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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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

City of North Myrtle Beach,

Appellant,

v.

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

Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court correctly concluded that the residency requirement created by certain provisions in sections 23-2 and 23-22 of the City's Zoning Ordinance for the ownership and use of cabana houses in North Myrtle Beach implicates the dormant Commerce Clause of the U.S. Constitution because it regulates an economic activity and has a substantial effect on interstate commerce.

II. Whether the trial court correctly ruled that the residency requirement imposed by the Zoning Ordinance for the ownership and use of a cabana house in North Myrtle Beach—which requires that cabana houses can only be used by a project in North Myrtle Beach and that a homeowners' association for that local project must own the cabana house—discriminates against interstate commerce on its face, in its effect, and in its purpose.

III. Whether the trial court correctly ruled that the City failed to meet its constitutional burden to establish that its stated municipal interests served by the residency requirement for use and operation of a cabana house in the City's R-4 (Resort Residential) zoning district advance a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives.

IV. Whether the trial court described which specific provisions of sections 23-2 and 23-22 of the Zoning Ordinance are deemed unconstitutional and for which the City is permanently enjoined from enforcing as a result.

STATEMENT OF THE CASE

This appeal follows the trial court's order, entered on November 20, 2023, enjoining Appellant, the City of North Myrtle Beach (the "City"), from enforcing certain restrictions imposed by sections 23-2 and 23-22 of the City's Zoning Ordinance as they relate to the ownership and use of cabana houses within the R-4 (Resort Residential) zoning district (the "R-4" District). (R. pp. 42–43). The trial court enjoined those restrictions because they violate the dormant Commerce Clause. Specifically, the trial court found that the residency requirement imposed by sections 23-2 and 23-22 of the City's Zoning Ordinance, which requires a cabana house located in the R-4 District to be owned by a homeowners' association and used exclusively by an affiliated "project" located in the City, discriminates against interstate commerce on its face, in its effect, and in its purpose. (R. p. 42).

The City's Zoning Ordinance authorizes property owners in the R-4 District to apply for a special exception permit to build a cabana house (also known as a beach club) on beachfront property for the use of "projects" in North Myrtle Beach not located near the ocean. According to the City's interpretation of its Zoning Ordinance, these cabana houses are to be used only by "projects" located in the City. The homeowners' and property owners' associations connected with Barefoot Resort & Golf, The Links Golf and Racquet Club, and Tidewater Planation, all located within the city limits of North Myrtle Beach, own cabana houses on the City's beachfront, for use by guests, homeowners, and rental customers of those "projects."

The lone exception is the cabana house at issue in this case, which is owned by Respondent Sun TRS Ocean Club LLC ("Sun") (a Michigan limited liability company). This cabana house is utilized primarily for the benefit of guests of the Sun Communities' RV Resort[1], located in

[1] The RV Resort is now known as Sun Outdoors Myrtle Beach. (R. p. 1382).

Conway, South Carolina. According to the City's interpretation of the applicable sections of the Zoning Ordinance, Respondents' ownership and use of the subject cabana house is illegal, because the RV Resort (as the applicable "project") is located outside the city limits of North Myrtle Beach, and the property is not owned by a homeowners' association for a project in the City.

On November 11, 2021, the City initiated this action seeking a declaration from the court that Respondents' use and ownership of property located at 1814 N. Ocean Boulevard in the City of North Myrtle Beach, Horry County, South Carolina (Lot 1, Block 18-A, Tilghman, Parcel Number 35501040048) (the "Property") violates applicable sections of the City's Zoning Ordinance. (R. pp. 49–56). Specifically, the City asked the trial court to order both Sun's ownership and the RV Resort's use of the property as a cabana house to "immediately cease and desist." (R. p. 54).

In response, Respondents counterclaimed for Declaratory Judgment/Injunctive Relief, asking the Court to declare the two relevant sections of the Zoning Ordinance unconstitutional under the dormant Commerce Clause, the Fourteenth Amendment Due Process Clause, and enter judgment against the City for violation of 42 U.S.C. § 1983 related to the deprivation of Respondents' constitutional rights. (R. pp. 71–83). Respondents also asserted a counterclaim for Inverse Condemnation/Regulatory Taking of the Property based on the City's claim for relief, should the Court determine the challenged portions of the Zoning Ordinance to be enforceable. (R. pp. 83–84).[2]

At the outset of litigation, the City moved for a preliminary injunction seeking to enjoin Respondents from both owning and utilizing the Property during the pendency of this action. After

[2] In an effort to streamline the issues for trial, the Sun Defendants voluntarily dismissed their Equal Protection counterclaim on July 10, 2023. (R. p. 111–12).

the trial court indicated that it was not inclined to issue a preliminary injunction depriving Sun of its ownership of the Property, the parties agreed to enter into a Consent Order regarding the use of the Property, limiting use of its facilities to beach club members not affiliated with the RV Resort, in exchange for jointly submitting the case to the South Carolina Business Court for an expedited resolution. (R. pp. 1–2). The Business Court declined to accept the case because the suit involved a public entity; hence, the Property remained closed pending a decision by the trial court.

On August 1, 2022, Respondents moved for a partial summary judgment on their dormant Commerce Clause counterclaim, which was denied on November 18, 2022, based on assertations from the City that it needed more time to conduct discovery into whether the challenged provisions of the Zoning Ordinance had a substantial effect on interstate commerce. (R. pp. 3–5). In a subsequent order denying Respondents' Motion, the trial court found that "a more comprehensive factual record was desirable to fairly determine the appropriate result." (R. p. 6–10). The trial court did not deny the motion as a matter of law, but rather because of a possible issue of material fact. (*Id.*)

On May 22, 2023, Respondents renewed their motion for partial summary judgment on their dormant Commerce Clause counterclaim, which was denied after a hearing on August 11, 2023. In denying Sun Defendants' Renewed Motion for Partial Summary Judgment, the trial court issued a Form 4 order that did not set forth reasons as to why the trial court denied the motion. (R. pp. 15–17).

The trial court granted the parties' joint motion to designate this case complex on June 6, 2023. The parties agreed to a bifurcation of the non-jury and jury issues which was encompassed in an order entered on June 7, 2023. (R. pp. 11–14). The Court entered the Second Amended Scheduling Order closing discovery on October 9, 2023 and setting the date certain for the first

phase of this trial on October 31, 2023. The non-jury trial was conducted between October 31, 2023 and November 3, 2023. The jury phase of the trial, which has not yet been tried, will be focused on Respondents' entitlement to damages under 42 U.S.C. §§ 1983 and 1988 for violation of its constitutional rights associated with the City's violation of the dormant Commerce Clause.

Immediately before trial, the parties consented to the substitution of Sun Carolina Pines RV, LLC for the misidentified Sun TRS Carolina Pines RV, LLC. Following the trial, the trial court took the matter under advisement and asked both parties to submit proposed orders for its consideration by November 13, 2023. The proposed orders were timely submitted to the trial court, and on November 16, 2023 the trial court's law clerk notified the parties, via e-mail, that the court had ruled in favor of Respondents. The trial court's order was entered on November 20, 2023, which enjoined the City from enforcing the residency restrictions imposed by sections 23-2 and 23-22 of the City's Zoning Ordinance, because those restrictions violated the U.S. Constitution's dormant Commerce Clause. (R. pp. 18–44).

On November 30, 2023, the City filed a Motion to Reconsider the trial court's order and an Amended Motion to Reconsider, pursuant to Rules 52(b), 59(a), and 59(e), SCRCP. (R. pp. 640–66). Respondents filed an opposition brief, and the trial court denied the City's Motion to Reconsider via a Form 4 Order on January 3, 2024. (R. pp. 45–47). This appeal followed.

STANDARD OF REVIEW

In an action at law, on appeal of a case tried without a jury, "the appellate court standard of review extends only to the correction of errors of law." *Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C.*, 353 S.C. 327, 334, 577 S.E.2d 468, 472 (Ct. App. 2003) (citation omitted). The trial judge's findings of fact will not be disturbed upon appeal, unless found to be without evidence

which reasonably supports the trial court's findings. *King v. PYA/Monarch, Inc.*, 317 S.C. 385, 388, 453 S.E.2d 885, 888 (1995) (citation omitted).

Additionally, "[i]n order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). "A bedrock part of error preservation is that an issue must have been ruled upon in the trial court in order for it to be preserved for appellate review." *Gleaton v. Orangeburg Cnty.*, 440 S.C. 350, 359, 891 S.E.2d 390, 395 (Ct. App. 2023). Further, it is well settled that "'[a]n issue may not be raised for the first time in a motion to reconsider.'" *Repko v. County of* Georgetown, 424 S.C. 494, 502, 818 S.E.2d 743, 748 (2018) (quoting *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009)).

STATEMENT OF FACTS

Respondents are wholly owned subsidiaries of Sun Communities, Inc., a publicly traded Real Estate Investment Trust that, through its subsidiaries, develops and operates manufactured housing communities, recreational vehicle resorts, and marinas. (R. p. 19; p. 1462, line 10–p. 1463, line 20). As of December 31, 2022, Sun Communities, Inc., and its subsidiaries owned and operated 669 properties in the United States and internationally, consisting of over 225,000 developed sites and over 47,000 wet slips and dry storage lots. (R. p. 1956).

The beachfront property at issue is owned by Sun and identified as Lot 1, Block 18-A, Tilghman, Parcel Number 35501040048 located at 1814 N Ocean Blvd. in the City of North Myrtle Beach, Horry County, South Carolina (the "Property"). Sun has an agreement with Respondent Sun Carolina Pines RV LLC ("RV Resort"), whereby it permits the RV Resort to use the Property (and the cabana house) as an off-site amenity and a private beach club for guests staying at the RV

Resort in Conway (the "Beach Club"). (R. p. 19; p. 1393, line 18–p. 1395, line 5; p. 1480, lines 10–13). The Property also honors several individual memberships to the Beach Club issued under previous ownership, some of whom do not reside in North Myrtle Beach. (R. p 1395, line 16–p. 1398, line 5).

Approximately 69% of the guests who have made reservations at the RV Resort since its opening on July 1, 2019, are from outside South Carolina. (R. p. 1552, line 23–p. 1553, line 1). At the time of trial, the RV Resort has entertained more than 90,000 reservations since the beginning of operations and provides an array of on-site amenities (including a waterpark, arcade, miniature golf, etc.), standalone cottages for short- and long-term renting, a general store, a restaurant, and importantly, access to the South Carolina coastline. (R. p. 1552, line 17–p. 1554, line 10; p. 1813). At the time of trial, there were 823 guest sites at the RV Resort, which included 162 annual sites where guests rent and reside on an annual basis. (R. p. 1546, lines 13–18).

Not surprisingly, the primary attraction of the RV Resort in Conway is its proximity to the beach. In addition to the on-site amenities, the RV Resort provides shuttle transportation as part of an all-inclusive package that departs throughout the day to public beach access points, as well as a variety of locations, including shopping destinations and other tourist attractions in the area. (R. pp. 19–20; p. 1558, line 23–p. 1561, line 25).

The Beach Club, along with the other cabana houses in the City owned by Barefoot Resort Residential Owners Association, Inc. ("Barefoot"), the Links Golf and Racquet Club Homeowners Association, Inc. (the "Links"), and Tidewater Plantation Community Association, Inc. ("Tidewater"), all provide direct access to the beach through a private facility. (R. p. 20; p. 2459, lines 19–20; p. 2569, lines 3–5; p. 2601, lines 23–25). As the City explained at trial, the cabana house special exception was created to direct investment away from the coastline—i.e., cabana

houses allow the coastline to remain unimpeded by high-rises and the associated traffic, while also providing private beach access to "projects" within the City not located on the beachfront. (R. p. 20; p. 1163, lines 3–12; p. 1203, line 23–p. 1205, line 2; p. 1256, lines 1–13).

Tourism is the largest economic driver in the Grand Strand and, more specifically, North Myrtle Beach. The economic impact of tourism to the area is substantial. In 2022, 17.2 million visitors traveled to the Grand Strand and, out of that number, Destination NMB (an affiliate of the North Myrtle Beach Chamber of Commerce) estimated between three (3) and five (5) million people visited the City of North Myrtle Beach. (R. p. 20; p. 1305, line 18–p. 1306, line 4). Importantly, lodging accommodations and short-term "transient" rentals dominate the real estate market in North Myrtle Beach. (R. p. 1292, line 24–p. 1294, line 1).

The City funds the marketing of its tourism industry through the collection of state accommodation taxes. (R. p. 1253, lines 18–20). The accommodations tax is levied on overnight accommodation for things such as hotels, motels, short-term rentals, and other resorts (such as campgrounds and RV parks). (*Id*., lines 21–24). After collection, a portion of the money raised through the state accommodation tax is then returned to the local area where the tax was originally assessed to be utilized for marketing the area's tourism. (R. p. 1254, lines 4–7). The accommodation taxes raised in the local area through lodging and short-term rentals help fund Destination NMB in its mission to bring more tourism to the area. (R. p. 1289, line 25–p. 1291, line 4).

There are two distinct provisions in the Zoning Ordinance at issue on this appeal. The first provision, found in section 23-2, defines a "cabana house" as:

> A structure utilizing single-family design and development standards in close proximity to the oceanfront **to be used by projects in North Myrtle Beach** not located near the ocean. The use of the cabana house shall be limited to drop-off and parking area,

> bathing, changing clothes and similar uses. Additionally, it can be used as an occasional guest quarters and similar residential uses. A cabana house shall be owned and maintained **by a homeowner's association** with a maintenance agreement submitted and approved by the planning department.

(R. p. 163), North Myrtle Beach, S.C., Code § 23-2 (emphasis added).

The second provision is found in section 23-22 of the Zoning Ordinance, which sets forth the requirements for the R-4 (Resort Residential) zoning district (the "R-4 District"). The R-4 District permits mixed uses of dwellings, hotels, motels, inns, accessory uses for each of the preceding, and for resort accommodations. (R. p. 174), North Myrtle Beach, S.C., Code § 23-22(2). It also has a provision providing for special exceptions. Regarding the special exception for cabana houses (which was enacted in 1996), section 23-22(4)(d) provides:

> Cabana houses subject to the following:
>
> 1. **That a homeowner's association shall have been established for the project** and a maintenance agreement has been submitted to the planning department.
>
> 2. That at least eight (8) parking spaces per zoning standards be established on site and that more spaces may be required by the board if there is no other means to limit the number of cars traveling to the property provided such as a shuttle service to and from the property to the project.
>
> 3. That the use of the house be limited to bathing and change of clothing facilities, and occasional use as guest quarters and other similar uses.
>
> 4. That the special exception will be in substantial harmony with the area in which it is to be located.
>
> 5. That the special exception will not be injurious to the adjoining property.
>
> 6. That the special exception will not discourage or negate the use of surrounding property for use(s) permitted by right.
>
> 7. That in granting the special exception, the board of zoning appeals may impose such reasonable and additional stipulations, conditions or safeguards as, in its judgment, will enhance the siting of the proposed special exception.

(R. pp. 176–77), North Myrtle Beach, S.C., Code § 23-22(4)(d) (emphasis added).

There is no other similar geographic limitation for property ownership and use like there is for a cabana house in the R-4 District—this residency requirement is unique. (R. p. 21; p. 1238, line 24–p. 1240, line 7). Under the City's interpretation of section 23-2, for a cabana house to be permitted, its use must be "exclusively" limited to a "project" (and its guests) within the City. (R. p. 21; p. 1234, line 23–p. 1235, line 2).

On or around March 28, 2005, Pan, LLC acquired the Property in an undeveloped state with the intention of building a high-rise condominium project. (R. p. 22; p. 990, lines 10–17; pp. 2617–19). Pan, LLC's efforts were blocked by the adjoining neighbors, Sea Cloisters I & II Homeowners' Associations ("Sea Cloisters"), based on a December 31, 1979 deed restriction that limited the use of the Property to a "clubhouse for recreational purposes." (R. p. 22; p. 990, lines 10–17). The Restrictive Covenants for the Property provide, in relevant part: "Said property shall be used only for recreational purposes and the improvement of said properly shall be limited to a clubhouse for recreational purposes." (R. pp. 2620–28). The Restrictive Covenants are silent about who is authorized to own and use the Property, or where they must reside. (*Id*.)

In May 2007, Pan, LLC applied to the City's Board of Zoning Appeals for a special exception to construct an oceanfront cabana house on the Property for the use of Seabrook Plantation, a housing development located in the City. (R. p. 22; pp. 1736–45). When Pan, LLC's Special Exception Application was submitted, the Property was zoned, as it is now, in the R-4 District.

According to the City, the municipal interests furthered by the residency requirement imposed by sections 23-2 and 23-22 include: "responsiveness," "quality of life," and "preservation of local property values." (R. p. 22; p. 1254, lines 8–15). However, the City has not conducted

any study or analysis as to how these interests are in fact furthered by the residency restrictions. (R. p. 1254, lines 16–18). The City's witnesses also testified at trial that "economic considerations" (including the preservation of property values) were factors in the development of the cabana house special exception; all agreed, at one point or another during the trial, that the restrictions were intended to encourage investment in the City, rather than in projects outside of the City. (R. pp. 22-23; p. 1066, line 22–p. 1067 line 9; p. 1102, line 22–p. 1105, line 4; p. 1253, lines 15–17; p. 2665).

On June 18, 2007, the City's then-zoning administrator, Paul Blust, informed Pan, LLC via letter that its Special Exception Application had been approved. (R. p. 2615). The Board of Zoning Appeals found that the proposed use of the building was consistent with the limitations set forth in the Zoning Ordinance. (*Id*.) However, the City never checked to see if Pan, LLC conveyed the Property to a homeowners' association after the special exception was approved. (R. p. 1090, lines 8–11).

The City subsequently testified at trial that, although the Zoning Ordinance is silent on the issue, any subsequent owner of the Property should have applied for a new special exception after it purchased the Property. (R. p. 1076, lines 2–18; p. 1261, line 9–p. 1262, line 10). The City acknowledged, however, that it has not required reapplication by any subsequent owner of this or any other cabana house located in the City. (R. p. 1085, lines 7–20).[3]

Following construction of the Beach Club, the Property was conveyed several times to other limited liability companies. (R. pp. 2617–19, 2629–52). The special exception for the

[3] Prior to trial, the City's former Zoning Administrator, Mr. Blust, testified in his deposition that it was <u>not</u> necessary for subsequent owners to reapply for a special exception once granted by the City. (R. p. 2523, lines 13–22). The "reapplication" position taken by the City was not articulated until the trial in November 2023.

Property was never rescinded, nor re-applied for. (R. pp. 1085, lines 15–20). None of these prior owners of the Property were homeowners' associations, nor was the Beach Club ever used exclusively by a "project" located in the City.

Immediately prior to Sun's purchase, the Property and Beach Club were operated as a private membership club by NMB Ocean Club Partners, LLC, with no restrictions on the residency of its members. (R. p. 1329, lines 1–21). NMB Ocean Club Partners, LLC also obtained two separate business licenses from the City to operate the Beach Club in 2017 and 2019, respectively. (R. p. 1327, lines 3–23). On May 17, 2018, the principal owners of NMB Ocean Club Partners, LLC attended a Technical Review Committee meeting to seek guidance from City officials on how to convert the private beach club to a restaurant. (R. p. 1330, line 15–p. 1332, line 4; pp. 2653–55).[4] The City never issued a cease-and-desist letter to NMB Ocean Club Partners, LLC regarding its ownership and operation of the Beach Club, from August 2017 to May 2019, nor did it express ay objections to its operations. (R. pp. 1332–34).

In late 2018, NMB Ocean Club Partners, LLC, approached Respondents, inquiring as to whether they would have an interest in acquiring the Property for use by the RV Resort's guests. (R. p. 1334, lines 3–13). On February 15, 2019, Sun entered into a Real Estate Purchase and Sale Agreement with NMB Ocean Club Partners, LLC (the "Purchase Agreement"). (R. pp. 1746–90).

Pursuant to the Purchase Agreement, NMB Ocean Club Partners, LLC warranted "to the best of Seller's knowledge" that the Property and Beach Club complied in all respects with all

[4] While the minutes from the Technical Review Committee Meeting contain a statement from the Zoning Department that "a private beach club is not permitted in the R-4 District," Mace Watts, the managing member for the club owner and an attendee at that meeting, testified at trial that this was never communicated to him by the City at any time, and that the City was well aware and had acquiesced to the operation and marketing of the cabana house as a private beach club. (R. p. 1332, lines 15–21; pp. 2653–55).

applicable ordinances pertaining to zoning and there were no existing facts or conditions which would result in the issuance of any zoning violations with respect to the Property. (R. p. 1750). Mr. Watts testified that this representation was made in good faith, based on the City's approval of the special exception and its knowledge and cooperation in his efforts to sell the Property to Sun. (R. p. 1337, line 24–p. 1339, line 8).

Prior to closing the sale of the Property and during the due diligence period, Sun, through its lawyers, requested a zoning letter from the City, inquiring about the current zoning and use of the Property and whether the Property or the Beach Club were subject to any violations of the Zoning Ordinance. (R. pp. 1805–06). On March 19, 2019, Mr. Blust, as then-Zoning Administrator for the City, sent Sun a letter (the "Zoning Letter") stating that the Beach Club was "permitted as a cabana house and has been legally used as such since construction. As of the date of this letter, there are no known zoning violations on the property." (R. p. 1807). Mr. Blust testified that he did not check to see if the Beach Club was owned by a homeowners' association or whether the Beach Club was being used by a "project" within the City. Rather, he testified that he drove by the Property, viewed it from his vehicle, thought it was "not in use," and concluded that because it was not in use on the day he was there, it was not in violation of the Zoning Ordinance. (R. p. 1145, line 15–p. 1151, line 13).

The seller of the Property and Sun both testified that while they were generally aware of the Zoning Ordinance, they nonetheless were led to believe by the City's Zoning Letter that Sun's intended ownership and use of the Property was consistent with the City's interpretation of its Zoning Ordinance, due to the statements in the Zoning Letter and the City's knowing acquiescence to almost 12 years of ownership by entities that were not homeowners' associations for "projects"

within the City. (R. p. 1332, line 15–p. 1334, line 2; p. 1338, line 20–p. 1340, line 1; p. 1343, lines 1–14, p. 1402, line 1–p. 1403, line 2; p. 1408, line 15–1409, line 18).[5]

On May 3, 2019, NMB Ocean Club Partners, LLC conveyed the Property along with the Beach Club to Sun via a general warranty deed, which was recorded with the Horry County Register of Deeds on May 10, 2019. (R. pp. 2649–52). Sun purchased the Property for approximately $2.5 million, intending to use the Beach Club as a featured amenity for the RV Resort's guests. (R. p. 1747). Between May 3, 2019, and September 2, 2021, the RV Resort operated the Beach Club for its guests, without any complaints from the City, shuttling its guests from Conway to and from the facility.

On September 2, 2021, after receipt of a written complaint from Sea Cloisters, the neighboring residential developments, the City sent a cease-and-desist letter (the "Cease-and-Desist Letter") to Sun asserting for the first time that both its ownership and use of the Property and the Beach Club, along with the related shuttle services to and from the RV Resort, were violative of the Zoning Ordinance. (R. pp. 1951–52). The Cease-and-Desist Letter alleged that Respondents were operating the Property and Beach Club in violation of sections 23-2 and 23-22 of the Zoning Ordinance because, *inter alia*, the Beach Club was not owned and maintained by a homeowners' association for a project in North Myrtle Beach. (*Id*.) Rather than issue a citation for the purported violations of the Zoning Ordinance, the City decided to file the instant

[5] Jon Colman, head of acquisitions for Sun Communities, Inc., testified that had he been informed by the City that a private beach club was not permitted in the R-4 District or that it must be owned by a homeowners' association for a project in North Myrtle Beach, he would have stopped the transaction and sought a meeting with the City to determine if Respondents could in fact own and operate the Beach Club for guests of the RV Resort in Conway. (R. p. 1410, line 14–p. 1412, line 11).

action seeking a declaration from the Court that Respondents' ownership and use of the Beach Club was illegal and asking the Court to divest Sun from its ownership of the Property.

ARGUMENTS

I. THE RESIDENCY REQUIREMENTS IMPOSED BY SECTIONS 23-2 AND 23-22 OF THE CITY'S ZONING ORDINANCE HAVE A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE, SO AS TO IMPLICATE THE DORMANT COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

A. Background of the dormant Commerce Clause.

The Commerce Clause affirmatively grants Congress the power to regulate interstate and foreign commerce. U.S. Const. art. I, § 8, cl.3. "Although the [Commerce] Clause is framed as a positive grant of power to Congress," the Supreme Court has "long held that this Clause also prohibits state laws that unduly restrict interstate commerce." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 514 (2019). "This negative command prevents a State [or local government] from jeopardizing the welfare of the Nation as a whole by placing burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005).

"The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism that is, regulatory measures designed to benefit in state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38, (2008) (internal quotations and citations omitted); *see also Orthofix, Inc. v. South Carolina Dept. of Revenue*, 443 S.C. 138, 144–45, 903 S.E.2d 496, 500 (2024). "The 'common thread' among those cases in which the Court has found a dormant Commerce Clause violation is that 'the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.'" *Amisub of S.C., Inc. v. S.C. Dep't of*

Health & Env't Control, 424 S.C. 80, 88, 817 S.E.2d 633, 637 (Ct. App. 2018) (quoting *McBurney v. Young*, 569 U.S. 221, 235 (2013)).

In addition to state laws, the dormant Commerce Clause applies with equal force to local and municipal laws. "[A] State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353, 361 (1992). The dormant Commerce Clause "invalidate[s] *local laws* that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (emphasis added).

B. The regulation at issue is the ownership and project residency requirements for cabana houses in the R-4 (Resort Residential) zoning district, not the operational conditions.

As the trial court noted in its Order, "[t]he threshold question regarding whether the applicable sections of the Zoning Ordinance have a substantial effect on interstate commerce is to determine what is being regulated." (R. p. 26). The City argued at trial, and continues to argue on appeal, that restrictions on the operational conditions for a cabana house is the regulation at issue, and because a cabana house cannot be used for commercial purposes and because Respondents' Beach Club was a "free-of-charge" amenity, the residency requirement espoused in

sections 23-2 and 23-22 does not have any effect on interstate commerce. (App.'s Br., pp. 8, 24–26, 33–34, 50).[6]

However, as the trial court correctly explained, Respondents are not disputing the constitutional validity of the operational conditions set forth in sections 23-2 and 23-22 of the Zoning Ordinance. (R. pp. 26–27). Instead, Respondents are challenging the ownership restrictions for cabana houses in the City, which require a cabana house to be owned and used by a local homeowners' association established for the exclusive use of a "project" in North Myrtle Beach.[7]

Indeed, the City acknowledged through its representative at trial that the applicable sections of the Zoning Ordinance regulate two distinct aspects of a cabana house within the City. (R. p. 1249, lines 13–22). First, they regulate operational considerations, such as number of parking spaces and ensuring that the cabana house is utilized in "substantial harmony" with the local area, conditions with which Respondents can fully comply. North Myrtle Beach, S.C., Code § 23-22(4)(d)(2), (4). Second, they regulate who can own and use a cabana house within the City. *Id*. at 23-2; 23-22(4)(d)(1).

As outlined above, the specific Zoning Ordinance provisions at issue are (1) the definitional requirements for ownership and use of a cabana house set forth in section 23-2, and (2) the

[6] The City maintains that the Beach Club was "free-of-charge," despite the evidence presented at trial that members of the Beach Club paid a fee for membership and the cost of the Beach Club was built into the fees charged by the RV Resort. (R. p. 1474, lines 2–24; p. 1477, line13–p. 1478, line 12; p. 1555, lines 4–14; p. 1567, lines 16–23).

[7] The City's case-in-chief at trial was focused almost exclusively on attempting to characterize the Beach Club as an out-of-control fraternity house, with no regard for its neighbors. The City's witnesses testified repeatedly about the parade of alleged violations of the operational conditions set forth in section 23-22 by Respondents' guests. (R. pp. 856–66, 876–86, 944–51, 957–74, 979–1021). However, as the trial court explained in its order, those matters are better addressed by local authorities, and are not germane to the issue before the Court – whether the City's residency requirement violated the dormant Commerce Clause. (R. p. 43).

requirement that a homeowners' association be established for the North Myrtle Beach "project" to own and utilize the cabana house in section 23-22(4)(d)(1). The term "project" is not defined in the Zoning Ordinance; however, the City acknowledged through the testimony of James Wood, its Rule 30(b)(6) representative and Director of Planning and Development, that an RV Resort would classify as a "project" under the Zoning Ordinance, if it was located within the City limits. (R. p. 1235 line 18–p. 1236, line 12). Mr. Wood also explained that section 23-2 does not prohibit commercial "projects" from using a cabana house. (*Id*.) Mr. Wood further testified that the City's interpretation of section 23-2 requires that a cabana house must be used "exclusively" by a "project" located in North Myrtle Beach. (R. p. 1234, line 16–p. 1235, line 17).[8]

The operational conditions are not being challenged by Respondents. Rather, the analysis for this appeal as to whether the applicable provisions of sections 23-2 and 23-22 of the City's Zoning Ordinance substantially effect interstate commerce must focus on **who may own or use** a cabana house within the R-4 District, not how it may be used.

C. *Lopez, Morrison,* and *Raich* – Whether the regulated activity at issue falls under the ambit of the dormant Commerce Clause hinges on whether the local activity is economic or non-economic.

The next step in the analysis is whether the activity that is being regulated is economic or non-economic. For the purposes of this analysis, "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979). The U.S. Supreme Court has identified three broad categories of activity that Congress may regulate under

[8] Section 23-2 does not expressly state that a cabana house must be "exclusively" used by a project located in North Myrtle Beach, and the prior owner of the Property utilized the Beach Club as a private membership club that included members who did not reside in North Myrtle Beach. (R. p. 1329, lines 1–21).

its commerce power: *First*, Congress may regulate the use of the channels of interstate commerce; *second*, Congress has the authority to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce; and *third*, Congress can regulate those activities having a substantial relation to interstate commerce, *i.e.,* those activities that substantially effect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). The parties agree that the third broad category of activities is at issue.

Starting in 1937, following the end of the *Lochner* era, until 1995, the United States Supreme Court did not declare any federal law enacted by Congress under the Commerce Clause unconstitutional because it exceeded the scope of Congress's commerce power. Then in *Lopez*, the Rehnquist Court declared unconstitutional the Gun-Free School Zones Act of 1990, which made it a federal crime to have a gun within 1,000 feet of a school. *Id*. at 551. The Court ruled that the relationship between school safety (a non-economic activity) and interstate commerce was too attenuated to uphold the law as a valid exercise of Congress's commerce power. *Id*. at 567–68. The Court followed *Lopez* with its ruling in *United States v. Morrison* in 2000, in which the Court declared unconstitutional the civil damages provision of the Violence Against Women Act, which created a federal cause of action for victims of gender-motivated violence. 529 U.S. 598, 601 (2000). In *Morrison*, the Court expounded on the *Lopez* decision holding that Congress cannot regulate non-economic activity by simply finding such activity has a substantial effect on interstate commerce in the aggregate. *Id* at 617–18.

Then, in 2005, the Court upheld Congress's Controlled Substances Act ("CSA") as a proper exercise of its power under the Commerce Clause, holding Congress had the authority to prohibit the local cultivation and use of marijuana. *Gonzales v. Raich*, 545 U.S. 1 (2005). In 1996 California voters passed the Compassionate Use Act, legalizing marijuana for medical use.

California's law conflicted with the federal CSA, which banned possession of marijuana. *Id*. at 7. After the Drug Enforcement Administration ("DEA") seized doctor-prescribed marijuana from a patient's home, a group of medical marijuana users sued the DEA and the U.S. Attorney General in federal district court. *Id*. at 7–8. Medical marijuana users argued that the CSA exceeded Congress' power under the Commerce Clause. The district court ruled against the group. The Ninth Circuit reversed and ruled the CSA unconstitutional as it applied to intrastate medical marijuana use. Relying on *Lopez* and *Morrison*, the Ninth Circuit held that using marijuana did not "substantially affect" interstate commerce and therefore could not be regulated by Congress. *Id*. at 8–9.

The Supreme Court disagreed and ruled that the Commerce Clause gave Congress authority to prohibit the local cultivation and use of marijuana, despite state law to the contrary. The Court reaffirmed its decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), and explained that its precedent "firmly establishes Congress' power [under the Commerce Clause] to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id*. at 17. The majority also argued that Congress could ban local marijuana use because it was part of such a "class of [economic] activities": the national marijuana market. *Id*. Local use affected supply and demand in the national marijuana market, marking the regulation of intrastate use "essential" to regulating the drug's national market. *Id*. at 24–25. The majority in *Raich* distinguished the case from *Lopez* and *Morrison* explaining that those cases dealt with statutes regulating non-economic activity and, as a result, fell entirely outside of Congress's commerce power. *Id.* at 23–26.

Here, the City relies heavily on the so-called "factors" deduced from *Lopez* and *Morrison*[9] to argue that the regulated activity at issue here—ownership of a cabana house by a homeowners' association located in North Myrtle Beach for exclusive use by a local "project" as part of its operations—is a non-economic activity. However, the real lesson from *Lopez, Morrison*, and *Raich* is that the substantial effect on interstate commerce analysis hinges almost entirely on whether the local activity being regulated is economic or non-economic in nature, and that the Court need not resort to the considerations identified in *Lopez* and *Morrison* if the regulated activity is economic. Indeed, the *Morrison* court expressly stated that petitioner and the dissent improperly downplayed the role that the economic nature of the regulated activity played in the Commerce Clause analysis and a "fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case." *Morrison*, 529 U.S. at 610.

The upshot of *Raich* is that in matters dealing with the regulation of quintessential local economic activities—like the ownership of a cabana house by a homeowners' association affiliated with a local "project" located in North Myrtle Beach for use in its commercial operations—the long-standing principles of *Wickard* apply. Congress's commerce power "extends to those [economic] activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *Wickard*, 317 U.S. at 124 (emphasis added).

What the City fails to appreciate in its reliance on *Lopez* and *Morrison* is that the considerations discussed therein are wholly inapplicable when dealing with an economic

[9] It should be noted that the Supreme Court in *Lopez* and *Morrison* did not articulate a "factor-based test" as the City contemplates in its brief. Rather, as explained in *Morrison*, the Supreme Court articulated four different considerations it found important when analyzing whether a non-economic activity could be considered to have a substantial effect on interstate commerce. *U.S. v. Morrison*, 529 U.S. 598, 611–12 (2000).

activity.[10] Indeed, the Supreme Court in *Raich* specifically cautioned parties about relying too heavily on *Lopez* and *Morrison*, in the very manner that the City is doing so in this case. The Supreme Court stated that the respondents in *Raich*, "[i]n their myopic focus, . . . overlook[ed] the larger context of modern-era Commerce Clause jurisprudence preserved by those cases" and, even in the respondents' narrow analysis, "read those cases far too broadly." *Raich*, 545 U.S. at 23. The Court further provided that because the CSA "is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality." *Id*. at 26.

D. The determination of whether the applicable provisions of sections 23-2 and 23-22 of the Zoning Ordinance regulate an economic activity and have a substantial effect on interstate commerce is a factual determination that cannot be disturbed upon appeal, unless found to be without evidence which reasonably supports the trial court's findings.

The determination of whether certain regulated local activities are economic in nature, and whether the regulation of said activities have a substantial effect on interstate commerce requires

[10] The City also fails to properly apply the second and third "factors" from *Lopez* and *Morrison*. With regards the analysis of whether the statute in question contains an "express jurisdictional element which might limit its reach" to non-economic activities having "an explicit connection with or effect on interstate commerce," this consideration is uniquely situated to Congress's affirmative exercise of its commerce power and the requirement for Congress to articulate a limited jurisdictional avenue for the commerce power to apply to a non-economic activity, i.e., that the statute might limit its reach to a discrete set of non-economic activities that additionally have an explicit connection with or effect on interstate commerce. *Morrison*, 529 U.S. at 610-13. There is no similar analysis with regards to the dormant Commerce Clause analysis and the City raises its "inverted" factor analysis for the first time on appeal and, therefore, should be disregarded by this Court. (App.'s Br., pp. 26–27); *see State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal."). Additionally, the City's argument that the third *Lopez-Morrison* "factor," requiring an analysis of the legislative history of the statute, does not help the City. The City's discussion about the cabana house special exception's historical record only mentions the record with respect to the predicted non-commercial "uses" of cabana houses. The record cited to by the City mentions nothing about ownership of cabana houses, and the City specifically testified at trial that the term "project" encompasses commercial entities. (R. p. 1236, lines 1–9).

a fact intensive inquiry done on a case-by-case basis.[11] Throughout this case, the City sought to avoid Respondents' two motions for summary judgment by repeatedly arguing that whether the applicable sections of the Zoning Ordinance had a "substantial effect on interstate commerce" was a factual issue that precluded granting of summary judgment. (R. pp. 217–20; 576–78; 591–96; 599-600; p. 768, line 12–p. 771, line 14).

The trial court properly found that the ownership and utilization of cabana houses within North Myrtle Beach by homeowners' associations for "projects" located in the City is a local economic activity that falls within the ambit of the dormant Commerce Clause, and that the regulation of this local economic activity has a substantial effect on interstate commerce. (R. pp.

[11] *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 26 (2005) (examining the definition of "Economics" to determine whether the statute that regulates the production, distribution, and consumption of commodities for which there is an established, lucrative, interstate market is economic); *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me*., 520 U.S. 564, 564 (1997) (conducting fact intensive inquiry into specific activities of camp such as camp's marketing practices, percentage of out of state campers, and mode of transportation these campers took to conclude the services the camp provided had a clear substantial effect on interstate commerce); *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (recognizing that Commerce Clause decisions require a "sensitive, case-by-case analysis of purposes and effects"); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964) (conducting fact intensive inquiry into hotels that solicited interstate patronage through various national advertising media, including magazines of national circulation; maintained over 50 billboards and highway signs within a state, accepted convention trade from outside the state, and approximately 75% of its guests were from outside the state to conclude the activity had substantial effect on interstate commerce); *Wickard v. Filburn,* 317 U.S. 111 (1942) (conducing in depth factual analysis of wheat industry in the United States to determine the individual production of wheat was economic); *Colon Health Ctrs. Of Am., LLC v. Hazel*, 733 F.3d 535, 545 (4th Cir. 2013) (reversing Rule 12 dismissal of dormant Commerce Clause claim because of the "fact-intensive quality of the substantive inquiry"); *United States v. Gibert*, 677 F.3d 613, 624 (4th Cir. 2012) ("There can be no serious dispute that the terms 'sport,' 'wagering,' and 'entertainment' each are closely aligned in our culture with economics and elements of commerce. Indeed, the uncontested factual allegations of the present case also demonstrate the economic activities inherently involved in cockfighting: individuals paid a fee to enter their birds into the derby, the owner of the winning bird won the 'pot' of the collective money paid by the entrants, minus any money retained by the derby organizers, and spectators and bird owners paid an admission fee to enter the building in which the birds fought.").

26–31). The City admitted during the trial that an RV Resort, like a homeowners' association or condominium project, classifies as a "project" under the Zoning Ordinance, and as the trial court explained, the Beach Club, along with other cabana houses in the City owned by Barefoot, the Links, and Tidewater, all provide beach access through private facilities as a valuable service to the associated projects' owners, members, and guests. (R. p. 20; p. 1235 line 18–p. 1236, line 12; p. 2459, lines 19–20; p. 2569, lines 3–5; p. 2601, lines 23–25).

The trial court also acknowledged the City created the cabana house special exception to "direct investment away from the coastline"—i.e., cabana houses allow the coastline to be less impeded by high-rises and the associated traffic—while also providing private beach access to "projects" (such as the RV Resort and homeowners' associations) within the City not located on the beachfront. (R. p. 20). The trial court's factual determination is further bolstered by its finding, through the City's witnesses, that "economic considerations" (including the preservation of property values) were factors in the development of the cabana house special exception and all agreed, at one point or another, that such restrictions encouraged investment in the City rather than outside of the City. (R. pp. 22-23; p. 1066, line 22–p. 1067 line 9; p. 1102, line 22–p. 1105, line 4; p. 1253, lines 15–17; p. 2665).

The trial court found that the RV Resort and other owners of cabana houses in North Myrtle Beach utilize cabana houses to host gatherings of property owners, promoted their cabana houses on their respective websites, and (at least in the case of Respondents and the Links) make their cabana houses open not only to owners within their communities, but also to guests and short-term renters as well. (R. p. 31; p. 2459, line 7–p. 2460, line 25; p. 2565, lines 6–25; p. 2601, line 16–p. 2602, line 22).

Further, there is no prohibition in sections 23-2 and 23-22 on the use of a cabana house by short-term "transient" renters, and there are no restrictions on cabana house owners advertising their amenity to the public.[12] In concluding its analysis, the trial court correctly compared the RV Resort to hotels and short-term rental providers (like the Links, Barefoot, and Tidewater) that offer their guests goods and services that are consumed locally and utilize the services provided, such as the Beach Club. (R. p. 31). These platforms, which comprise a significant part of the tourism economy in the Grand Strand, clearly are economic activities and the regulation of such activities necessarily have a substantial effect on interstate commerce. The same holds true for the residency requirement's restrictions on making those services available (like private beach access through a cabana house) to nonresidents. *Cf. Carbone,* 511 U.S. at 391. Likewise, the services that the RV Resort provides, which includes access to the Beach Club to its principally out-of-state guests, along with the residency requirement prohibiting ownership of a cabana house by Sun, also have a substantial effect on interstate commerce.

The City takes great pains in its briefing to argue that the Beach Club is "an amenity" and the ownership of such an amenity by a commercial RV Resort cannot be considered an economic activity. (*See, e.g.,* App.'s Br., pp. 24–27, 31–32, 34). However, the City also acknowledges that the definition of commerce encompasses the exchange of "services," and that "services" can be defined as "labor performed in the interest or under the direction of others' specifically, the performance of some useful act or series of acts for the benefit of another . . . In this sense, service denotes an intangible commodity in the form of human effort, such as labor, skill, or advice." (*Id*. at pp. 24–25) (quoting *Service, Black's Law Dictionary* (11th ed. 2019)) (alterations omitted).

[12] In fact, any limits imposed on the use of cabana houses to owners in certain communities, or other similar restrictions, are the creation of those specific associations, and are not mandated by the City.

The ownership and utilization of a cabana house or a beach club by a "project" (whether it be a homeowners' association, an RV Resort, a condominium association, or a timeshare community)[13] as an amenity to attract guests, which provides private beach access, shuttle transportation and/or parking, restrooms, air conditioning, meeting spaces, and other accommodations to its residents, paying customers, guests, short-terms renters, or others, constitutes a valuable service in furtherance of the project's operations and, therefore, an economic activity.[14] The trial court so found, and this finding is substantially supported by the evidence presented at trial.

The trial court's findings of fact are equivalent to a jury's findings in an action at law. *Snow v. Smith*, 416 S.C. 72, 88, 784 S.E.2d 242, 250 (Ct. App. 2016) (citations omitted). "[Q]uestions regarding credibility and weight of evidence are exclusively for the" trial court. *Sheek v. Crimestoppers Alarm Sys.*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989). Accordingly, the Court of Appeals "must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." *Id*. (citing *May v. Hopkinson*, 289 S.C. 549, 347 S.E.2d 508 (Ct. App. 1986)).

Here, the Court engaged in a fact-intensive inquiry into the substantive questions of 1) whether the activity at issue here—the ownership and utilization of cabana houses within the R-4 District—was a local economic activity and 2) whether the regulation of that local economic

[13] All of which the City testified at trial constitute a "project" that utilizes a cabana house under sections 23-2 and 23-22. (R. p. 1235, line 18–p. 1236, line 12).

[14] Additionally, the purchase of a cabana house is a significant investment. The Property and Beach Club at issue in this case cost Sun approximately $2.5 million and, according to the City, cannot be owned by anyone other than a homeowners' association associated with a "project" located within the City's limits. Accordingly, considering the deed restriction on the use of the property and the City's zoning restrictions, the "value" to Sun of the Property is derived almost entirely by its use as an amenity, rather than as an investment property.

activity substantially effects interstate commerce. The trial court's factual inquiry and findings, based on the evidence presented, that the residency requirement in sections 23-2 and 23-22 of the City's Zoning Ordinance has a substantial effect on interstate commerce should not be disturbed on appeal. *King*, 317 S.C. at 388, 453 S.E.2d at 888.

E. The U.S. Supreme Court's precedent in *Camps Newfound/Owatonna, Inc.* directly supports the trial court's conclusion.

In *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564 (1997), the Supreme Court held that an otherwise generally applicable state property tax violated the dormant Commerce Clause because its exemption for property owned by charitable institutions excluded organizations operated principally for the benefit of nonresidents. *Id*. at 571–595. The appellant/petitioner in *Camps Newfound* was the operator of a non-profit outdoor church camp that brought an action challenging the constitutionality of Maine's property tax exemption statute for charitable institutions. The respondent town argued that the dormant Commerce Clause jurisprudence was inapplicable to the case because interstate commerce was not implicated, and Congress has no power to enact a tax on real estate. *Id*. at 572.

The Court disagreed and explained that even though the camp did not make a profit, it unquestionably "engaged in commerce," not only as a purchaser of goods, but also as a provider of goods and services. The Court found that the camp marketed those services, together with an opportunity to enjoy the natural beauty of an inland lake in Maine, to campers who were attracted to the facility from other states. *Id*. at 572–73. The Supreme Court emphasized that the camp operator advertised for campers in out-of-state periodicals and its recruiting efforts were quite successful; 95 percent of its campers came from out of State, and the attendance of these campers necessarily generated transportation of persons across state lines, an activity that had long been recognized as a form of "commerce." *Id*. at 573 (internal citations omitted).

The Supreme Court explained that summer camps, like the one at issue, were comparable to hotels that offer their guests goods and services consumed locally. To bolster its analogy and analysis, the Supreme Court cited to *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964),[15] for the proposition that interstate commerce is substantially effected by the activities of hotels that solicit patronage from across the country through national advertising media. *Id*. Accordingly, the Supreme Court stated that discrimination "that limits the access of nonresidents to summer camps creates a similar impediment . . . [e]ven when business activities are purely local, if 'it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.'" *Id*. at 573–74 (quoting *Heart of Atlanta*, 379 U.S. at 258) (emphasis added). The Supreme Court held that the services the camp operator provided to its principally out-of-state campers clearly had a substantial effect on interstate commerce, as did the state restrictions on making those services available to nonresidents. *Id*. at 574.

The lessons on interstate commerce set forth in *Camps Newfound/Owatonna* are directly applicable to the facts presented here. The RV Resort advertises its product nationally through its website and social media platforms, and those advertising efforts have proven successful; 69% of the RV Resort's guests are from out-of-state. (R. p. 1552, line 23–p. 1553, line 10, p. 2616). Likewise, the RV Resort marketed the Beach Club and various other amenities on its advertising platforms and social media, together with an opportunity to enjoy the natural beauty of the South Carolina coastline, to potential and actual guests throughout the country. (R. pp. 1814–52; 2669–82,). The RV Resort engages in commerce, as a purchaser of goods, as a provider of goods and services, and transports its guests throughout the local area, whether to the Beach Club or to other

[15] In that case, the Supreme Court held that commerce was substantially affected by private race discrimination that limited access to the hotel and thereby impeded interstate commerce in the form of travel. *Heart of Atlanta*, 379 U.S. at 244.

various commercial locations via its shuttle service. And, like *Camps Newfound/Owatonna*, the attendance of the RV Resort's guests necessarily generates the transportation of people across state lines that has long been recognized as a form of commerce.

The comparison between the City's residency requirement and *Camps Newfound/Owatonna* is augmented by considering the ownership and use of the other cabana houses in the City. Tidewater's homeowners' association utilizes its cabana house to host gatherings of property owners at what it considers to be its most popular amenity, and it promoted the cabana house on its website. (R. p. 2604, line 4–p. 2606, line 4). Barefoot's association also marketed its cabana house and other community amenities and holds community-sponsored events at its cabana house where neighbors gather. (R. p. 2459, line 4–p. 2461, line 17). The Links cabana house is open not only to owners of the timeshares in the community, but also to its guests and short-term renters as well, many of whom are nonresidents (or "transient" as the City classifies them). (R. p. 2565, lines 13–25).

There is no prohibition in sections 23-2 and 23-22 on the use of a cabana house by short-term renters in communities that own a cabana house in the City, and there is no restriction on cabana house owners from advertising their amenity to the public. Further, as stated previously, there is no restriction on a cabana house being used by a commercial "project." (R. p. 1235 line 18– p. 1236, line 12). Moreover, homeowners' associations, like the camp in *Camps Newfound/Owatonna*, are non-profit organizations engaged in interstate commerce by providing goods and services to their members through their respective cabana houses.

The RV Resort (and other types of "projects" that might own a cabana house) is comparable to hotels or short-term rental providers that offer their guests goods and services that are consumed locally. These commercial platforms, which comprise a significant part of the main economic

driver in the Grand Strand – tourism, clearly have a substantial effect on interstate commerce, as does the Zoning Ordinance's restrictions on making those services available to nonresidents. *Cf. Carbone*, 511 U.S. at 391. Likewise, the services that the RV Resort provides, which includes private access to the beach through the Beach Club, to its principally out-of-state guests, as well as the Zoning Ordinance restricting the ownership and use of a cabana house clearly have a substantial effect on interstate commerce. The trial court's findings are firmly supported by the evidence.

F. The fact that the ability to own and operate a cabana house is a special exception provided for in the Zoning Ordinance is immaterial to the analysis under the dormant Commerce Clause.[16]

The City devotes a portion of its brief to the argument that because the right to own a cabana house is a special exception under the Zoning Ordinance, the denial of such a special exception cannot substantially affect interstate commerce for the purposes of the dormant Commerce Clause, and to do so "would turn zoning law on its head and render all zoning authority obsolete." (App.'s Br., pp. 37–39). Despite the hyperbole of the City's arguments, the argument is both incorrect and irrelevant to this appeal.

While a property owner does not possess a "claim of entitlement" to a special exception, the denial or infringement of such cannot be done unconstitutionally.[17] The same lack of a "claim

[16] The City also attempts to ferret out an argument through an analysis of the "legislative history" of the City's Overlay Zone that sections 23-2 and 23-22 do not have a substantial effect on interstate commerce. However, this theory was never presented to the trial court and, therefore, not preserved for this Court's review. "It is 'axiomatic that an issue cannot be raised for the first time on appeal.'" *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)).

[17] Much like the City's argument that zoning regulations are "inherently discriminatory," such regulations cannot achieve their ultimate purpose in an unconstitutional manner. *See Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (5th Cir. 2022) (striking down unconstitutional provisions in City of New Orleans' zoning ordinance dealing with short term rental licenses).

of entitlement" also exists for licenses or permits to utilize property in a certain manner under zoning regulations. *See, e.g., Worsley Companies, Inc. v. Town of Mount Pleasant*, 339 S.C. 51, 528 S.E.2d 657 (2000) (agreeing with trial court that town's refusal to issue a permit and certificate of occupancy did not constitute a taking because plaintiff did not have any protected property interest or clear entitlement to such permits because they were subject to the discretion of the issuing agency); 51 Am. Jur. 2d *Licenses and Permits* § 48 (explaining that whether an applicant possesses a legitimate claim of entitlement to a permit or license, courts will look to the government's degree of discretion). However, as the Fifth Circuit ruled in *Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (5th Cir. 2022), unconstitutional discrimination against interstate commerce in the zoning context with respect to licenses (much like special exceptions), still implicates the dormant Commerce Clause and the requisite scrutiny of such impermissible restrictions thereunder.

II. THE RESIDENCY REQUIREMENT IMPOSED ON THE OWNERSHIP AND USE OF CABANA HOUSES IN THE R-4 (RESORT RESIDENTIAL) ZONING DISTRICT, ESPOUSED IN SECTIONS 23-2 AND 23-22 OF THE CITY'S ZONING ORDINANCE, DISCRIMINATES AGAINST INTERSTATE COMMERCE ON ITS FACE, IN ITS EFFECT, AND IN ITS PURPOSE.

Similar to the analysis above with regards to whether a regulation has a substantial effect on interstate commerce, determining whether a challenged law discriminates against interstate commerce requires an in-depth factual analysis, which the trial court undertook in this case. *Colon Health Ctrs. Of Am., LLC v. Hazel*, 733 F.3d 535, 545 (4th Cir. 2013) (reversing the Rule 12 dismissal of dormant Commerce Clause purpose and effects claims because of the "fact-intensive quality of the substantive inquiry"); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 334 (4th Cir. 2001) (denying summary judgment because whether the challenged law discriminated in its effects or purpose were "[q]uite obviously ... questions of fact"); *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 327 (5th Cir. 2022) (refusing to dismiss dormant Commerce

Clause claims because such analysis is usually "premature" as "[c]laims that turn on intent and effects typically require factual development.").

In conducting the discrimination inquiry, the focus must be on discrimination against interstate commerce—not just the discrimination against the specific parties before it. *Hazel*, 733 F.3d at 543. Focusing on the discrimination against individual entities "improperly narrows the scope of the judicial inquiry and has the baneful effect of precluding certain meritorious claims. For while the burden on a single firm may have but a negligible impact on interstate commerce, the effect of the law as a whole and in the aggregate may be substantial." *Id*. Discrimination in this context "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id*. at 542–43.

A law that is found to discriminate against interstate commerce "puts it on death's doorstep," and can only survive if it advances a legitimate local purpose that cannot be adequately served by any reasonable nondiscriminatory alternatives. *Hignell-Stark*, 46 F.4th at 328.[18] "In fact, facial discrimination by itself may be a fatal defect, regardless of the [City's] purpose, because the evil of protectionism can reside in legislative means as well as legislative ends." *Orthofix, Inc.*, 443 S.C. at 145, 903 S.E.2d at 500 (quoting *Hughes*, 441 U.S. at 337 (1979) (internal quotations omitted)).

Laws challenged under the dormant Commerce Clause are examined using a two-step analysis. However, the antidiscrimination principle lies at the "very core" of the Supreme Court's dormant Commerce Clause jurisprudence, no matter which step is analyzed. *Nat'l Pork Producers Council v. Ross*, 143 S.Ct. 1142, 1153 (2023). The only analysis relevant to this case is when the

[18] If there are "*any* available alternative methods for enforcing [the City's] legitimate policy goals," the law is unconstitutional. *Dickerson v. Bailey*, 336 F.3d 388, 402 (5th Cir. 2003) (emphasis added).

regulation directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests. In such cases, the Supreme Court has "generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Unless "demonstrably justified by a factor unrelated to economic protectionism, a 'discriminatory law is virtually *per se* invalid.'" *Brown v. Hovatter*, 561 F.3d 357, 363 (4th Cir. 2009) (quoting *Davis*, 553 U.S. at 338). Such is the case here, as the trial court correctly determined.

A. The Zoning Ordinance's residency requirement on the ownership and use of a cabana house plainly discriminates against interstate commerce.

Section 23-2 defines a "cabana house," in part, as a "structure utilizing single-family design and development standards in close proximity to the oceanfront to be used by projects in North Myrtle Beach not located near the ocean." Section 23-22(4)(d) requires that a "homeowner's association shall have been established" for that same project. The City has posited that this geographic restriction advances the City's municipal interest of "quality of life," "responsiveness," and "preservation of property values," which Respondents do not dispute. Nevertheless, whatever the City's "ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State [or the City] unless there is some reason, apart from their origin, to treat them differently." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626–27 (1978).[19]

Sections 23-2 and 23-22 create a residency requirement for ownership of a cabana house in the R-4 District in that they exclude the ownership and use of cabana houses from entities

[19] The City articulated no legitimate purpose or rationale for treating projects within the city limits differently from those without. Barefoot, Tidewater, and the Links compete with Respondents for tourism/resort rental proceeds. All of them are authorized to make their cabana houses available for use to "transient" renters of resort accommodations. They advertise their amenities, including

located anywhere outside of the City's limits. The fact that the applicable sections of the Zoning Ordinance apply equally to in-state "projects," like the RV Resort, does not change the analysis, because "[i]t is immaterial that [a South Carolina "project" from outside the City] is subjected to the same proscription as that moving in interstate commerce." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.4 (1951). The City's employees at trial did not offer any justification for its different treatment of "projects" located outside of the City, except to suggest that "transient" individuals represent a greater burden to the City's "quality of life." (R. p. 1216, line 20–p. 1218, line 21; p. 1240, line 9–p. 1241, line 16). But "transient" individuals renting properties within the City limits are permissible, which is precisely the discrimination that the dormant Commerce Clause prohibits.

Both the City Manager and Destination NMB testified that the economic bloodline of the City is tourism. (R. pp. 1054, lines 1–16; p. 1284, lines 4–7). Accordingly, the City has "erect[ed] an economic barrier protecting a major local industry against competition from without the state" by enacting the applicable sections of the Zoning Ordinance which "plainly discriminate[] against interstate commerce." *Dean Milk*, 340 U.S. at 354. Through sections 23-2 and 23-22, the City ensures that only local residents/projects can benefit economically from ownership of a cabana house on the City's coastline in the R-4 District.

The City's geographic restriction discriminates on its face against non-local projects.[20] The City does not just make it more difficult for non-local entities to compete in the market for visitors who want private beach access through a cabana house in the R-4 District; it forbids them from

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beach access through their cabana houses, to a national customer market. All were determined by the City to be uses consistent and in substantial harmony with the R-4 District.

[20] Indeed, Mr. Wood candidly acknowledged at trial that the restriction against non-local projects from ownership of a cabana house in the R-4 District is exclusionary "on its face." (R. p. 1258, lines 1–6).

participating altogether. And the City will not grant a special exception to own a cabana house unless the cabana house is owned and operated exclusively by a local homeowners' association for a project in the City. The natural and fully intended consequence is that only residents of the City may participate in the market to own and use a cabana house in the R-4 District.

The City's representatives acknowledged on multiple occasions that an RV Resort is encompassed by the term "project." (R. p. 1235, line 18–p. 1236, line 12). Hotels, times shares, condominium associations, residential developments that consist of short-term rental properties located in the City, and RV Resorts located outside of the City that participate in the short-term vacation rental market, are "substantially similar." *Davis*, 553 U.S. at 342 (explaining that the only form of discrimination that implicates the dormant Commerce Clause is discrimination between "substantially similar entities"). All are private entities, not public entities carrying out traditional government functions. *See id.* at 341–43. And all seek to compete in the highly competitive market for recreational access to the South Carolina coastline. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997).

Non-local projects want to offer the same private beach access services to the same customers in the same locations as projects located within the City. The only difference between them, and the one emphasized by the residency requirement, is that one group does not reside in North Myrtle Beach. Accordingly, the residency requirement set forth in sections 23-2 and 23-22 directly discriminates against interstate commerce.

A recently decided case out of the Fifth Circuit Court of Appeals involving a licensing regime under New Orleans' zoning ordinance is particularly instructive on the nature of the restrictions before the Court. In *Hignell-Stark*, homeowners who sought to operate short term rentals ("STRs") and the company providing services for STR owners brought a Section 1983

claim against the City of New Orleans, alleging, *inter alia*, violations of the dormant Commerce Clause, based on the city's ordinance requiring licenses to operate STRs. 46 F.4th at 321–22. In 2016, the city decided to offer licenses to property owners to rent their homes for less than thirty (30) days. *Id*. at 321. One year into the initial licensing regime, the city commissioned a study to reevaluate its STR policies and found that the rapid proliferation of STRs brought nuisances to the city. *Id*. Specifically, it discovered that STRs in residential neighborhoods "had lowered residents' quality of life." *Id*. The study also determined that expansion of STRs into residential neighborhoods led to "a loss of neighborhood character," and it collected "anecdotal evidence" that the increasing STR market had made housing less affordable to residents. *Id*. Because of the study, the city revised its STR licensing regime in 2019 and imposed a local residency requirement for STRs in residential neighborhoods. *Id*. The policy provided that no person could obtain a license to own an STR unless the property was also "the owner's primary residence." *Id*.

On appeal, the Fifth Circuit analyzed the district court's ruling that, although the residency requirement in the new licensing regime discriminated against interstate commerce, the policy was constitutional because the burden it imposed was not "clearly excessive in relation to the putative local benefits." *Id*. at 322 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The Fifth Circuit disagreed, explaining that the *Pike* test did not apply to an ordinance that discriminated by its very terms between local and non-local market participants. *Id*. at 325.

The Fifth Circuit further explained that because the residency requirement in the new licensing regime discriminated against interstate commerce, it was in "big trouble because 'a discriminatory law is virtually *per se* invalid.'" *Id*. (quoting *Davis*, 553 U.S. at 338). The Fifth Circuit held that the residency requirement discriminated on its face against non-local property owners because it forbade them from participating in the STR market in residential neighborhoods

altogether[21] and even though the city did not adopt the residency requirement to protect its residents from interstate competition, "the dormant Commerce Clause prohibits more than laws with protectionist purposes. It also prohibits laws that discriminate against interstate commerce on their face." *Id*. at 325–327 (citation omitted). According to the Fifth Circuit, "'the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory.'" *Id*. at 327 (quoting *Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or.*, 511 U.S. 93, 100 (1994)).

As the trial court correctly determined, the same is true here. The City's residency requirement with respect to limiting the ownership of cabana houses to homeowners' associations for "projects" located in the City cannot be saved by legitimate municipal purposes. Regardless of the "purpose of, or justification for" the restriction, it has "no bearing on whether it is facially discriminatory." *Id*. at 327. Because the residency requirement at issue directly discriminates against interstate commerce on its face—by forbidding non-local homeowners' associations for projects outside the City from participating in the market to utilize a cabana house in the City within the R-4 District—it is *per se* invalid.

Significantly, section 23-2 provides that a cabana house must be owned by a local homeowners' association. Section 23-22(4)(d)(1) provides, in relevant part, that a homeowners' association must be established for the local project utilizing the cabana house. Consistent with the trial court's conclusion, the homeowners' association requirement is inextricably linked to the

[21] In *Hignell-Stark*, the Fifth Circuit rejected the city's argument that the ordinance allowed out-of-staters to own short-term rentals in **nonresidential** neighborhoods because "even if the residency requirement merely imposes a discriminatory burden on interstate commerce, it still qualifies as discriminatory." 46 F.4th 317, 327 (5th Cir. 2022). The City here has made the same unavailing argument with respect to beachfront cabana houses in other areas outside of the R-4 District. (App.'s Br., pp. 26–28).

project's geographic restriction and violates the dormant Commerce Clause in the same way. (R. p. 38).

Under South Carolina's Homeowners' Association Act, a homeowners' association governing documents must be recorded in the Register of Deeds office in the county where the property owned by the association is located. S.C. Code Ann. § 27-30-130(A)(1). In its effect, the homeowners' association requirement in both sections 23-2 and 23-22 of the Zoning Ordinance violates the dormant Commerce Clause because it requires the ownership of the cabana house and the administration of the "project" using the cabana house to be located and registered in Horry County, South Carolina (pursuant to the statutes) because the subject property and associated project must necessarily be located in North Myrtle Beach. This precludes a non-local homeowners' association from owning a cabana house or establishing a "project" outside the City to access a cabana house, and plainly discriminates against interstate commerce in both its practical and legal effect.

In response to Interrogatories propounded by Respondents regarding the purpose behind the geographical ownership restrictions set forth in Sections 23-2 and 23-22 of the Zoning Ordinance, the City stated: "This requirement operates to encourage and support local, private developments and their corresponding homeowners' associations (as opposed to non-local, corporate enterprises) by providing them with a private beach club and access point to the beach. It also encourages investment in the City rather than in projects outside of the City." (R. p. 2665). This candid explanation of the purpose behind the residency requirement, coupled with the City's

repeated testimony at trial acknowledging the explanation undermines the City's arguments on appeal.

The City expressly admits that one of the purposes behind these restrictions is economic protectionism—to incentivize investment in the City while restricting or outright prohibiting ownership and use from outside the City. *Dean Milk*, 340 U.S. at 354. Incentivizing local commerce at the expense of interstate commerce is one of the chief evils the Commerce Clause seeks to prevent and renders the challenged portions of the Zoning Ordinance unconstitutional. *See Carbone,* 511 U.S. at 390.

The City also acknowledges an economic interest in ensuring that visitors to the City decide to stay in accommodations located in the City. If the City were to allow the RV Resort in Conway to have access to a cabana house, it would eliminate an important reason for tourists to stay within the City limits. The result is that the City is unable to collect the accommodation taxes that would have been paid by those seeking lodging within the City. (R. p. 1253, line 15–p. 1254, line 7). Consequently, the residency requirement limiting ownership of a cabana house promotes financial investment within the City, to the exclusion of non-local entities. Avoiding this sort of "economic Balkanization" is one of the central purposes of the dormant Commerce Clause. *Hughes*, 441 U.S. at 325.

B. The City failed to preserve its three-part ordinance and severability arguments for this Court's review.

On appeal, the City now argues for the first time that there is a project requirement and <u>two</u> separate and distinct homeowners' association requirements in sections 23-2 and 23-22 (as opposed to the one, singular requirement that the City advocated up to and throughout trial). (App.'s Br., pp. 41–45). To the extent the City asserts any argument relating to the severability of ordinances into three distinct parts, these arguments are not properly before this Court. Both were

raised for the first time in the City's post-trial motion to reconsider, and thus were not preserved for appeal. *See Repko*, 424 S.C. at 502, 818 S.E.2d at 748.

Second, the trial court did properly find that the project requirement and the homeowners' association requirement were inextricably linked. Using the rules of statutory interpretation,[22] coupled with the City's own testimony, the trial court appropriately determined that the project and homeowners' association requirements have to be read together to understand the purpose and intent of the ordinance. According to the City's own interpretation and application of the Zoning Ordinance, section 23-2 requires that a cabana house must be used exclusively by projects in North Myrtle Beach (and their guests), that a homeowners' association must be established for the project, and the cabana house must be owned and maintained by a local homeowners' association. (R. p. 1234, line 12–p. 1235, line 20; p. 1274, line 18–p. 1276, line 11).

In the middle of the trial, in an effort to rescue the homeowners' association requirement, the City suggested that perhaps the homeowners' association identified in sections 23-2 and 23-22 did not have to be located within the City. The City's counsel posed this novel theory to Mr. Wood in a candid moment on the stand during re-direct examination. (R. p. 1270, line 13–p.1271, line 7). However, on re-cross examination, Mr. Wood clarified that it was "probably an assumption [from City Council] that the homeowners association would be within the City in addition to the project . . .." (R. p. 1276, lines 6–10). Indeed, Mr. Wood explained that he had to try and "imagine a scenario" where the homeowners' association identified in sections 23-2 and 23-22 "could be

[22] "The legislature's intent should be ascertained primarily from the plain language of the statute." *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005). "[T]he text of a statute is considered the best evidence of the legislative intent or will." *Id*. at 231, 612 S.E.2d at 724. The language must be read to harmonize with its subject matter and in accord with its general purpose. *Id*. at 230, 612 S.E.2d at 723. The court's primary function in interpreting a statute is to determine the intent of the legislature. *Smith v. South Carolina Ins. Co.*, 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct. App. 2002).

based outside the City." (R. p. 1275, lines 1–8). Unfortunately, such an imagined scenario is unavailable to the City on appeal, and it was never fully explained in its brief.

For the purposes of clarity, Respondents submit the following summary of this analysis:

- Section 23-2 of the Zoning Ordinance requires that a cabana house must be used by a project in North Myrtle Beach not located near the ocean.
    - The City testified repeatedly that the cabana house must be used exclusively by this North Myrtle Beach-based project. (R. p. 1234, line 12–p. 1235, line 2).
- Section 23-22(4)(d)(1) of the Zoning Ordinance requires that a homeowners' association must be established for the local project.
    - The City testified that sections 23-2 and 23-22 refer to one homeowners' association (i.e., there is not a second homeowners' association that owns the cabana house, there is only one homeowners' association, and it is established both for the "project" and owns the cabana house). (R. p. 1275, lines 9–13).
- Section 23-2 of the Zoning Ordinance states that a cabana house must be owned by that same homeowners' association that was established by the North Myrtle Beach-project.
    - The City testified at trial that it was probably an assumption by City Council when it enacted the residency requirement that the homeowners' association would also be located within the city limits, along with the project. (R. p. 1276, lines 6–10).
- Under South Carolina's Homeowners' Association Act, the homeowners' association governing documents must be recorded in the Register of Deeds office in Horry County because that is where the property owned by the association (either the project or the cabana house) is located. S.C. Code Ann. § 27-30-130(A)(1).

The homeowners' association associated with the cabana house has to be located in North Myrtle Beach because the "project" and the cabana house must also be located in North Myrtle Beach. Any homeowners' association comprised of properties located outside of the city limits cannot comply with the residency requirement. Indeed, as stated above, the City's own designee testified at trial that he tried, but was unable, to "imagine a scenario where [the applicable] homeowners association could be based outside the City." (R. p. 1275, lines 1–8).

Thus, as the Court correctly concluded in its Order, "the homeowners' association requirement in both sections 23-2 and 23-22 of the Zoning Ordinance violates the dormant Commerce Clause because it requires the ownership of the cabana house . . . to be located and registered in Horry County (pursuant to the statutes) because the subject property . . . must be located in North Myrtle Beach." (R. p. 38).

Additionally, the City appears to argue a severability analysis with respect to the residency requirement. However, the trial court's Order already ruled that "all other provisions of the City's Zoning Ordinance are constitutional and fully enforceable," thereby severing the residency requirement espoused in sections 23-2 and 23-22 from the rest of the Zoning Ordinance. (R. p. 42). Thus, it is not clear what severability argument the City is now making on appeal.

However, to the extent the City is now arguing that the residency requirement can also be severed in such a way so as to preserve parts of the residency requirement, as it relates to homeowners' associations affiliated with the North Myrtle Beach-project, that argument was never raised to the trial court and is being raised for the first time on appeal. Therefore, it is not preserved for this Court's review. *Herron*, 395 S.C. at 465, 719 S.E.2d at 642.

III. THE CITY FAILED TO ESTABLISH THAT ITS STATED MUNICIPAL INTERESTS SERVED BY THE "RESIDENCY REQUIREMENT" IN SECTIONS 23-2 AND 23-22 OF THE CITY'S ZONING ORDINANCE ADVANCE A LEGITIMATE LOCAL PURPOSE THAT CANNOT BE ADEQUATELY SERVED BY OTHER REASONABLE NON-DISCRIMINATORY ALTERNATIVES.

A law that is found to discriminate against interstate commerce "puts it on death's doorstep," and can only survive if it advances a legitimate local purpose that cannot be adequately served by **any** reasonable nondiscriminatory alternatives. *Hignell-Stark*, 46 F.4th at 328 (citing *Davis*, 553 U.S. at 338); *see also Orthofix, Inc.*, 443 S.C. at 145, 903 S.E.2d at 500 ("A state law that facially discriminates against interstate commerce is virtually *per se* invalid.") (quotations and

citations omitted).[23] Discrimination in this context "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Hazel*, 733 F.3d at 542–43 (quoting *Or. Waste Sys., Inc.*, 511 U.S. at 99).

The City offered three separate interests that are served by the restrictions in sections 23-2 and 23-22: (1) responsiveness, (2) quality of life, and (3) preservation of property values. (R. p. 1254, lines 8–15). Respondents did not dispute that these are legitimate interests; however, as the trial court observed, all can be adequately served by reasonable nondiscriminatory alternatives; therefore, none of them can justify the restrictions. (R. p. 40).

First, the City claims that the homeowners' association ownership requirement is necessary to address its "responsiveness" concerns. (R. p. 1243, lines 19–24). The City claims that it has a more successful track record dealing with local homeowners' associations and believes they are more responsive to the City's concerns because, as the City Manager testified, the City has authority over them by virtue of their location. (R. p. 1060, lines 12–p. 1062, line 4). Granted, the City has not conducted any studies to back up this assertion, but believes its anecdotal impressions are sufficient. (R. p. 1243, line 19–p. 1244, line 3).

While the homeowners' association ownership requirement might help the City achieve its responsiveness goal, this Court needs to look no further than the Zoning Ordinance's penalty provision found in section 23-7 to find reasonable nondiscriminatory alternatives available to the City to ensure responsiveness. (R. p. 207). Section 23-7 provides that violations of the conditions and safeguards established in connection with special exceptions, like cabana houses, shall

[23] To date, only one such U.S. Supreme Court case has been able to meet this exceedingly high standard. *Maine v. Taylor*, 477 U.S. 131 (1986) (holding Maine's ban on the importation of out-of-state bait fish was constitutional, even though the law discriminated against interstate commerce on its face, because Maine had no other means to prevent the spread of parasites to its unique, native fish species).

constitute a misdemeanor, and any person who violates the Zoning Ordinance shall, upon conviction thereof, be fined in an amount not exceeding $500.00, imprisonment for a period not exceeding 30 days, or both. (*Id*.) Each day such violation continues shall be considered a separate offense. (*Id*.) Accordingly, this enforcement mechanism could be utilized to ensure owners of cabana houses are responsive to requests from the City. The City could also increase the penalties imposed on cabana house owners who fail to respond to the City when an issue arises. This would create a stronger incentive to quickly respond to the City when called upon and would also help the City fund any increase in its enforcement efforts.[24]

Second, the City argued that limiting the ownership of cabana houses to homeowners' associations for projects in North Myrtle Beach preserves "quality of life." Specifically, the City testified that quality of life in the community is advanced when projects are developed in a safe and efficient manner and that requiring a cabana house to be used exclusively by a project within the City helps take pressure off the oceanfront by directing investment elsewhere in the City. (R. p. 1255, line 5–p. 1256, line 13).

The City's legitimate concerns about quality of life are achievable by enforcement of the remaining provisions in section 23-22, which govern the use of approved cabana houses. For example, section 23-22(4)(d)(4) requires that use of a cabana house must be "in substantial harmony with the area in which it is to be located." Additionally, the use of a cabana house may "not be injurious to the adjoining property" or "discourage or negate the use of surrounding property for use(s) permitted by right." North Myrtle Beach, S.C. Code § 23-22(4)(d)(5)-(6). And

[24] Notwithstanding the City's arguments that these enforcement tools would not be meaningful to a large corporation like Sun Communities, Inc., the prospect of spending 30 days in the North Myrtle Beach jail is incentive enough. But, having never availed itself of these enforcement tools, the City cannot be heard to claim that they would be ineffective.

again, as stated above, enforcement of these provisions, through Section 23-7, would not only incentivize cabana house owners and users to adhere to the requirements set forth in Section 23-22, but would also fund increased enforcement. The City has not shown that these interests can only be served by requiring Respondents to cease and desist owning and operating the Beach Club, or by banning non-resident ownership.

Third, the City claims preservation of property values (an economic consideration in itself) is another interest served by the discriminatory residency requirement for cabana houses. However, as discussed in detail above, increased enforcement of the other provisions already identified in section 23-22 through the enforcement mechanism provided for in section 23-7 presents a clear reasonable alternative method for achieving the City's interest in preserving property values.

Through these provisions already in existence, reasonable nondiscriminatory alternative measures exist to advance the City's legitimate local interests regarding the ownership of cabana houses, without resorting to discriminating against interstate commerce in violation of the dormant Commerce Clause. Although the City's position is that there are no other alternatives to achieve its interests other than prohibiting non-local ownership of a cabana house, common sense says otherwise, and the City cannot withstand its constitutional burden under strict scrutiny analysis.

IV. THE TRIAL COURT ADEQUATELY DEFINED THE SPECIFIC PROVISIONS CONTAINED WITHIN SECTIONS 23-2 AND 23-22 THAT CONSTITUTE THE UNCONSTITUTIONAL RESIDENCY REQUIREMENT AND FOR WHICH THE CITY IS PERMANENTLY ENJOINED FROM ENFORCING.

Finally, the City argues in its brief that the trial court "fails to define what the residency requirement is," and as a result, the trial court's order is "vague, ambiguous, and in need of clarification." (App.'s Br., p. 49). The City's argument is unavailing.

First, the trial court did define residency requirement on page 9 of its Order when it laid out the two critical and controlling issues, stating: "Whether the residency requirement set forth in sections 23-2 and 23-22, which require[s] that a homeowners' association established for a project in North Myrtle Beach must own and exclusively operate a cabana house, is violative of the dormant Commerce Clause." (R. p. 26). Therefore, clarification of the residency requirement is not needed.

Second, the Court is not required to expressly state which specific words in the Zoning Ordinance are unconstitutional. The Order is clear as to the unconstitutional requirements contained in sections 23-2 and 23-22, and it would be a usurpation of the City Council's governmental authority for this trial court to re-write the Zoning Ordinance. Rather, having made clear that the residency requirement in the Zoning Ordinance is unconstitutional, it is within the control and responsibility of the City Council to administer the Zoning Ordinance in compliance with the Order.

CONCLUSION

The judgment of the trial court should be affirmed in its entirety. Based on the foregoing and any other grounds appearing in the Record on Appeal (as provided for in Rule 220, SCACR), the residency requirement imposed by sections 23-2 and 23-22 of the R-4 District in North Myrtle Beach governing the ownership and use of a cabana house violates the dormant Commerce Clause of the U.S. Constitution. As the trial court correctly found, the residency requirement regulates a local economic activity, which has a substantial effect on interstate commerce. The residency requirement discriminates against interstate commerce on its face, in its effect, and in its purpose; and should therefore be considered *per se* invalid. The remaining provisions of section 23-22 of the Zoning Ordinance and the enforcement mechanisms set forth in section 23-7 are unmistakable

evidence that reasonable non-discriminatory alternatives exist to advance the City's proffered legitimate local interests of "responsiveness," "quality of life," and "preservation of property values," without resort to the discriminatory restrictions that currently exist.

If the City passed an ordinance stating that only residents of North Myrtle Beach could own and use beachfront property within the City's limits, that ordinance would be struck down as unconstitutional without a second thought. This case is no different. The City does not merely make it more difficult for RV Resorts and other similar projects located outside the City to compete in the market for visitors who want private beach access through a beach club or a cabana house in the R-4 District; it outright forbids them for participating in the market altogether, simply because they are "outsiders," or as the City referred to them at trial—"transient." The consequence is that only residents of the City (and those who will pay accommodation taxes to benefit the City) may own and use a cabana house, whether for themselves or as part of an effort to participate in the tourism market in North Myrtle Beach.

These types of restrictions represent the very laws grounded on local "economic protectionism" that "the Constitution was designed to prevent." *Carbone*, 511 U.S. at 390 (citing THE FEDERALIST NO. 22, at 143-145 (A. Hamilton) (C. Rossiter ed. 1961); JAMES MADISON, *Vices of the Political System of the United States*, *in* 2 WRITINGS OF JAMES MADISON 362-363 (G. Hunt ed. 1901)). Far from sounding the death knell to all zoning ordinances, as the City histrionically predicts, affirming the trial court encourages proper and careful analysis of local zoning decisions, so as to preserve their constitutionality.

The trial court's order should be affirmed in its entirety, and this matter should be remanded to the trial court for the jury phase of this case to determine what damages Respondents should be awarded under 42 U.S.C. §§ 1983 and 1988.

Respectfully submitted,

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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

City of North Myrtle Beach,

Appellant,

v.

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

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondents complies with Rule 211(b), SCAR.

Signature Page to Follow

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