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 REPLY BRIEF

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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 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 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 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 **(R p 707, lines 14-23, p 710, lines 9-10, p 711, lines 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 Brief at 4)**

The Town makes unsubstantiated assertions regarding golf course conversions happening along the coast **(Respondent's 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 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 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 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 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, R p 827)** 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 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 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, R p 819, Ex 19 to Def 's Mem In Supp , R p 821)**

DWGC did not base its taking damages on the potential residential development of all 60 acres but instead on approximately 32 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 R p 750, lines 7-23, p 767, line 11-p 769, line 23)**[1] The effect of

[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

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 eliminate 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 total taking (i e , Lucas[2]) and a regulatory partial taking (i e , Penn Central[3]) This Court

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feasibility of residential use nor the DWGC's reasonable economic expectations at the time it purchased the Property

[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)

has previously held that 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)

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 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)

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[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)

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 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 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 R pp 887-889)** 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 R p 741, line 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 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 R p 703, lines 14-23, p 710, lines 9-10, p 711, lines 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 R p 740, line 19-p 742, line 25, pp 798-801, Ex 2, Whiteside Dep R p 831, lines 13-18, p 834, lines 10-23, p 836, lines 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 R pp 741-742)** 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 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 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

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[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 **(Tr , R pp 91-93)** 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 structure[4] 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

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 extended 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 unrebutted 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 A2d 1328 (NH 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's 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, 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)

[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

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 **(Tr , R pp 91-93)**

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 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 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 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 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 C 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 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 Brief at 38-40)**

The Town is correct in its statement that the ordinance's professed purposes are legitimate public purposes **(Respondent's 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 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, R pp 1097-1099)**

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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The undersigned certifies that this Reply Brief complies with Rule 211(b), SCACR

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