

**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

RECEIVED

Dec 17 2024

SC Court of Appeals

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.

**FIRST AMENDED
RECORD ON APPEAL**

VOLUME VII

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE FIFTEENTH CIRCUIT
COUNTY OF HORRY	)	
	)	Case No. 2021-CP-26-07489
	)	
CITY OF NORTH MYRTLE BEACH,	)	
	)	
Plaintiff,	)	
	)	SUN DEFENDANTS' MEMORANDUM
vs.	)	IN OPPOSITION TO CITY'S MOTION
	)	TO RECONSIDER
SUN TRS OCEAN CLUB LLC, SUN TRS	)	
CAROLINA PINES LLC, and SUN	)	
CAROLINA PINES RV LLC,	)	
	)	
Defendants.	)	

Defendants Sun TRS Ocean Club LLC, Sun TRS Carolina Pines LLC, and Sun Carolina Pines RV, LLC (collectively, the "Sun Defendants") submit this Memorandum in Opposition to Plaintiff City of North Myrtle Beach's (the "City") Motion to Reconsider pursuant to Rules 52(b), 59(a), and 59(e) of the South Carolina Rules of Civil Procedure.

INTRODUCTION

The City's Motion fails to assert any compelling reasons for the Court to reconsider or amend its rulings. The Court properly considered and ruled on all the issues raised by the City, and the Court thoroughly explained its reasoning in reaching its conclusions in its November 20, 2023 Final Order (the "Order"). The City merely expresses dissatisfaction with the Court's ruling or attempts to raise new issues that could have been raised prior the Order. *See Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849, 854 (2005); *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (a party may not raise an issue in a motion to reconsider, alter or amend judgment that could have been presented prior to judgment). For the reasons set forth below, Sun Defendants respectfully request that the Court deny the City's Motion.

STANDARD OF REVIEW

The City has failed to state the appropriate standard of review for a new trial under Rule 59(a), SCRCF, likely because applying the applicable standard would certainly result in the denial of the City's Motion. Rule 59(a)(2), SCRCF, states that in non-jury actions a new trial may be granted "for any of the reasons for which rehearings have heretofore been granted in the courts of the state." The South Carolina rule is substantially similar to the federal rule. Courts have held that a trial court may set aside the verdict and order a new trial only if "(1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a miscarriage of justice even though there may be substantial evidence which would prevent the direction of a verdict." *Castles v. Tricam Indus.*, Civil Action No. 3:18-cv-00525-JMC, 2021 WL 5446214, at *3 (D.S.C. Nov. 22, 2021) (quoting *Atlas Food Sys. & Servs. Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996)).

Rule 59(e), SCRCF, permits a party to request a court "reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). As indicated in the "Notes" to Rule 59(e), it is also "substantially" the same as the federal rule.¹ Rule 59 permits a court to amend a judgment if the movant can show: "(1) an intervening change in the controlling law, (2) new evidence that was not available at trial, or (3) that there has been a clear error of law or a manifest injustice." *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 407 (4th Cir. 2010). A party's dissatisfaction with the outcome of the underlying litigation and the instance action is not grounds for relief under Rule 59. Furthermore, courts have held that a motion to reconsider should not be a "vehicle for rearguing the law, raising new arguments, or petitioning a court to change its mind." *Lyles v. Reynolds*, Civil Action No.

¹ "Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004).

4:14-1063-TMC, 2016 WL 1427324, at *1 (D.S.C. Apr. 12, 2016) (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008)); see also *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (“A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.”).

ARGUMENT

1. The City’s “Preliminary Matters.”

To the extent that the Order did not specifically mention the “significant public policies favoring the constitutionality of municipal ordinances,” the Court fully considered such public policies during trial as the topic was repeatedly raised by the City in its filings, through witness testimony, and in oral argument. Simply because the City’s chosen public policy concerns were not mentioned in an order does not indicate that the Court did not consider it.

Regarding the Court’s finding that the City cannot escape the plain language of sections 23-2 and 23-22 as it relates to the Court’s denial of both of Sun Defendants’ motions for partial summary judgment on the dormant Commerce Clause, the City’s argument that the Court’s actions are somehow inconsistent is without merit. In denying Sun Defendants’ first Motion for Partial Summary Judgment, the Court found that “a more comprehensive factual record is desirable to fairly determine the appropriate result,” which indicates the Court did not deny the motion as a matter of law but rather because of a possible issue of material fact. (Order Denying Sun Defendants’ Mot. for P. Summary Judgment, pg. 3). In denying Sun Defendants’ Renewed Motion for Partial Summary Judgment, the Court issued a Form 4 order that did not set forth reasons as to why the Court denied the motion. Regardless, while it may appear to the City that the Court’s actions were “inconsistent,” a court is well within its authority to determine facts and issues at trial without regard to a denial of summary judgment because an order denying summary judgment

does not finally determine anything about the merits of the case. *See Ballenger v. Brown*, 313 S.C. 476, 477-78, 443 S.E.2d 379, 380 (1994) (“A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial.”). Further, the City received the benefit of presenting its entire case and all of its evidence to the Court for a full and fair trial, which resulted in a more complete record.

To the extent that the City takes issue with Sun Defendants’ references to the likelihood that the non-prevailing party might appeal a non-favorable order,² this issue was not contemporaneously objected to at trial and is being raised for the first time in a Motion to Reconsider; therefore, it is not properly before the Court. *See Repko v. County of Georgetown*, 424 S.C. 494, 502, 818 S.E.2d 743, 748 (2018) (“It is settled that ‘[a]n issue may not be raised for the first time in a motion to reconsider.’” (quoting *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009)) (alteration in original)). To the extent that this issue is properly before the Court, any references made by Sun Defendants’ counsel to a potential appeal by either side simply referred to the right that any non-prevailing party has in South Carolina—that is, to perfect an appeal before the Court of Appeals. *See* Rule 201, SCACR. The Court, as an experienced member of and participant in the judicial system, is aware of a non-prevailing party’s right to appeal and of the frequency with which such parties appeal non-favorable orders. Thus, any reference to a potential appeal did not sway the Court’s findings.

² During trial, counsel for Sun Defendants (Mr. Willis) stated, “This isn’t a threat or anything, but I think both parties feel strongly enough about this case that it may be taken up to the Court of Appeals regardless of how the Court rules and possibly on to the South Carolina Supreme Court and even to the U.S. Supreme Court, given the issue.” (Tr. 483-84). This statement was made in explanation of why Sun Defendants were not moving for judgment as a matter of law.

2. Separateness of the Project and HOA Requirements.

First, to the extent that the City argues there are two separate and distinct HOA requirements in sections 23-2 and 23-22 (as opposed to the one, singular HOA requirement that the City espoused up to and throughout trial), and to the extent the City asserts any argument relating to the severability of ordinances into three distinct parts, these arguments are not properly before the Court. Both were raised for the first time in the City's post-trial motion, and both could have been raised at trial. *See Repko*, 424 S.C. at 502, 818 S.E.2d at 748.

Second, the Court did properly consider whether the project requirement and the HOA requirement were inextricably linked, and implicitly using the rules of statutory interpretation³ coupled with the City's own testimony, determined that the project and HOA requirements must be read together to understand the purpose and intent of the City Council. Moreover, 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) and must be owned and maintained by a local homeowners' association. Additionally, the City's Rule 30(b)(6) witness testified at trial that, under section 23-22, the same homeowners' association that owns the cabana house must be the same entity established for the project, and it was the City Council's assumption that the homeowners' association that owns a cabana house would also be located within the City. (Tr. 480, ln. 18 – 482 ln. 10).

³ The legislature's intent should be derived primarily from the plain language of the statute. *See Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct.App.2005). The text of a statute is considered the best evidence of the legislative intent or will. *Jones*, 364 S.C. 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. *Jones*, 364 S.C. 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).

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.” Therefore, as the Court fully considered this issue in its Order, it need not reconsider the issue based on the City’s new arguments or the City’s inability (or unwillingness) to comprehend the interrelated nature of its own ordinance.

3. Applicability and the Court’s Interpretation of *Camps Newfound* and *Hignell-Stark*.

The Court properly considered, analyzed, and interpreted *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997), and *Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (5th Cir. 2022) in its Order. As a result, reconsideration of the Court’s interpretation of these cases is not warranted.

a. *Camps Newfound*

As the Court referenced in its Order, the Beach Club is an included amenity of the RV Resort, and as such, is encompassed in the RV Resort’s economic activity. As an included amenity, the cost of using the Beach Club is borne by the RV Resort’s customers as part of the cost of staying at the RV Resort regardless of whether those customers use the beach club; hence, the description of the RV Resort and its amenities as “all-inclusive.” As the Court found, *Camps Newfound* is applicable to this case as it provides guidance on whether the City’s residency requirement with respect to cabana houses has a substantial effect on interstate commerce. *See Camps Newfound*, 520 U.S. at 574.

The City’s repeated attempts to miscategorized the Beach Club as separate and distinct from the RV Resort for the purposes of a dormant Commerce Clause analysis has been raised on

numerous occasions throughout this case and at trial. As such, the City's is merely rearguing the same points that the Court has already heard and considered. The City's dissatisfaction with the outcome of the trial and attempts to change the Court's mind on this legal issue are not proper grounds for relief. Therefore, as the Court has already considered and ruled, the residency requirement as it relates to cabana houses has a substantial effect on interstate commerce.

Regarding City's arguments related to the percentage of RV Resort guests that used the Beach Club, this argument is being presented for the first time in the City's Motion to Reconsider. *See Repko*, 424 S.C. at 502, 818 S.E.2d at 748. While the City did elicit testimony about Plaintiff's Exhibit 62 at trial, which is an incomplete attendance log for the beach club for the 2021 season,⁴ the City never questioned any witnesses about the percentages it now presents. Moreover, the Court has already considered the arguments the City did present—those regarding the RV Resort's occupied site nights—and found the arguments to be unpersuasive.

Likewise, regarding the City's argument that an increase in cost—or in the City's view, a lack thereof—is relevant to the Court's analysis, this issue was also raised for the first time in the City's Motion to Reconsider, and therefore, it's not appropriately before the Court. *See Repko*, 424 S.C. at 502, 818 S.E.2d at 748. To the extent this argument is appropriately before the Court, the City has provided no authority to support its contention that a cost increase is a required consideration, instead only pointing to two anecdotal cases where an unconstitutional law resulted in additional costs.

Based on the foregoing and the Court's interpretation and analysis of *Camps Newfound* in its Order, the City has not provided sufficient reason for the Court to reconsider its holding under *Camps Newfound*.

⁴ Testimony was presented at trial, by the City, that Sun Defendants did not keep a complete or accurate record of attendance at the Beach Club.

b. *Hignell-Stark*

The Court fully analyzed and considered the application of *Hignell-Stark* in its Order. Therefore, reconsideration of this analysis is also not necessary.

To the extent that the City likens Sun Defendants use of the Beach Club to an “accessory use,” this argument is a red herring. Under section 23-2 of the Zoning Ordinance, an “accessory building” and an “accessory use” are both limited to buildings and uses “located on the same lot with such principal building or use.” Clearly, as the City has made abundantly clear through testimony at trial, that is not the case here.

The City’s remaining arguments that the Court improperly applied *Hignell-Stark* are nothing more than hyperbolic assertions that the Court’s ruling degrades zoning ordinances across the country and impedes local governments from regulating accessory uses. Not only does the City fail to provide any support for this conclusory claim, but the Court is aware that its ruling does not affect the ability of local governments to implement zoning requirements with respect to accessory uses. The City, much like any other local government, simply must do so in ways that do not violate the U.S. Constitution.

c. *Lopez-Morrison* Considerations

The Court considered *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), in its Order, and the City’s arguments in its Motion to Reconsider are again nothing more than the City rearguing the same points on these two cases that the Court has already heard and considered. Thus, the City does not present any argument related to the

Court's consideration of *Lopez* and *Morrison* that would warrant the Court's reconsideration of the applicability of these two cases.⁵

4. The City's Failure to Raise a *Pike v. Bruce Church* Argument.

In *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the United States Supreme Court outlined a two-step analysis for laws challenged under the dormant Commerce Clause. The first step is to determine whether a law or regulation directly regulates or discriminates against interstate commerce. If so found, the burden shifts to the government to show that no reasonable non-discriminatory alternative exists to achieve the policy goals of the law or regulation. Only when the law or regulation does not directly discriminate against interstate commerce would a court proceed to the second step under *Pike*, "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

Recently, the United States Supreme Court emphasized that *Pike* and its progeny serve "as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose even if the law regulates even-handedly on its face." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 378 (2023). In *National Pork Producers*, the Supreme Court indicated that a *Pike* analysis is appropriate only when a law is does not directly discriminate against interstate commerce. *Id.*

Here, while the City did assert that the residency requirement of sections 23-2 and 23-22 did not discriminate against interstate commerce, the City's failure to argue that the *Pike* analysis

⁵ It is interesting, however, that the City only saw fit to argue the first and fourth of the factors it identified from *Lopez* and *Morrison*, rather than all four as it presented at trial. Additionally, the attorney-made chart that the City included in its analysis of the fourth factor was never testified to at trial, despite being utilized by the City in its closing arguments.

should have applied, much less that the *Pike* analysis would weigh in its favor, means this argument is presented for the first time in the City's motion to reconsider and is not properly before the Court. *See Repko*, 424 S.C. at 502, 818 S.E.2d at 748. Contrary to the City's assertion that Sun Defendants did not raise a *Pike* challenge to the residency requirement (and the City's implication that it failed to raise this argument only because Sun Defendants did not raise it), Sun Defendants are not responsible for raising the City's arguments for it. *See Hickman*, 301 S.C. at 456, 392 S.E.2d at 482.

However, if the issue is properly before the Court, when a law directly discriminates against interstate commerce on its face, in its effect or in its purpose—as the Court determined the residency requirement does here—the Court need not resort to a *Pike* analysis. Rather, the burden immediately shifts to the government to show no reasonable non-discriminatory alternatives existed other than to discriminate against interstate commerce to achieve the City's legitimate municipal interests.⁶ The City failed to meet this burden, as it only presented evidence that its public interests were “legitimate” but failed to establish that no reasonable non-discriminatory alternatives existed. Therefore, as the Court determined that the residency requirement directly discriminated against interstate commerce and the City failed to satisfy its constitutional burden, it did not need to consider the *Pike* analysis.

⁶ If the Court finds that a law or regulation discriminates against interstate commerce (whether on its face, in its effect, or in its purpose), the analysis ends, and the Court must shift the burden to the government to show no reasonably nondiscriminatory alternatives exist to achieve its policy goals. *See, e.g., Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (2022) (“The district court held that the residency requirement discriminated against interstate commerce. That was the right call. But the court then applied the *Pike* test to uphold the law. That was a mistake . . .”).

5. Transience and Intensity of Use is Part of the City’s “Quality of Life” Municipal Interest According to the City’s Own Testimony.

The Order does not “discount” the issue of transience in the RV Resort’s guests and their intensity of use of the Beach Club as the City contends in its Motion. Rather, as the City’s witnesses testified, the transient nature of the RV Resort’s guests and intensity of use at the Beach Club were considered by the Court as part of the multitude of factors making up the City’s “quality of life” municipal interest that was testified to at length throughout the trial. (Tr. 475, ln. 10-22). The Court found that, although the City’s quality of life justification represented a legitimate municipal interest, the City failed to satisfy its burden by showing that no other reasonable non-discriminatory alternatives existed other than to directly discriminate against interstate commerce through the residency requirement as it pertains to cabana houses. (Order, p. 24).

Thus, as the Court fully and properly considered the City’s quality of life justification and analyzed whether any non-discriminatory alternatives existed to achieve this legitimate municipal interest as required in a dormant Commerce Clause analysis, there is no need to reconsider this finding.

6. The City’s Interrogatory Responses

Sun Defendants are unsure what improper weight the City believes the Court is giving to the interrogatory responses based on the word “telling.” However, as acknowledged by the Court in its Order, Mr. Wood, the City’s 30(b)(6) representative, read the relevant interrogatory responses into the record, after which he stated that he still agreed with the responses to Interrogatories 17, 18, and 19. (Tr. 457, ln. 8 – 459, ln 9; Tr. 474, ln. 1 – 475, ln. 9). Mr. Wood even acknowledged on cross examination that the responses were submitted before the City had obtained and reviewed the legislative history. (Tr. 475, ln. 6-9). Therefore, because the Court was aware that the responses were submitted before the City had obtained and reviewed the legislative

history and Mr. Wood still agreed with the substance of the responses at trial, the Court properly considered the responses and testimony of Mr. Wood in its Order. *See* Rule 33(d), SCRCP (“[T]he answers [to interrogatories] may be used to the extent permitted by the rules of evidence.”). Therefore, reconsideration of this issue is not warranted.

7. Stricken Language

First, the 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.” Therefore, clarification of “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 legislative authority for this Court to strike out specified words in 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 revise the zoning ordinance accordingly in compliance with the Order.

CONCLUSION

Based on the foregoing, the Court correctly found that the residency requirement for cabana houses in sections 23-2 and 23-22 of the City’s Zoning Ordinance discriminates against interstate commerce in violation of the U.S. Constitution’s dormant Commerce Clause and is, therefore, unconstitutional. The City cannot escape the plain language of these provisions, and the requirement that a cabana house located in the R-4 Resort Residential District must be owned by

a local homeowners' association for a project located in the City discriminates against interstate commerce on its face, in its effect, and in its purpose. Accordingly, the Court properly determined and ordered that the City is permanently enjoined from enforcing those restrictions against Sun Defendants as well as against any other current or future owners of cabana houses in the R-4 Resort Residential District.

WILLIAMS MULLEN

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Counsel for Sun Defendants

December 12, 2023
Columbia, South Carolina

REAL ESTATE PURCHASE AND SALE AGREEMENT

15* This **REAL ESTATE PURCHASE AND SALE** ("**Agreement**") is made and entered into this day of February, 2019 (the "**Effective Date**"), by and between **NMB Ocean Club Partners, LLC**, a South Carolina limited liability company ("**Seller**"), with an address of 2120 Sea Mountain Highway, Suite 1200, North Myrtle Beach, South Carolina, 29582, and **SUN ACQ LLC**, a Michigan limited liability company ("**Purchaser**") having its principal office at 27777 Franklin Road, Suite 200, Southfield, Michigan 48034, or its designee or assignee.

R E C I T A L S:

A. Seller is the owner of a parcel of real property located at 1814 N. Ocean Blvd., North Myrtle Beach, South Carolina 29582, which is more particularly described on **Exhibit A** attached hereto and made a part hereof, together with all buildings, easements, improvements, and appurtenances now or hereafter on the real property and together with all of Seller's interest in all real property lying in the bed of any street, road or avenue adjoining the above described real property, if any, all easements, strips, rights of way, and privileges inuring to the benefit of such real property, all fixtures attached to and made a part of such real property ("**Real Estate**"). The Seller owns and operates a beach club known as "The Ocean Club at Tilghman Beach" ("**Beach Club**") on the Real Estate.

B. Seller also owns personal property, equipment and goods used in connection with the operation of the Beach Club as described on **Exhibit B** ("**Personal Property**").

C. Seller has entered into, holds and is the owner of certain Use and Access Agreements Related to Ocean Club at Tilghman Beach in the form attached as **Exhibit C** attached hereto and made a part hereof ("**Use and Access Agreements**") and Ocean Club Resident Member Acknowledgement and Agreements in the form attached as **Exhibit D** attached hereto and made a part hereof ("**Resident Agreements**"), pursuant to which customers use and gain access to the Beach Club entered into as of the dates, with the initial fees of, at the rates of, and with the persons identified on **Exhibit E** attached hereto and made a part hereof ("**Member Summary**").

D. Seller is the owner of certain intangible property relating to the Beach Club and its operation including, by way of illustration and not limitation, (i) all governmental licenses and permits ("**Licenses**"); and (iii) all trade names and property names, including the name "The Ocean Club at Tilghman Beach", and all variations of the name, all telephone numbers, domain names, e-mail addresses and other means of contact utilized in connection with the Beach Club ("**Tradenames**"). The Licenses, Tradenames and other intangible property are hereinafter referred to as "**Intangible Property**".

E. The Personal Property, Use Agreements, and Intangible Property are hereinafter collectively referred to as the "**Operating Assets**".

F. Seller wishes to sell to Purchaser and Purchaser wishes to purchase from Seller the Real Estate and the Operating Assets (collectively, "**Assets**").

NOW, THEREFORE, for and in consideration of the premises, and the mutual promises hereinafter set forth, and the purchase monies to be paid by Purchaser to Seller, IT IS HEREBY AGREED:

1. PURCHASE AND SALE.

1.1 Purchaser hereby agrees to purchase from Seller, and Seller hereby agrees to sell to

Purchaser, the Assets upon the terms and subject to the conditions set forth in this Agreement.

2. **PURCHASE PRICE AND PAYMENT THEREOF.**

2.1 The aggregate purchase price for the Assets shall be the sum of Two Million Five Hundred Thousand and 00/100 Dollars (\$2,500,000.00) ("**Purchase Price**"). The Purchase Price, adjusted as provided in this Agreement, shall be payable by Purchaser in the following manner:

- (a) Twenty Thousand and No/100 (\$20,000.00) Dollars (the "**Earnest Money Earnest Money Deposit**"), delivered to Robert S. Guyton, P.C., 4605 B Oleander Drive, Suite 202, Myrtle Beach, South Carolina ("**Escrow Agent**"), to be refunded to Purchaser, applied to the Purchase Price, or disbursed to Seller, in accordance with the terms of this Agreement and Joinder attached hereto; and
- (b) The balance of the Purchase Price, after application of the Earnest Money Earnest Money Deposit, on the Closing Date (as herein defined) by wire transfer of immediately available funds to the Title Company for disbursement to Seller or Seller's direction.

3. **PERMITTED EXCEPTIONS.**

3.1 The Assets shall be sold and conveyed to Purchaser subject only to the following matters ("**Permitted Exceptions**"):

- (a) Those easements, encumbrances and other matters set forth on Schedule B-2 of the Commitment to be delivered pursuant to Section 4.1 hereof which Purchaser does not designate as Title Defects pursuant to Section 5.1 hereof;
- (b) Any Title Defect, as defined in Section 5.1, which Seller or Purchaser cures, or with respect to which Purchaser waives its objection, as provided in Section 5.1 hereof;
- (c) The rights of parties to use the Assets in accordance with the Use and Access Agreements and Resident Agreements to the extent set forth in the Member Summary, as the same shall be updated to the Closing Date; and
- (d) Liens for unpaid real estate taxes not yet due and payable, and assessments for public improvements installed after the Closing Date, all not yet due or payable, subject to proration thereof as hereinafter provided.

4. **EVIDENCE OF TITLE; SURVEY; LIEN SEARCHES.**

4.1 Purchaser has, at its sole cost and expense, placed an order for a Commitment for an A.L.T.A Form B Owner's Policy of Title Insurance (the "**Commitment**") from **Amrock, Inc., 662 Woodward Ave., 9th Floor, Detroit, Michigan 48226, Attn: Janet Meisel-Voisine (janetvoisine@titlesource.com)**, acting as agent for a nationally recognized title insurance company reasonably acceptable to Purchaser (the "**Title Company**"), in the amount of the Purchase Price (subject to allocation by Seller and Purchaser between the Real Estate and Operating Assets), naming the Purchaser (or its permitted assignee) as the insured, with respect to the Real Estate. Purchaser has provided to the Title Company, an existing title policy delivered by Seller and has instructed the Title Company to provide the Commitment and copies of all instruments described in Schedule B of the Commitment, as soon as

possible. Upon Purchaser's receipt of the Commitment, Purchaser shall forward a copy of the Commitment, together with copies of any and all exceptions set forth therein.

4.2 Purchaser shall, at its sole cost and expense, as soon as possible after the entry into this Agreement order a survey ("**Survey**") from a surveyor satisfactory to Purchaser ("**Surveyor**") which Survey shall be certified to Purchaser, Title Company, and any other parties designated by Purchaser and in such form and including such certifications as Purchaser may designate. Seller shall, as soon as possible, provide Purchaser and Purchaser shall, in turn, provide to the Surveyor any existing surveys delivered by Seller and require the Surveyor to provide the Survey as soon as possible. Purchaser shall submit the Survey to Seller, promptly following receipt, for Seller's review. To the extent Seller objects to the Survey, Purchaser shall not record the Survey in the public records until after Closing, and such Survey shall not serve as the basis for the legal description to be included in the conveyance from Seller to Purchaser. To the extent Seller approves the Survey, and the same is recorded in the public records of Horry County, such Survey shall also form the basis for the legal description to be included in the conveyance from Seller to Purchaser. The Survey shall show the legal description of the Real Estate, Permitted Exceptions and such information as Purchaser may require. The Survey shall be in form and content acceptable to Purchaser. The Parties understand and agree that the initial draft of the Survey will not be completed until the Commitment and all copies of all instruments identified in the Commitment have been delivered.

4.3 Prior to the Closing Date, Purchaser shall obtain, at Purchaser's sole cost and expense, Uniform Commercial Code financing statement, tax lien and litigation searches with respect to Seller and the Assets not later than the expiration of the Inspection Period, showing no security interests, pledges, liens, claims, encumbrances or litigation with respect to the Assets, including the Personal Property, or interfering with the consummation of the transactions provided for herein, except for security interests of a definite or ascertainable amount which may be removed by the payment of money before or at Closing and which Seller has a right to, and must remove at or before Closing.

5. **TITLE OBJECTIONS.**

5.1 If the Commitment or Survey discloses exceptions or other matters which are not acceptable to Purchaser, in its sole discretion, Purchaser shall notify Seller in writing of Purchaser's objections to such exceptions (the "**Title Defects**") on or before the date which is five (5) business days following receipt of both the Commitment and Survey ("**Title Notice**"). Seller agrees to cause to be discharged on or prior to Closing, all Title Defects pertaining to liens, encumbrances and other matters shown on the Commitment of a definite or ascertainable amount, not to exceed the amount of the Purchase Price less any of Seller's expenses to be incurred in connection with Closing (the "**Removable Liens**"). Seller shall have a period of Five (5) business days following receipt of the Title Notice in which to notify Purchaser in writing ("**Title Response**") of those Title Defects which Seller shall elect to cure, if any, prior to Closing. For avoidance of doubt, Seller may elect to cure or not to cure any Title Defect other than Removable Liens which may be discharged from proceeds available at Closing. If Seller fails to provide its Title Response in a timely manner, it shall be deemed an election by Seller not to cure any Title Defects (other than Removable Liens). If Seller elects not to cure any Title Defects Purchaser may: (a) terminate this Agreement by delivery of written notice to Seller, whereupon the Earnest Money Deposit shall be returned to Purchaser and neither Seller nor Purchaser shall have any further duties or obligations under this Agreement; (b) waive any Title Defect and proceed to close as provided herein; or (c) elect to attempt to cure such Title Defects itself for a period not to exceed, fifteen (15) days after the date of the Title Response and if such Purchaser determines it cannot cure the Title Defects during the extended period, Purchaser may then exercise its rights under subparagraphs (a) or (b) above. If Seller or Purchaser cures such Title Defects, the Closing shall be held within seven (7) days after delivery of the revised Commitment and Survey or on the Closing Date specified in **Section 18** hereof, whichever is later.

5.2 At the Closing, the Title Company shall be committed to provide Purchaser, at Purchaser's sole cost and expense, with a policy of title insurance ("**Policy**") issued pursuant to the Commitment, insuring Purchaser with marketable title in in the Real Estate without the so-called "standard exceptions" (other than the standard survey exception, unless the Purchaser provides a survey of the Real Estate to the Title Company sufficient for removal of the standard survey exception) subject to the Permitted Exceptions. The policy of title insurance shall also include such endorsements as Purchaser shall request and such endorsements shall be supplied at Purchaser's sole cost.

6. **INFORMATION AND ACCESS TO PROJECT.**

6.1 The Seller has provided copies to Purchaser of all due diligence material regarding the Assets which it has in its possession or can obtain with reasonable efforts ("**Inspection Materials**") by loading the same on the "Dropbox" folder identified as "Ocean Club at Tilghman Beach". Seller represents and warrants, that, to the best of its knowledge, it has no other Inspection Materials such as surveys; environmental site assessments; contracts regarding use, operation maintenance or repair of the Assets; financial statements or statements of profit and loss; tax returns; plans and specifications; certificates of occupancy, fire inspections, or any other permit, license or certificate pertaining to the operation of the Assets; zoning, safety, building, fire, environmental, health code or other violations relating to the Assets. If any additional Inspection Materials become known or available to Seller, Seller will notify Purchaser in writing and provide copies of them when the same become known or available.

6.2 At all reasonable times from and after the Effective Date, Seller shall afford Purchaser and its representatives full and free access to the Assets, including, but not limited to, the right to conduct environmental, soil, engineering and other tests and to inspect the mechanical, plumbing and utility systems located at the Assets, together with all other aspects of the Assets. Purchaser may obtain at its sole expense a Phase I Environmental Report. If the Environmental Report discloses any condition which requires further review or investigation, Purchaser shall have the right to obtain, at its sole expense, such additional environmental reports as recommended by the engineer delivering such report, and, if necessary, the Investigation Period, as hereinafter defined, shall be extended to provide Purchaser with sufficient time to receive, review and approve the additional environmental reports but no longer than a total of thirty (30) days. Purchaser agrees to indemnify and hold Seller harmless from all damage caused to any person or the Assets as a result of entry on the Real Estate and the negligent acts or omissions of Purchaser or its representatives but not from any currently existing condition or the negligence or misconduct of Seller or its agents.

7. **ADJUSTMENTS AND PRORATIONS.**

7.1 The following adjustments and prorations shall be made at the Closing between Seller and Purchaser computed to, but not including, the Closing Date.

(a) Real estate taxes and personal property taxes which are a lien upon or levied against any portion of the Assets on or prior to the Closing Date, and all special assessments levied prior to the Closing Date shall be paid by Seller. Further, all taxes in the nature of rollback or similar taxes charged, assessed or levied based on the prior use or any change in use of the Assets shall be the obligation of Seller. All current real estate taxes and personal property taxes (the "**Current Taxes**") levied against any portion of the Assets with respect to the tax year in which the Closing occurs, which Current Taxes are payable in advance, shall be prorated and adjusted between the parties in accordance with the custom followed in the county where the Real Estate is located.

(b) The amount of all unpaid water and other utility bills, and of all other expenses incurred with respect to the Assets, relating to the period prior to the Closing Date, shall be paid by Seller,

and such expenses attributable to the period from and after the Closing shall be the obligation of Purchaser.

(c) All revenues (collectively, the "**Fees**") whether arising under Use and Access Agreements and Resident Agreements or otherwise and which are collected by Seller up to the Closing Date which are allocable to the period from and after the Closing Date shall be paid by Seller to Purchaser. There shall be no proration of past due fees and neither Seller or Purchaser shall have any obligation to collect for, or pay past due fees to, the other.

(d) All recording and filing fees shall be paid by Seller. Any real estate transfer tax, intangible tax, documentary tax, sales taxes, sales and use taxes and other taxes or charges levied on the transfer and conveyance of the Assets, whether levied on the Real Estate or Operating Assets or otherwise, shall be paid by Seller.

8. **SELLER'S WARRANTIES.**

8.1 Seller represents and warrants to Purchaser as of the Effective Date, and as of the Closing Date, the following with the understanding that each of the representations and warranties are material and have been relied on by Purchaser in connection herewith.

(a) True, complete and accurate copies of the Use and Access Agreements and Resident Agreements, including all amendments and documents relating thereto, have been or will be delivered to Purchaser; the Member Summary attached hereto as **Exhibit E**, as updated to the Closing Date, is and will be a true, complete and accurate list describing each of the Use and Access Agreements and Resident Agreements, respectively, including the name of the member, the parking or gate pass issued to the member, taxes and other charges, delinquencies in payments, any deposits, prepaid fees or credits paid by such member as well as any reservations to use the Beach Club or part thereof on any date at Closing.

(b) Except as set forth on **Exhibit E** each Resident Agreement is in full force and effect, absent any default by Seller or the Member, and no events have occurred which, with notice or the passage of time, or both, would constitute such a default; to the best of Seller's knowledge, Seller has performed all of its obligations under each Use and Access Agreements and Resident Agreements have not been modified unless expressly described in **Exhibit E**. Seller has not received and has no knowledge of any asserted defaults or claims from any party to any Use and Access Agreements and Resident Agreements or from any party whose rights under Use and Access Agreements and Resident Agreements have been terminated.

(c) To the best of Seller's knowledge, the Assets and the operation of the Beach Club comply in all respects with all Permitted Exceptions and all applicable laws, ordinances, codes, rules and regulations, including those pertaining to zoning, access to disabled persons (ADA), building, health, safety and environmental matters and there are no outstanding or incomplete development requirements, including offsite improvements, required under any development agreement with, or requirements, of any governmental authority or private body and all fees incident to construction and operation of the Assets have been paid. To the best of Seller's knowledge, there are no existing facts or conditions which may result in the issuance of, any violations of any building, zoning, safety, fire, environmental, health or other codes, laws, ordinances or regulations with respect to the Assets, the appurtenances thereto or the maintenance, repair or operation thereof. To the best of Seller's knowledge, Parking at the Real Estate complies with all requirements for the operation of the Beach Club.

(d) There are no existing, pending or, to the best of Seller's knowledge, threatened litigation or condemnation proceedings or other court, administrative or extra judicial proceedings with respect to or affecting the Assets or any part thereof.

(e) Seller is the lawful owner of the Assets and holds insurable and marketable title to the Assets, free and clear of all liens and encumbrances other than the Removable Liens which Seller has the right to cause to be discharged at Closing. There are no options to purchase, rights of first refusal or other agreements to sell or transfer the Assets to any other party other than the Purchaser.

(f) Seller is duly organized, validly existing and in good standing as a limited liability company under the laws of the State of South Carolina. Seller has and will have on the Closing Date the power and authority to sell the Assets to Purchaser and perform its obligations in accordance with the terms and conditions of this Agreement, and each person who executes this Agreement and all other instruments and documents in connection herewith, has or will have due power and authority to so act.

(g) Neither the execution, delivery, performance of or compliance with this Agreement and all other documents contemplated hereby, nor the conveyance of all of Seller's right, title and interest in and to the Assets as herein contemplated will: (i) violate or conflict with Seller's governing documents; (ii) result in any breach or violation of, or be in conflict with, or constitute a default under, any contract, agreement, judgment, order, statute, rule, regulation or restriction binding on Seller or to which Seller is a party, or affecting or binding on the Assets; or (iii) result in the acceleration of any indebtedness or other obligation of, or create a mortgage, pledge, lien or encumbrance on, the Assets.

(h) Seller has not contracted for the furnishing of labor or materials to the Assets which will not be paid for in full prior to the Closing Date, and if any claim is made by any party for the payment of any amount due for the furnishing of labor and/or materials to the Assets or Seller prior to the Closing Date and a lien is filed against the Assets as a result of furnishing such materials and/or labor, Seller will immediately pay the said claim and discharge the lien.

(i) Seller has not, and to the best of Seller's knowledge, no other party has, discharged, released, generated, treated, stored, disposed of or deposited in, on or under the Assets, and the Assets is free of and does not contain, any "toxic or hazardous substance", asbestos, urea formaldehyde insulation, PCBs, radioactive material, flammable explosives, underground storage tanks, or any other hazardous or contaminated substance (collectively, the "Hazardous Materials") prohibited, limited or regulated under the Comprehensive Environmental Response Compensation and Liability Act, the Resource Conservation and Recovery Act, the Hazardous Materials Transportation Act, the Toxic Substance Control Act, the Federal Insecticide, Fungicide and Rodenticide Act, or under any other applicable federal, state or local statutes, regulations or ordinances (collectively the "Environmental Laws"), and to the best of Seller's knowledge, there are no substances or conditions in or on the Assets which may support a claim or cause of action under any of the Environmental Laws. There is no suit, action or other legal proceeding arising out of or related to any Environmental Laws with respect to the Assets which is pending, and to the best of Seller's knowledge, threatened before any court, agency or government authority, and Seller has not received any notice that the Assets are in violation of the Environmental Laws.

(j) Attached hereto as **Exhibit F** is the operating statement for the Assets for the year ending December 31, 2018. To the best of Seller's knowledge the statements are true, complete and accurate in all material respects.

(k) To the best of Seller's knowledge, nothing contained in this Agreement, the Exhibits attached hereto or the information and material delivered or to be delivered to Purchaser pursuant to the terms hereof, include any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements contained herein or therein not misleading. Notwithstanding the above, such reports, materials and other information prepared by any third party are delivered without warranty by Seller as to accurateness or completeness. Seller has not received any written notice of any fact which would materially adversely affect the Assets or the operation thereof which is not set forth in this Agreement, the Exhibits hereto, or has not otherwise been disclosed to Purchaser in writing.

(l) Seller has timely paid, and will timely pay up to the Closing Date, all sales, use unemployment or other taxes which are due in connection with or arising out of the operation of the Operating Assets.

(m) There are no employees employed by Seller or by any other party in connection with the Assets.

(n) (i) Seller is not a Prohibited Person (as defined below); (ii) none of Purchaser's investors, affiliates or brokers or other agents (if any), acting or benefiting in any capacity in connection with the transaction contemplated under this Agreement are Prohibited Persons; and (iii) none of the funds or other assets, if any, to be transferred hereunder are the property of, or beneficially owned, directly or indirectly, by a Prohibited Person, nor are such funds or other assets the proceeds of any specified unlawful activity as defined by 18 U.S.C. § 1936(e)(7). "Prohibited Person" means any of the following: (A) a person or entity that is listed in the Annex to, or is otherwise subject to the provisions of, Executive Order No. 13224 on Terrorist Financing (effective September 24, 2001) (the "Executive Order"); (B) a person or entity owned or controlled by, or acting for or on behalf of any person or entity that is listed in the Annex to, or is otherwise subject to the provisions of, the Executive Order; (C) a person or entity that is listed as a "specially designated national" or "blocked person" on the most current list published by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") at its official website www.treas.gov/office/enforcement/ofac; (D) a person or entity that is otherwise the target of any economic sanctions program currently administered by OFAC; or (E) a person or entity that is affiliated with any person or entity identified in subclause (A), (B), (C) and/or (D).

(o) To the best of Seller's knowledge, the amount of Removable Liens do not exceed the amount of the Purchase Price less any of Seller's expenses to be incurred in connection with Closing.

8.2 The provisions of Section 8.1 and all representations and warranties contained therein shall be true and correct as of the Closing Date and shall survive the closing of the transaction contemplated herein and the conveyance of the Assets to Purchaser for a period of One (1) year. The investigation by Purchaser and its employees, agents and representatives, of the financial, physical and other aspects of the Assets shall not negate or diminish the representations and warranties of Seller contained herein.

9. INVESTIGATION PERIOD AND GOVERNMENT APPROVALS.

9.1 Purchaser shall have a period of forty (40) days after the Effective Date (the "Investigation Period") to inspect and investigate all aspects of the Assets to determine whether, in the sole discretion of Purchaser, the Assets are adequate for their intended uses and whether the acquisition of the Assets is satisfactory to Purchaser in all respects. If Purchaser is not satisfied during the Investigation Period,

Purchaser may terminate this Agreement, whereupon the Earnest Money Deposit shall be returned to Purchaser, and neither Purchaser nor Seller shall have any further obligations to each other hereunder.

9.2 If Purchaser notifies Seller in writing at any time on or prior to the date of expiration of the Investigation Period that Purchaser is satisfied with the Assets (the "**Investigation Notice**"), Purchaser's right to terminate this Agreement under **Section 10.1** above shall be deemed to have been waived. If Purchaser does not send the Investigation Notice to Seller on or prior to the date of expiration of the Investigation Period, the Earnest Money Deposit shall be returned to Purchaser and this Agreement, without further action of Purchaser, shall terminate and be of no further force or effect and neither Purchaser nor Seller shall have any further obligations to each other hereunder.

9.3 If Purchaser is advised that any hazardous or contaminated materials develop on the Real Estates or on any land adjoining the Real Estate at any time after the expiration of the Investigation Period and prior to the Closing Date (a "**Late Discovered Environmental Concern**"), it shall advise Seller in writing of such Late Discovered Environmental Concern (the "**Environmental Notice**"). If upon further investigation Purchaser's environmental consultant concludes that such Late Discovered Environmental Concern was not caused by Purchaser, its agents, representatives or contractors, Purchaser shall have the right to cancel and terminate this Agreement. In such event, the Earnest Money Deposit shall be returned to Purchaser and this Agreement shall be null and void and Seller and Purchaser shall not have any further obligation to the other hereunder.

9.4 Seller shall execute and submit such applications, forms and other documents as Purchaser may reasonably request as necessary for Purchaser to obtain any licenses or other consents or approvals necessary to operate the Assets.

10. **CONDITIONS.**

10.1 Purchaser's obligation to consummate the purchase of the Assets is expressly conditioned upon the following, which, if not performed or determined to be acceptable to Purchaser on or before the Closing Date (unless a different time for performance is expressly provided herein), shall permit Purchaser, at its sole option, to declare this Agreement null and void and of no further force and effect by written notice to Seller (or with respect to item (e), below, extend the time for delivery of the discharge for thirty (30) days), and neither Seller nor Purchaser shall have any further obligations hereunder to the other (provided that Purchaser shall have the right to waive any one or all of said conditions).

(a) On the Closing Date, Seller shall have good and marketable title to the Assets and the Title Company shall be prepared to issue the requisite Policy pursuant to the Commitment as approved by Purchaser.

(b) Seller shall have complied with and performed all covenants, agreements and conditions on its part to be performed under this Agreement within the time herein provided for such performance in all material respects.

(c) Seller's material representations, warranties and agreements contained herein are and shall be true and correct as of the Effective Date and as of the Closing Date in all material respects.

(d) From and after the Effective Date to the Closing Date there shall have been no materially adverse change in or to the Assets or the business conducted thereon.

(e) Seller shall have obtained a full termination and release of the Easement and Memorandum of Agreement dated May 22, 2014, recorded at Deed Book 3735, Page 3182, Horry County Register of Deeds without liability or any continuing obligation to Purchaser.

11. **OPERATION.**

11.1 From and after the Effective Date to the Closing Date, Seller shall continue to maintain, operate and conduct business of the Assets in the same manner as prior to the Effective Date; (b) perform all regular and emergency maintenance and repairs with respect to the Assets; (c) not sell, assign or convey any right, title or interest in any part of the Assets; (d) but shall not enter into any agreements binding on Purchaser (including any agreements allowing any members to use the Assets) after Closing.

12. **DESTRUCTION OF PROJECT.**

12.1 In the event any part of the Assets shall be damaged or destroyed prior to the Closing Date, Seller shall notify Purchaser thereof, which notice shall include a description of the damage and all pertinent insurance information. If the use or occupancy of the Assets is materially affected by such damage or destruction or the cost to repair such damage or destruction exceeds Fifty Thousand Dollars (\$50,000.00), Purchaser shall have the right to terminate this Agreement by notifying Seller within thirty (30) days following the date Purchaser receives notice of such occurrence, whereupon the Earnest Money Deposit shall be returned to Purchaser and Seller and Purchaser shall not have any further obligation hereunder to the other. If Purchaser does not elect to terminate this Agreement, or shall fail to notify Seller within the said thirty (30) day period, on the Closing Date, which may be extended by Seller or Purchaser to accommodate compliance with this Section 13.1, Seller shall assign to Purchaser all of Seller's right, title and interest in and to the proceeds of any fire and extended coverage insurance presently carried by or payable to Seller, Seller shall cooperate in settling any claim for the benefit of Purchaser and the parties shall proceed to close as provided herein.

13. **CONDEMNATION.**

13.1 If, prior to the Closing Date, either Seller or Purchaser receives or obtains notice that any governmental authority having jurisdiction intends to commence or has commenced proceedings for the taking of any portion of the Assets by the exercise of any power of condemnation or eminent domain, or notice of any such taking is recorded among the public records of the state or county in which the Assets is located, Purchaser shall have the option to terminate this Agreement by notifying Seller within thirty (30) days following Purchaser's receipt of such notice, in which event the Earnest Money Deposit shall be returned to Purchaser, and Seller and Purchaser shall not have any other or further liability or responsibility hereunder to the other. If Purchaser does not elect to terminate this Agreement or shall fail to notify Seller within the thirty (30) day period, Purchaser shall close the transaction as if no such notice had been received, obtained or recorded or proceedings commenced, and in such event, any proceeds or awards made in connection with such taking shall be the sole property of Purchaser, and Seller shall execute such assignments and cooperate in asserting any claims as Purchaser may reasonably request.

14. **DEFAULT BY SELLER OR PURCHASER.**

14.1 In the event Seller shall fail to perform any of its material obligations hereunder, Purchaser may, at Purchaser's option: (a) terminate this Agreement by written notice delivered to Seller at or prior to the Closing Date receive a return of the Earnest Money Deposit and Seller shall be liable to Purchaser for third party costs incurred in connection with this Agreement, not to exceed \$20,000.00; (b) obtain specific

performance of the terms and conditions hereof; or (c) waive Seller's default and proceed to consummate the transactions with Seller.

14.2 In the event Purchaser does not elect to terminate this Agreement as provided herein, Seller is not in default of its obligations under this Agreement and the conditions precedent to Purchaser's obligation to purchase the Assets have been satisfied or waived by Purchaser, and Purchaser fails to purchase the Assets on the Closing Date in accordance with the terms of this Agreement, Seller shall be entitled to terminate this Agreement and have delivered to Seller, as liquidated damages, by the Escrow Agent, the Earnest Money Earnest Money Deposit, the same being Seller's sole remedy, and Purchaser shall have no further or other liability hereunder. Seller and Purchaser agree that in the event of a default by Purchaser under this Agreement, Seller's damages would be difficult or impossible to ascertain, and the Earnest Money Earnest Money Deposit represents a reasonable estimate of such damages. Neither Purchaser, nor any designee, transferee or assignee of Purchaser, nor any officers, directors, shareholders or partners, general or limited, of Purchaser or such designee, transferee or assignee, shall be personally or individually liable with respect to any obligation under this Agreement, all such personal and individual liability, if any, being hereby waived by Seller on its behalf and on behalf of all persons claiming by, through or under Seller.

15. LIABILITY AND INDEMNIFICATION.

15.1 Purchaser does not and shall not assume any liability for any claims arising out of the occurrence of any event or the existence of any condition prior to the Closing Date with respect to the Assets.

15.2 From and after the Closing Date, Seller agrees to indemnify, defend and hold harmless Purchaser, and Purchaser's successors and assigns, from and against any and all claims, penalties, damages, liabilities, actions, causes of action, costs and expenses (including attorneys' fees), arising out of, as a result of or as a consequence of the occurrence of any event or the existence of any condition of the Assets prior to the Closing Date including any liabilities, obligations or indebtedness of Seller, and any breach by Seller of any of its representations, warranties, or obligations set forth herein or in any other document or instrument delivered by Seller in connection with the consummation of the transactions contemplated herein.

15.3 From and after the Closing Date, Purchaser agrees to indemnify, defend and hold harmless Seller from and against any and all claims, penalties, damages, liabilities, actions, causes of action, costs and expenses (including attorneys' fees), arising out of or as a consequence of the occurrence of any event or the existence of any condition of the Assets on or after the Closing Date including any liabilities, obligations or indebtedness of Purchaser and any breach by Purchaser of any of its representations, warranties, or obligations set forth herein or in any other document or instrument delivered by Purchaser in connection with the consummation of the transactions contemplated herein.

15.4 All claims for indemnity made by either Party must be made in a written notice to the other on or before the date which is six (6) months following the Closing.

16. CLOSING.

16.1 Subject to the provisions of this Agreement, the closing ("**Closing**") of the transaction contemplated herein shall take place on or before the date which is five (5) days after expiration of the Investigation Period (as the same may be extended), or such earlier date as may be designated by Purchaser in its sole discretion (the "**Closing Date**"). The Closing shall take place in escrow by depositing all documents with the Title Company, or at a location as Purchaser and Seller shall agree upon.

16.2 At Closing:

- (a) Seller shall execute and deliver a Limited Warranty Deed in recordable form conveying to Purchaser marketable and insurable title to the Real Estate, subject only to the Permitted Exceptions.
- (b) Seller shall execute and deliver a Limited Warranty Bill of Sale conveying the Personal Property to Purchaser, free and clear of any liens or encumbrances other than the Permitted Exceptions.
- (c) Seller shall execute and deliver to Purchaser, in form and content satisfactory to Purchaser, an Assignment, transferring to Purchaser all of Seller's right, title and interest in and to: (i) the Use and Access Agreements and Resident Agreements and all deposits relating thereto; and (ii) the Intangible Property.
- (d) Seller shall satisfy the requirements and conditions of the Title Company applicable to the Seller and which are required issue the Title Policy including delivering to Purchaser and the Title Company such organizational documents and documents confirming the authority of the party executing documents on behalf of Seller as the Title Company may require together with such reasonable affidavits or certifications as the Title Company may require to issue the Policy without standard exceptions (other than the survey exceptions which are conditioned on the Purchaser obtaining the Survey as provided hereinbefore).
- (e) Purchaser shall deliver to the Title Company for disbursement to Seller or its direction, the Purchase Price adjusted as provided in this Agreement, by wire transfer of immediately available funds.
- (f) Seller shall deliver to Purchaser a certificate confirming the truth and accuracy of Seller's representations and warranties hereunder, and any exhibits shall be updated to the Closing Date, and certified as true, correct and complete in all respects.
- (g) Seller and Purchaser shall execute and cause to be delivered to occupants under the Use and Access Agreements and Resident Agreements and all customers written notice of the sale of the Assets to Purchaser together with such other information or instructions as Purchaser shall deem appropriate.
- (h) Seller shall deliver to Purchaser originals of: (i) the Use and Access Agreements and Resident Agreements, including all amendments thereto and modifications thereof; (ii) all Inspection Materials; and (iii) all books, records, correspondence or materials, whether in paper or electronic format, pertaining to the operation of the Assets.
- (i) Seller shall deliver to Purchaser an affidavit, in form acceptable to Purchaser, executed by Seller, certifying that Seller is not non-resident aliens or foreign entities, as the case may be, such that Seller and such interest holders are not subject to tax under the Foreign Investment and Real Real Estate Tax Act of 1980.
- (j) Seller shall execute and deliver to Purchaser a discontinuation of any assumed name certificate whereby Seller has reserved the right to conduct business under the name "Ocean Beach Club" or any variation thereof.

(k) Seller shall execute and deliver all authorizations and execute all documents, and forms, electronically or otherwise, to effectuate the transfer of ownership and control over all social media accounts used in connection with the Beach Club (collectively, the "**Social Media Accounts**") to Purchaser.

(l) Seller and Purchaser each shall deliver to the other such other documents or instruments as shall reasonably be required by such party, its counsel or the Title Company to consummate the transaction contemplated herein and/or to cause the issuance of the policy of title insurance which, in all events, shall not increase such party's liability hereunder or decrease such party's rights hereunder.

17. **COSTS.**

17.1 Purchaser and Seller each shall be responsible for their own counsel fees and travel expenses. Escrow and closing fees, if any, shall be borne equally by Seller and Purchaser.

18. **BROKERS.**

18.1 Purchaser and Seller each represent and warrant to the other that they have not had any direct or indirect dealings with any real estate brokers, salespersons or agents in connection with the Property or the transactions contemplated herein. In consideration of said warranty, Purchaser agrees with Seller that it will pay, and will defend and hold Seller harmless from and against, any and all finder's and/or broker's commissions due or claimed to be due on account of the transactions contemplated herein and arising out of contracts made by or the acts of Purchaser, and Seller agrees with Purchaser that it will pay, and will defend and hold Purchaser harmless from and against, any and all finder's and/or broker's commissions due or claimed to be due on account of the transactions contemplated herein and arising out of contracts made by or the acts of Seller.

19. **ASSIGNMENT.**

19.1 Purchaser hereby reserves the right, on or before the Closing Date, to assign all of its right, title and interest in and to this Agreement or to transfer its interest in the Assets to any affiliate of Purchaser without the consent of Seller, but to no other persons or entities without the consent of Seller, and upon notice of such assignment to Seller, all terms and conditions hereof shall apply equally to such assignee as if the assignee was the original party hereto.

20. **MISCELLANEOUS.**

(a) This Agreement shall be controlled, construed and enforced in accordance with the laws of the State of South Carolina, without reference to the choice of law or conflicts of law principles of such state.

(b) This Agreement, including the Recitals set forth herein, the Exhibits attached hereto, and the Joinder attached hereto constitute the entire agreement between the parties hereto with respect to the transactions herein contemplated, and supersedes all prior agreements, written or oral, between the parties relating to the subject matter hereof. Any modification or amendment to this Agreement shall be effective only if in writing and executed by each of the parties hereto. By execution of this Agreement, the parties agree to and are bound by the Joinder.

(c) Any notice from Seller to Purchaser or from Purchaser to Seller shall be deemed duly served (i) when personally served, (ii) three (3) days after deposited in the U.S. certified mail, return

receipt requested, (iii) upon receipt if sent by telephone facsimile with fax acceptance sheet verifying receipt, (iv) upon receipt if sent by electronic mail, (e) one (1) day after sent via "overnight" courier service, addressed to such party as follows:

If to Seller: NMB Ocean Club Partners, LLC
2120 Sea Mountain Hwy Suite 1200
North Myrtle Beach, SC 29582

With a copy to: Robert S. Guyton, P.C
4605 B Oleander Drive, Suite 202
Myrtle Beach, SC 29577
Attn: Robert S. Guyton, Esq.
Email: rsguyton@guytonlawfirm.com

If to Purchaser: Sun Acq LLC
27777 Franklin Road, Suite 200
Southfield, Michigan 48034
Attn: Mr. Jonathan M. Colman
Email: jcolman@suncommunities.com
Fax: (248) 598-1884

With a copy to: Kenneth J. Clarkson, Esquire
Jaffe, Raitt, Heuer & Weiss, P.C.
27777 Franklin Road, Suite 2500
Southfield, Michigan 48034
Email: kclarkson@jaffelaw.com
Fax: (248) 351-3082

Either party hereto may change the name and address of the designee to which notice shall be sent by giving written notice of such change to the other party hereto as hereinbefore provided.

- (e) The terms hereof shall be binding upon and shall inure to the benefit of the parties hereto, their successors, transferees and assigns.
- (f) The provisions of this Agreement are severable and if any part is found to not be legally binding, or if any provision of this Agreement conflicts with any statute or law in the state where the Assets is located or is otherwise unenforceable, then that part or provision shall be deleted from the Agreement with the remaining Agreement to be held in full force and effect.
- (g) The captions in this Agreement are inserted for convenience of reference and in no way define, describe or limit the scope or intent of this Agreement or any of the provisions hereof.
- (h) Except as otherwise expressly provided herein, each agreement, representation or warranty made in this Agreement by or on behalf of either party, or in any instruments delivered pursuant hereto or in connection herewith, shall survive the Closing Date and the consummation of the transactions provided for herein.
- (i) The covenants, agreements and undertakings of each of the parties hereto are made solely for the benefit of, and may be relied on only by, the other party hereto, their transferees and assigns, and are not made for the benefit of, nor may they be relied upon, by any other person whatsoever.

- (j) This Agreement shall not be construed more strictly against one party than against the other, merely by virtue of the fact that it may have been prepared by counsel for one of the parties, it being recognized that both Purchaser and Seller have contributed substantially and materially to the preparation of this Agreement.
- (k) This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, and all of which together shall be deemed one in the same instrument.
- (l) Transmission of signatures electronically by facsimile, photostatic, pdf, email or otherwise of signatures to this Agreement and otherwise in connection with this transaction shall be binding on the parties and deemed originals and may be relied on to the same extent as the originals.
- (m) Unless otherwise specified herein, in computing any period of time described herein, the day of the act or event after which the designated period of time begins to run is not to be included and the last day of the period so computed is to be included, unless such last day is a Saturday, Sunday or legal holiday for national banks in the location where the Assets is located, in which event the period shall run until the end of the next day which is neither a Saturday, Sunday or legal holiday.
- (n) The submission of this Agreement may be revoked by Purchaser at any time before execution by Seller and this Agreement shall not be of any force or effect.
- (o) In the event of any litigation, action or proceeding concerning the interpretation or enforcement of this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party all costs, expenses and fees incurred (including without limitation reasonable attorneys' and paralegals' fees), in connection therewith, and in connection with any appellate or post-judgment proceedings. The provisions of this Section shall survive the closing or termination of this Agreement.
- (p) Time is of the essence with respect to performance under this Agreement.
- (q) Seller and Purchaser acknowledge that either party (the "**Electing Party**") may elect to effect the sale and purchase of the Assets as an exchange pursuant to Section 1031 of the Internal Revenue Code, provided the Electing Party utilizes the services of a "qualified intermediary" as defined in Treasury Regulation § 1.1031(k)-(g)(4)(iii) ("**Intermediary**") to effectuate such Section 1031 exchange and will cooperate in the accomplishment of that purpose provided only that (a) the other party shall not be required to be vested in title to any parcel other than the Real Estate and (b) the other party shall incur no liability or expense beyond those inherent in an acquisition of the Real Estate for a cash payment nor be delayed in the Closing. The Electing Party may assign this Agreement to an Intermediary without the other party's consent for purposes of effectuating a Section 1031 exchange (provided a copy of such assignment is promptly given to the other party). Notwithstanding an assignment to or substitution of the Intermediary to act in place of the Electing Party, the Electing Party agrees to unconditionally guarantee the full and timely performance by the Intermediary of the representations, warranties, obligations and undertakings of the Intermediary regarding a Section 1031 exchange, and in the event of breach the other party may proceed directly against the Electing Party without the need to join the Intermediary. The other party agrees to execute such documents as are reasonably necessary or appropriate and to otherwise cooperate with the Electing Party to effectuate a Section 1031 exchange, and the Electing Party hereby covenants and agrees to hold the other party free and harmless from any liability relating to the tax ramifications to the Electing Party of such Section 1031 exchange, except insofar as such liability is attributable solely to the failure of the other party to perform as required hereunder.

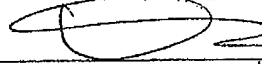
SIGNATURES ON FOLLOWING PAGE

**SIGNATURE PAGE TO OCEAN CLUB
PURCHASE AGREEMENT**

WHEREAS, the parties have executed this Agreement on the day and year first above written.

SELLER:

NMB Ocean Club Partners, LLC, a South Carolina
limited liability company



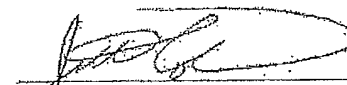
By: *Mace Watts*
Its: *Managing Member*

PURCHASER:

SUN ACQ LLC, a Michigan limited liability company

By: Sun Communities Operating Limited
Partnership, a Michigan limited partnership, its
Sole Member

By: Sun Communities, Inc., a Maryland
corporation, its General Partner



By: *Jonathan M. Colman*
Its: *Executive Vice President*

JOINDER

The undersigned ("**Escrow Agent**") hereby acknowledges receipt of the Deposit and agrees to hold the same pursuant to terms of this Joinder ("**Joinder**") and agrees to serve as escrow agent pursuant to the foregoing Purchase Agreement ("**Purchase Agreement**") and this Joinder. Terms which are capitalized in this Joinder but not defined herein shall have the meaning ascribed to them in the Purchase Agreement. The Deposit shall be deposited by Escrow Agent in an account with a federally insured financial institution.

1. In the event the Escrow Agent receives at any time a written statement from Seller or Seller's counsel ("**Seller's Notice**") stating that (a) Purchaser is in default under the Purchase Agreement or (b) Seller is otherwise entitled to the Deposit under the terms of the Purchase Agreement, Escrow Agent shall immediately forward a copy of Seller's Notice to Purchaser in accordance with Paragraph 8 hereof. If, within five (5) business days of delivering a copy of Seller's Notice to Purchaser, Escrow Agent does not receive written notice from Purchaser or Purchaser's counsel objecting to the release of the Deposit to Seller, then Escrow Agent shall deliver the Deposit by wire transfer to Seller pursuant to wire instructions provided by Seller; provided, however, if Escrow Agent receives written notice from Purchaser or Purchaser's counsel within such five (5) business day period stating that Purchaser disputes Seller's right to receive the Deposit and directing Escrow Agent not to deliver the Deposit to Seller as provided above, Escrow Agent shall not deliver the Deposit to Seller but instead shall retain the Deposit until instructed otherwise by a court of competent jurisdiction or in writing jointly by Seller and Purchaser or, if appropriate, interplead the Deposit in a court of competent jurisdiction.

2. In the event that Escrow Agent receives at any time a written statement from Purchaser or Purchaser's counsel ("**Purchaser's Notice**") stating that (a) Seller is in default under the Purchase Agreement or (b) Purchaser is otherwise entitled to a portion of the Deposit under the terms of the Purchase Agreement, Escrow Agent shall immediately forward a copy of Purchaser's Notice to Seller in accordance with Paragraph 8 hereof. If, within five (5) business days of delivering a copy of Purchaser's Notice to Seller, Escrow Agent does not receive written notice from Seller or Seller's counsel objecting to the release of the Deposit to Purchaser, then Escrow Agent shall deliver the Deposit by wire transfer to Purchaser pursuant to wire instructions provided by Purchaser; provided, however, if Escrow Agent receives written notice from Seller or Seller's counsel within such five (5) business day period stating that Seller disputes Purchaser's right to receive the Deposit and directing Escrow Agent not to deliver the Deposit to Purchaser as provided above, Escrow Agent shall not deliver the Deposit to Purchaser but instead shall retain the Deposit until instructed otherwise by a court of competent jurisdiction or in writing jointly by Seller and Purchaser or, if appropriate, interplead the Deposit in a court of competent jurisdiction.

3. If Escrow Agent is made a party to any judicial, nonjudicial or administrative action, hearing or process based on the acts of Purchaser and Seller and not on the willful misconduct or gross negligence of Escrow Agent in performing its duties hereunder, then the losing party shall indemnify, save and hold harmless Escrow Agent from the expenses, costs and reasonable attorneys' fees incurred by Escrow Agent in responding to such action, hearing or process.

4. Purchaser and Seller acknowledge and agree that the duties of Escrow Agent are purely ministerial in nature, that Escrow Agent is acting as an accommodation to both Purchaser and Seller, and that Escrow Agent, in performing its duties, shall not be liable for: (i) any loss, cost or damage which Escrow Agent may incur as a result of serving as escrow agent hereunder, except for any loss, costs or damage arising out of its own willful misconduct or gross negligence; (ii) any action taken or omitted to be taken in reliance upon any document, including any written instructions provided for in this Joinder, which Escrow Agent shall in good faith believe to be genuine; and (iii) any loss or impairment of the Deposit

deposited with a Federally insured financial institution, resulting from the failure, insolvency, or suspension of the depository. Purchaser and Seller acknowledge that they are aware that the Federal Deposit Insurance Corporation (FDIC) coverage applies only to a cumulative maximum amount of \$250,000.00 for each individual depositor for all of depositor's accounts at the same or related institution.

5. If any dispute arises with respect to the Deposit, whether such dispute arises between the parties hereto or between the parties hereto and other persons, Escrow Agent is authorized to interplead such dispute in a court of competent jurisdiction.

6. All notices given by any party hereunder shall be in writing and shall be deemed duly given (i) on the day delivered if delivered in person or by facsimile, electronic mail or PDF, (ii) on the first business day after prepaid deposit if delivered by overnight delivery service such as Federal Express, Airborne Express, U.S. Postal Service Express Mail or other national overnight courier service. Any such notice is to be addressed to the appropriate party of the address set forth below (or such other address as the party might request in writing):

a. As to Escrow Agent:

Robert S. Guyton, P.C
4605 B Oleander Drive, Suite 202
Myrtle Beach, SC 29577
Attn: Robert S. Guyton, Esq.
Email: rsguyton@guytonlawfirm.com

b. As to Purchaser:

Sun ACQ LLC
c/o Sun Communities, Inc.
27777 Franklin Road, Suite 200
Southfield, Michigan 48034
Attn: Mr. Jonathan M. Colman
Email: jcolman@suncommunities.com
Fax: (248) 208-2646

With a required copy to:

Jaffe, Raitt, Heuer & Weiss, P.C.
27777 Franklin Road, Suite 2500
Southfield, Michigan 48034
Attn: Kenneth J. Clarkson, Esq.
Email: kclarkson@jaffelaw.com
Fax: (248) 351-3082

c. As to Seller:

NMB Ocean Club Partners, LLC
2120 Sea Mountain Hwy Suite 1200
North Myrtle Beach, SC 29582

With a required copy to:

Robert S. Guyton, P.C
4605 B Oleander Drive, Suite 202
Myrtle Beach, SC 29577
Attn: Robert S. Guyton, Esq.
Email: rsguyton@guytonlawfirm.com

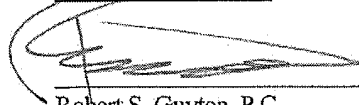
7. The instructions and conditions set forth herein may not be modified, amended or altered in any way except by a writing (which may be in counterpart copies) signed by the parties and Escrow Agent. This Acknowledgment is intended solely to implement the provisions of the Purchase Agreement and is not intended to modify, amend or vary any of the rights or obligations of the parties under the Purchase Agreement.

8. This Joinder shall be construed in accordance with the internal laws of the state where the Property is located.

9. This Joinder may be executed in one or more counterparts which when taken together shall constitute one and the same agreement and such counterparts may be delivered by facsimile or .pdf copies reflecting the party's signature. Copies (whether facsimile, photostatic or otherwise) of signatures to this Joinder shall be deemed originals and may be relied on to the same extent as the originals.

10. This Joinder shall be binding upon and inure to the benefit of the Parties and Escrow Agent and each of their respective successors and assigns.

ESCROW AGENT:



Robert S. Guyton, P.C
Date: 2/18/19

INDEX OF EXHIBITS

Exhibit A Real Estate

Exhibit B Personal Property

Exhibit C Use and Access Agreement

Exhibit D Resident Agreement

Exhibit E Member Summary

Exhibit F Operating Statement

EXHIBIT "A"

Description of Property

ALL AND SINGULAR, all that certain piece, parcel or lot of land containing one (1) lot, and improvements thereon, on Ocean Boulevard, North Myrtle Beach, South Carolina, as is shown and represented as **BLOCK 18-A** on a map of Blocks 18, 18-A and 19, Tilghman Estates, prepared by C.B. Berry, R.L.S., dated July 19, 1979 and recorded in Deed Book 663 at Page 847, records of Horry County, South Carolina.

TMS No.: 144-08-11-005

EXHIBIT B PERSONAL PROPERTY

OCEAN CLUB AT TILGHMAN BEACH

PROPERTY LIST

- 2 Round Tables with 8 Matching Chairs
- 1 Leather Sofa Brown
- 2 Fabric Chairs Floral
- 3 Ratan Chairs Brown with Cushions
- 2 Small Ratan Accent Tables Brown
- 2 Wooden Credenzas
- 1 Square Wooden Table with 6 Matching Chairs
- 1 Wooden Rectangular Table
- 1 Model Sailboat
- 1 Vizio TV
- 4 Artificial Plants
- 5 Pictures
- 6 Small Pillows
- 1 Microwave Oven
- 1 Refrigerator

EXHIBIT C USE AND ACCESS AGREEMENT

Agreement, on behalf of the Club and such other individuals and or communities, in accordance with the terms hereof; and

WHEREAS, the Club may elect, at a future date, to convey the Club Facilities to an association or other entity for the benefit of all Authorized Users, as defined below, and any other parties granted access to the Club Facilities by Club.

NOW, THEREFORE, in consideration of the foregoing recitals, the mutual obligations set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Membership Initiation Fee.

Upon the execution of this Agreement, and the Member Acknowledgement and Agreement delivered simultaneously to Member, Member shall become eligible to use the Club Facilities located on the Ocean Club Property. In exchange for such use of the Club Facilities, Member shall pay an initial Membership Initiation Fee in the amount of _____ and No/100 (\$ _____) Dollars (the "**Membership Initiation Fee**"), which Membership Initiation Fee shall be due and payable within Thirty (30) days of the date of this Agreement. This Membership Initiation Fee shall be mandatory, whether or not the purchaser elects to use the Club Facilities, shall be in addition to the periodic dues payable by Member on behalf of all eligible users as a result of this Agreement, and shall not constitute an advance payment of such periodic dues.

2. Grant of License; Easement.

Upon payment of the Membership Initiation Fee, the Club shall issue to the Member an individual resident "**Individual Membership**" constituting a non-exclusive license which, upon activation pursuant to Paragraph 3 below, shall entitle the Authorized Users of the Community Membership, as defined in Paragraph 4 below, to access, use, and enjoy the Club Facilities, and to access the adjacent public beach through the Club Facilities, during operating hours and subject to such rules, regulations, and operating policies as the Club may establish and amend from time to time ("**Club Rules**"). Individual Memberships are not transferable and no person shall be entitled to any payment upon termination of their Individual Membership.

An Individual Membership shall not represent any ownership or proprietary interest, beneficial interest, or any other vested interest whatsoever in the Club or the Club Facilities, or any of the assets of the Club. No Individual Member shall have any right to vote on or approve any matter relating to management or operation of the Club or Club Facilities.

3. Activation of Membership.

(a) The Member may activate his or her Individual Membership by executing a Membership Acknowledgement and Agreement in the form provided by the Club, identifying each Member and provide such information regarding the Member and Authorized Users (as defined below) as the Club deems reasonably necessary to control use and access to the Club Facilities and facilitate Club operations. In addition, the Member shall acknowledge, on behalf

of himself and all Authorized Users, the matters set forth in Paragraph 6(e) - (n) of this Agreement.

(b) An election not to access or use the Club Facilities, or failure to activate an Individual Membership, shall not relieve the Member of the obligation for the Membership Initiation Fee, or from the obligation for periodic dues pursuant to Paragraph 5 of this Agreement.

4. Exercise of Membership Privileges; Authorized Users.

(a) Individual Memberships. Upon payment of the Membership Initiation Fee, and activation of a Individual Membership, the following persons, as applicable ("**Authorized Users**"), may enjoy the access and use privileges of such Community Membership:

(i) in the case of Members who are natural persons, one person 18 years of age or older, together with his or her spouse, if married, or if unmarried, one Significant Other as defined below, and in either case, the unmarried children of such Member and spouse or Significant Other who are under the age of 25 and who are living with the Member, attending school on a full-time basis, or serving in the United States Armed Services; or

(ii) in the case of a Member which is a legal entity, one person 18 years of age or older whom the Member designates in writing to the Club ("**Designee**"), together with his or her spouse, if married, or if unmarried, one Significant Other as defined below, and in either case, the unmarried children of such Designee and spouse or Significant Other who are under the age of 25 and who are living with the Designee, attending school on a full-time basis, or serving in the United States Armed Services; or

A "**Significant Other**" is an individual who resides with an unmarried Member, or unmarried Designee and whom the Member or Designee has designated as a "Significant Other" by written notice to the Club. Such designation may be changed no more than once in any 12-month period (except in the event of the Significant Other's death) upon payment of such change fees as the Club may establish.

(a) Other Memberships. The Club may, but shall not be obligated to, issue other memberships to such persons, and on such terms and conditions, as the Club deems appropriate in its sole discretion, provided that the total number of memberships shall not exceed 7,000, at any given time.

5. Periodic Dues.

(a) Commencing on the date that the Club Facilities are first available for access and use by the Members ("**Commencement Date**"), the Club shall charge annual dues ("**Ocean Club Fee**") for each Individual Membership issued pursuant to an Agreement similar to this Agreement. The Member shall pay to the Club the Ocean Club Fee on account of his/her/its Individual Membership issued pursuant to Paragraph 2, whether or not such Individual Membership has been activated pursuant to Paragraph 3.

(b) The 12-month period commencing on the Commencement Date, and each 12-month period thereafter, shall constitute the Club's "**Membership Year**". The Ocean Club Fee for each membership issued hereunder shall be due and payable on the first day of each Membership Year, except that for any membership issued after the Commencement Date, the Ocean Club Fee payable for the Membership Year in which the membership is issued shall be prorated as of the date of issuance and shall be due and payable on such date.

(c) The amount of the Ocean Club Fee shall be set by the Club from time to time, subject to the limitations of this Paragraph 5(c), but shall not exceed \$_____ per Membership for the 12-month period immediately following the Commencement Date. Thereafter, the Ocean Club Fee shall be subject to reasonable increases, provided that:

(i) it shall not be increased more than once in any 12-month period;

(ii) any increase shall not exceed 15% per annum;

(iii) the Ocean Club Fee shall not exceed the sum which the Club charges to any other person whose residence is located in Horry County for equal or greater rights of use and access to the Club Facilities than granted to Member pursuant to this Agreement; and

(iv) the Club shall have the right to assess the Members for maintenance and repairs (including, but not limited to maintenance and repairs as a result of a storm, hurricane or other natural event), either in the form of a special assessment, or a separate line item as a part of the annual assessment, in the discretion of the Club.

Any Ocean Club Fees that are not paid when due shall bear interest from the due date until paid at 18% per annum or the maximum rate permitted by South Carolina law, if less than 18%. In addition, the Club may assess a late charge in the amount of \$10.00 or 10% of the amount past due, whichever is greater, for each month that the Ocean Club Fees for any membership remain unpaid.

(d) Personal Obligation. The obligation to pay Ocean Club Fees, as well as interest, late charges, costs, and reasonable attorneys' fees incurred in collecting the same, shall be the personal obligation of the Member.

(e) Independent Covenant. The obligation to pay the amounts provided for herein shall be mandatory and shall be a separate and independent covenant on the part of the Member. No Member may exempt himself or herself from liability for any fee otherwise due or Ocean Club Fees by non-use of the Club Facilities, or any other means. No diminution or abatement of such fees or set-off shall be claimed or allowed for any alleged failure of the Club to take some action or perform some function required of it, or for inconvenience or discomfort arising from the making of repairs or improvements, or from any other action it takes.

6. CLUB OPERATIONS.

(a) Maintenance and Operation. The Club shall be responsible for management, operation, and control of the Club Facilities and shall maintain the Club Facilities in good condition and repair and in continuous operation, subject to such reasonable operating hours and seasonal and weather-related closings as the Club may reasonably establish and subject to the right of the Club to temporarily close the facilities as may reasonably be necessary to perform maintenance or repairs.

The Club may enter into leases, licenses, and management or operating agreements with respect to the Club Facilities as the Club deems appropriate, subject to the terms of this Agreement. The Club may, from time to time, and until such time as the Authorized Users of the Club are fully subscribed, permit use of the Ocean Club Facilities by persons other than members and Authorized Users and may charge guest and other user fees, in such amount as the Board may establish, for such use. In addition, the Club may charge a fee for the issuance of wrist bands, lanyards or other forms of access passes to readily distinguish Authorized Users, and for the registration of such Authorized Users.

(b) Insurance. The Club shall obtain and maintain continuously in effect the following insurance coverage, if reasonably available, or if not reasonably available, the most nearly equivalent coverage as is reasonably available:

(i) Blanket property insurance covering "risks of direct physical loss" on a "special form" basis (or comparable coverage by whatever name denominated) for all insurable improvements comprising the Club Facilities that are owned by the Club. If such coverage is not generally available at reasonable cost, then "broad form" coverage may be substituted. The limits of such property insurance shall be sufficient to cover the full replacement cost of the insured improvements under current building ordinances and codes; and

(ii) Commercial general liability insurance on the Club Facilities, insuring the Club and the members for damage or injury caused by the negligence of the Club or any of its members, employees, agents, or contractors while acting on its behalf. If generally available at reasonable cost, such coverage shall have a limit of at least \$2,000,000.00 per occurrence with respect to bodily injury, personal injury, and property damage. Such coverage may be provided through a combination of primary and umbrella policies.

The insurance policies may contain a reasonable deductible, which shall not be subtracted from the face amount of the policy in determining whether the policy limits satisfy the requirements of this Section. In the event of an insured loss, if the Club reasonably determines that the loss is the result of the negligence or willful misconduct of one or more Authorized Users or their guests, the Club shall be entitled to recover the full amount of such deductible from such Authorized User.

(c) Restoring Damaged Improvements. In the event of damage to or destruction of portions of the Club Facilities, the Club or its duly authorized agent shall file and adjust all insurance claims and obtain reliable and detailed estimates of the cost of repairing or restoring the property to substantially its condition prior to the damage, allowing for changes or

improvements necessitated by changes in applicable building codes. The Club shall repair or reconstruct damaged improvements unless the Association otherwise agrees.

(d) Compliance and Enforcement. Every Member must comply with this Agreement and the Club Rules and shall be responsible for ensuring compliance by the Member's Authorized Users and guests, and may be sanctioned for their violations and for any damage to Club Facilities that any of them may cause. The Club may impose sanctions for violations of this Agreement or the Club Rules, including without limitation:

(i) imposing reasonable monetary fines. If an Authorized User or guest violates this Agreement or the Club Rules and a fine is imposed, the fine may, but need not, first be charged to the violator; however, if the fine is not paid by the violator within the time period set by the Club, the sponsoring member shall pay the fine upon notice from the Club;

(ii) suspending a member's right to use the Club Facilities (A) for any period during which the member's account remains delinquent, and (B) for a period not to exceed 30 days for a single violation or for a longer period in the case of any continuing violation (except that no hearing is required if the member is more than 60 days delinquent in paying any capital recovery fee or Ocean Club Fee hereunder). Suspension of a member's right shall suspend the use privileges of all Authorized Users and guests of such member;

(iii) expelling any person from the Club Facilities or confiscating their personal property in any situation which requires prompt action to avoid potential injury or damage or unreasonable inconvenience to other persons or their property (specifically including, but not limited to, the towing of vehicles that are in violation of parking rules and regulations);

(iv) bringing suit at law for monetary damages or in equity to stop or prevent any violation, or both.

In any action to enforce this Agreement or Club Rules, if the Club prevails, it shall be entitled to recover all costs, including, without limitation, attorneys' fees and court costs, reasonably incurred in such action.

(e) Food and Beverage Service. The Club may, but shall have no obligation to, offer or maintain food and beverage service at the Club Facilities. The Club shall have complete discretion in determining the level of service and hours of operation of any food and beverage service provided.

(f) Right to Substitute Comparable Property and Facilities. The Club reserves the right to substitute for the Club Facilities comparable facilities in an alternative location providing access to the public beaches of the Atlantic Ocean and access to private space within a facility owned and operated by the Club or its assignee.

(g) Commercial Operation. The Club shall be entitled to operate the Club Facilities as a commercial business for profit and shall have no obligation to operate on a nonprofit basis.

(h) Right to Transfer. The Club shall have the right to sell, lease, or otherwise transfer the Club Facilities and Club operations to any person or entity, to be operated on a for profit or nonprofit basis, subject to the terms of this Agreement. If the Club transfers the Club Facilities to the Association or another similar community association, it shall do so free and clear of any mortgage.

(i) Right to Change Membership Structure. The Club shall have the right to convert the current memberships to an equity membership or similar club structure in which the members have a proprietary interest in the owner and/or operator of the Club Facilities, provided that each Member has a right to membership therein upon payment of periodic dues, without payment of any additional capital recovery fee, initiation fee, or similar one-time payment for such membership.

(j) Safety and Security. Each Member, Authorized User, and guest shall be responsible for their own personal safety and the security of their property while using the Club Facilities. The Club may, but shall not be obligated to, maintain or support certain activities designed to promote or enhance the level of safety or security that each person provides for himself or herself and his or her property. However, the Club shall have no liability for any loss or injury by reason of failure to provide adequate security or ineffectiveness of security measures undertaken. No representation or warranty is made that any security or safety systems or measures will be effective in all circumstances. The Club is not an insurer or guarantor of security or safety and has no duty to screen or exclude from membership persons who may pose a threat to the security or safety of others and no duty to warn any person of the presence of such persons. Each Member and Authorized user assumes all risks of personal injury and loss or damage to property resulting from acts of third parties.

(k) Assumption of Risk. **Each Member and Authorized User, by use of the Club Facilities, assumes all risks associated with the use of the Club Facilities and agrees to release the Club and its members, officers, and agents from and indemnify them against any and all losses, expenses, liens, claims, demands, and causes of action of every kind and character for death, personal injury, property damage or any other liability, damages, fines, or penalties, including costs, attorneys' fees and settlements, whether or not based on the acts or omissions of the Club or its employees or agents, resulting from, arising out of or in any way connected with the use of the Club Facilities by the Member, Authorized Users of the Member's Membership, and guests, or if an Individual Member is a legal entity, by its approved designee(s), their Authorized Users, and guests, except to the extent that the same are the direct result of the gross negligence or willful misconduct of the Club, its employees, or its agents acting within the scope of their assigned duties.** As used in this paragraph, "Club" shall include the Club and its members, and the heirs, successors, assigns, officers, directors and employees of the Club and its members, and all persons, corporations, partnerships, and other entities with which it is or may in the future become affiliated.

(l) No Liability for Personal Property. Each Member and Authorized User, by use of the Club Facilities,

(i) assumes sole responsibility for their personal property and acknowledges that the Club shall not be responsible for any loss or damage to any personal property which any such persons may use or store on the Club Facilities, whether in lockers or elsewhere; and

(ii) acknowledges and understands that he or she shall be liable for any property damage or personal injury occurring on the Club Facilities as a result of such persons' actions, or which the member or its designee(s), or their respective Authorized Users or guests, may cause. If a member or Designee arranges or sponsors any activity or function on the Club Facilities, Member shall be responsible for any such damage or injury even if Member did not cause such damage or injury.

(m) No Guarantee of Adequate Capacity. The Club Facilities are to be made available for use on a first come, first served basis. Usage patterns for facilities such as the Club Facilities can vary greatly from one facility to another and from one season to another depending upon a variety of factors, including distance from members' residences, season, availability of other amenities, and other circumstances. No representation or warranty is made or authorized by the Club or any of its agents that the Club Facilities are of a size or capacity to accommodate all persons who may be authorized and desire to use them at any one time. If capacity is exceeded at any time, the Club reserves the right to turn away members, other Authorized Users, and their guests. In such event, the Club shall have no duty to provide alternative facilities and no responsibility for any cost incurred by the Member, Authorized User, or guest in securing alternative facilities.

(n) Susceptibility to Storm Damage; Closure. The Club Facilities are located in a low-lying, ocean front area that is subject to hurricanes, tropical storms, high winds and tides, and periodic flooding. Any of these natural occurrences could result in substantial damage to or destruction of the Club Facilities, which could make all or portions of the Club Facilities temporarily or permanently unavailable for use. The Club shall have no obligation to secure alternative facilities for use by members. No warranty or representation is made by the Club, the Community Developer, or any agent of either of them, that the Club Facilities can be rebuilt in accordance with the original plans if destroyed.

7. GENERAL PROVISIONS.

(a) Notice. Any notice provided for in this Agreement shall be served personally or shall be mailed by registered or certified mail, or delivered by reliable courier or overnight delivery service with tracking capability, to the addresses specified below, unless the Club or Association has specified, by written notice in accordance with this Section, a different address for delivery of notices, in which case the notice shall be addressed to such different address:

(i) if to the Club:

NMB Ocean Club Partners, LLC

Attn: _____

(iii) if to a Member, at the address of such Member set forth in the recitals to this Agreement.

All such notices shall, for all purposes, be deemed delivered and received (i) upon personal delivery to the addressee, (ii) upon courier delivery to the address of the address, signed for by the addressee or another person residing or employed at such address; or (iii) on the third day after mailing when mailed by registered or certified mail, postage prepaid, and properly addressed.

(b) Duration; Termination. Subject to any amendments adopted pursuant to Paragraph 7(c), this Agreement shall remain in effect for an initial term expiring 15 years after the Commencement Date and shall automatically be extended at the expiration of such initial term for successive periods of 5 years each unless and until terminated by either party by written notice to the other in accordance with this Agreement delivered within the 12-month period immediately preceding any automatic renewal.

(c) Amendment. This Agreement may be amended only by a written instrument executed by both the Member and the Club.

(d) Construction; Severability. This Agreement shall be governed by and construed under South Carolina law. Invalidation of any provision of this Agreement, in whole or in part, by judgment or court order shall not affect other provisions.

(e) Waiver. No failure of the Club or any Member to exercise any right or power under this Agreement or to insist upon strict compliance with this Agreement, and no custom or practice at variance with the terms of this Agreement, shall constitute a waiver of the right thereafter to demand exact compliance with the terms of this Agreement.

(f) Captions. The captions of each Paragraph of this Agreement are inserted only for convenience and are in no way to be construed as defining, limiting, extending, or otherwise modifying or adding to the particular Paragraph to which they refer.

(g) Binding Effect. This Agreement shall be binding upon the Club, and its respective successors and assigns, and shall inure to the benefit of the each of them and each Member, except as otherwise expressly provided or limited herein.

8. ARBITRATION. In the event of any controversy or claim arising out of or relating to this Agreement, the parties agree to attempt in good faith to resolve such controversy or claim. If the matter has not been resolved within forty-five (45) days of the commencement of such discussions (which period may be extended by mutual agreement), the parties hereby agree to immediately submit the controversy to binding arbitration and expressly waive their right to a jury trial. The arbitration shall be conducted by a single arbitrator in accordance with the Commercial Rules of the American Arbitration Association. Judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof. All proceedings relating to the arbitration shall occur in Horry County, South Carolina. The arbitrator shall have the authority to resolve the legal disputes between the parties, but shall not have the authority to abridge or enlarge the substantive rights or remedies available under existing law, and shall determine the rights and obligations of the parties according to the laws of South Carolina. Each of the parties shall use all reasonable efforts to ensure that any arbitration proceeding is completed within ninety (90) days from the submission of

the controversy to the American Arbitration Association. Upon request by either party, (a) the arbitrator may require that the subject arbitration proceedings be kept confidential, and (b) no party shall disclose or permit the disclosure of any information produced or disclosed in the arbitration proceedings until the award is final. The Arbitration provided for herein shall include by joinder or consolidation any other person or entity who has an interest in the subject matter of the dispute between the parties. Notwithstanding the foregoing provisions, any party may apply to any court of competent jurisdiction for injunctive relief and other interim measures to prevent or stop irreparable harm to such party's rights or property prior to or during the pendency of any arbitration proceeding.

9. REMEDIES.

- (a) Violations. In addition to any other remedies in this Agreement, and subject to the mandatory arbitration provisions of this Agreement set forth above, each party shall have the right to enforce, by proceeding at law or in equity, whether in an action for damages, injunctive relief or both, all covenants, conditions, easements, restrictions, reservations, licenses, charges, and liens now or hereafter imposed under this Agreement.
- (b) Costs of Enforcement. Should either party find it necessary to employ an attorney or institute legal action against any party to enforce this Agreement, the prevailing party shall pay all costs in connection with such action, including court costs and reasonable attorneys' fees and other professionals' fees for pretrial, trial, and appellate proceedings. The "prevailing party" shall be the designated prevailing party in a final non-appealable judgment or arbitration award.

10. ENTIRE UNDERSTANDING. This Agreement constitutes the complete understanding between the parties hereto, and supersedes any and all prior agreements, promises, or inducements, whether orally or in writing. The parties hereto further agree that no promises or agreements made subsequent to the date of this Agreement shall be binding unless reduced to writing and executed by the parties hereto. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal affiliates, representatives, successors and permitted assigns.

11. COUNTERPARTS. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

12. AUTHORITY. Each party represents and warrants that it has full authority to execute this Agreement and any such other documents, instruments, affidavits and certificates as are necessary or desirable to effectuate the matters contemplated herein.

13. SUCCESSORS AND ASSIGNS. This Agreement shall run with the land and (i) be binding upon and inure to the benefit of Club, its heirs, successors and assigns to the Club Facilities, and (ii), be binding upon and inure to the benefit of the Association, its successors and assigns. Club shall have the right to assign all its rights and obligations hereunder to an association upon the conveyance of the Club Facilities to an association by recording a copy of such assignment in the land records of Horry County, South Carolina. Upon the effective date of

such assignment, Club shall be released from any and all obligations hereunder accruing after the effective date of the assignment.

14. **AMENDMENT.** This Agreement may be modified or amended only by an instrument in writing executed by the Club, the Association, their successor and assigns to this Agreement as provided above in Section 13, and filed in the Horry County Register of Deeds. Any association, upon succeeding to the Club's interests hereunder following an assignment in accordance with Section 13 may execute an amendment on behalf of all members and owners of the Club Facilities.

15. **HEADINGS.** The section headings in this Agreement have been inserted merely for convenience, are not a part of this Agreement, and shall not affect the rights and obligations of the parties or the meaning of the language herein.

16. **SEVERABILITY.** Invalidation of any one or more of the provisions of this Agreement or portions thereof shall in no way affect any other provision and all of such other provisions shall remain in full force and effect.

17. **NO JOINT AND SEVERAL LIABILITY.** The liability of the Club, is and shall be entirely kept separate from any other person or entity, and shall not be joint and several.

[Signatures appear on the following page]

IN WITNESS WHEREOF, the parties have executed this Agreement by and through their authorized officers as of the date first above written.

CLUB: NMB OCEAN CLUB PARTNERS, LLC, a
South Carolina limited liability company

By: _____

Name: _____

Its: _____

WITNESS:

STATE OF SOUTH CAROLINA

HORRY COUNTY

PERSONALLY appeared before me _____ and made the oath that (s)he saw the within-named named NMB OCEAN CLUB PARTNERS, LLC, a South Carolina limited liability company, by its duly authorized manager, _____, sign and seal and, as the act and deed of said limited liability company, deliver the within instrument, and that (s)he with _____, the other witness named above, witnessed the execution thereof.

Sworn to before me this ____ day of _____, 20__:

Notary Public for the State of South Carolina

My Commission Expires: _____

[Signatures continued on next page]

ENTITY MEMBER:

(Print name above)

By: _____

Name: _____

Its: _____

INDIVIDUAL MEMBER:

PRINT NAME: _____

WITNESS:

STATE OF _____

ACKNOWLEDGEMENT

COUNTY OF _____

PERSONALLY appeared before me _____
acknowledging the execution of the foregoing instrument _____ on behalf of the above entity; or
_____ on his or her behalf, intending to be legally bound.

Sworn to before me this _____ day of _____, 20__:

Notary Public for the State of _____

My Commission Expires: _____

EXHIBIT "A"

Description of Property

ALL AND SINGULAR, all that certain piece, parcel or lot of land containing one (1) lot, and improvements thereon, on Ocean Boulevard, North Myrtle Beach, South Carolina, as is shown and represented as **BLOCK 18-A** on a map of Blocks 18, 18-A and 19, Tilghman Estates, prepared by C.B. Berry, R.L.S., dated July 19, 1979 and recorded in Deed Book 663 at Page 847, records of Horry County, South Carolina.

TMS No.: 144-08-11-005

EXHIBIT D RESIDENT AGREEMENT

OCEAN CLUB AT TILGHMAN BEACH

RESIDENT MEMBER ACKNOWLEDGEMENT AND AGREEMENT

MEMBER INFORMATION:

Member's Full Name: _____

Date of Birth: _____ Driver's License No.: _____ State: _____

Primary Residence Address: _____

State and Zip Code: _____ Primary Telephone: _____

Address, Unit or Lot Number (Eligible Unit): _____

Emergency Contact: _____

Address: _____

Phone No.: _____

Spouse/Significant Other/Dependent Information:

Please identify all dependent children of Member who are under 25 years of age, attend college on a full-time basis, or are on active military duty, and/or Member's spouse who resides with Member:

Name	Sex	Date of Birth	School Attending

ACKNOWLEDGEMENT

I represent that I am the owner or a co-owner of the Eligible Unit described above, and that all other co-owners, and Authorized Users, if any, are listed below. I wish to activate, in my name, an Individual Resident Membership in Ocean Club at Tilghman Beach issued for such Eligible Unit. I understand that such membership represents a non-exclusive license to use the Ocean Club Facilities owned by NMB Ocean Club Partners, LLC, its successor or assigns (the "Club"). I understand and agree that such membership is subject to the terms and conditions of:

- (a) This Member Acknowledgement and Agreement;
- (b) The Use and Access Agreement Relating to Ocean Club at Tilghman Beach executed by me, as the owner of the Eligible Unit, and outlining the terms of my membership;
- (c) Such rules, regulations and policies relating to the use of and conduct on the Club Facilities as the Club may establish from time to time (the "Club Rules").

I acknowledge receipt of copies of the foregoing documents, including the Club Rules effective as of the date of this Acknowledgement (the "Membership Documents") and have had an opportunity to review the Membership Documents. I agree to be bound by and comply with all of the terms and provisions of the Membership Documents, as they may be amended, and to be responsible for compliance by the authorized users of my membership and our guests.

I understand that the membership represents only a non-exclusive license to use the Club's facilities in accordance with the Membership Documents and in common with such other persons as the Club may authorize from time to time. I understand that I acquire no rights in or to the Club of the Club Facilities,

nor any right to participate in the management or control of the Club Facilities. I acknowledge that the membership may not be pledged or assigned and is not transferable.

I ACKNOWLEDGE AND AGREE ON BEHALF OF MYSELF, THE OTHER AUTHORIZED USERS OF MY MEMBERSHIP, AND OUR GUESTS, TO ASSUME ALL RISKS ASSOCIATED WITH OUR USE OF THE CLUB FACILITIES, WHETHER OR NOT INHERENT, AND AGREE TO RELEASE THE CLUB AND IS MEMBERS, OFFICERS, EMPLOYEES, AGENTS AND AFFILIATES FROM AND INDEMNIFY THEM AGAINST, ANY AND ALL LOSSES, EXPENSES, LIENS, CLAIMS, DEMANDS AND CAUSES OF ACTION OF EVERY KIND AND CHARACTER FOR DEATH, PERSONAL INJURY, PROPERTY DAMAGE OR ANY OTHER LIABILITY, DAMAGES, FINES OR PENALTIES, INCLUDING COSTS, ATTORNEYS' FEES AND SETTLEMENTS, WHETHER OR NOT BASED ON THE ACTS OR OMISSIONS OF THE CLUB OR ITS EMPLOYEES OR AGENTS, RESULTING FROM, ARISING OUT OF OR IN ANY WAY CONNECTED WITH OUR USE OF THE CLUB FACILITIES, EXCEPT TO THE EXTENT THAT THE SAME ARE THE DIRECT RESULT OF THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE CLUB, ITS EMPLOYEES OR ITS AGENTS WITHIN THE SCOPE OF THEIR ASSIGNED DUTIES.

I agree on behalf of myself, the other Authorized Users of my membership, and our guests, to assume sole responsibility for our personal property and acknowledge that the Club shall not be responsible for any loss or damage to any personal property which any of us may use or store on the Club Facilities, whether in lockers or elsewhere.

I agree to assume all liability for any property damage or personal injury resulting from my conduct or actions and the conduct or actions of the Authorized Users of my membership and our guests.

I understand that upon resignation of my membership, I shall forfeit the opportunity to reinstate or acquire another membership in the future and that, upon the transfer of title to my Eligible Unit, my membership shall automatically terminate. In either event, I shall not be entitled to any refund of any fees paid on account of my membership.

Signature of Member:

_____ Date: _____

Authorization of other Co-Owners and Authorized Users:

_____ Date: _____

_____ Date: _____

_____ Date: _____

_____ Date: _____

_____ Date: _____

_____ Date: _____

_____ Date: _____

_____ Date: _____

_____ Date: _____

EXHIBIT E MEMBER SUMMARY

NMB OCEAN CLUB PARTNERS, LLC

MEMBER LIST

LAST NAME	FIRST NAME	FAMILY MEMBERS	STREET	CITY	STATE	ZIP CODE	PHONE	EMAIL	SOURCE OF MEMBERSHIP
Ashley	Stan		11125 Treynorth Drive	Cornelius	NC	28031	(704) 575-4040	sashley@acosta.com	New Club Member
Atienza	Jonessa	Joseph Villanueva	1500 Beachwalker Lane	North Myrtle Beach	SC	29582	(650) 353-6463	jbv2081@yahoo.com	New Club Member
Beasley	Shawn		8269 North Old Wire Road	North Myrtle Beach	SC	29582			Robbers Roost Member
Bullard	Hubert	Kathy	4389 Lake Circle	Little River	SC	29566	(843) 385-3180	hbullard@sc.rr.com	Level 10 Homes Member
Burnett	Steven W.		1135 Doubloon Drive	North Myrtle Beach	SC	29582			Robbers Roost Member
Caulder	Bob	Judy	1715 Lake Egret Drive	North Myrtle Beach	SC	29582	(910) 280-0475	jcaulder13@gmail.com	New Club Member
Cochran	Autie	Teena	2000 Lake Egret Drive	North Myrtle Beach	SC	29582	(919) 801-4474	autiecochran@gmail.com	New Club Member
Cooper	Keith	Annette	4387 River Road	Little River	SC	29566	(480) 282-2685	keithc159@yahoo.com	Level 10 Homes Member
D'Amelio	Vincent	Dina	1424 Cottage Cove Circle	North Myrtle Beach	SC	29582	(732) 921-4250	ddamelio39@gmail.com	Original Member
Dehart	Paul	Catherine	1120 Brandywine Drive	Little River	SC	29566	(843) 399-0215	cdehart@comcast.net	New Club Member
Fleischner	Mark	Teresa	1315 Seabrook Plantation Way	North Myrtle Beach	SC	29582	(516) 641-9986	impct42@gmail.com	Original Member
Gordon Jr	Fred	Kergael	1501 Osprey Pointe Lane	North Myrtle Beach	SC	29582	(240) 401-2966	fgordonjr@aol.com	New Club Member
Hannon	Kevin	Donna	2180 Waterview Drive #327	North Myrtle Beach	SC	29582	(843) 390-5187	kevinjr118@aol.com	New Club Member
Johnson	Kenneth	Elizabeth	PO Box 913	North Myrtle Beach	SC	29597	(919) 818-2032	adsispy@bellsouth.net	Original Member
Johnson	David	Donna Kay	1605 East Island Drive	North Myrtle Beach	SC	29582	(843) 957-4211	peachiecrm@aol.com	Original Member
Kirby	John	Melinda	1924 Lake Egret Drive	North Myrtle Beach	SC	29582	(843) 655-7866	kirbyjohn159@gmail.com	Original Member
Kraska	Jan	Shelley	1602 East Island Drive	North Myrtle Beach	SC	29582	(336) 707-5803	jckraska@hotmail.com	New Club Member
Lawrence	Matt	Beth	1506 Seabrook Plantation Way	North Myrtle Beach	SC	29582	(443) 829-7307	mlaw19892@gmail.com	Level 10 Homes Member
Lippert	Jim	Jane	1601 Surf Estates Way	North Myrtle Beach	SC	29582	(845) 489-5994	jlippert2@gmail.com	Level 10 Homes Member
Lucey Jr	Francis	Sydna	1312 Seabrook Plantation Way	North Myrtle Beach	SC	29582	(617) 828-3521	slucey@gmail.com	Original Member
Magnarella	Phil	Eleanor	1129 Captain Hook's Way	North Myrtle Beach	SC	29582		ELEANORMAGNARELLA@yahoo.com PJMAG7997@gmail.com	Robbers Roost Member
Mannain	Karl, "Skip"	Taawya	1740 Lake Egret Circle	North Myrtle Beach	SC	29582	(914) 489-7422	tdmannain@gmail.com	Original Member
McLeod	John	Cindy	1400 East Island Drive	North Myrtle Beach	SC	29582	(972) 983-1009	jrmj24@sbcglobal.net	New Club Member
McRory	Steve	Pat	2010 Lake Egret Drive	North Myrtle Beach	SC	29582	(919) 819-6240	steve_mcrory@yahoo.com pattymac729@gmail.com	New Club Member
Mucci	Thomas	Richelle	465 Allison Hollow Road	Washington	PA	15301	(724) 263-2735	eagletom@hky.com	Original Member

Myrick	Edna Earle Boone		PO Box 616	North Myrtle Beach	SC	29582		Robbers Roost Member
Norman	Robert	Debra	1312 Hunters Rest Dr	North Myrtle Beach	SC	29582	(864) 580-9167 roleno@yahoo.com	New Club Member
Oates	Ben	Brock	4383 River Road	Little River	SC	29566	(843) 319-7493 boates16@yahoo.com	Level 10 Homes Member
Palmer	Sabrina	Shawn	1308 Seabrook Plantation Way	North Myrtle Beach	SC	29582	(804) 592-8350 shawnieef@yahoo.com	Level 10 Homes Member
Parrish	Bill	Laura	P.O. Box 1109	Benson	NC	27504	(919) 669-9495 weparrish1@aol.com	New Club Member
Pena	Audy	Alyssa	810 Callant Drive	Little River	SC	29566	(631) 702-0552 alena051@hotmail.com	New Club Member
Reece	Jonathan	Ellen	4606 Hickory Nut Ridge Road	Granite Falls	NC	28630	(828) 312-9527 jreecerph@charter.net	Original Member
Ross	Ed	Kay	1204 James Island Ave	North Myrtle Beach	SC	29582	(843) 6858445 Edandkayross@yahoo.com	New Club Member
Ross	John	Linda	4391 River Road	Little River	SC	29566	(843) 855-0021 jross3303@gmail.com	Level 10 Homes Member
Salerno	Stephen		117 10th Avenue	Holtville	NY	11742	(631)816-8819 Stenodude@optonline.net	New Club Member
Shea	Mark	Amy	824 Lafayette Park	Little River	SC	29566	(252) 675-2556 ahg4403@aol.com	New Club Member
Smith	John G.		1116 Doubloon Drive	North Myrtle Beach	SC	29582		Robbers Roost Member
Snipes	Charles, "Chuck"	Shawna	1400 Summerwind Court	North Myrtle Beach	SC	29582	(919) 291-5078 shawna.snipes@gmail.com	New Club Member
Specialized Concrete	Timmy Ray Davis	Shelia	1306 Painted Tree Lane	North Myrtle Beach	SC	29582	(910) 734-7717 Beachbummer114@yahoo.com trdavis34@gmail.com	New Club Member
Taylor	Peggy	Dick	1322 Seabrook Plantation Way	North Myrtle Beach	SC	29582	(704) 219-4185 peggy@sucontractors.com	Original Member
Tucker	Joe		131 Oakridge Lane	Bridgeport	WV	26330	(304) 641-0585 mistatefoam@aol.com	New Club Member
Tullis	Christopher	Tabatha	2950 Smith Ave	Loris	SC	29569	(843)457-7535 Blade-tullis@hotmail.com , blessedbeachweddings@gmail.com	New Club Member
Twomey	Megan		1509 Seabrook Plantation Way	North Myrtle Beach	SC	29582	(910) 269-1759 megantwomey@aol.com	Original Member
Watts	Mace	Bobbie	4528 River Road	Little River	SC	29566	(910) 443-9181 macewatts@yahoo.com	Level 10 Homes
Whaley Management	Jon Jones	Jan	620 Lexington Drive	Greenville	NC	27834	(252) 671-1980 rltwhaley@gmail.com	Original Member
								20 New Club Members
								12 Original Members
								8 Level 10 Homes Members
								5 Robbers Roost Members
								45 Total Members

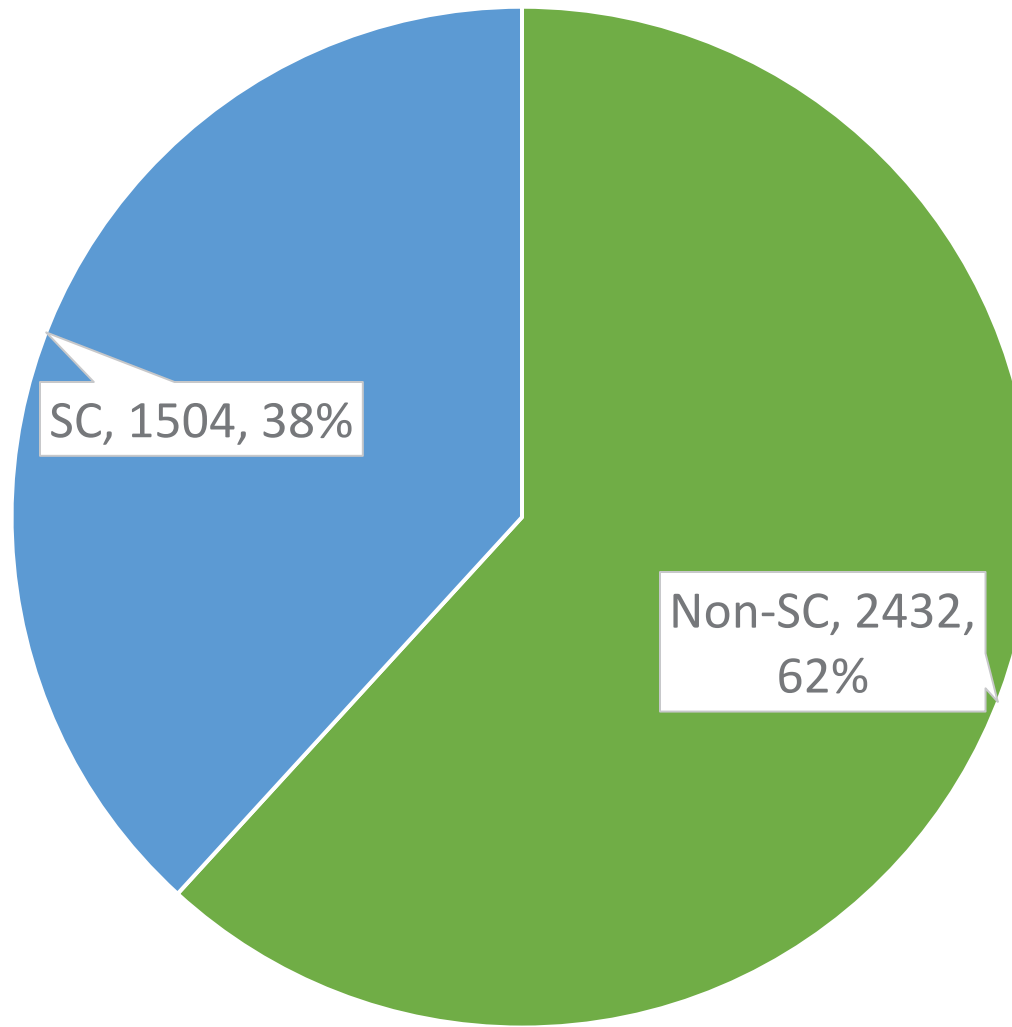
EXHIBIT F OPERATING STATEMENT

To be supplied no later than February 20, 2019

Together with a list of the initial fees of, and rates of club members

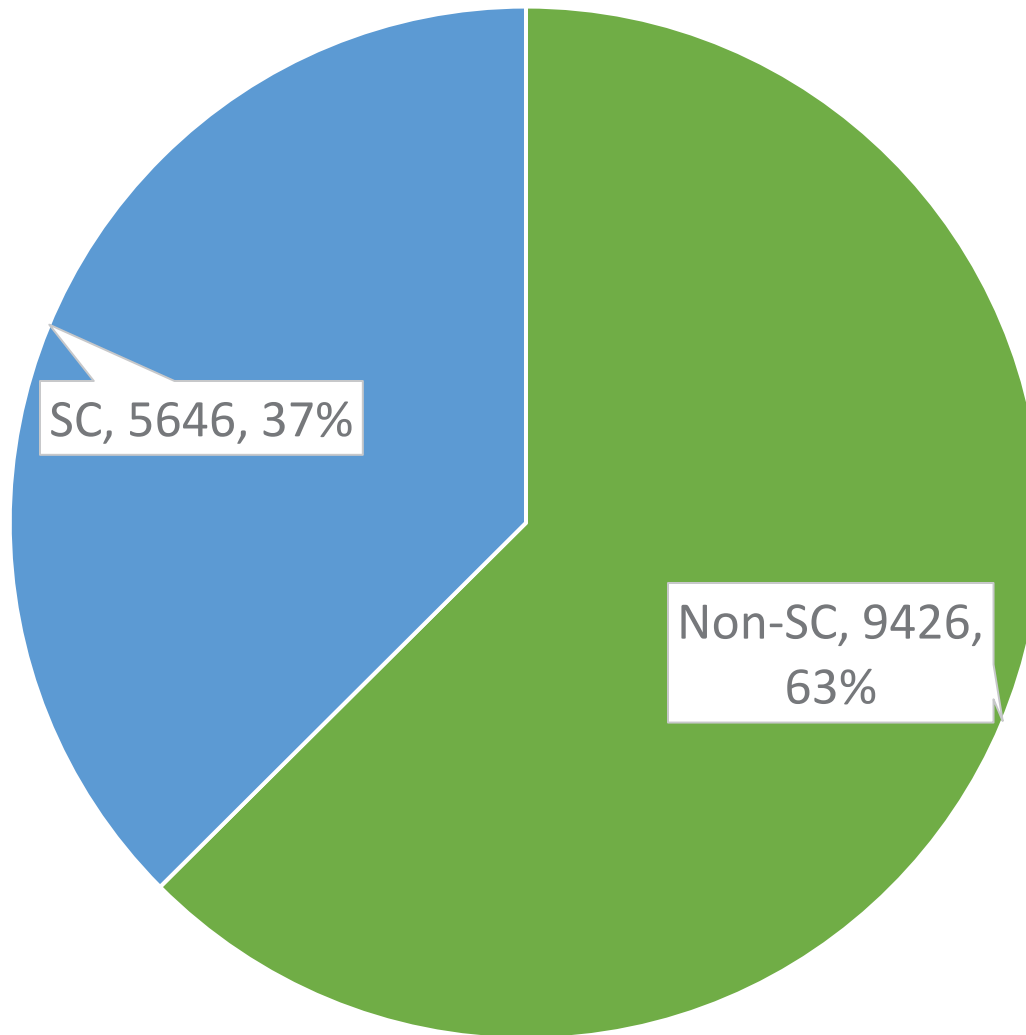
2019 Reservations

Opening Year; 3,936 Reservations



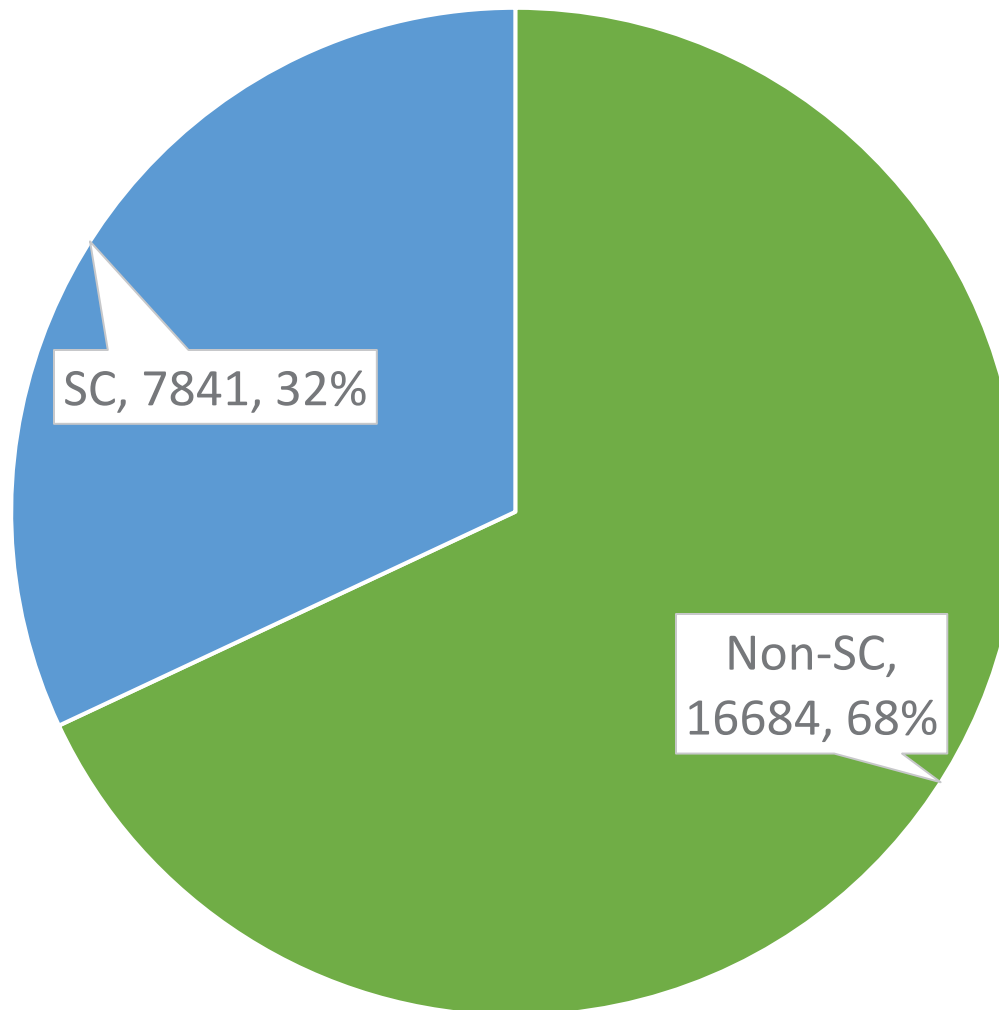
2020 Reservations

15,072 Reservations



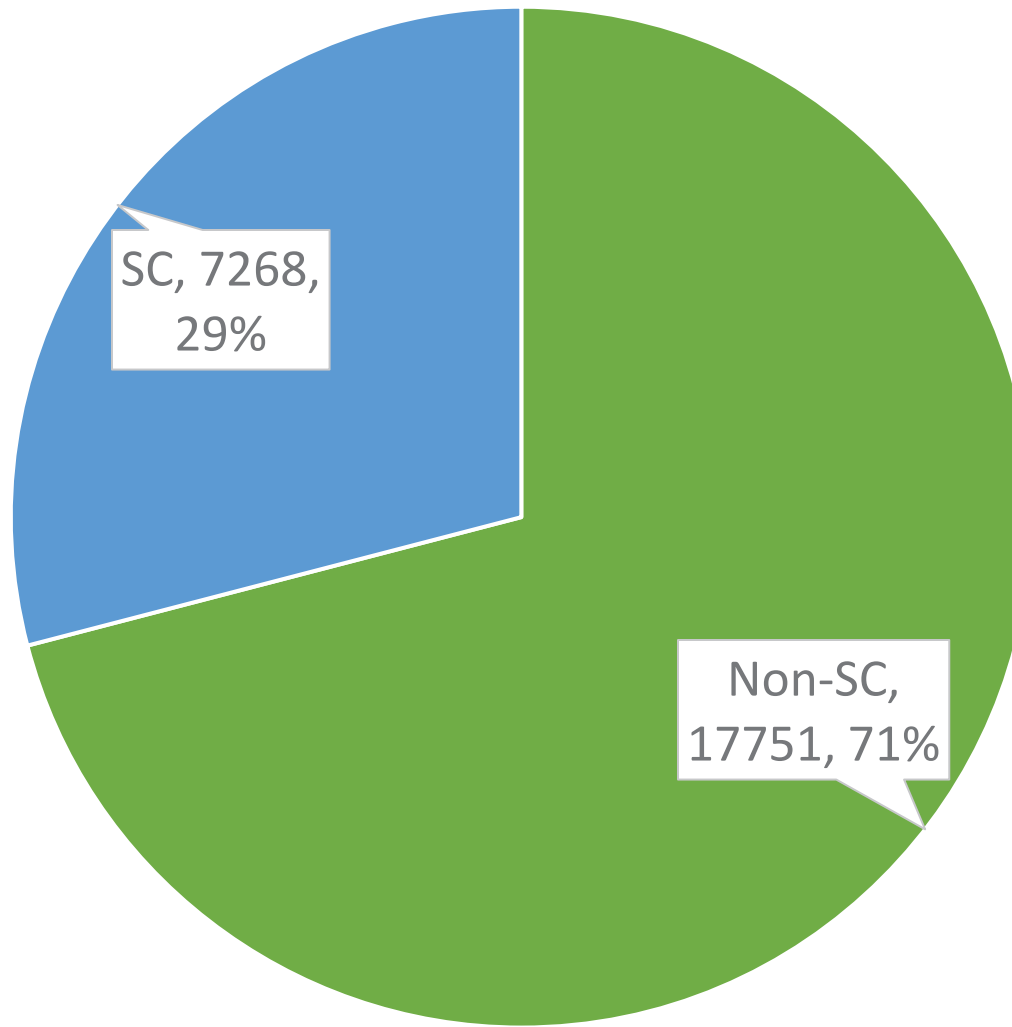
2021 Reservations

24,525 Reservations



2022 Reservations

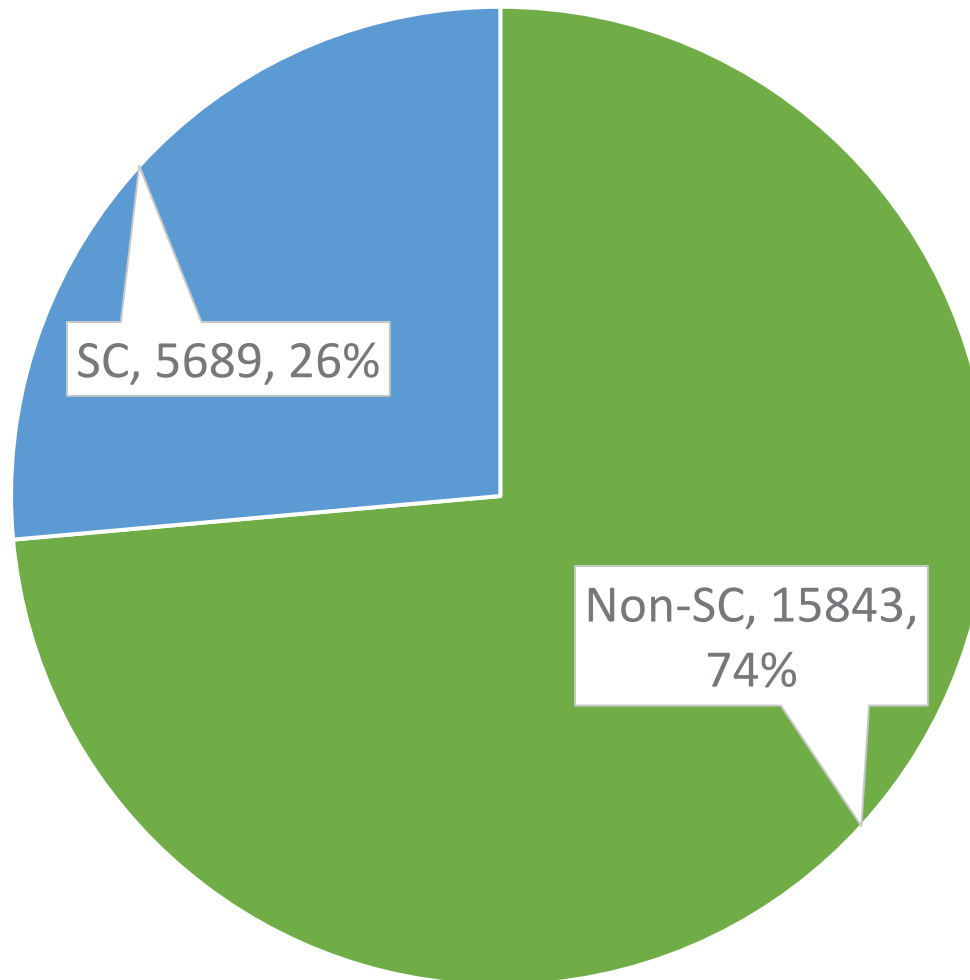
25,019 Reservations



2023 Reservations*

21,532 Reservations

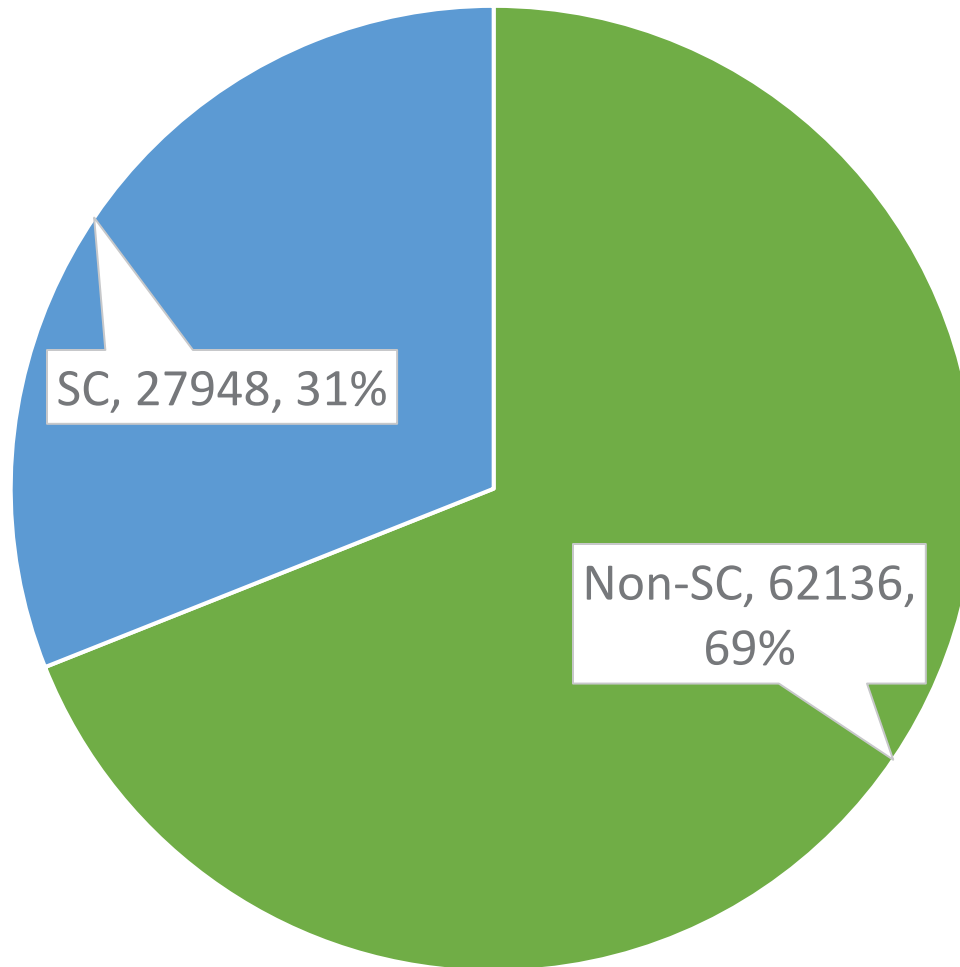
*As of October 31, 2023



All Reservations - 2019-23*

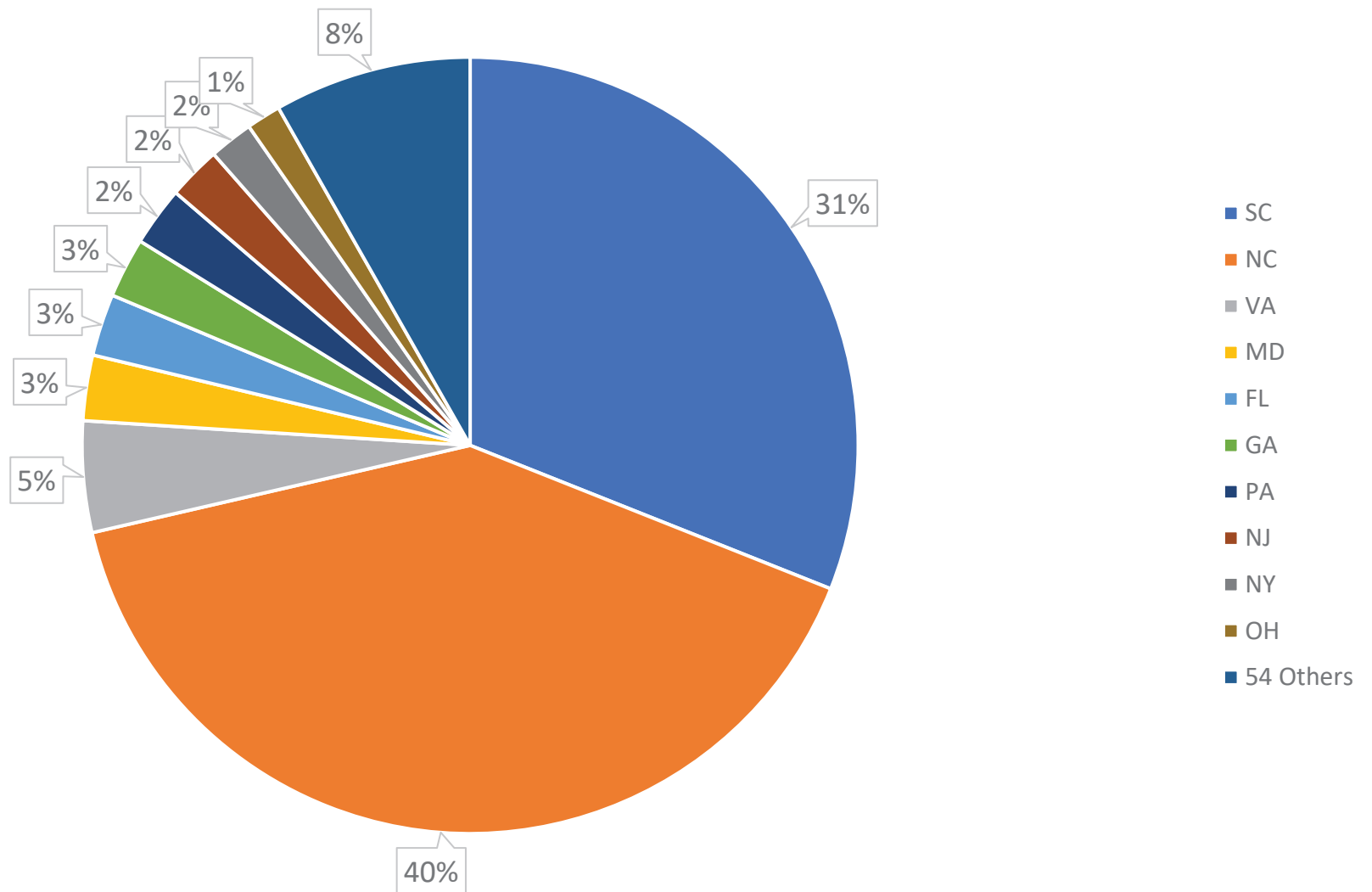
90,084 Total Reservations

*as of October 31, 2023



Total Reservation Breakdown for States with 1,000+ Reservations

2019-2023 as of October 31, 2023



STATE OF SOUTH CAROLINA

COUNTY OF HORRY

CITY OF NORTH MYRTLE BEACH,

Plaintiff,

vs.

SUN TRS OCEAN CLUB, LLC, SUN TRS
CAROLINA PINES, LLC, AND SUN
CAROLINA PINES RV, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2021-CP-26-07489

**PLAINTIFF'S AMENDED MOTION AND
INCORPORATED MEMORANDUM TO
RECONSIDER**

Plaintiff, the City of North Myrtle Beach (the “City”), by and through its undersigned counsel, pursuant to Rules 52(b), 59(a), and 59(e) of the South Carolina Rules of Civil Procedure, respectfully requests the Court to alter or amend its Order of November 20, 2023 (“**Order**”). The City respectfully submits that the proposed order submitted by Defendants Sun TRS Ocean Club, LLC, Sun TRS Carolina Pines, LLC, and Sun Carolina Pines RV, LLC¹ (collectively, “**Defendants**”), which was adopted by this Court, commits errors of law and ignores issues altogether, both of which require rehearing and correction. For the reasons set forth herein, the City requests this Court’s reconsideration of its Order.²

I. RELEVANT FACTS

A. The City’s Zoning Purposes, Generally

1. The City’s general purposes underlying its zoning ordinances are: “to guide development

¹ Immediately prior to trial commencing on October 31, 2023, the City moved this Court, with consent of Defendants, to substitute Sun TRS Carolina Pines RV, LLC for the appropriate party, i.e. Sun Carolina Pines RV, LLC. The Court granted this substitution.

² To the extent consultation requirement of Rule 11 of the South Carolina Rules of Civil Procedure applies, the undersigned certifies that consultation would serve no useful purpose in this case, given Defendants have obtained a final judgment in their favor.

in accordance with existing and future needs and to promote the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare of the community.” North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-1 (1984).

2. The City also gives reasonable consideration for the following specific purposes:

- 1) To provide for adequate light, air, and open space;
- 2) To prevent the overcrowding of land, to avoid undue concentration of population, and to lessen congestion in the streets;
- 3) To facilitate the creation of a convenient, attractive, and harmonious community;
- 4) To protect and preserve scenic, historic, or ecologically sensitive areas;
- 5) To regulate the density and distribution of populations and the uses of buildings, structures and land for trade, industry, residence, recreation, . . . water supply, sanitation, protection against floods, public activities, and other purposes;
- 6) To facilitate the adequate provision or availability of transportation, police and fire protection, water, sewage, schools, parks, and other recreational facilities, affordable housing, disaster evacuation, and other public services and requirements specified in the ordinance;
- 7) To secure safety from fire, flood, and other dangers; and
- 8) To further the public welfare in any other specified regard.

North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-1 (1984).

3. The City’s zoning ordinance recognizes that the City’s “economy is dependent on the retail and service industries supported by tourism,” and as such, the City’s further objective is “to encourage the future growth in tourism in an orderly fashion without compromising the character of residential areas or the natural environmental assets so important to tourist attraction.” North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-1 (1984).

B. The City’s R-4 Resort Residential District

4. The City utilizes approximately twenty (20) different zoning districts, ranging from residential ones to commercial ones, which regulate the intensity of use within those districts.

5. One residential district is named the R-4 Resort Residential District, which has as its purpose

to provide for the orderly development of certain areas within the community where both year-round and seasonal or resort housing may be developed and where, because of proximity to the ocean, such “mixed development” would promote year-round use of public facilities, and permit housing choices in response to market demands, but not at the expense of ocean visibility and access by the community.

North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-22(1) (1984).

6. The permitted uses within the R-4 Resort Residential District are: (a) dwellings, such as single-family detached, semi-detached, patio homes, duplexes and multiplexes, and townhouses, amongst others; (b) hotels, motels, inns, and lodges; (c) accessory uses customarily incidental to dwellings; (d) accessory uses customarily included in hotels, motels, inns, and lodges; and (e) parking lots. North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-22(2) (1984).

7. Any owner with property located in the R-4 Resort Residential District may use said property in accordance with these permitted uses by right.

C. Cabana Houses as Special Exceptions in the R-4 Resort Residential District

8. In or around January 1996, the City promulgated ordinances to permit a new use category called “cabana houses” as a special exception in the R-4 Resort Residential District within the City.

9. Special exceptions, including cabana houses, require approval by the Board of Zoning Appeals “[o]wing to their potential negative impact on the community and surrounding areas.”

North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-22(4) (1984).

10. The City’s Code of Ordinances defines a “cabana house” as:

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

North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-2 (1984) (emphasis added).

11. Cabana houses, as special exceptions, are subject to additional use restrictions within the City's Code of Ordinances, including, but not limited to "[t]hat a *homeowner's association shall have been established* for the project." North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-22(4)(d)(1) (1984) (emphasis added). Defendants are not challenging all of use restrictions outlined in Section 23-22(4)(d), but they are challenging the constitutionality of a homeowner's association ("**HOA**") being established for the project.

D. Defendants' Ownership and Use of a Cabana House

12. The land commonly referred to and designated as Lot 1, Block 18-A, Tilghman, located in the City of North Myrtle Beach (the "**Property**"), is subject to the City's Code of Ordinances.

13. A structure originally designed and approved as a cabana house ("**Cabana House**") is located on the Property.

14. The Property was approved for use as a special exception cabana house in 2007 via an application from Seabrook Plantation, LLC, a developer of the Seabrook Plantation development project located within the City.³

³ The Order states the "City did not require or specify that Pan, LLC [the original owner of the Cabana House] deed the property to Seabrook Plantation's homeowners' association as a condition of operations." (Order, p. 6, ¶ 17.) The factual finding is erroneous, because the City's very ordinances required any owner with an approved special exception for a cabana house to be a homeowners' association. Although it is true the City approved Pan, LLC to own the property temporarily, as the City's witnesses testified, it was always the understanding once the development reached a certain progress point that it would be transferred to a homeowners' association.

15. In 2019, the Property was sold from a prior owner to an entity affiliated with Defendants, which then assigned it to Sun TRS Ocean Club, LLC, who is the owner of the Property.

16. Sun Carolina Pines RV, LLC is the owner and operator of a recreational vehicle (“RV”) resort located in Conway, South Carolina.

17. The land for the RV resort was purchased in 2017 and a groundbreaking occurred in 2018.

18. Defendant Sun TRS Ocean Club, LLC’s ownership and Defendants’ collective use of the Cabana House for the benefit of the RV resort are at issue in this action.

19. Defendants’ ownership and use of the Property was materially different than the ownership and use by the prior owners of the Property, including the original owner who obtained approval to use the Property for a special exception cabana house.

20. Defendants’ use of the Property does not meet any of the permitted uses under Section 23-22 of the City’s Code of Ordinances.

21. Instead, Defendants used the Property as a cabana house, i.e. as an amenity for shuttling their RV resort guests to and from the beach.

22. Notably, at the time of the groundbreaking in 2018 and at all times prior to the discovery of the sale of the Cabana House, Defendants intended to shuttle their RV resorts guests to and from public beach access points rather than purchasing beachfront property to use as a private amenity.

23. Defendants never separately charged their guests for shuttle services and access to the Cabana House; indeed, Defendants used the Cabana House as a free amenity in that regard.

24. However, on a number of occasions, Defendants used the Cabana House in a commercial manner, such as by hosting events for charge and serving food and beverage, including alcohol.

25. Defendants’ use of the Cabana House in a commercial manner was conducted without a business license issued by the City for the Property and their service of alcohol on the Property

was conducted without an alcohol permit issued by the South Carolina Department of Revenue.

26. Notably, Defendants admit to knowing of the City's zoning ordinances that are at issue in this case *prior* to their purchase of and use of the Cabana House.

27. Despite this knowledge, Defendants acquired the Cabana House, and failed to apply for authorization to own and use the Property pursuant to the special exception use for cabana houses under Section 23-22 of the City's Code of Ordinances.

28. To date, Defendants have never applied for authorization to own and/or use the Property pursuant to the special exception use for cabana houses under Section 23-22 of the City's Code of Ordinances.

29. In the preliminary stages of this litigation, Defendants consented to the closure of the Cabana House, pursuant to the Consent Order Regarding Use of Subject Property, which was entered with the Court on January 11, 2022 ("**Consent Order**").

E. Facts Related to the Interstate Commerce Analysis

30. The City's historical records and legislative history demonstrate no finding that the ordinances in question will have a substantial effect on interstate commerce; neither do they demonstrate an intent to discriminate against out-of-town or out-of-state entities or persons.

31. Instead, the City's historical records and legislative history demonstrate cabana houses were meant to provide for limited noncommercial amenity use; and such use does not have a direct relationship with commerce or any sort of economic enterprise.

32. The City's special use exception for a cabana house is jurisdictionally limited to the R-4 Resort Residential District, which is one of approximately twenty separate zoning districts in the City.

33. The City allows commercial recreational facilities to be owned and used in other zoning

districts, including as permitted uses within the Resort Commercial and Highway Commercial Districts as well as a special exception within the Business Commercial District. North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, §§ 23-27(2)(d), 23-26(2)(h), 23-25(4)(b) (1984).

34. The Resort Commercial District contains beachfront lots and the Highway Commercial and Business Commercial Districts contain lots in close proximity and within walking distance to the beach.

35. The City has not prohibited Defendants from purchasing, owning, or operating a commercial recreational facility where allowed by the City's zoning ordinances for the purposes of shuttling guests to and from the beach, nor is there any evidence the City would attempt such prohibition.

36. Neither does the City prohibit Defendants from shuttling their guests to and from the City's public parking locations and public beach access points, many of which include bathrooms, wash areas, and changing facilities; indeed, Defendants have shuttled their guests to and from a public location within the City for beach access in the summer months of 2023.

37. Defendants' number of reservations and revenue generated from their RV resort have increased from 2021 to 2022 to 2023, despite the closure of the Cabana House due to the Consent Order entered on January 11, 2022.

38. The City has a number of local interests that are served by the pertinent ordinances in this case, including, but not limited to: (1) reducing competition of the City's public parking; (2) reducing traffic congestion; (3) regulating the intensity of use and undue concentration in and around a special exception amenity; (4) protecting ocean visibility by encouraging development further inland; (5) facilitating a harmonious community and compatible uses across neighboring properties within the zoning district; (6) facilitating other quality of life issues, including the

adequate provision and prioritization of police and fire protection and security from dangers;
 (7) promoting responsive and self-regulating and/or self-governing communities; and
 (8) preserving property values.

F. Procedural History

39. The trial of this matter occurred between October 31 and November 3, 2023.

40. At the conclusion of trial, the Court instructed counsel for both parties to submit competing proposed orders with a twenty-five-page limit.

41. The Court entered its final Order on November 20, 2023, which in all substantive regards adopts Defendants' proposed order.

II. LEGAL STANDARD

The South Carolina Supreme Court has recognized “two basic situations” in which a party should consider filing a motion to alter or amend, colloquially known as a motion to reconsider⁴: (1) for a rehearing (i.e. a reconsideration) of the issues and arguments; and (2) error preservation for appellate review. *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004); *see also Motions to amend findings and judgment*, Trial Handbook for South Carolina Lawyers § 2:34 (5th ed.) (noting the “two distinct functions: rehearing and error preservation” for motions to alter or amend under Rules 52(b) and 59(e), SCRCp). Regarding the former, “[a] party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.” *Elam*, 361 at 24, 602 S.E.2d at 780 (emphasis in original). Regarding the latter, “[a] party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order

⁴ “A motion under Rule 59(e) long has been viewed as ‘motion for reconsideration’ despite the absence of those words from the rule.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004).

to preserve it for appellate review.” *Id.* (emphasis in original). The Supreme Court of South Carolina has also recognized that “[t]here is nothing inherently unfair in allowing a party one final chance not only to call the court’s attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument.” *Id.* at 22, 602 S.E.2d at 779. Rather, “[i]t is inherently unfair to disallow such an opportunity.” *Id.*

III. ARGUMENT

As a preliminary matter, there are a few points worth addressing from the outset. First, the Order does not address or even mention, the significant public policies favoring the constitutionality of municipal ordinances. *See, e.g., McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 719 S.E.2d 660 (2011); *City of Rock Hill v. Harris*, 391 S.C. 149, 705 S.E.2d 53 (2011); *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007); *Ani Creation, Inc. v. City of Myrtle Beach Board of Zoning Appeals*, 440 S.C. 266, 890 S.E.2d 748 (2023). It is error not to consider and address this extensive public policy favoring the constitutionality of municipal zoning ordinances.

Second, this Court found “[t]he City cannot escape the plain language” of the pertinent ordinances in this case and that the ordinance requiring that “a cabana house located in the R-4 Resort Residential District must be owned by a homeowners’ association for a project located in the City discriminates against interstate commerce on its face, in its effect, and in its purpose.” (Order, p. 25.) However, this same Court denied not one, but two motions for partial summary judgment filed by Defendants, both of which were based upon an alleged facial discrimination. This apparent inconsistency begs the question: when did the City’s ordinances become facially discriminatory? Respectfully, it appears inconsistent to deny facial discrimination as a matter of law on two separate occasions prior to trial, but then to find as a matter of law the City’s ordinances

are facially discriminatory. Such an apparent inconsistency should encourage this Court to carefully reexamine the issues presented in this case as well as the proposed order submitted by Defendants.

Third and finally, on multiple occasions during the course of this litigation, during the hearing on Defendants' renewed motion for partial summary judgment as well as during trial, Defendants' counsel expressly referenced the likelihood of an appeal, even going so far as to suggest it might ultimately be appealed to the Supreme Court of the United States. These assertions were inappropriate, and to the extent this Court was swayed by them, this Court should reconsider and set them aside.

Notwithstanding the foregoing, the following arguments necessitate this Court's reconsideration of its Order. Once reexamined, this Court should alter or amend its Order and find in favor of the City, whether in whole or in part.

A. Separateness of the Project Requirement, the HOA Ownership Requirement, and the HOA Maintenance/Establishment Requirement

The Court erred in treating the City's separate requirements as "inextricably linked." (Order, p. 21.) The City has three separate requirements for cabana houses that are pertinent for the Court's reconsideration:

1. **Project Requirement:** By definition, a cabana house must "be used by projects in North Myrtle Beach";
2. **HOA Ownership Requirement:** By definition, a cabana house "shall be owned . . . by a homeowner's association"; and
3. **HOA Maintenance/Establishment Requirement:** By definition and by operative statute, a cabana house "shall be . . . maintained by a homeowner's association," *and* "a homeowner's association shall have been established for the project."

North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, §§ 23-2, 23-22(4)(d)(1) (1984).

Defendants' erroneous assertions that these separate requirements work in combination to violate the Dormant Commerce Clause has induced this Court into a similar, but flawed analysis. For the purposes of this section, the Motion will assume *arguendo* the Project Requirement violates the Dormant Commerce Clause. But just because the Project Ordinance might violate the Dormant Commerce Clause does not necessarily establish the two HOA requirements also violate the Dormant Commerce Clause as a consequence. There is a critical distinction that arises with *and* between the HOA Ownership Requirement and the HOA Maintenance/Establishment Requirement.

To set the table, the Order treats the two HOA requirements as a singular requirement and then treats that singular requirement as working in tandem with the Project Requirement:

[S]ection 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. Accordingly, the homeowners' association *requirement* is *inextricably linked* to the project's geographic restriction and violates the dormant Commerce Clause in the same way.

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 (pursuant to the statutes) because the subject property and associated project must 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.

(Order, pp. 21–22 (emphasis added).) These are the only two paragraphs in the Order that consider the constitutionality of the two HOA requirements. Nevertheless, there are two errors committed in these two paragraphs.

First, the two HOA requirements do not preclude a non-local HOA from owning a cabana house. Certainly nothing on the face of the two HOA requirements excludes non-local HOAs, so the only way in which discrimination could occur is via practical effect, as Defendants appear to concede. Via state statute, the HOA that owns the cabana house must record its governing documents in Horry County. However, this recordation requirement does not require the project for which the HOA is established to be located in Horry County. Assuming the Project Requirement is stricken as a violation of the Dormant Commerce Clause, Defendants have not presented any authority and the City is not aware of any authority that suggests an HOA cannot be established for a project outside of Horry County and simultaneously own property in North Myrtle Beach. It is erroneous to hold “the homeowners’ association requirement is inextricably linked to the project’s geographic restriction and violates the dormant Commerce Clause in the same way,” (Order, p. 21), because of the severability of ordinances.

Naturally, a “statute may be constitutional and valid in part and unconstitutional and invalid in part.” *Thayer v. S.C. Tax Comm’n*, 307 S.C. 6, 12–13, 413 S.E.2d 810, 814 (1992) (citing *Strom v. Amvets*, 280 S.C. 146, 311 S.E.2d 721 (1984)). Thus, statutes and ordinances can be severed so as to strike down invalid portions while preserving valid portions. “The test for severability is whether the constitutional portion of the statute remains ‘complete in itself, wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the [legislative body] would have passed it independent of that which is in conflict with the Constitution. . . .’” *Id.* at 13, 413 S.E.2d at 814–15. As testified to at trial by the City’s witnesses,

most pointedly by its Rule 30(b)(6) designee, there are independent reasons for requiring an HOA to own and/or to maintain a cabana house. Most notably, because the City intended for cabana houses to be used in a limited, noncommercial manner, the City did not have an intent to regulate cabana houses via business licenses. Without the ability to regulate via business licenses, and given cabana houses were to be used in conjunction with projects, a reasonable method of regulation would be to require an HOA to own and/or maintain the cabana house. Because the two HOA requirements are wholly independent of the alleged geographic/residency discrimination and because there are independent reasons why the City would have passed the two HOA requirements, the Project Requirement can be severed and stricken as unconstitutional, while preserving the remaining valid portions of the City's ordinances. After all, the HOA Maintenance/Establishment Requirement simply states "a homeowner's association shall have been established for the project," without any additional requirement the project or the HOA has to be located within the City. North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-22(4)(d)(1) (1984).

Second, even assuming *arguendo* the HOA Ownership Requirement is inextricably linked to the Project Requirement, there remains a distinction between the HOA Ownership Requirement and the HOA Maintenance/Establishment Requirement. There is nothing facially discriminatory in requiring a homeowner's association to maintain a cabana house or being established for the project, which is, again, apparently conceded by Defendants with their focus on the "practical effect" of both the HOA requirements. If severed from the two other requirements, all the HOA Maintenance/Establishment Requirement does is to require an HOA to be established for a project anywhere in the United States and then to maintain the cabana house. There is no requirement in this situation for the HOA to own the property and therefore be arguably required to be local to Horry County via the state statutory recordation requirement. This isolated requirement does not

discriminate against interstate commerce on its face or in effect. Defendants certainly have not presented any facts or authority that the HOA Maintenance/Establishment Requirement independently violates the Dormant Commerce Clause. Instead, Defendants conclusory jumbled these separate ordinances together under one roof in the hopes of convincing the Court to strike down all of them as one. It is not constitutionally sound to do so, and the Court should avoid falling into this trap. Based on the two reasons set forth above, this Court must reconsider the improper merging of the three requirements as one and follow the authority requiring severance to preserve portions of ordinances that are constitutionally valid.

B. The Inapplicability of *Camps Newfound* and *Hignell-Stark*

The Court erred in finding certain case law persuasive, most notably *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564 (1997), and *Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (5th Cir. 2022). These cases are not analogous to the case at bar and do not concern special exceptions or accessory uses.

1. *Camps Newfound*

Camps Newfound concerned a property tax exemption statute for charitable institutions, which singled out institutions that served mostly state residents for beneficial tax treatment and penalized those institutions that did principally interstate business. *Camps Newfound*, 520 U.S. at 568. The camp at issue was not eligible for the property tax exemption and any charitable tax exemption at all, because most of its campers came from out of state and its weekly tuition was roughly four hundred dollars (\$400). *Id.* at 568–69. Further, there was nowhere the camp could locate in the state in order to become eligible for the beneficial tax treatment, because it was a “generally applicable state property tax” that applied across the state. *Id.* at 567–68. Despite being a nonprofit organization, the camp was directly engaged in commerce, because it was a “provider

of goods and services” and the “attendance of [its] campers necessarily generates the transportation of persons across state lines that has long been recognized as a form of ‘commerce.’” *Id.* at 573.

Camps Newfound is not applicable here. If this case were about the RV resort in Conway, as counsel for the City stated during trial, then there would be no question the RV resort engages in interstate commerce. The camp in *Camps Newfound* is analogous to the RV resort in this case, but it is **not** analogous to the cabana house. There is a clear distinction of a special exception or accessory use being at issue rather than the camp or resort being at issue. In the aggregate, all the provision of goods and services and the corresponding interstate transportation that is generated from a camp or an RV resort naturally will affect interstate commerce; but a cabana house, being just one type of a free amenity (as opposed to a good or service) does not substantially affect interstate commerce. At minimum, Defendants have not proven a substantial effect on interstate commerce. There was no tax implemented against one of the camp’s goods or services or amenities or anything accessory; instead, the tax was applied to the entire camp. Thus, the closest analogy to *Camps Newfound* in this case would be if the City prohibited RV resorts altogether from operating within its city limits or if the City prohibited RV resorts that catered to out-of-state tourists rather than City residents, but the City has not implemented such a restriction. It is merely regulating the zoning for an amenity feature. Defendants recognize this problem, because they must bootstrap all of the services their RV resort provides in order to make a claim interstate commerce is substantially affected. This bootstrapping is highlighted by the mere conclusory statement in the Order that “the services that the RV Resort provides, which includes access to the Beach Club [i.e. the Cabana House] . . . also have a substantial effect on interstate commerce.”⁵ (Order, p. 14.) This

⁵ The Court found it relevant that “the City has not conducted any study or analysis as to how [its municipal] interests are furthered” by the Project Requirement. (Order, p. 5.) However, Defendants did not present any study or analysis regarding whether a cabana house has a substantial effect on

conclusion is in error, because it improperly widens the aperture of the issue at hand; the question is whether the ordinances governing cabana houses substantially affects interstate commerce and **not** whether the RV resort and the aggregation of all the goods and services it provides substantially affect interstate commerce.

Camps Newfound's focus on goods and services is important as well, *see* 520 U.S. at 573, because it reiterates a point asserted by the City, which is that a cabana house is a free amenity, rather than a paid-for good or service. "Commerce" is defined as the "exchange of goods and services, esp[ecially] on a large scale involving transportation between cities, states, and countries." *Commerce*, *Black's Law Dictionary* (11th ed. 2019). And the Dormant Commerce Clause is focused on activities that are "quintessentially economic," meaning the "the production, distribution, and consumption of commodities." *See Gonzales v. Raich*, 545 U.S. 1, 25 (2005). An amenity use does **not** constitute a direct exchange of a good or service, such as pasteurized milk in *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). Thus, even if a cabana house as an amenity use is construed to affect the travel of some of the RV resort's guests, it is undisputed Defendants never directly generated any revenue from this free-of-charge amenity. Further, the record is clear that only a small portion of the RV resort's hundreds-of-thousands of guests annually ever visited the Cabana House. When examining Plaintiff's Exhibit 87, between May 2021 and September 2021, Defendants total occupied site nights at their RV resort was 83,178. This number does **not** include families or friends that stayed with the person reserving the site; it only accounts for the number of people who had reservations at the RV resort each night during

interstate commerce, which is the critical question in this case. Instead, Defendants inappropriately bootstrapped the cabana house to the RV resort in order to demonstrate a substantial effect on interstate commerce and have induced this Court into making the same mistake.

this timeframe.⁶ However, when examining Plaintiff's Exhibit 62, the number of people who visited the Cabana House during this timeframe was a mere fraction: 8,763.⁷ When dividing 8,763 by 83,178, the percentage of the people making a reservation at the RV resort who used the Cabana House during this timeframe is roughly ten percent (10%).⁸ But even this low percentage is artificially inflated, because again, it does not consider the multiplier required—many if not most of its occupied site nights would be filled not just with one person, but with families, such that the 83,178 should have some multiplier effect (whether 1.5x, or 2x, or even 3x) which would drastically reduce the percent of users of the Cabana House. Further, this low percentage does not take into consideration that no one uses the Cabana House during the months outside of the peak season. More importantly, it also does not factor the number of RV resort guests who, even without the Cabana House, would nevertheless make a reservation and travel across state lines to the RV resort, especially if given the opportunity to shuttle to public beach access points or drive themselves to public beach access points. Point in fact, the RV resort's occupied site nights *increased year-over-year* from 2021 to 2022 to 2023 despite the fact the Cabana House was closed since January 2022 due to the Consent Order. These facts are damning and the Court should

⁶ This number would include the same physical person if the person stayed multiple nights, but for purposes of attendance at the Cabana House, it does not make a difference. What matters is the number of opportunities that existed to visit the Cabana House versus how often the Cabana House was visited.

⁷ Again, this number would include the same physical person if the person visited multiple times, but importantly, it does account for friends and families, so no multiplier is implicated with this number.

⁸ To be sure, while this percentage is low (and artificially inflated as set forth further) and while this low percentage does not establish a substantial effect on interstate commerce, it does not mean there is not a substantial issue created when this number of people attempt to use a small access node to a beach all at once. The intensity of use by this number of people for a residential-type facility, designed for the changing of clothes and beach access, creates a very substantial effect on the neighboring properties and other effects as discussed at trial. The substantiality issue between the effect on interstate commerce and the effect on quality of life issues are completely separate.

reconsider them in finding that a free amenity, such as a cabana house, does not substantially affect interstate commerce like the entire operation of a camp as in *Camps Newfound*.

Put in another way, the property tax exemption in *Camps Newfound* was found to affect interstate commerce, because the camp was faced with a higher tax burden that would increase the cost for the camp to host its campers. *Camps Newfound*, 520 U.S. at 570 (“Denial of a tax exemption is explicitly and primarily triggered by engaging in a certain level of interstate commerce. This denial makes operation of the institutions serving non-residents more expensive. This increased cost results from an impermissible distinction between in-state and out-of-state consumers.”) (quoting the lower court’s opinion). This focus on increased cost is an important one as well. *See also C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 383 (1994) (“By requiring Carbone to send the nonrecyclable portion of waste it receives from out of State to the transfer station at an additional cost, the ordinance drives up the cost for out-of-state interests to dispose of their solid waste.”). However, the RV resort does **not** incur a similar increase in cost from an inability to own and operate a cabana house in the R-4 Resort Residential District. Nothing about the operation of the RV resort has become or would become more expensive as a result of the closure of the Cabana House or the inability to use the Cabana House. Neither have Defendants established how their customers have borne an increased cost as a result of the closure of the Cabana House or would bear an increase cost from the inability to use the Cabana House.

In sum, *Camps Newfound* is inapplicable here for three significant reasons: (1) the attenuation between a portion of a noneconomic activity being regulated via a zoning ordinance in one zoning district (i.e. a cabana house) versus an entire commercial operation being impacted via a state-wide property tax (e.g. a camp as in *Camps Newfound* or an RV resort like here); (2) the activity regulated being a free, noncommercial amenity (i.e. a cabana house) as distinct from the

exchange of a good or service (e.g. a commercial reservation for a camp guest as in *Camps Newfound* or RV resort guest like here, or even the selling a milk such as in *Dean Milk*); and (3) the lack of additional cost incurred as a result of an inability to use said amenity as opposed (i.e. a cabana house) as opposed to incurring such an increased cost (e.g. from the imposition of a tax and/or the inability to take advantage of a tax exemption as in *Camps Newfound* or directing waste disposition in a more expensive manner as in *C & A Carbone*). Based on the foregoing, the Court should reconsider *Camps Newfound* and find it clearly distinguishable and not applicable to the case at bar.

2. *Hignell-Stark*: Short Term Rentals versus an Accessory Use

Hignell-Stark v. City of New Orleans, 46 F.4th 317 (5th Cir. 2022), unlike *Camps Newfound*, is not binding precedent. It is a case arising from the Fifth Circuit Court of Appeals rather than the Supreme Court of the United States, and therefore only constitutes persuasive precedent. Regardless, it is inapplicable to the case at bar. As background, *Hignell-Stark* concerned an ordinance requiring a license to operate short term rental properties. 46 F.4th at 321. However, in order to obtain a license, the ordinance imposed a residency requirement such that “no person could obtain a license to own such an STR [i.e. short term rental] unless the property was also ‘the owner’s primary residence.’” *Id.* (quoting the municipality’s ordinance). Thus, the Fifth Circuit found there to be discrimination against out-of-state property owners who wished to use property owned inside the municipality as a short term rental. *Id.* at 325–29.

The primary reason *Hignell-Stark* is not applicable goes back to the definition of “commerce” discussed above. A short term rental property, much like a commodity such as milk, has an intrinsic value as a good or service that is directly exchanged in the open market. If an out-of-state property owner is completely excluded from operating a short term rental property in a

market that allows for residents to operate short term rental properties, then the out-of-state property owner faces a complete inability to generate revenue and engage in commerce in this manner inside the municipal boundaries. This situation is much like in *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), in which the municipality prohibited the selling of milk inside the city that was not also pasteurized within five miles of the city. All milk producers that pasteurized outside of this five-mile radius were completely excluded from being able to exchange their good (i.e. milk) on the open market.

First, Defendants have not established nor can they establish, they are completely excluded from the City, whether via ownership of a commercial recreational facility in another zoning district in the City or via shuttling their guests to and from public beach access points in the City. Second, and more importantly, a cabana house is not a good or service that generates revenue when exchanged on the open market. Defendants themselves admitted the Cabana House is an amenity, which did not generate any revenue when it was used prior to the Consent Order. Neither do any other cabana houses in the City generate revenue; all other cabana houses in the City operate as they were intended by the City's legislative history: as a limited, noncommercial amenity.

Comparing an amenity with a short term rental unit that generates revenue is an inapt comparison. Instead, the closest analogy for a cabana house is an accessory use. An "accessory use" is a "use that is dependent on or pertains to a main use." *Use, Black's Law Dictionary* (11th ed. 2019). There is not any substantive difference between special exception cabana houses and accessory uses that the City and other municipalities allow. After all, accessory uses—such as a detached garage at a residence, classroom space or a kitchen at a church, or a pool at a hotel—are uses that are restricted to owners and users of properties within the municipality and within the zoning district. The only difference is that accessory uses are generally co-located with the

dominant use, whereas the special exception cabana house is in close proximity to the beach with the project being further inland and not co-located.

Therefore, the Order entered puts at jeopardy the ability of any municipality to regulate accessory uses, because it opens the door to property owners outside of a municipality purchasing and using property inside the property for accessory uses without having the main use co-located with the accessory use property. One can imagine someone relying on the current Order to support operating a private parking lot as an accessory use in a residential neighborhood for a project outside a municipality. The Order does not and cannot create a one-way ratchet; rather, the Order can be used in two ways. In other words, if governance of a non-co-located accessory use like a cabana house can violate the Dormant Commerce Clause, then all accessory uses are eligible for delinking and decoupling. The Court failed to address this closer analogy with accessory uses in its Order and therefore should reexamine its ruling in light of special exception cabana houses simply operating as accessory uses for projects in the City.

3. Non-Economic Activity and the *Lopez-Morrison* Test

Ultimately, *Hignell-Stark* skips over the initial burden of proving a substantial effect on interstate commerce, because it is obvious a short term rental implicates interstate commerce. Unfortunately, the Order commits an error by finding a cabana house implicitly implicates interstate commerce; after all, the Order jumps immediately to holding the “proper analysis” in this case is “who may own or use” a cabana house rather than “how it may be used.” (Order, p. 10.) Respectfully, who may own or use a cabana house is not the proper first step in the analysis. Instead, the proper first step is determining (1) whether any effect on interstate commerce exists, and if so, (2) whether the effect is substantial. *See Sch. Bd. of Par. of St. Charles v. Shell Oil Co.*, 435 F. Supp. 2d 531, 539 (E.D. La. 2006) (“The initial determination that the Supreme Court in *Maryland v. Louisiana*[, 451 U.S. 725 (1981)] makes is that the transactions at issue are in fact

interstate commerce.”). This initial burden is one Defendants must prove in order to sustain a challenge under the Dormant Commerce Clause. The factors used in order to make this assessment are derived from *United States v. Lopez*, 514 U.S. 549, 558 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). These *Lopez-Morrison* factors are as follows:

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

United States v. Buculei, 262 F.3d 322, 328 (4th Cir. 2001) (quoting *Morrison*); see also *United States v. Gibert*, 677 F.3d 613, 624 (4th Cir. 2012). The Court erred in not considering this test and these factors. Instead, the Order merely concludes the Cabana House is an economic activity and erroneously finds the *Lopez-Morrison* factors inapplicable.

Regarding the first factor, a thought experiment is instructive: what amount of money would Defendants be required to pay for a business license to operate the Cabana House? After all, without the ability to regulate via an HOA, the City will likely be forced to impose a business license requirement. Using common sense and the ways of the world, the Court is aware business license fees are based on the amount of revenue generated by an entity conducting the alleged business activity at issue. If the operation of the Cabana House is inextricably linked to the RV resort, the City will be entitled to a percentage of the millions of dollars generated by Defendants by their RV resort as a whole. But Defendants are surely not going to take that position. As the

only alternative, Defendants will likely take the position that the operation of the Cabana House generates no revenue and will refuse to pay any fee to the City on that basis—which proves the point: a free amenity is not an economic enterprise, but a noncommercial activity.

Regarding the fourth factor, there is a significant attenuation between the impact on interstate commerce by a free amenity versus the operation of a tuition-based camp as in *Camps Newfound* or a for-profit RV resort in the case at bar. Further, it is telling whether there has been any effect on Defendants' bottom line due to the closure of the Cabana House since the entry of the Consent Order. In 2021, Defendants generated \$9,062,608.24 in income while the Cabana House was fully open and accessible for its RV resort guests. However, following the closure of the Cabana House due to the Consent Order entered on January 11, 2022, Defendants generated \$11,154,491.29 in calendar year 2022, more than two million dollars (\$2 million+) more in revenue than when the Cabana House was offered as an amenity in 2021. In comparing year-through-September data across 2021, 2022, and 2023, Defendants generated *more* reservations and *more* income year-over-year, despite the closure of the Cabana House for nearly two years. The chart below, entered as a Plaintiff summary during trial, demonstrates this point:

YTD REVENUE COMPARISON RELATIVE TO AVAILABLE SITE NIGHTS			
	YTD through September 2021	YTD through September 2022	YTD through September 2023
TOTAL USABLE RV SITES	6,399	7,506	7,482
Percent Increase		17.30%	-0.32%
TOTAL AVAILABLE SITE NIGHTS	194,103	227,682	226,947
Percent Increase		17.30%	-0.32%
TOTAL OCCUPIED SITE NIGHTS	138,381	144,830	151,954
Percent Increase		4.66%	4.92%
TOTAL RV TRANSIENT RENTAL INCOME	\$6,440,595.41	\$7,956,431.45	\$8,420,953.44
Percent Increase		23.54%	5.84%
TOTAL RV RENTAL INCOME	\$7,352,675.98	\$9,007,490.14	\$9,538,900.40
Percent Increase		22.51%	5.90%

The Order ignores this important data. This Court should reconsider the clear fact that the RV

resort's commercial activity has not been affected by the closure of the Cabana House, which demonstrates there has not and cannot be a substantial effect on interstate commerce as a whole.⁹

Based on the foregoing, this Court should hold the operation of a free amenity does not constitute a regulation of an economic activity. A cabana house is a noneconomic enterprise. Even to the extent it can be considered an economic activity, as a free amenity, it is far too attenuated to substantially effect interstate commerce, which is borne out through Defendants' own financial data. To hold otherwise is error.

C. *Pike* Test

The Court also erred in finding "[t]he City offered no argument at trial that the *Pike* test applies here." (Order, p. 17, n.11.) This finding is clearly in error. First, Defendants have the burden to prove a Dormant Commerce Clause violation, and they never challenged the ordinances under the second-tier analysis from *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Defendants relied upon a facial challenge throughout the entirety of this litigation, including their motions for partial summary judgment mentioned earlier. Regardless, and more importantly, the City presented evidence and argument of its legitimate municipal interests, pursuant to either of the two tests under the Dormant Commerce Clause; the City also argued at trial the ordinances at issue survive even the strictest scrutiny under the Dormant Commerce Clause, which would necessarily include their survival under the less stringent *Pike* standard. Thus, this finding by the Court needs correction, at a minimum, because even if a cabana house

⁹ The Order also ignores Defendants' counterargument to this point, that is, the occupancy rate allegedly decreasing during this timeframe. However, as presented by another Plaintiff summary during trial, when the occupancy rate is normalized for the increase in the number of units available for reservation beginning in December 2021, Defendants' occupancy rate has also increased year-over-year since the closure of the Cabana House. Under any relevant metric, Defendants' bottom line numbers have increased despite the closure of the Cabana House, which demonstrates the lack of any effect on their commercial enterprise specifically and an effect on interstate commerce generally.

implicates interstate commerce, the *Pike* test should apply rather than the first-tier analysis and the Court failed to address this second-tier *Pike* analysis.

D. Transience and Intensity of Use is a Legitimate Municipal Interest

The Order discounts the significant issue of transience in the RV resort's guests and their intensity of use of the Cabana House versus out-of-state individuals renting properties within City limits; indeed, the Order equates the intensity of use of out-of-state individuals renting properties to the intensity of use of the RV resort's guests use of the Cabana House. (Order, p. 18.) This finding belies the evidence in the record as well as common sense. The intensity of use by a couple or few people renting a short term rental property is drastically different than *hundreds* of people filtering through a residential-style and residential-sized Cabana House, squeezed between two residential condominium projects, day-in and day-out, for months in the peak tourist season, which is evidenced by Plaintiff's Exhibit 62, described above. The intensity of use issue was an important interest testified to during trial and it justifies the accessory nature of a cabana house for projects inside the City limits. Residents of the City simply do not generate an equal intensity of use of cabana houses as transient guests of project outside of the City, and the testimony from representatives of the other cabana houses, compared to Plaintiff's Exhibit 62, support this assertion. And as argued at trial, a high intensity of use results in quality of life issues, which presented continual problems at the Cabana House and to its neighbors through the summer of 2021. Therefore, the Court should reconsider its finding that there is no difference between the transience and intensity of use of short term rentals versus cabana houses used as an amenity for projects outside the City.

E. Interrogatory Response

The Court also erred in finding one of the City's interrogatory responses was "telling." (Order, p. 22.) Case law holds, "[a]s a general rule, an answer to an interrogatory does not

conclusively bind the answering party” *Marcoin, Inc. v. Edwin K. Williams & Co., Inc.*, 605 F.2d 1325, 1328 (4th Cir. 1979). After all,

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

Victory Carriers, Inc. v. Stockton Stevedoring Co., 388 F.2d 955, 959 (9th Cir. 1968). As the City’s Rule 30(b)(6) testified, the interrogatory response the Court finds “telling” was submitted *prior* to the City being able to pull, produce, and examine the legislative history in this case. Therefore, this Court should give the interrogatory response (which incorporates by reference all the quality of life issues submitted in the previous interrogatory response), much less weight than what it does in its Order.

F. Clarification of Stricken Language

Lastly, although Defendants argued at trial approximately twenty words of the ordinances violate the Dormant Commerce Clause, the Order does not expressly state which specific words are deemed unconstitutional. Neither does the Court define what it means by the residency requirement. Therefore, clarification is necessary.

IV. CONCLUSION

Based on the foregoing, this Court should grant the City’s Amended Motion to Reconsider. The City requests any other and further relief as this Court deems just and proper.

Respectfully submitted,

/s/ Rhett D. Ricard

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