STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

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 FINAL BRIEF

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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 award 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 constitutes an unlawful exaction (First Cause of Action), that the Rezoning Ordinance constitutes a permanent and regulatory taking of property (Second and Third Causes of Action), that the Rezoning Ordinance, being excessive, is 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 violates 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 layed 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 , Vol II, Ford Dep , p 901, 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 , Vol III, Prause Dep , p 1296, lines 2-20, Vol II, Popson Dep , p 787, line 8 – p 788, 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 , Vol I, p 121, Court Ex 1 (Tab 9), Vol III, pp 1004-1005, 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 , Vol III, Prause Dep , p 1296, line 21 – p 1297, 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 , Vol I, p 116, Court Exhibit 1 (Tab 4), Vol III, pp 1106-1107, Vol III, pp 1302-1303, Answer to Interrogatory 5, Vol I, p 20, Complaint, par 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 , Vol I, pp 122-124, Court Exhibit 1 (Tab 10) Deed, Vol II, Popson Dep , p 737, line 4 – p 738, line 11, p 753, lines 4-23, Vol II, Wieland Dep p, 710, lines 9-17, Vol III, McMickle Dep , p 1219, line 4 – p 1220, 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 , Vol II, Popson Dep , p 739, line 7 – p 746, 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 Courses 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 , Vol III, Farrell Dep , p 906, line 22 – p 908, line 2, Vol III, Prause Dep , p 1286, line 6 – p 1287, line 15, Vol III, Farrell Dep , Ex 3, Ex 4, Ex 6, pp 1052-1057, pp 1060-1068, Vol II, Ford Dep , p 872, line 24 – p 873, line 23, Vol II, Popson Dep , p 770, line 14 – p 771, 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 (Vol 1, p 115, Court Ex 1 (Tab 3), Vol III, pp 1097-1099, 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 , Vol I, p 115, Court Ex 1 (Tab 3), Vol III, pp 1097-1099, CRO Ordinance, Vol I, p 116, Court Ex 1 (Tab 4), Vol III, pp 1106-1107, Rezoning Ordinance, Vol III, Dep Farrell, p 909, line 22 – p 910, 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 , Vol I, p 116, Court Ex 1, (Tab 4), Vol III, pp 1106-1107, Rezoning Ordinance, Vol III, Dep Farrell, p 988, line 24 – p 989, 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 , Vol I, p 137, Court Ex 1 (Tab 13), Vol III, pp 1085-1094, Council Minutes, Vol II, Popson Dep , p 743, line 18 – p 745, line 2, p 764, line 22 – p 765, line 5, Vol II, Wieland Dep , p 707, line 11 – p 709, 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 , Vol II, Popson Dep , p 743, line 18 – p 744, 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 , Vol I, pp 138-139, Court Ex 1 (Tab 14), 2008 Rezoning Application, Vol I, p 140, Court Ex 1 (Tab 15), Vol III, pp 1184-1191, Planning Commission Minutes, 1/23/08, Vol 1, p 141 Court Ex 1 (Tab 16), Vol III, pp 1192, Planning Committee Minutes, 2/4/08, Vol I, p 142, 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 , Vol I, pp 143-149, Court Ex 1 (Tab 18), 2009 Rezoning Application, Vol I, p 150, Court Ex 1 (Tab 19), Vol II, pp 817-829, Power- Point Presentation, Vol I, pp 151-161, Court Ex 1 (Tab 20), LaFoy Report, Vol II, pp 632-649, 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 , Vol I, p 162, Court Ex 1, (Tab 21), Vol III, pp 1193-1199, 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 , Vol I, p 163, Court Ex 1 (Tab 22), Vol III, pp 1200-1202, Planning Committee Minutes, 5/5/09, Vol I, p 164, Court Ex 1 (Tab 23), Vol III, pp 1203-1214, Council Minutes, 5/12/09, Vol I, p 165, Court Ex 1 (Tab 24), Vol III, pp 1215-1217, 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 , Vol I, pp 166-172, Court Ex 1 (Tab 25), Commitment Letter, Vol I, pp 173-185, Court Ex 1 (Tab 26), Appraisal Excerpts, Vol III, Dep McMickle, p 1219, line 4 – p 1224, line 12)

[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 (R Vol III McMickle Dep p 1236 line 16 – p 1237 line 3, Vol II Popson Dep p 734 line 24 – p 737 line 16)

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 , Vol I, pp 187-193, Court Ex 1 (Tab 28), Appraisal Excerpts, Vol III, Dep McMickle, p 1225, line 16 – p 1128, line 15)

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 (R , Vol III, Dep McMickle, p 1232, line 6 – p 1233, line 1)

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 (R , Vol I, p 196, Court Ex 1 (Tab 31), Vol III, Dep McMickle, p 1228, line 16 – p 1229, line 6, Vol I, p 197, Court Ex 1 (Tab 32), Vol III, Dep McMickle, p 1234, line 15 – p 1237, 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 , Vol II, Popson Dep , p 739, line 7 – p 745, line 14, p 763, line 14 – p 764, line 8, p 767, lines 1-10, Vol II, Popson Dep , Ex 6 and 7, pp 815-816)

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 , Vol II, Popson Dep , p 765, line 18 – p 766, line 25, Vol II, pp 632-648, 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), SCRCP

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

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

[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 (R Vol II Popson Dep p 739 line 7 – p 745 line 14 p 763 line 14 – p 764 line 8 p 767 lines 1 10 Vol II Popson Dep Ex 6 and 7 pp 815 816)

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 , Vol II, pp 632-648, 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 , Vol II, Popson Dep , p 746, line 11 – p 747, line 20)

3 Prior to closing, the Golf Club informally identified areas of the Tracts that could potentially be put to residential uses (R , Vol II, Popson Dep , p 739, line 7 – p 745, 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 , Vol II, Popson Dep , p 739, line 7 – p 746, 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 , Vol II, Popson Dep , p 737, line 4 – p 738, line 4, p 771, lines 2-5)

6 The Golf Club Tracts were purchased in one transaction (R , Vol I, pp 122-134, 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 (R , Vol III, McMickle Dep , p 1220, line 25 – p 1221, line 13, p 1230, line 22 – p 1231, line 17, Vol III, McMickle Dep Ex 7, 8, 9, 10, 11, first 2 pages, Balance Sheets, pp 1242-1282)

8 After being purchased by the Golf Club, the Tracts continued to be used only for recreational purposes (R , Vol II, Popson Dep , p 746, line 11 – p 747, 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 , Vol II, Popson Dep , p 764, line 22 – p 765, line 5, Vol III, Prause Dep , p 1288, line 14 – p 1289, 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 , Vol II, Popson Dep , p 740, line 13 – p 743, 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 , Vol II, Wieland Dep , p 714, line 2 – p 716, 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 , Vol II, Popson Dep , p 764, line 22 – p 765, line 5, Vol III, Prause Dep , p 1288, line 14 – p 1289, line 15, Vol I, pp 138-139, Court Ex 1 (Tab 14), Vol I, p 142, Court Ex 1 (Tab 17), Vol I, pp 143-149, Court Ex 1 (Tab 18)

13 Each application made to rezone Claimed Developable Land included land within areas of play of the course (R , Vol I, p 138-139, Court Ex 1 (Tab 14), Vol I, pp 143-149, Court Exhibit I (Tab 18), Vol I, p 150 Court Exhibit I (Tab 19), Vol II, pp 817-829, Power Point Presentation, Vol I, pp 151-161, Court Exhibit I (Tab20), Vol I, pp 151-161, Court Ex 1 (Tab 20), Vol II, pp 632-648, Court Ex 1 (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 (R , Vol I, p 16, Order) 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 , Vol II, Popson Dep , p 746, line 6 – p 747, line 20, Vol III, McMickle, Dep , p 1220, line 25 – p 1221, line 13, p 1230, line 22 – p 1231, line 17, Vol III, McMickle Dep Ex 7, 8, 9, 10, 11, first 2 pages, Balance Sheets, pp 1242-1282, Vol II, Wieland Dep , p 714, line 2 – p 716, 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 (R , Vol I, pp 173-185, Court Ex 1 (Tab 26), 2008 Bank of America Appraisal, R , Vol I, pp 187-193, Court Ex 1 (Tab 28), 2009 Bank of America Appraisal) The Town's appraisal was consistent (R Vol I, pp 262-458, Court Ex 1 (Tab 47), Vol II, pp 459-631, Court Exhibit 1(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 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 Marin 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 tracts, 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 Oder 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 , Vol I, p 28, 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 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

[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

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 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 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 , Vol II, pp 649-655, 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 legislation 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 , Vol II, Ford Dep , p 867, line 10 – p 870, line 23, p 878, line 3 – p 880, line 25) The Golf Club's own witness testified that drainage issues were associated with some of the Claimed Developable Lands (R , Vol II, Whiteside Dep , p 840, line 14 – p 844, 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 , Vol I, pp 202-252, Court Ex 1 (Tab 37), Snee Farm PD, Vol III, Prause Dep , p 1290, line 23 – p 1292, line 4, p 1293, line 25 – p 1295, 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 , Vol III, Prause Dep , p 1294, line 12 – p 1295, line 9, Vol I, pp 151-165, 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 similarly 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 , Vol I, pp 202-252, Court Ex 1, (Tab 37), Snee Farm PD, Vol I, pp 143-149, 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 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 , Vol II, Popson Dep , p 726, line 16 – p 729, line 10, Vol II, Whiteside Dep , p 832, lines 3-21, Vol II ,Wieland Dep , p 717, 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)

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 , Vol III, Farrell Dep , p 975, line 19 – p 976, line 24, p 979, line 23 – p 982, 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 , Vol I, p 164, Court Ex 1 (Tab 23), Vol III, pp 1206-1207, Council Minutes 5/12/09)

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

January 13, 2012

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CERTIFICATE OF COUNSEL

I certify the within Final Brief complies with Rule 211(b), SCACR

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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

CERTIFICATE OF SERVICE

The undersigned certifies that on the 17th day of January, 2012, a true and correct copy of the Respondent Town of Mount Pleasant's Final Brief was placed in an envelope with first class postage prepaid affixed thereto and mailed to the following

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