EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
McDaniel Jones, LLC, Plaintiff, v. City of Greenville Planning Commission, Defendant.	C.A. No. 2020-CP-23-05094 **ORDER**

INTRODUCTION

This matter was heard by me pursuant to an Order of Reference on January 24, 2025. Plaintiff was represented by Bruce W. Bannister and Ryan W. Pasquini of Bannister, Wyatt & Stalvey, LLC. The Defendant was represented by V. Clark Price of Cassidy Coates Price, P.A. All attorneys were well-prepared and presented zealous and compelling arguments on behalf of their clients

The parties have filed motions for summary judgment and have asked that I issue a final order based on the stipulation of facts, briefs and related exhibits, and arguments of counsel. As will be explained herein, I conclude that Defendant City of Greenville Planning Commission is entitled to judgment as a matter of law.

PROCEDURAL HISTORY

On November 5, 2020, Plaintiff filed a complaint alleging that the denial by Planning Commission of Plaintiff's application for a preliminary plat to develop property owned by Plaintiff constituted a regulatory taking. On December 12, 2022, Plaintiff filed an amended

complaint adding a cause of action alleging that the denial of the application violated Plaintiff's rights to equal protection under the Fourteenth Amendment to the United States Constitution.

The Planning Commission answered the Complaints, denying liability. Planning Commission contends that its decision was lawful, was not an unconstitutional taking, and did not violate Plaintiff's equal protection rights.

FINDINGS OF FACT

The action arises out of the purchase by Plaintiff of a piece of residential real estate located at 808 McDaniel Avenue on July 26, 2018. Plaintiff is a single purpose limited liability company organized for the purpose of purchasing, subdividing, and selling the property, which comprises 1.86 acres. Plaintiff paid $1,430,000 for the property. 808 McDaniel Avenue fronts McDaniel Avenue but also borders Jones Avenue, which runs roughly parallel to McDaniel Avenue. The property is located in an established and high dollar residential area. At the time of the purchase, a single home was situated on the property. The property was zoned R-9, Single-Family Residential District.

Plaintiff's owner Mark Cothran desired to raze the existing home and subdivide the property into seven residential lots, with five lots fronting on McDaniel Avenue and two on Jones Avenue. Plaintiff applied to the Planning Commission for permission to subdivide the property. The initial application was submitted on September 14, 2018. A large magnolia tree on the property would have been removed under the proposal, but City planning staff determined that the tree was a historical tree and would have to be protected.

There was public opposition to the proposal. Written comments against the proposal were submitted by a number of neighborhood residents. Plaintiff revised its plan for the

property. A second application was filed with the Planning Commission on December 12, 2018. The revised application left the magnolia tree in place that would be protected by a conservation easement. The number of lots set aside for development was reduced to six, with lots again fronting on both McDaniel and Jones Avenues.

Public notice of the proposed subdivision was published. Again, there was public opposition to Plaintiff's proposal for a six lot subdivision. The Planning Commission received multiple written statements from individual opponents to the subdivision. A petition opposing the subdivision was submitted to the Planning Commission on January 2, 2019, which was signed by residents from the community. A neighborhood meeting was conducted by Plaintiff's representatives on January 9, 2019. Numerous opponents attended and expressed their opposition to the proposal. Prior to the Planning Commission meeting to consider the application, Mr. Cothran met with several representatives of the neighborhood during which their concerns about the plan were raised. Mr. Cothran told the representatives that he intended to proceed with the six lot subdivision and that he would not reduce the number of lots.

The Planning Commission considered the application at a public hearing on January 17, 2019. Many opponents attended the hearing. Jay Marting, a representative for Plaintiff, presented the application. No one else spoke in favor of the proposal. Eleven neighborhood residents spoke against the application. At the end of the public comments segment, Planning Commission members suggested to Mr. Cothran that a five lot subdivision would be approved. However, Plaintiff refused to reduce the proposal by one lot.

The Planning Commission voted unanimously to deny the application. Written notice of the denial dated February 13, 2019 was mailed to representatives of Plaintiff. The notice advised Plaintiff that "reducing the number of residential lots could potentially address [the Planning

Commission's] compatibility concerns…." Plaintiff did not submit a revised application. Instead, Plaintiff appealed the Planning Commission's decision to the Court of Common Pleas. The matter was heard and on September 1, 2020, Judge Edward W. Miller entered an order denying the appeal.

Plaintiff did not appeal Judge Miller's order or consider reducing the number of lots in the proposed subdivision from six to five. Instead, Plaintiff sold 808 McDaniel Avenue on October 2, 2020 for $1,400,000. The purchaser is constructing a single family residence on the property.

CONCLUSIONS OF LAW

The Regulatory Takings Cause of Action:

In the regulatory takings context, the question of whether a taking has occurred is a question of law for the court. Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 314, 737 S.E.2d 601, 619 (2013); . Columbia Venture, LLC v. Richland County, 413 S.C. 423, 776 S.E.2d 900 (2015). South Carolina recognizes that an inverse condemnation claim is a regulatory taking challenge that is governed by the standards set forth in Penn Central v. City of New York, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). See Sea Cabins on the Ocean IV Homeowners Association, Inc. v. City of North Myrtle Beach, 345 S.C. 418, 430, 548 S.E.2d 595, 601 (2001); Columbia Venture, LLC v. Richland County, 413 S.C. at 447, 776 S.E.2d at 913.

The Takings Clause of the Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. The typical taking that will require just compensation is a direct government appropriation or physical invasion of private property. Dunes West Golf Club, LLC, 401 S.C. 280, 313, 737 S.E.2d 601,

618 (2013). Absent a direct physical invasion, government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster. Such regulatory actions may be compensable under the Fifth Amendment. Clayland Farm Enterprises, LLC v. Talbot County, Maryland, 987 F.3d 346 (4th Cir. 2021). (Citations omitted.) However, federal and state case law indicate that nearly all the value of property must be taken before a regulatory taking has occurred.

To determine whether a governmental action such as the Planning Commission's decision in this case was an unconstitutional regulatory taking, this Court must balance "a complex of factors, including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct, reasonable, investment-backed expectations; and (3) the character of the governmental action." Clayland Farm Enterprises, LLC , 987 F.3d 346, 353. (Citations omitted.) The first two factors—economic effects and investment-backed expectations—are primary among those factors. Id. South Carolina law follows the federal law on the subject. See generally Dunes West Golf Club, LLC, supra. The genesis of the regulatory takings analysis is found in Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

I find that the Planning Commission's denial of Plaintiff's application did not constitute a regulatory taking. Plaintiff argues that being forced to reduce the proposed subdivision by a single lot is an unconstitutional taking of that lot. However, under the facts herein, mere diminution in value does not rise to the level of a taking in the constitutional sense. Plaintiff did not lose the ability to make money off the property. The Planning Commission did not prohibit Plaintiff from developing the property into multiple lots, or from building a new home on the site. The property retained market value. These factors show that the impact on Plaintiff's

ability to exercise its ownership (its "bundle of property rights") was insufficient to establish a taking. The denial of one traditional property right by a governmental act does not necessarily amount to a taking. Where an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking, because the aggregate has to be viewed in its entirety. See Braden's Folly, LLC, 439 S.C. 171, 201, 886 S.E.2d 674, 690 (2023); Andrus v. Allard, 444 U.S. 51, 64-67, 100 S.Ct. 318, 62 L.Ed.2d 201 (1979).

An action by the government that restricts a developer's plan to develop property is not a taking merely because it prohibits the most economically beneficial use of the developer's property. United States Supreme Court decisions have uniformly rejected the proposition that diminution in value, standing alone, can establish a taking, and the taking issue in the context of land use regulations is resolved by focusing on the uses the regulations permit. Dunes West Golf Club, LLC , 401 S.C. 280, 317, 737 S.E.2d 601, 621.

The Takings Clause does not create an affirmative obligation for local governments to make good on speculative private investments or to increase property owners' property values. Pulte Home Corporation v. Montgomery County, Maryland, 909 F.3d 685, 696 (4th Cir. 2018). Neither diminution in property value nor even a substantial reduction of the attractiveness of the property to potential purchasers establishes a taking. Esposito v. South Carolina Coastal Council, 939 F.3d 165 (4th Cir. 1991). A reduction in the number of houses that an owner may build may end up being a diminution in value but is not a taking. FIC Homes of Blackstone, Inc. v. Conservation Commission, 41 Mass.App.Ct. 681, 673 N.E.2d 61 (1996), citing Moskow v. Commissioner of Dept. of Environmental Management, 427 N.E.2d 750 at 753, which in turn cites Penn Central at 438 U.S. at 130-131, 98 S.Ct. at 2662, in which the United States Supreme Court said: "'Taking' jurisprudence does not divide a single parcel into discrete segments and

attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole…."

Plaintiff bought the property for $1,430,000; it sold the property for $1,400,000. Assuming Plaintiff acted reasonably in selling the property at a $30,000 loss, Plaintiff sustained a two percent diminution in value. Such a diminution in value, even if it could be linked to the Planning Commission's decision, establishes that the property retained 98 percent of its value. Plaintiff contends that the diminution in value is much greater. Plaintiff retained an appraiser who has opined that the fair market value of the entire property, had the Planning Commission voted to approve the six lot subdivision, would have been $2,510,000. Plaintiff argued at the hearing that the denial of the preliminary plat resulted in the property losing all its value. However, Plaintiff's sale of the property for $1,400,000 demonstrates the property retained significant value. The diminution in value, if any, is not significant enough to show a taking. See Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 317, 737 S.E. 2d 601, 621 (2013). I conclude that the economic impact of the Planning Commission's decision weighs in favor of the Defendant.

The Penn Central factor of the reasonableness of Plaintiff's investment-backed expectations also favors the Defendant. A valid regulatory taking claim must be premised on a property right that was in existence at the time the owner purchased the property. Clayland Farms, LLC 987 F.3rd at 354. Continuation of the existing use of the property is the property owner's primary expectation when considering an owner's investment-backed expectations for the property; a reasonable investment-backed expectation must be more than a unilateral

expectation or an abstract need. Dunes West Golf Club, LLC. In this case, from the time of purchase, Plaintiff sought to expand the existing use of 808 McDaniel Avenue from a single family residential lot to a six lot subdivision. The necessary premise to establish a regulatory taking is, therefore, lacking.

Case law instructs that the court should evaluate Plaintiff's investment-backed expectations through an objective lens. The subjective expectations of Plaintiff are irrelevant. The critical question is what a reasonable owner in Plaintiff's position should have anticipated. Courts are to look at (1) whether the challenged regulation interferes with the existing use of the property; (2) the degree to which the property's general locale is subject to regulation; and (3) whether the property owner acquired the land after the regulation went into effect. Braden's Folly, LLC v. City of Folly Beach, 439 S.C. 171, 886 S.E.2d 674 (2023). It is undisputed that 808 McDaniel Avenue was within the city limits, and that the city's zoning laws applied to the property. Plaintiff acquired the property knowing it was in the City and was on notice that the City's zoning procedures would apply. The Planning Commission's denial of Plaintiff's application did not interfere with the property's existing use; it was Plaintiff that sought to change the existing use.

Mark Cothran, an experienced real estate investor, is the sole and managing member of Plaintiff. Plaintiff, through Mr. Cothran, was aware at the time it purchased the property that in order to develop the property into a subdivision an application for a preliminary plat would have to be made to the Planning Commission, and that the Planning Commission would decide whether to approve or deny such application after receiving input from planning staff and interested members of the public. Plaintiff was aware prior to the Planning Commission

considering the application that Plaintiff would have to participate in a public meeting to discuss and take questions about the proposed subdivision.

Plaintiff, through Mr. Cothran, was aware of public opposition early on. Plaintiff knew the opponents had multiple concerns about the impact a six lot subdivision would have on what had historically been a single family residence. Opponents expressed concerns about increased traffic congestion; safety issues; stormwater increase; risks to the existing historic magnolia tree on the property; the potential negative impact on the tree canopy on surrounding properties; and proposed lot sizes and homes inconsistent with that of the neighborhood.

The January 2, 2019 petition was presented to the Planning Commission by residents opposed to the subdivision. The petition quoted from City Code Section 19-6.9.1: *General purpose and intent. This section is intended to achieve neighborhood compatibility, maintain the harmony and character of established single-family areas, and guide residential infill development to occur in an orderly and desirable manner.*

The petition identified major areas of concern to the petitioners: neighborhood compatibility; construction issues; traffic; and tree canopy. At least 96 residents signed the petition.

Prior to the Planning Commission hearing, Mr. Cothran met with several members of the neighborhood. Sam Outten, whose home is across the street from Plaintiff's property, testified to the Planning Commission that Mr. Cothran refused to agree to any change in the proposal, including the neighbors' request that the number of proposed lots be reduced.

A neighborhood meeting was conducted by Plaintiff's representatives on January 9, 2019. Numerous opponents of the proposed subdivision attended and expressed their opposition.

Austin Allen, a representative of Plaintiff who attended the meeting, prepared a summary of the comments made by the opponents. Mr. Allen noted that one of the attendees said that "A 4 lot subdivision would make a lot more sense and be much more reasonable and comparable to what is on McDaniel and Jones."

The public opposition did not sway Plaintiff, and on January 17, 2019, Plaintiff presented its six lot proposal to the Planning Commission. As noted above, public opposition was again intense. Plaintiff was offered the opportunity to revise its plan. The Planning Commission made it clear both at the hearing and in the notice of denial that a five lot subdivision would be a more acceptable proposal. Plaintiff declined to adjust the proposed subdivision and instead appealed the Planning Commission's denial to the Court of Common Pleas. When the appeal was denied, Plaintiff sold the property one month later for slightly less than it had paid for it.

The neighborhood's concerns about changing the use of the property from its historic use as a single residence and about the proposed subdivision's impact on traffic, safety, and the land management ordinance's purposes, including the admonition to "encourage quality development to blend with existing development" and to "facilitate the creation of a convenient, attractive, and harmonious community" could well have caused a reasonable investor to reduce the number of proposed lots.

I also find that the third Penn Central factor, the character of the challenged governmental action, favors the Defendant. The regulatory takings doctrine seeks to "identify regulatory actions that are functionally equivalent to the classic taking, in which government directly appropriates private property or ousts the owner from his domain". Dunes West Golf Club, LLC, 401 S.C. 280, 314, 737 S.E.2d 601, 619. The Planning Commission's decision did not rise to this level. A regulation that is merely a public program adjusting the benefits and burdens of

economic life to promote the common good will pass constitutional muster. Braden's Folly, LLC, 439 S.C. 171, 210, 886 S.E.2d 674, 696 (2023).

The character of the governmental action in this case is a denial of a preliminary plat for the subdividing of an existing 1.86 acre lot into six lots, coupled with the invitation to submit a plan with one fewer lot. The Planning Commission's decision did not deprive Plaintiff of its right to own, use, develop, and involved sell 808 McDaniel Avenue. While Plaintiff argues that the denial diminished the value of the property, the diminution in value involved herein does not establish an unconstitutional taking. To amount to a taking, the impact of the denial must be so profound as to be confiscatory. The Planning Commission's denial was not confiscatory; it was a preliminary zoning decision that affected only the density of the proposed use of the property, not the right of the developer to develop it.

The Equal Protection Cause of Action:

I find that the Planning Commission did not violate Plaintiff's equal protection rights when it denied the application for a six lot subdivision. There were multiple rational reasons why the Planning Commission denied the proposal, not the least of which was the indisputable public opposition to the plan. The decision was "fairly debatable". There is no proof that the decision was the result of intentional, invidious discrimination against Plaintiff. Even if the decision was not technically perfect, it did not rise to the level of a constitutional deprivation of rights. The legislative body's decision in zoning matters is presumptively valid, and the property owner has the burden of proving to the contrary. See Harbit v. City of Charleston, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009).

The Planning Commission determined "that the size and configuration of the proposed lots were not compatible with the existing development patterns along McDaniel and Jones

Avenues…these discrepancies informed the Commission's determination that the proposed subdivision was incompatible with the existing character and development pattern of the established surrounding neighborhood." (See February 13, 2019 letter to Jay Martin from Michael Frixen, Development Planner.) In this regard, it is significant that in his order denying Plaintiff's appeal of the Planning Commission's decision, Judge Miller found that the Planning Commission's decision was sustainable and permitted by the purpose and intent sections of the City of Greenville Code of Ordinances Sections 19.1.3 and 19.6.9.1 and that it did not abuse its discretion when it acted to deny Plaintiff's preliminary plat. See Order Denying Appeal, p. 3.

The decision was supported by neighborhood testimony presented to the Planning Commission. For example, Tom Snider, a resident of the neighborhood, testified that the proposed subdivision contained lots narrower than those of surrounding homes, and that if permitted, they would "create an incompatibility that destroys the harmony and character of the street". Mr. Snider described the proposed lots as "like a set of piano keys against the rest of McDaniel". Concerns about safety, increased traffic, the potential harm to the magnolia tree and the overall tree canopy of the neighborhood all supported the decision of the Planning Commission.

There were other reasons presented to the Planning Commission that made the propriety of its decision "fairly debatable". Concerns about safety, increased traffic, the potential harm to the magnolia tree, and the overall tree canopy of the neighborhood, all supported the decision of the Planning Commission. The Harbit court explained that "[w]hile all of the residents' concerns might not be well-founded, City Council's response to public opposition does not rise to the level of a constitutional violation". 382 S.C. at 391; 675 S.E.2d at 780. Quoting the court in Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach, 420 F.3d 322,329 (4th Cir.2005), the Harbit court

said, "[T]he Fourth Circuit Court of Appeals determined the city council's improper denial of the zoning application in response to public opposition did not rise to the level of a constitutional violation because 'matters of zoning are inherently political, and it is a zoning official's responsibility to mediate disputes between developers and local residents'".

The record in this case reflects that the Planning Commission tried to offer a compromise, suggesting it would accept a five lot subdivision; however, the compromise attempt was rejected by Plaintiff. Under the facts herein, Planning Commission's decision was not an *unconstitutional* exercise of its authority. There is no evidence before me that indicates the Planning Commission intended to discriminate against Plaintiff by denying its application. The Planning Commission had a rational basis to deny the application for a six lot subdivision. Intense public opposition was a factor that caused the Planning Commission to suggest a five lot subdivision to which Plaintiff, fully aware of the public opposition, said no. Whether or not Plaintiff was treated differently than similarly situated owners might have been treated, such disparate treatment, if any, did not rise to the magnitude of an unconstitutional deprivation of equal protection.

To prevail on an equal protection claim, the Plaintiff must demonstrate that it has been treated differently from others with whom it is similarly situated, and that the unequal treatment was the result of intentional or purposeful discrimination. Morrison v. Garraghty, 239 F.3d 648, 654 (4th Cir. 2001); Whaley v. Dorchester County Zoning Board of Appeals, 337 S.C. 568, 524 S.E.2d 404 (1999.) If this showing is made, the court should proceed to the second step and "determine whether the disparity in treatment can be justified under the requisite level of scrutiny". Morrison, 239 F.3d 648, 654. When a party has not alleged that it was deprived of a fundamental right or that it was subjected to discrimination based on a suspect classification, a

court "will uphold the distinctions drawn by [the defendant] if they were 'rationally related to a legitimate state interest.'" Pulte Home Corp. v. Montgomery County, 909 F.3d 685, 693 (4th Cir. 2018). To rebut a defendant's rational reasons for treating a plaintiff differently, the plaintiff carries the "heavy burden of negating every conceivable basis which might reasonably support the challenged classification." Van der Linde Housing, Inc. v. Rivanna Solid Waste Authority, 507 F.3d 290, 293 (4th Cir. 2007).

Here, there is no evidence that the denial of its application was motivated by discriminatory goals, such as revenge, illegitimate animus, or ill will on the part of the Planning Commission. Dunes West, 401 S.C. at 295, 737 S.E.2d at 609). One seeking to show discriminatory enforcement in violation of the Equal Protection clause must demonstrate arbitrary and purposeful discrimination in the administration of the law being enforced. Even assuming a governmental entity is not enforcing an ordinance equally, the fact that there is some unequal treatment does not necessarily rise to the level of a constitutional equal protection violation. Harbit, 382 S.C. at 396, 675 S.E.2d at 783. The City's written notice of denial shows the Planning Commission was letting Plaintiff know that a reasonable alternative to the six lot proposal was available. The letter of denial advised Plaintiff that "The Commission's discussion further indicated that reducing the number of residential lots could potentially address their compatibility concerns and bring the development into closer compliance with the City's Infill Standards". The Planning Commission's denial of the application was not based on purposeful discrimination and did not "rise to the level of a constitutional equal protection violation".

Plaintiff's equal protection argument also fails because there is no evidence of similarly situated property owners who applied for a subdivision plat and were granted the application.

"Similarly situated" means the other entities "are in all relevant respects alike" to Plaintiff. Nordlinger v. Hahn, 505 U.S.1,10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992).

Plaintiff's proposal for 808 McDaniel Avenue was not similarly situated to other permit applications in the area. The property's location, bordering both McDaniel and Jones Avenues, and its close proximity to Augusta Street, were unique features. It was also unique in that a single lot containing one house was proposed to be divided into six much smaller lots requiring six new curb cuts. The magnolia tree requiring preservation was another unique feature of the application.

Plaintiff cannot negate every rational or conceivable basis that might reasonably support the denial. The public opposition to the application standing alone establishes a rational basis for the Planning Commission's denying the application. See Dunes West Golf Club, LLC, 401 S.C. 280, 295, 737 S.E.2d 601, 608-609 (citing with approval Sowers v. Powhatan County, 347 Fed. Appx. 898, 903-904 (4th Cir. 2009), "holding public opposition furnishes a rational basis for differential treatment in zoning decisions". Any of the concerns communicated to the Planning Commission by opponents to the application, e.g., increased traffic flow, proximity to existing busy intersection, potential stormwater runoff, risks to tree canopy, safety concerns from increased traffic flow and retention of stormwater, and incompatibility with the neighborhood, are rational reasons that would support the denial of the application.

The Court therefore concludes that Plaintiff has not proven that it was denied equal protection by the Planning Commission.

It is, therefore,

ORDERED that Defendant City of Greenville Planning Commission is entitled to judgment as to both the Regulatory Takings and Equal Protection causes of action.

AND IT IS SO ORDERED.

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The Hon. Charles B. Simmons, Jr.
Master in Equity for Greenville, South Carolina

Greenville, South Carolina

Greenville Common Pleas

Case Caption: McDaniel Jones LLC vs. Planning Commission City Of Greenville

Case Number: 2020CP2305094

Type: Master/Order/Other

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)