to its remaining property, conceding it never intended to develop that property. The acreage for which it seeks compensation are part of the parent tax map parcels and is within areas of play of the course, contrary to the initial representations to Council that the Rezoning

² The First Cause of Action of the Complaint alleges the Rezoning Ordinance constituted an unlawful exaction. At the summary judgment hearing, the Golf Club withdrew this cause of action.

Ordinance included areas not part of the play areas of the course (Court Ex 1, Tab 45, Dep Popson, p 59, line 18 – p 61, line 10, Tab 46, Dep Popson, p 65, lines 2 5)

Takings jurisprudence seeks a balance between private and public interests and is designed to prohibit the government “ from forcing some people alone to bear public burdens which, in fairness and justice, should be borne by the public as a whole” Armstrong v United States, 364 U S 40, 49 (1950)

The Golf Club’s takings claims are premised on the theory that the Claimed Developable Lands, though never legally separated from their parent tracts, can be “conceptually severed” and considered as stand alone, legally existing, individual parcels of property

In evaluating the confiscatory effect of a regulation, the law requires that the “parcel as a whole” be viewed

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated In deciding whether a particular governmental action has affected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole – here, the City block designated as the “landmark site”

Penn Central Transportation, Co , et al v New York City, et al, *supra*, 438 U S at 130 131 (1978) South Carolina law is in accord See Beard v South Carolina Coastal Council, 304 S C 205, 207, 403 S E 2d 620, 622 (1991), where this very reasoning of the United States Supreme Court was adopted See also Animas Valley Sand and Gravel Inc v Board of Commissioners of the County of La Plata, 38 P 3d 59, 69, (Colo 2001) (*were we to accept AVSG s position that a court should evaluate the effect of a regulation with respect to only on segment of the parcel, virtually any land use regulation would effect a taking if the landowner defined the relevant parcel small enough For example, were partitioning allowed, a zoning ordinance that*

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*required a setback would effect a taking of the land between the lot line and the building line
Such a regime would defeat the balance of interests reached in takings jurisprudence)*

Determining the relevant parcel is the threshold step in a takings analysis. When multiple tracts are in play, a number of factors are germane to determining whether the tracts should be considered as a unit, or separately. Factors include when and how the tracts were purchased, their physical relationship to one another, how the owner has used the tracts, and how the tracts have been developed. District In town Properties Limited Partnership v District of Columbia, 198 F 3d 874, 889 (D C Cir 1999) *(The District Court used several factors to determine the relevant parcel: the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot. An analysis focused on these factors is eminently sound and it mirrors the approach taken by other courts in regulatory takings cases (citations omitted))*

On this Record, I find the relevant parcel, or “parcel as a whole”, in this case to be the six tax map parcels that comprise the golf course. From their initial development, these parcels have been used as a unit, as a golf course. The Golf Club did not set out to purchase just the Claimed Developable Lands. It purchased all the tracts and created a separate corporate entity with a title having a golf emphasis i.e., “Dunes West Golf Club, LLC”, to own them. It used the tracts as a golf course and did not avail itself of its vested right window to pursue residential development on the tracts. It mortgaged the tracts as a unit. These facts compel but one conclusion: the relevant parcel are the six tracts, not fragments of them.

The reasoning of the New Hampshire court in Quirk v Town of New Boston, 140 N H 124, 663 A2d 1328 (1995) resonates.

In the present case, we find no compelling reason to view the perimeter as a discrete segment of the campground. That the plaintiff has never

treated the perimeter of his campground as distinct from the interior supports this finding “At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety” (citations omitted)

Quirk, 140 N H at 132, 553 A2d at 1333

Like the campground owner, the Golf Club purchased and thereafter treated, for purposes of use, financing and taxes the Claimed Developable Lands as part and parcel of the parent tracts to which they legally belong

The Ordinances have not effected a categorical taking After the parcels were zoned CRO, two independent appraisals demonstrated the parcels, used as a golf course, retained significant value, in the multiple millions This value enabled the Golf Club to secure a loan and pay its owner \$3 million (Court Ex 1, Tab 26, Tab 30, Dep McMickle, p 41, line 6 – p 42, line 1) The contention that the Ordinances rendered the parcels economically idle cannot be substantiated under any view of the facts

Neither have the Ordinances effected a regulatory taking

A regulatory taking analysis requires a balancing of factors, to include the character of the government action, the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with distinct investment backed expectations If, after application of the regulation, the claimant is left with beneficial use of his property, there is no regulatory taking Penn Central Transportation, Co., et al v New York City, et al, supra, 438 U S at 124 South Carolina takings jurisprudence is in accord Byrd v City of Hartsville, 365 S C 650, 620 S E 2d 76 (2005)

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The CRO Ordinance is bottomed on legitimate, land use considerations. Preservation of open space and recreational opportunities, flood prevention and curbing ill effects of indiscriminate golf course conversions are all proper zoning considerations.

And despite the Rezoning Ordinance, a beneficial use of the Golf Club's property remains. All evidence reveals that the application of the CRO and Zoning Ordinances to the six parcels has not rendered them valueless or without beneficial use. The Bank of America appraisals, each rendered post rezoning, identified a golf course as the highest and best use for the parcels and attributed significant value to the parcels when so used. Nor does the Golf Club contend that the use of the parcels, as a course, is not beneficial use, as its intention that a golf course remain on the parcels.

As for distinct investment backed expectations, when the Golf Club purchased the six parcels and when the Rezoning Ordinance was passed, all six parcels were then being used for a recreational pursuit, that being a golf course. This fact bears noting, as courts traditionally look "to the existing use of property as a basis for determining the extent of interference with the owner's 'primary expectation' concerning the use of the parcel." Esposito v. South Carolina Coastal Council, 939 F.2d 165, 170 (4th Cir. 1991), quoting *Penn Central*, 438 U.S. at 136. See *Penn Central*, *supra*, 438 U.S. at 136 (*the New York City law did not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel*). The Rezoning Ordinance did not interfere with the Golf Club's traditional use of the property as a golf course. And, because the Golf Club never intended to develop the whole course, the Rezoning Ordinance does not

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interfere with Golf Club's anticipated future use of the parcels, all of which brings into question whether its primary expectation concerning the use of the parcels has been affected at all. And while the Golf Club may have intended to subdivide lots from the parcels, it never timely did.

That the CRO and Rezoning Ordinance have resulted in a lesser value to the parcels is not dispositive. The dispositive issue is what value remains. Keystone Bituminous v DeBenedictis, 480 U.S. 470, 497 (1987) (our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property). The evidence demonstrates significant value in the parcels as currently zoned and used. On this Record, the takings causes of action fail as a matter of law.

NOW, THEREFORE based on the foregoing it is

ORDERED, that the Defendant's motion for summary judgment be, and hereby is, granted.

AND IT IS SO ORDERED.

Charleston, South Carolina

May 18, 2011


R. Markley Dennis, Jr.
Presiding Judge

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