

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

APPEAL FROM HORRY COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

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

City of North Myrtle Beach,

Appellant,

v.

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

Respondents.

**FIRST AMENDED
RECORD ON APPEAL**

VOLUME II

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Exhibit M



March 19, 2019

Sun Acq LLC, a Michigan limited liability company
c/o Jaffe, Raitt, Heuer & Weiss, P.C.
27777 Franklin Road, Suite 2500
Southfield, MI 48034
Attn: Stephanie R. Van Newkirk

Re: 1814 North Ocean Boulevard, North Myrtle Beach, South Carolina

Dear Ms. Van Newkirk,

The above referenced property is zoned R-4 (Resort Residential). The R-4 district permits cabana house as a special exception subject to the regulations contained in the R-4 district of the North Myrtle Beach Zoning Ordinance. The existing structure on the property was permitted as a cabana house and has been legally used as such since construction. As of the date of this letter, there are no known zoning violations on the property.

If you have any further questions, you can e-mail me or call me at (843) 280-5563.

Sincerely,

Paul Blust
Zoning Administrator

Exhibit N

Page 1

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF HORRY

3 CITY OF NORTH MYRTLE BEACH,

4 Plaintiff,

5 vs. CIVIL CASE NO. 2021-CP-26-07489

6 SUN TRS OCEAN CLUB, LLC; SUN TRS CAROLINA

7 PINES, LLC; AND SUN TRS CAROLINA PINES RV, LLC,

8 Defendants.

9
10
11 DEPOSITION OF: MINDY KIRTLEY, in her individual
12 capacity and as the designated
30(b)(6) representative of Sun
TRS Ocean Club, LLC, et al.

13
14
15 DATE: May 12, 2023

16 TIME: 9:30 a.m.

17 LOCATION: 205 King Street
Charleston, SC

18
19 TAKEN BY: Counsel for the Plaintiff

20 REPORTED BY: Roxanne Easterwood, RPR

1 Q. I want to understand correctly. I was
2 under the impression shuttling to other locations
3 didn't start until fall of 2021. To be absolutely
4 clear, during off-season beginning in 2019,
5 shuttling services to other locations other than
6 cabana house occurred?

7 A. Yes.

8 Q. So we're not exactly sure the year in
9 which this shuttle bus was going in this packet?

10 A. Correct.

11 Q. Obviously, we can conduct a search
12 using the calendars in the back, correct, to
13 figure out what year it is?

14 A. The calendar doesn't say what year it
15 is.

16 Q. I'm going to move on. That's not the
17 point of this line of questioning.

18 What is there to do at Broadway at the
19 Beach?

20 A. There's all kinds of things to do at
21 Broadway at the Beach: You can shop; you can eat;
22 you can enjoy multiple entertainment venues.

23 Q. What can you do in downtown Conway?

24 A. Shop, eat.

25 Q. Any other attractions?

1 A. I'm sure.

2 Q. Calabash, North Carolina, what is
3 there to do there?

4 A. I'm sure there's lots of seafood to be
5 eaten in Calabash, North Carolina.

6 Q. Anything else?

7 A. Absolutely. I'm sure, again,
8 shopping, eating, golfing.

9 Q. I mean, do you know what RV guests
10 would do when they would visit Calabash, North
11 Carolina?

12 A. I do not.

13 Q. Obviously, Sun TRS thought it was
14 going to be a destination that was popular;
15 otherwise, they wouldn't have transported there?

16 A. Yes. I'm sure they talked to our
17 guests and asked them what they liked to do and it
18 came up.

19 Q. Does Sun TRS know why guests wanted to
20 go to Calabash, North Carolina?

21 A. Sun as a corporation, no. The park,
22 quite possibly, because they're the local experts
23 on what guests want to do in the area.

24 Q. You're the 30(b)(6) for Sun TRS
25 Carolina Pines, LLC, which is the RV resort,

1 correct?

2 A. That is correct.

3 Q. So do you know why Carolina Pines RV
4 Resort shuttled guests to Calabash, North
5 Carolina?

6 A. I would say, as the corporate
7 representative, since 70 percent of our guests
8 come from outside of South Carolina, that that is
9 definitely a popular destination throughout the
10 United States. We would want to transport our
11 guests there so they could see it.

12 Q. What would they do there?

13 A. Eat, drink, see the water.

14 Q. What would they do -- is it on a
15 river? Is it beach? What would they do there?

16 MR. TAMASITIS: Objection to scope.
17 But you can answer.

18 THE WITNESS: I'd have to chat with
19 some guests that actually went on that shuttle
20 trip and ask them what they did when they were in
21 Calabash, North Carolina.

22 BY MR. RICARD:

23 Q. What water feature is near the
24 drop-off point in Calabash, North Carolina?

25 MR. TAMASITIS: Same objection.

1 You can answer.

2 THE WITNESS: The ocean.

3 BY MR. RICARD:

4 Q. The Tanger Outlets, why shuttle guests
5 there?

6 A. To shop.

7 Q. Anything else?

8 A. I mean, maybe they want to get some
9 exercise at an outlet mall. Maybe they want to
10 get a coffee at Starbucks. Maybe they just want
11 to get outside of the RV resort for the day and
12 see a little bit more of the area.

13 Q. What is there for guests to do at
14 Barefoot Landing?

15 A. There's lots of things at Barefoot
16 Landing. They could, again, get some exercise.
17 They could get some fudge. They could buy some
18 shoes. They could pick out a good piece of
19 seafood at a restaurant. Lots of things for them
20 to do as well there.

21 Q. What about Market Commons, what is
22 there to do there?

23 A. Same thing: shopping, eating,
24 walking.

25 Q. On Page 3 it mentions Topgolf. Can

1 you describe that feature for us?

2 A. Where is Topgolf listed?

3 Q. On Page 3 of this exhibit. If you
4 look at April 12th, April 19th, April 26th, it
5 shows Topgolf being a destination for the shuttle
6 bus.

7 A. I see that.

8 Q. Just for the record, what is the
9 attraction to Topgolf? What is there for guests
10 to do there?

11 A. There is food and drink and
12 activities.

13 Q. Playing golf, right?

14 A. Playing golf.

15 Q. Brookgreen Gardens, what is there for
16 guests to do there?

17 A. Gardens, botanical gardens to see.

18 Q. What is there for guests to do at
19 Murrells Inlet? I believe that's on the following
20 page.

21 A. Murrells Inlet: shopping, walking,
22 eating.

23 Q. The Coastal Grand Mall, what is there
24 to do there?

25 A. Whatever one likes to do at a shopping

1 mall.

2 Q. Eating, shopping, that sort of thing?

3 A. Sure.

4 Q. Were any or all of these popular
5 destinations for the RV resort guests?

6 A. I'm sure if they weren't, they would
7 drop off and find something else to do.

8 Q. If you look at Page 6 of this exhibit,
9 this is the July month. Here it talks about the
10 shuttle taking -- I'm looking at July 11th
11 through 15 here. It mentions the shuttle taking
12 guests to beach access at Myrtle Beach 9th Avenue
13 North. Is that the restaurant location that you
14 were referring to earlier?

15 A. I believe so, yes.

16 Q. It also mentions right below: "There
17 is a sign-up to use this service in the welcome
18 center."

19 Do those records still exist?

20 A. I don't know.

21 Q. Has Sun TRS searched for them?

22 A. Sun TRS would have searched anything
23 related to beach club. So, yes, I would think so.
24 They would have searched.

25 Q. Because that's the only location where

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STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF HORRY

CITY OF NORTH MYRTLE BEACH,

Plaintiff,

vs. CIVIL CASE NO. 2021-CP-26-07489

SUN TRS OCEAN CLUB, LLC; SUN TRS CAROLINA

PINES, LLC; AND SUN TRS CAROLINA PINES RV, LLC,

Defendants.

Volume II

DEPOSITIONS OF: MINDY KIRTLEY, in her individual
capacity -- and 30(b)(6)
deposition of Sun TRS Ocean
Club, LLC, et al., through MINDY
KIRTLEY and NICK DIBELLA, the
designated representatives

DATE: May 25, 2023

TIME: 9:00 a.m.

LOCATION: 205 King Street
Charleston, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: Roxanne Easterwood, RPR

1 Q. The size of Ocean Lakes, what is the
2 difference in size between Ocean Lakes and the RV
3 resort in this case?

4 A. I don't know.

5 Q. Let's ballpark it. There's over
6 800 units at the RV resort in Conway, correct?

7 A. Yes.

8 Q. Is Ocean Lakes the same?

9 A. I believe it's bigger than that.

10 Q. Why did Carolina Pines not search for
11 beachfront property to host its RV resort, such as
12 Ocean Lakes did?

13 A. Repeat your question.

14 Q. Why did Carolina Pines not look for
15 oceanfront property to locate its RV resort, like
16 Ocean Lakes did?

17 A. I don't know.

18 Q. Why does Carolina Pines view hotels
19 and Airbnb as competitors?

20 A. Because we're in the hospitality
21 industry.

22 Q. Is there any distinguishing, within
23 the hospitality industry, between the RV lifestyle
24 versus the hotel lifestyle versus even the Airbnb
25 lifestyle?

1 A. I don't know.

2 Q. Has Sun defendants ever done a market
3 analysis of the differences between those
4 subindustries?

5 A. Yes.

6 Q. What has been the result of that
7 market analysis?

8 MR. TAMASITIS: Objection. Scope.
9 You can answer.

10 THE WITNESS: I mean, we do offer
11 vacation rentals. We do have our own lodging,
12 which does make us relevant in the hotel industry
13 as a competitor or -- same thing with Airbnb. We
14 do have the accommodations available where people
15 don't have to bring their own RV. So we do feel
16 that we can dip into the market on the hotel side.
17 BY MR. RICARD:

18 Q. The majority of the Conway RV resort
19 is dedicated to the RV lifestyle, though, correct?

20 A. A large percentage.

21 Q. If we just take that slice of the RV
22 resort, you would agree there's a difference in
23 that RV lifestyle versus hotel and Airbnb
24 lifestyle, correct?

25 A. I don't know.

1 terms, those are the three entities that we're
2 referring to?

3 A. Correct.

4 Q. If there comes a point where you would
5 like to distinguish between those defendants at
6 all, and there may be a portion where we need to
7 do that, will you agree to let me know if you're
8 distinguishing between those?

9 A. Yes.

10 Q. Likewise, with the operating company
11 and Sun Communities, Incorporated, I may refer to
12 them, generally speaking, as a group as Sun
13 Communities. Will you agree that if there is any
14 distinction between those two that you need to
15 make or I need to make in order for us to
16 understand each other clearly, will you agree to
17 do that?

18 A. Yes.

19 Q. Any questions about those definitions
20 that we've just covered?

21 A. No.

22 Q. You've done this a little bit already.
23 Can you provide an overview of the organization
24 structure for Sun Communities, Incorporated?

25 A. Yes. So like I just mentioned, the

1 parent level, Sun Communities, Inc., is the
2 publicly-traded REIT formed in 1993. Underneath
3 that is the operating partnership, which functions
4 as the support for the property-level staff. And
5 then underneath that is every individual property
6 that's an LLC, as you just mentioned, with those
7 entities.

8 Q. So Sun TRS Ocean Club, LLC would be
9 one of those entities?

10 A. Correct.

11 Q. So let's use that as an example. Is
12 its parent company the operating company that you
13 work for, or is it the Sun Communities,
14 Incorporated?

15 A. The operating partnership.

16 Q. So there's direct line between Sun
17 Communities to the operating company, correct?

18 A. Correct.

19 Q. And then operating company, that's
20 where all of the LLCs fall under?

21 A. Correct.

22 Q. Just generally speaking, what business
23 or what industry is Sun Communities, Incorporated
24 involved in?

25 A. The parent company really is three

1 People were inside a lot and wanted to
2 get outside in general, I think played into our
3 advantage as well. It's a combination of those
4 factors.

5 Q. What do the Sun defendants believe
6 might be -- whether it's specific to Sun
7 defendants or whether it's nationwide -- might be
8 the reason for it kind of coming off of that peak
9 after COVID?

10 A. I think folks just went back to
11 traditional travel. Meaning going back to
12 airlines, going back to hotels, those things,
13 where they felt safe again.

14 Q. Do you believe there is a difference
15 in the RV resort industry versus, like, the hotel
16 industry?

17 A. In what way?

18 Q. That's the question for you, though.
19 Do you believe there is a difference in, I guess,
20 the type of clientele, the types of amenities that
21 might be offered, and the experience that's
22 offered between RV resort industry and the hotel
23 industry?

24 MR. TAMASITIS: Object to the form.

25 You can answer.

1 THE WITNESS: No. I think they're --
2 you know, fundamentally, they're fairly similar.

3 BY MR. RICARD:

4 Q. I mean, they're all in the hospitality
5 industry?

6 A. Correct.

7 Q. But within the hospitality industry,
8 you would agree, there's different subsectors?

9 A. Yes.

10 Q. Do you think there is a distinction
11 between hotel and RV resorts?

12 A. From, like, a "person looking where
13 they would stay" perspective, yes, for sure.

14 Q. Obviously, a guest of an RV resort
15 would need to either own or lease an RV in order
16 to access an RV-specific unit?

17 A. Correct.

18 Q. Obviously, not everybody owns or rents
19 an RV, correct?

20 A. Correct.

21 Q. Same situation, not everybody stays in
22 a hotel when they travel, correct?

23 A. Correct.

24 Q. So what I'm getting at is there is not
25 a perfect overlap in the clientele of the hotel

1 Q. I want to talk about the negotiations.
2 Who made the first offer amount for the property?

3 A. The acquisitions team.

4 Q. What did they offer first?

5 A. I am not privy to that. I'm not
6 involved in the negotiations.

7 Q. Do you know if there were any
8 counteroffers?

9 A. I am not aware.

10 Q. Do you know any details about the
11 negotiation for the price -- the purchase price
12 for the property?

13 A. No.

14 Q. Do you know how long the negotiations
15 lasted?

16 A. I would say approximately three
17 months.

18 Q. Was that negotiation over the price or
19 just negotiations over other aspects of the deal?

20 A. I just think the process.

21 Q. What about for the price? Do you know
22 the negotiations of the price, how long that may
23 have lasted?

24 A. No, I do not. No.

25 Q. The purchase price was ultimately 2

1 and a half million?

2 A. Correct.

3 Q. How long was any due diligence period
4 for the property?

5 A. We're back to the three months, three
6 to five months. I don't know how long it took
7 before we gave the green light to go ahead and
8 look to when it closed. I don't have that
9 information.

10 Q. What were the steps in the due
11 diligence process?

12 A. Well, first of all, just giving the
13 acquisitions team, like I said, the green light
14 that we'd be interested from an operation's
15 standpoint, trying to fit this into the RV resort,
16 how we would make that work. From there, the
17 acquisitions team worked with counsel, as they do
18 with any other purchase of a property, to start
19 looking into the details of how we could make this
20 work.

21 Q. Did anyone at Sun -- so let's set
22 aside the attorneys that were handling the
23 closing. Did anyone at Sun look into any
24 ordinances that might apply to this property?

25 A. The only thing was just asking --

Exhibit O

Page 1

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF HORRY

CITY OF NORTH MYRTLE BEACH,

Plaintiff,

vs. CASE NO. 2021-CP-26-07489

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

Defendants.

DEPOSITION OF: CHRISTOPHER MARTUCCI

DATE: April 25, 2023

TIME: 12:53 p.m.

LOCATION: Maynard Nexsen

1101 Johnson Avenue, Suite 300

Myrtle Beach, South Carolina

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: KAREN M. BECKMAN, CSR
Court Reporter

1 A. No.

2 Q. Setting aside any preparation that
3 you've had for this deposition, have you spoken
4 with anyone at Carolina Pines about this lawsuit at
5 any time?

6 A. Yes. Mindy Kirtley, prior to
7 everything going on, had called me to ask me a
8 question regarding who I worked with at the beach
9 club regarding a parking issue that I had handled.
10 And she had just asked me for the person's name and
11 information and I had given it to her.

12 Q. Okay. Do you recall that person's name
13 sitting here today?

14 A. I don't.

15 Q. Explain to me what that parking issue
16 was.

17 A. The busses that brought people from
18 Carolina Pines to the beach club, which is what we
19 called it, used to park in front because they
20 couldn't get into the lot so they parked in front
21 and let people off. And the, I guess the,
22 Department of Transportation from North Myrtle
23 Beach had an issue with it and thought it was
24 unsafe.

25 Q. Okay. So the person that you spoke

1 with about the issue, was that a government
2 employee?

3 A. It was a person representing North
4 Myrtle Beach.

5 Q. Okay. Do you know why Ms. Kirtley was
6 asking you about that?

7 A. No, not at the time.

8 Q. Okay.

9 A. I later found out, I'm sure, it was
10 part of the lawsuit.

11 Q. Got it.

12 Have you discussed this lawsuit with
13 anyone else at Carolina Pines?

14 A. No.

15 Q. What is your understanding of this
16 lawsuit?

17 A. My understanding of this lawsuit is
18 that North Myrtle Beach is stating that they had
19 not knowledge of what Carolina Pines' actual
20 capacity would be there, what capabilities of the
21 beach club.

22 Q. Okay. Okay. Are you aware of any of
23 the facts or claims that the City of North Myrtle
24 Beach is alleging in this lawsuit?

25 A. No.

1 identification.)

2 BY MR. RICARD:

3 Q. So same thing, Mr. Martucci. If you
4 could, just review this email and look up when
5 you're finished reviewing it, and I'll ask you some
6 questions about it.

7 A. (The witness complies.)

8 I just have a question. I'm not
9 understanding rough plumbing, rough mechanical,
10 rough framing as far as things that were done.
11 Like that stuff I've never been involved in. I've
12 been in -- I worked with Hal from the electric
13 company in securing electric and stuff like that
14 and a permit to change the parking lot from Myrtle
15 Beach, but this other stuff I'm not familiar with.

16 Q. Okay. So let's start with Hal first.

17 A. Sure.

18 Q. So how did you know him?

19 A. I didn't. I cold called a few
20 companies to get estimates on changing some stuff
21 at the beach club.

22 Q. Okay. Do you recall specifically what
23 was being changed in this email?

24 A. Yeah. He was assisting me in the
25 turnaround that we called it, the parks so the

1 busses could actually get into the parking lot to
2 avoid the situation of North Myrtle Beach
3 Department of Transportation problems --

4 Q. Okay. Got it.

5 A. -- to rectify it.

6 Q. Okay.

7 So I'll represent to you that, you
8 know, this email and attachment was produced by
9 Carolina Pines to the City of North Myrtle Beach.
10 That's how I received this email.

11 A. Sure.

12 Q. And my assumption, but you can correct
13 me if I'm wrong, is that the last two pages were
14 the attachment that is on the first page of this
15 email. Do you recall whether this attachment was
16 to that email?

17 A. There was a -- well, according to the
18 email, they're saying that here is the inspection
19 report, and it says CO/Completion Inspection
20 Report, which I understand. It's just it lists all
21 this other stuff that I'm not -- sewer/water tap,
22 final plumbing. You know, there wasn't plumbing
23 involved in any of this. I don't know what they're
24 being specific about. But I did change the parking
25 lot. It was inspected by North Myrtle Beach and it

1 was approved by them.

2 Q. Okay. This attachment, is this a
3 document that you created, Hal created, or do you
4 know who created this document?

5 A. I don't know who created this document,
6 but they're sending me a Final Inspection Report,
7 but it doesn't look like this is an actual
8 inspection report.

9 Q. Okay. There's some mention here on
10 page 4 about zoning compliance and on page 3 about
11 zoning review. Do you know anything about that or
12 whether Hal or his company would have done a
13 review?

14 A. I don't know.

15 Q. Do you recall having any conversations
16 with Hal or anyone at Mr. Electric of North Myrtle
17 Beach about zoning compliance or zoning review?

18 A. Yes, I did, because we complied to
19 whatever North Myrtle Beach asked us to do to make
20 the parking lot the way they wanted it.

21 Q. Okay. And who did that review, if you
22 recall?

23 A. Whoever worked for North Myrtle Beach,
24 myself, and Hal was the contractor for that.

25 Q. Okay. Working together?

1 A. I don't know.

2 Q. Are any close businesses nearby the
3 cabana house?

4 A. Define close.

5 Q. Well, I'll turn it back on you.

6 A. Walking distance?

7 Q. Right.

8 A. A mile? Two miles.

9 Q. Right. Walking distance.

10 A. They're all businesses right there.

11 Q. Okay.

12 A. There's three resorts. There's a bar,
13 a place that serves alcohol. There's...

14 Q. Do you remember the names?

15 A. Not all, but it's Fantasy Harbor or
16 Fantasy Bar right there that serves liquor.
17 There's Beachcomber, I think it is. Right behind
18 there's a giant resort, Tilghman, this Tilghman
19 Resort that has a restaurant and food service for
20 payment in there.

21 Q. Okay. Do you know if any of the cabana
22 house guests would go to those businesses?

23 A. They would -- yes, they would frequent
24 any bar or restaurant in the area they would walk
25 to, beach side.

Exhibit P

1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
2 COUNTY OF HORRY CA NO. 2021-CP-26-07489
3 _____ :
4 CITY OF NORTH MYRTLE BEACH, :
Plaintiff :
5 vs. :
6 SUN TRS OCEAN CLUB, LLC; SUN TRS :
CAROLINA PINES, LLC; and SUN TRS :
7 CAROLINA PINES RV, LLC, :
Defendants :
8 _____ :

9

10

11 DEPOSITION OF: Tidewater Plantation Community Association,
Inc.'s 30(b)(6) designee CATHERINE S. WEIS

12

DATE: Monday, May 15, 2023

13

TIME: 4 p.m. to 4:35 p.m.

14

LOCATION: 2000 Spinnaker Drive, North Myrtle Beach
South Carolina, 29582

15

16

17

Volume: 1
Pages: 1-29
Exhibits: 5

18

19

Christine E. Borrelli, RPR, RMR

20

21

22

23

24

25

1 open, make sure it's closed at night when they do their
2 rounds. As I said, there are cameraed. So they're watching
3 it anyway on their bank of cameras. Residents can go there
4 and have dinner. We have happy hours there. We have lots of
5 things there. And the only restrictions are really that
6 people who are not residents or residents' guests cannot use
7 the cabana.

8 Q. And what is the reason for that restriction, do you know?

9 A. Well, it's really because it's a Tidewater amenity, and
10 it's just not big enough to handle a lot of other people.

11 Q. And I should have done this before, if you turn to
12 page 26 on Exhibit 3 under Subsection F, it has "Beach Cabana
13 House." Are these the general rules governing the beach
14 cabana house?

15 A. Yes.

16 Q. And you said something about happy hours. Are food and
17 drinks served at those events, during those events?

18 A. Sure. Well, people usually bring food to share, and they
19 brings their own drinks. It's not served by us. They bring
20 their own drinks.

21 Q. Okay. Is there any fee associated --

22 A. No.

23 Q. -- with using the cabana house? Does the cabana house
24 for Tidewater have beach access?

25 A. Yes.

1 Q. It does?

2 A. Well, it's public. It's actually North Myrtle Beach's
3 access. We have a gate that goes to the public access, right
4 out to the beach.

5 Q. And is the cabana house managed by the association, or is
6 there a third party hired to manage it?

7 A. Well, when I say the association manages it, we have a
8 management company, First Service Residential. And within
9 that, we have a maintenance crew, and they take care of the
10 maintenance and cleaning and so forth.

11 Q. And are the security guards hired by First Service
12 Residential as well?

13 A. The security guards are a hired by the association.
14 That's Allied Security. Just like the management company, the
15 security guards report to the association.

16 Q. Does the association advertise the cabana house?

17 A. No.

18 Q. Okay.

19 A. Now, people who are selling their homes, their real
20 estate agents, or they themselves, may promote the cabana
21 because it's a wonderful amenity, but we don't personally, as
22 an association, advertise it.

23 (Defendant's Exhibit 4, Website information,
24 marked for identification)

25 Q. (By Mr. Tamasitis) All right. I'm going to hand you

1 what has been marked as Exhibit Number 4.

2 Sean, this is the TidewaterVilla.com website.

3 MR. O'CONNOR: Gotcha.

4 Q. (By Mr. Tamasitis) I'll represent to you that I pulled
5 this off of the TidewaterVilla.com/oceanresort website.

6 A. What is Tidewater Villa?

7 Q. That's what I wanted to ask you a question about. And I
8 pulled this on May 10, 2023. Are you familiar with this
9 website?

10 A. No. Name of the website is Tidewater.com --

11 Q. Yes, ma'am.

12 A. -- oceanresorts? I'm not familiar with it.

13 Q. And is that, in the bottom right-hand corner, a photo of
14 the Tidewater Plantation --

15 A. It is.

16 Q. -- cabana house?

17 A. Uh-huh.

18 Q. And if you go to the second full sentence -- it's "Ocean
19 resort features of our Tidewater Villa." That second full
20 sentence says, "The Tidewater Plantation actually
21 owns/operates" -- I think it's supposed to say "in" --

22 A. Uh-huh.

23 Q. -- "oceanfront property called a cabana, but is only
24 accessible to the property owners themselves." So that's
25 consistent with your --

1 A. That's true.

2 Q. -- previous assessment; correct?

3 A. Uh-huh.

4 Q. Okay. And I think I might have interrupted you. You
5 said that some of the homeowners will advertise?

6 A. I said we don't advertise it at all, but I'm sure -- I
7 know that I have seen -- and I'm sure when people are selling
8 their homes, they promote the fact that we have this wonderful
9 amenity. It is the most popular amenity we have.

10 Q. So it's a selling point; is that fair to say?

11 A. That's what I'm saying, yes.

12 MR. TAMASITIS: This will be marked as Exhibit
13 Number 5.

14 (Defendant's Exhibit 5, Our Neighborhoods Website,
15 marked for identification)

16 MR. TAMASITIS: Sean, this is the Our Neighborhoods
17 website.

18 MR. O'CONNOR: Gotcha.

19 Q. (By Mr. Tamasitis) And I will apologize. I could not
20 for the life of me figure out a way to get these photos to
21 populate. Shockingly, the one that did populate was the
22 private beach cabana photo.

23 A. Well, wasn't that convenient.

24 Q. Yes. But I will represent to you that I pulled this from
25 the TidewaterPlantation.org website on Our Neighborhoods. Are

1 you familiar with this website?

2 A. I'm very familiar with it. We're not using it anymore.

3 Q. And why are you not using it?

4 A. Well, just because we moved over to First Services
5 Website Connect, and -- this still exists. And the public,
6 like yourself, can get into this without signing in and see
7 amenities, and we left it that way. And, as a matter of fact,
8 the only updating we do at all for this is our monthly
9 newsletter, and that's only because my husband, who happens to
10 sell the advertising for the newsletter, likes to tell his
11 clients, You want to take a look at them, you know, go to
12 this website, and they can see it without signing in.

13 But the new website that we're trying to move
14 everyone over to requires you to set up an account and sign
15 in. So this is very dated. And if you could have pulled up
16 all the pictures, a lot of them are very dated. But you
17 wouldn't even know that because you don't know the people in
18 them, so ...

19 Q. So this is the old website --

20 A. Yes.

21 Q. -- for the homeowner's association?

22 A. Yes.

23 Q. Okay. And when did that change?

24 A. Well, we just moved over to the new website in the past
25 year. I would say it hasn't even been a full year yet. We're

1 still trying to get people to move over. And we're not going
2 to, like, eliminate this because, like I said, the public can
3 still look at it, and it still sells Tidewater, so that's
4 fine.

5 Q. That was going to be my next question, what was the
6 purpose of having this website be front facing and not having
7 a login?

8 A. And I suppose the purpose -- and I wasn't here when it
9 was first built, but I suppose the purpose was to promote our
10 neighborhood and our community and all the amenities.

11 Q. Okay. And then on the second page, like I said, the
12 private beach cabana is promoted on there?

13 A. Uh-huh.

14 Q. Is that yes?

15 A. Yes, sorry.

16 Q. Are there any brochures that are handed out to
17 prospective property purchasers?

18 A. No, not anymore. I mean, back in the day when we bought
19 our property, there was. We bought or property in 1998 and
20 didn't built on it for a while. But that was when the
21 developer still was in control and selling. We don't have any
22 brochures now, other than you walk into the office, there may
23 be a stack of the most current newsletter. And if you want to
24 call that promotion, that's about it.

25 Q. Okay. Turning to a different topic, has the cabana house

Exhibit Q

1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
2 COUNTY OF HORRY CA NO. 2021-CP-26-07489
3 _____ :
4 CITY OF NORTH MYRTLE BEACH, :
Plaintiff :
5 vs. :
6 SUN TRS OCEAN CLUB, LLC; SUN TRS :
CAROLINA PINES, LLC; and SUN TRS :
7 CAROLINA PINES RV, LLC, :
Defendants :
8 _____ :

9

10

11 DEPOSITION OF: North Myrtle Beach Chamber of Commerce,
12 Convention and Visitors Bureau, Inc. (n/k/a
Destination North Myrtle Beach) 30(b)(6) and
45 designee CHERYL KILDAY

13

DATE: Monday, May 15, 2023

14

TIME: 9:00 a.m. to 9:40 a.m.

15

LOCATION: 1521 Highway 17 S, North Myrtle Beach
South Carolina, 29582

16

17

Volume: 1

18

Pages: 1-34

Exhibits: 2

19

20

21

Christine E. Borrelli, RPR, RMR

22

23

24

25

1 policy talking about things that impact planning.

2 We attend and participate in council workshops and
3 activities and their meetings, and communication, really, is
4 key to keeping that open amongst a variety of representatives
5 with the City, whether it's Public Safety, policy, something
6 that affects residents or business.

7 Q. You mentioned this earlier, but what does the Destination
8 North Myrtle Beach consider the largest economic driver in the
9 area?

10 A. Tourism.

11 MR. TAMASITIS: I'll mark this as Exhibit 2.

12 (Defendant's Exhibit 2, Annual Program Report, FY
13 2022, marked for identification)

14 Q. (By Mr. Tamasitis) If you could review what I've just
15 handed you marked as Exhibit Number 2, can you identify that
16 document?

17 A. Yes. This is our annual report for fiscal year '22. I
18 guess that would be fiscal year 2022.

19 Q. And who created that document?

20 A. We did. I did with our team.

21 Q. And is this -- does this appear to be a fair and accurate
22 copy of the Destination North Myrtle Beach Annual Program
23 Report for fiscal year 2022?

24 A. Yes.

25 Q. Why is this report created?

1 and this section over here on the right quarter of the page is
2 really a recap of that integrated campaign and how many
3 impressions we generated landing page views on our website.
4 And then we give a comparison of how we're doing compared to
5 other benchmarks against organizations similar to ourselves,
6 so other tourism-based organizations. And then we give them
7 an idea of our -- of the value of our page search performance,
8 how that was based on -- you know, again, compared to others.

9 And then our business development is really showing
10 that partnership engagement, that local business community
11 engagement and how we're doing with that, because all of our
12 programs have inclusion of our business community, and it's
13 really important to show that they're engaged with us and that
14 we are not just sitting in an office doing these on behalf of
15 the community without any other involvement.

16 Q. I want to point out, it says here this -- there is a map
17 of the United States --

18 A. Yes. I forgot that, yes.

19 Q. -- and it says, "Website user traffic by location" --

20 A. Yes.

21 Q. -- and identifies ten different states.

22 A. Right. Those are the top ten states.

23 Q. Okay.

24 A. That's not an exclusive list. That's just the top ten.

25 Q. Okay. So these are the top ten states that are

1 trafficking your website?

2 A. Yeah, and those are our -- we have primary and secondary
3 markets, and this is -- all of these would be in that primary
4 list of where we are targeting visitors, and it shows that
5 they're connecting with us.

6 Q. Okay. So the primary market then includes North
7 Carolina, South Carolina, Georgia, New York, Pennsylvania,
8 Ohio, Michigan, Tennessee, and Illinois?

9 A. Yeah. Actually, Illinois might not be a primary, and New
10 York might be a secondary, but they are all in the primary
11 and/or secondary markets.

12 Q. And how big is the secondary market?

13 A. The secondary list is probably about six, and we change
14 that from year to year based on our analytics. But off the
15 top of my head, I'm thinking about what we're doing next year,
16 not what we did in 2022.

17 Q. So in 2022, who was the secondary market?

18 A. The secondary market was probably New Jersey -- or New
19 York was secondary, and New Jersey maybe was primary. But we
20 have a list of, like, both. I can get that for you, but off
21 the top of my head I don't recall --

22 Q. Okay, that's fine.

23 A. -- that breakdown. I'm deep in 2024.

24 Q. That's all right. We're going to touch on this a little
25 bit later on, but how does Destination North Myrtle Beach

1 generate revenue?

2 A. Yeah, we have dues. We have participation fees. We have
3 sponsorships, and we receive funds from the State of South
4 Carolina through an emerging destinations grant that we apply
5 for, and we have a co-op that helps us match those. We have
6 to match it 2:1. And then we have a -- so we get co-op
7 dollars, and then we have money that we receive from the City,
8 per state code they have to contribute as certain amount of
9 the accommodation tax that is collected locally.

10 Q. Okay.

11 A. And then we also apply for a grant with the City for
12 another portion of funding from accommodations taxes.

13 Q. Does Destination North Myrtle Beach track the average
14 number of visitors to North Myrtle Beach each year?

15 A. Not really in that way. Myrtle Beach has a report that
16 they do on the overall visitation to the region, and we are
17 part of that.

18 Q. Okay. Do you have a guess at how many visitors to the
19 City?

20 A. Yeah, we --

21 MR. OWNBEY: Object to the form.

22 THE WITNESS: Oh, okay.

23 MR. OWNBEY: Oh, no, you can answer.

24 THE WITNESS: Okay. We estimate that it's between three
25 and five million. Based on the information from the

1 Myrtle Beach area, we estimate. And if we were to look
2 at the occupancy numbers and sort of some of the
3 conversion information that we use on our websites, it
4 gets us to an educated estimate.

5 Q. (By Mr. Tamasitis) Does Destination North Myrtle Beach
6 track those occupancy numbers?

7 A. We track the vacation rental occupancy numbers.

8 Q. Okay.

9 A. Not all of them.

10 Q. Okay. We'll talk about that, then.

11 A. Okay.

12 Q. Do you know how much visitor spending has been increased
13 by Destination North Myrtle Beach?

14 A. In our -- it's hard to answer that yes or no.

15 Q. You can explain.

16 A. Yeah. So visitor spending is, again, estimated based on
17 conversion studies and that sort of thing, and so it might --
18 it's imperfect, but we estimate. So, as an example, we just
19 did a study with one of our advertisers. And so for every
20 dollar in advertising we spent, it generated \$67 of visitor
21 spending in North Myrtle Beach. So we generated from that one
22 campaign \$2.2 million. But we don't have that data for
23 everything that we do, so we try to take that value of
24 spending and conservatively estimate an impact. And we are
25 very careful about that because it's not -- it's hard to

1 A. It's on overnight accommodations in North Myrtle Beach.

2 Q. And is that -- is there a geographical restriction, then,
3 is it just to the City?

4 A. Uh-huh. Those are just the dollars that the City
5 collects inside the City.

6 Q. So, for example, if accommodation dollars were spent in
7 Conway, those would not be collected by the City, and
8 therefore, would not be part of your funding?

9 A. Correct.

10 Q. So is it fair to say that Destination North Myrtle Beach
11 is publicly funded by the tourism that it's promoting in North
12 Myrtle Beach?

13 A. Yes.

14 Q. Does Destination North Myrtle Beach track how many hotels
15 are located in the City?

16 A. Yes.

17 Q. How many are there?

18 A. There's only about 30, and there's a couple that are
19 closed or not operating currently, but --

20 Q. Do you guys -- I'm sorry, go ahead.

21 A. So I went through it earlier today. I think there's
22 about 28 that are currently operating.

23 Q. Do you track how many room units?

24 A. Yes.

25 Q. And how many are there?

1 A. In the hotels?

2 Q. Yes.

3 A. There's only about 30 to 100 hotel units. If you add
4 condos, it's about 8,800.

5 Q. Do you know what the average occupancy rates are, or does
6 Destination North Myrtle Beach track those?

7 A. Not for everybody. We have the -- AirDNA has a program
8 for the rental units, not the hotels.

9 Q. And by "rental units," what do you mean by that?

10 A. So it can be a beach house, it can be a condominium, but
11 it's -- and then they try to also include hotels in that.
12 It's not perfect because they basically skim data. But the
13 occupancy -- you know, we track what AirDNA has been, but it's
14 not like the same as tracking, like having people report to us
15 their occupancy.

16 Q. What is AirDNA?

17 A. AirDNA is a company that we subscribe to their data --

18 Q. Okay.

19 A. -- on accommodations that they are tracking, which is
20 basically what I just described.

21 Q. And what are the occupancy rates for peak season?

22 A. Yeah, the peak season occupancy rate in North Myrtle
23 Beach is probably around 80 percent on the weekends and
24 70 percent during the week. And it might be higher on the
25 weekends on the oceanfront, but it's not typically, you know,

1 the whole community at that higher level.

2 Q. And does Destination North Myrtle Beach track how many
3 rooms are for rent during peak season?

4 A. Yes.

5 Q. And how many would that be?

6 A. It's about -- when I looked at it earlier, it's like
7 8,882, and that can vary year over year depending on how many
8 vacation rentals are also available or hotel rooms that might
9 be out of order.

10 Q. So those rooms include --

11 A. That includes everything.

12 Q. So that would be beach rentals?

13 A. Uh-huh.

14 Q. Would that include short-term rentals, which I guess --

15 A. Yes.

16 Q. -- would be the same thing? And then it also includes
17 hotels?

18 A. Yes.

19 Q. And does that include condos?

20 A. Yes. If they're made available to -- for rental, yeah.

21 Q. Does Destination North Myrtle Beach track the most
22 popular hotels in North Myrtle Beach?

23 A. No.

24 Q. Does Destination North Myrtle Beach have any metrics or
25 full-service restaurants in North Myrtle Beach?

Exhibit R

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
)
COUNTY OF HORRY) CASE NUMBER: 2021-CP-26-07489

CITY OF NORTH MYRTLE)
BEACH,)
)
Plaintiff,) 30(b)(6) DEPOSITION OF:
)
vs.) THE MYRTLE BEACH AREA
) CONVENTION & VISITORS BUREAU
SUN TRS OCEAN CLUB,)
LLC; SUN TRS CAROLINA) by KAREN RIORDAN
PINES, LLC; and SUN)
TRS CAROLINA PINES)
RV, LLC,)
)
Defendants.)
)

DATE: Tuesday, May 23rd, 2023

TIME: 10:31 a.m.

LOCATION: The Myrtle Beach Area Convention
& Visitors Bureau
1200 North Oak Street
Myrtle Beach, S.C. 29577

REPORTED BY:
Cara-Leigh V. Richardson

1 testify about those topics.

2 Do you understand that you are the company's
3 representative today to testify on behalf of the
4 company?

5 A: Yes.

6 Q: Do you understand that the testimony you give today
7 is not your own individual testimony, other than
8 some of the background questions I'm going to ask
9 you, but the testimony of the company and it is
10 binding on the company?

11 A: Yes.

12 Q: So, when I ask you a question, I'm asking a
13 question of the company, and you are responding on
14 behalf of the company, not individually. Do you
15 understand that?

16 A: Yes.

17 Q: Before we get started, can you explain to me the
18 difference between Myrtle Beach Area Convention &
19 Visitors Bureau, the Chamber of Commerce, and any
20 other related entities?

21 A: Yes. All of that information is actually on our
22 websites, so there's a
23 MyrtleBeachAreaChamberOfCommerce.com website that
24 represents everything that we do as a Chamber of
25 Commerce. We're incorporated as a 501(c)(3)

1 Chamber of Commerce. The other website is
2 VisitMyrtleBeach.com, which covers everything we do
3 as a Convention & Visitors Bureau.

4 Q: So, what are the responsibilities of a Convention &
5 Visitors Bureau as opposed to the Chamber of
6 Commerce?

7 A: The Convention & Visitors Bureau is the designated
8 marketing organization for the Grand Strand.

9 MR. TAMASITIS: OKAY. LET'S MARK THIS AS EXHIBIT
10 NUMBER 1.

11 DEFENDANT'S EXHIBIT NUMBER 1

12 MARKED FOR IDENTIFICATION

13 MR. TAMASITIS CONTINUES:

14 Q: Going back and discussing the Convention & Visitors
15 Bureau and the Chamber of Commerce, is it fair for
16 me to just call them all the Chamber today or
17 should I separate them out?

18 A: No, you should separate them out.

19 Q: Okay, so we'll call the Convention & Visitors
20 Bureau, just that, the Convention & Visitors
21 Bureau, and then we'll refer to the Chamber as just
22 the Chamber. Okay?

23 A: Yes.

24 Q: Are you the President and CEO for both companies?

25 A: Yes.

1 revenue for Horry County?

2 A: They, they don't feed up into it. They're two
3 separate statistics, but one is showing, for
4 instance, supermarkets, \$1.3 billion sold. And
5 then here, we are seeing in the other statistic,
6 what kinds of tax revenue was derived from
7 accommodation tax, tourism development fee, and
8 again, hospitality tax. So, they're not co-joined
9 necessarily.

10 Q: If you go back to page 6, I'm going to ask some
11 questions based on page 6 and the data that's
12 provided on there.

13 A: Mm-hmm.

14 Q: Does the CVB track the average number of visitors
15 to the Grand Strand each year?

16 A: Yes.

17 Q: And how many are those?

18 A: The number varies every year. So, for the full
19 year 2022, we reported 17.2 through the third party
20 company that gathered this data, but that, that
21 does change every year.

22 Q: Is this number, 17.2 million, was it higher in 2022
23 than it was in '21? Lower? Do you know?

24 A: I don't know off the top of my head. I know it was
25 higher than 2020.

1 Q: Do you track, and by "you," I mean the CVB, does it
2 track how many folks come from out of state that
3 make up the 17.2 million number?

4 A: Yes.

5 Q: And do you know how many that is?

6 A: I don't.

7 Q: Do you know, is there a percentage?

8 A: I don't, but again, some of the reporting and some
9 of the research reports that tie to the 17.2
10 million stat are on the website,
11 MyrtleBeachAreaCVB.com, and that's where this whole
12 study is found.

13 Q: Okay. So, there is a study that's tied to this
14 number, and from that study, I can find out how
15 many people from out of state make up that 17.2
16 million?

17 A: Yes.

18 Q: Can you give me a quick rundown of how the CVB
19 markets the Grand Strand from like a 10,000-foot
20 perspective? What are the programs you have in
21 place?

22 MS. BAILEY: OBJECT TO THE FORM. YOU CAN ANSWER.

23 A: I would, I would refer you back to the Annual Plan,
24 because that's close to a hundred pages in length,
25 and that gives you great detail in terms of all of

1 the different marketing programs that we do. It's
2 not one thing. It's many, many things that we're
3 doing. So, that annual plan is probably the best
4 place to look to see all the different programs
5 that we're doing.

6 Q: So, obviously, there's a website, right?

7 A: Yes.

8 Q: Okay. And are there advertisements in newspapers,
9 things like that?

10 A: Yes.

11 Q: Is there billboards?

12 A: Yes.

13 Q: How do you do outreach in some of these top origin
14 markets that we were talking about?

15 A: Again, the Annual Plan shows you mind-numbing
16 detail of that, but all advertising channels are
17 used: digital, social media, websites, promotions,
18 sponsorships, newspaper, magazine, TV, radio,
19 They're all there.

20 Q: Does the CVB do business development programs?

21 A: No.

22 Q: Is that more of the Chamber?

23 A: Yes.

24 Q: Okay. How does the Chamber work -- how does that
25 business development program with the Chamber work?

1 owned companies. So, it is not dominated by a
2 single entity, like Disney, like other
3 destinations.

4 Q: What is the largest economic driver for the Grand
5 Strand?

6 MS. BAILEY: OBJECT TO THE FORM. YOU CAN ANSWER.

7 A: Tourism overall is the biggest economic driver as
8 far as I understand for the economy.

9 MR. TAMASITIS: I DON'T HAVE ANY FURTHER QUESTIONS.
10 PLEASE ANSWER ANY QUESTIONS MR.
11 RICARD MIGHT HAVE.

12 MR. RICARD: GOOD MORNING, MA'AM. MY NAME IS
13 RHETT RICARD. I REPRESENT THE CITY
14 OF NORTH MYRTLE BEACH. I DON'T HAVE
15 ANY QUESTIONS FOR YOU. THANK YOU
16 FOR YOUR TIME TODAY.

17 MS. RIORDAN: OKAY.

18 MS. BAILEY: EXCELLENT.

19 MR. TAMASITIS: THANK YOU, APPRECIATE YOUR TIME.
20 (Whereupon, there being no further
21 questions, this deposition concluded
22 at 11:06 a.m.)

23 (*This transcript may contain quoted
24 material. Such material is reproduced as
25 read or quoted by the speaker.)



Exhibit S

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
CASE NO. 2021-CP-26-07489

CITY OF NORTH MYRTLE BEACH,

Plaintiff,

VS.

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

Defendants.

DEPOSITION OF MICHAEL G. MAHANEY

DATE TAKEN: June 15, 2022

TIME BEGAN: 10:22 a.m.

TIME ENDED: 11:34 a.m.

LOCATION: North Myrtle Beach City Hall
1018 Second Avenue South
North Myrtle Beach, South Carolina
29582

REPORTED BY: Rita Rodriguez
Court Reporter
Notary Public for South Carolina

1 Q. Any currently?

2 A. No.

3 Q. How about church affiliation?

4 A. Yes.

5 Q. What's your church affiliation?

6 A. **Trinity United Methodist. That's in North**
7 **Myrtle.**

8 Q. Any military service in the past?

9 A. No.

10 Q. Have you ever been arrested?

11 A. No.

12 Q. Let's go through your employment history. What's
13 been your employment status for the last ten
14 years?

15 A. **I have been the city manager in North Myrtle**
16 **Beach since 2010.**

17 Q. What did you do before that?

18 A. **I was a city manager in Deerfield Beach, Florida.**

19 Q. So, you have been in this position since 2010.

20 Can you kind of give me your -- what are your job
21 duties?

22 A. **Sure. Let me kind of gather my thoughts here to**
23 **give you an executive summary. First of all,**
24 **we're in a tourism environment in North Myrtle.**
25 **There is 20 million visitors to the Grand Strand**

1 in the course of a year. The budget is
2 \$162,000,000. There is over 650 city employees.

3 Some of the projects we do are rather
4 large. There are three that are multi-year that
5 are between 25 million and 35 million, that are
6 multi-year projects. There is about 36,000 calls
7 into dispatch on the police side a year. There
8 is about 5000 calls into the police or to the
9 dispatch on the fire side.

10 Part of my job is to stay ahead of it so
11 that, say, for instance, if I get overnight --
12 there are certain command notifications that come
13 up line to me no matter what time of the day or
14 night. That involves shootings, death of a
15 police officer, armed robberies, people killed
16 that are on motorcycles or in cars. A lot of
17 things that is going to have media interest
18 because they're listening to the scanners.
19 Airplane crashes, those kind of things. So that
20 I could communicate to my seven bosses so that
21 they don't see it for the first time, whatever is
22 going on, on the TV or hearing it on the radio or
23 whatever.

24 So that's kind of an executive summary of
25 my job. It's management by exception. I don't

1 public health, safety, morals, convenience,
2 order, appearance, property and general welfare'
3 for the city of North Myrtle Beach."

4 **A. Okay.**

5 Q. That's the question. Now, if you could read the
6 answer to yourself, please.

7 **A. Okay.**

8 Q. Do you agree with all the statements in that
9 answer?

10 **A. Generally speaking, yes.**

11 Q. I want to point specifically to one sentence. It
12 says that these restrictions encourage investment
13 in the city rather than projects outside of the
14 city. Do you agree with that?

15 **A. Yeah, I could see where it could possibly do
16 that.**

17 Q. In general terms, from your position as the city
18 manager, what is the city's goal here in this
19 lawsuit?

20 MR. RICARD: Objection to form.

21 **A. I mean, from the city manager's perspective, the
22 city manager's goal is for them to abide by the
23 rules. In other words, so that my bosses are not
24 getting calls or I'm not getting calls about late
25 night activities, parking in the street, buses**

1 **backing out, parking on the sidewalk, all those**
2 **sort of quality of life issues.**

3 Q. So, the use of the property is a bigger concern
4 to you than who owns it?

5 A. **To me, personally, yes.**

6 Q. I don't have any further questions.

7 MR. RICARD: I don't have any questions
8 either. Thank you for your time.

9 - - - - -

10 (Time noted: 11:34 a.m.)

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Exhibit T

**STATE OF SOUTH CAROLINA
COUNTY OF HORRY**

IN THE COURT OF COMMON PLEAS

CITY OF NORTH MYRTLE BEACH,
Plaintiff,

Case No. 2021-CP-26-07489

vs.

SUN TRS OCEAN CLUB LLC AND SUN
TRS CAROLINA PINES, LLC,
Defendants.

**PLAINTIFF'S ANSWERS TO
DEFENDANTS SUN TRS OCEAN
CLUB LLC AND SUN TRS CAROLINA
PINES LLC'S FIRST SET OF
INTERROGATORIES TO THE CITY OF
NORTH MYRTLE BEACH**

Plaintiff, City of North Myrtle Beach ("NMB" or "Plaintiff"), answers Defendants Sun TRS Ocean Club LLC and Sun TRS Carolina Pines LLC's (collectively "Defendants") First Set of Interrogatories to Plaintiff as follows:

GENERAL OBJECTIONS

1. NMB objects to each and every interrogatory to the extent that the interrogatory purports to seek attorney-client communications, attorney work-product, or any other privileged communication on the ground that such interrogatories are beyond the scope of discovery permitted under the South Carolina Rules of Civil Procedure.

2. By responding to these interrogatories, NMB does not intend to waive the attorney-client privilege, the work-product doctrine, or any other privilege, objection, or limitation upon discovery as to that interrogatory or any other discovery request.

3. NMB objects to each and every interrogatory to the extent that the interrogatory seeks to impose obligations inconsistent with, incongruent with, or in addition to those required by the South Carolina Rules of Civil Procedure.

4. NMB reserves the right to supplement and/or amend its answers to these interrogatories as information is obtained through discovery in this matter.

5. These answers to interrogatories are made without waiver of, and with preservation of:

a. all questions of competency, relevancy, confidentiality, materiality, privilege, and admissibility or other issues related to evidentiary concerns;

b. the right to object on any ground at any time to a demand or request for further discovery; and

c. the right at any time to revise, correct, supplement, or clarify any of the responses contained herein.

6. All documents produced and references to same shall be subject to the terms of the Confidentiality Order entered by the Court, if one is filed.

ANSWERS TO INTERROGATORIES

1. Give the names and addresses of all persons known to the Plaintiff and/or Plaintiff's attorneys to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses, and who has possession of such statements. This should include but is not limited to persons who were witnesses to any alleged improper uses of the Property, or who have personal knowledge of the circumstances surrounding any such alleged improper uses, persons who investigated or have knowledge of the substance of investigations of use of the Property, and persons with personal knowledge of information relevant to the Plaintiff's claims in this litigation.

ANSWER:

- a) Ben Caldwell
Zoning Administrator
c/o Plaintiff's counsel

Ben Caldwell has knowledge regarding the history of the subject property, the Zoning Ordinances and their application to the subject property, complaints received about the subject property, and current and ongoing Zoning Ordinance violations the Defendants are committing in their ownership and use of the subject property.

- b) Jim Shortle
President, Sea Cloisters I HOA, Inc.
843-274-5301

Jim Shortle has knowledge regarding the history of the subject property and the current and ongoing Zoning Ordinance violations the Defendants are committing in their ownership and use of the subject property.

- c) Michael Stephenson
President, Sea Cloisters II HOA, Inc.
804-337-0539

Plaintiff anticipates Mr. Stephenson has knowledge regarding the history of the subject property and the current and ongoing Zoning Ordinance violations the Defendants are committing in their ownership and use of the subject property.

- d) Arnett Vereen
1705 Madison Drive
North Myrtle Beach, SC 29482

Plaintiff anticipates Mr. Vereen has witnessed certain events ongoing at the subject property, that are inconsistent with the applicable Zoning Ordinances.

- e) Chris Martucci
current address unknown

Plaintiff anticipates Mr. Martucci has information relative to Defendants' use of the property that was inconsistent with applicable Zoning Ordinances.

- f) Troy Bittner
current address unknown

Plaintiff anticipates Mr. Bittner has information as to Defendants' use of the property that was inconsistent with applicable Zoning Ordinances.

- g) Paul Blust
Former Zoning Administrator for the City of North Myrtle Beach
C/O undersigned counsel

Mr. Blust has information relative to communication between him, in his official capacity, and representatives of Defendants, concerning use and/or potential use of the property, including proposed uses that are prohibited pursuant to the applicable Zoning Ordinances.

- h) All individuals or entities referenced in Defendants' production of documents.

- i) All individuals or entities identified as witnesses on behalf of Defendants.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the Plaintiff that relate to its claims or any Sun Defendant's defenses in this case.

ANSWER: See documents produced in response to Defendants' Requests for Production 1 through 16.

3. Set forth an itemized statement of all damages which Plaintiff claims to have been proximately caused by the Sun Defendants' ownership or use of the Property.

ANSWER: Plaintiff asserts Defendants have been and continue to be in possession of and exercise use of the subject property in violation of the applicable Zoning Ordinances, thereby damaging Plaintiff's ability to ensure the subject property is in substantial harmony with the area in which it is located and is not injurious to the adjoining properties.

4. List the names and addresses or any expert witnesses whom the Plaintiff proposes to use as a witness at the trial of the case.

ANSWER: As of the date of these Answers, Plaintiff has not retained an expert to use in the trial of this case, but reserves the right to do so in accordance with the South Carolina Rules of Civil Procedure and the Court's instructions.

5. For each person known to the Plaintiff or his attorneys to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the Sun Defendants of the important facts known to or observed by each witness, or provide a copy of any written or recorded statements related to same received from such witnesses.

ANSWER: See Answer to Interrogatory #1.

6. List the date of each complaint, the identity and contact information of each complainant, and the substance of each complaint the Plaintiff has received related to use or ownership of the Property since the special exception described in Plaintiff's Complaint was first approved.

ANSWER: See documents produced to Defendants' Requests for Production 13 and 15.

7. Identify the name and contact information for each person involved in the drafting of Section 23 of the Zoning Ordinance, including any amendments thereto since the "cabana house" terms were adopted in it.

ANSWER: Plaintiff objects to this Interrogatory on the basis of relevance, overly broad, and unreasonably burdensome or expensive taking into account the needs of the case, the amount in controversy, and limitations on the parties' resources. Additionally, to the extent this Request seeks to identify individuals and/or documents protected by the

deliberative process privilege, this Request is also denied on this ground as well. Notwithstanding the objections set forth above, Plaintiff has made efforts to identify responsive names and contact information, but has not been able to obtain such information at this time. Plaintiff reserves the right to supplement this response should Plaintiff be able to identify responsive information in the future.

8. Identify and provide the contact information for every employee or agent of the Plaintiff that has corresponded or attempted to correspond with any employee or agent of either Defendant with regard to the Property.

ANSWER: Plaintiff objects to this Request on the basis of relevance, overly broad, and unreasonably burdensome or expensive taking into account the needs of the case, the amount in controversy, and limitations on the parties' resources. Additionally, Defendants would likewise be in possession of or otherwise have the requested information.

9. List every "cabana house" in North Myrtle Beach, identify the owner of each such "cabana house," and the "project in North Myrtle Beach" used by the "cabana house," and specify if the owner of the "cabana house" is a homeowners' association.

ANSWER: Not including the Cabana House subject to the pending litigation, the following is a list of the other cabana houses in North Myrtle Beach:

- A. Barefoot Resort Cabana House – 4611 S. Ocean Blvd., North Myrtle Beach, SC 29582 – Owner: Barefoot Resort Residential Owners Association, Inc.
– Project: Barefoot Resort & Golf
- B. Beachwalk Cabana House – 4106 N. Ocean Blvd., North Myrtle Beach, SC 29582 – Owner: Beachwalk Villas HPR – Project: Beachwalk Villas

C. Links Cabana House – 200 11th Avenue South, North Myrtle Beach, SC 29582 – Owner: The Links Golf & Racquet Homeowners Association – Project: The Links

D. Tidewater Cabana House – 5710 N. Ocean Blvd., North Myrtle Beach, SC 29582 – Owner: Tidewater Plantation Community Association, Inc. – Project: Tidewater Plantation

10. Identify all zoning enforcement activities, including cease and desist letters, warnings, citations, hearings, and litigation initiated against any owner or user of a “cabana house,” other than the Sun Defendants, because such owner was not a homeowners’ association, or because the project using the “cabana house” was not located in North Myrtle Beach.

ANSWER: Plaintiff is unaware of any enforcement activities conducted against the owners or users of cabana houses in the R-4 Residential District, other than the Defendants, as Plaintiff is and has been unaware of any conduct relative to other cabana houses that violates the Zoning Ordinance as does the acts and/or omissions of Defendants.

11. Please explain why the City of North Myrtle Beach informed Sun Acq, LLC, and thereby Sun TRS OC, that all prior use of the “cabana house” at issue was lawful and consistent with the applicable zoning ordinances as of March 19, 2019 (see attached letter from P. Blust, Zoning Administrator for the City of North Myrtle Beach), if the owner at that time was not a homeowners’ association.

ANSWER: Plaintiff was unaware the prior owner of the subject property was not a homeowners’ association.

12. Please identify all sources of authority that delegate to the City of North Myrtle Beach the authority to enact zoning ordinances that restrict or limit ownership of property zoned as a “cabana house” to homeowners’ associations, including but not limited to any state or federal statute, regulation or policy.

ANSWER: Plaintiff objects to this Interrogatory on the basis of overly broad and calls for the Plaintiff to make a legal conclusion. Subject to and without waiving this objection, Plaintiff responds as follows: (1) Section 29 of Title 6 of the South Carolina Code; and (2) *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1927).

13. Please identify all sources of authority that delegate to the City of North Myrtle Beach the authority to limit use of “cabana houses” to “projects in North Myrtle Beach.”

ANSWER: Plaintiff objects to this Interrogatory on the basis of overly broad and calls for the Plaintiff to make a legal conclusion. Subject to and without waiving this objection, Plaintiff responds as follows: (1) Section 29 of Title 6 of the South Carolina Code; and (2) *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1927).

14. Please identify any other efforts employed by the City of North Myrtle Beach to enjoin or restrain the use of “cabana houses” in the City of North Myrtle Beach.

ANSWER: None, because Plaintiff is unaware of any violations of its Zoning Ordinances at other cabana houses that require such action.

15. Please identify any other uses of real property in the Zoning Ordinances that limit ownership to certain forms of real property ownership, and/or the use is limited to certain types or classes of persons or entities by the Zoning Ordinances.

ANSWER: Plaintiff objects to this Request on the basis of relevance, overly broad, is obtainable from some other source that is more convenient, less burdensome, or less

expensive (i.e. the Sun Defendants may refer to the Zoning Ordinances themselves), and is unreasonably burdensome or expensive taking into account the needs of the case, the amount in controversy, and limitations on the parties' resources.

16. Please identify any other types or classes of persons, legal or jural, that the Zoning Ordinances prohibit from owning or using certain real property.

ANSWER: Plaintiff objects to this Request on the basis of relevance, overly broad, is obtainable from some other source that is more convenient, less burdensome, or less expensive (i.e. the Sun Defendants may refer to the Zoning Ordinances themselves), and is unreasonably burdensome or expensive taking into account the needs of the case, the amount in controversy, and limitations on the parties' resources.

17. Please explain how the Zoning Ordinances' restricting ownership of properties zoned as "cabana houses" exclusively to "homeowners' associations" furthers "the general purpose of guiding development in accordance with existing and future needs and promoting the public health, safety, morals, convenience, order, appearance, property, and general welfare" for the City of North Myrtle Beach.

ANSWER: This requirement supports the homogeneous and harmonious use of the property alongside adjacent properties, all of which are, after all, located within a residential district. Specifically, the restriction supports the homogeneous and harmonious use because the subject property is located between adjoining, beach-front condominium developments with their own respective homeowner's associations. These adjoining properties share the same name (Sea Cloisters I and Sea Cloisters II), they are essentially mirror-images in their design and layout, and the two homeowner's associations coordinate with and mutually-support each other. Requiring there to be a

stretch of three homeowner's associations, rather than allowing for a commercial enterprise engaging in non-residential, commercial uses of the property at best, or creating a nuisance at worst, between such close homeowner's associations, is reasonable and has a tendency to promote the general welfare of the adjoining properties and the R-4 residential district specifically and the City generally.

18. Please explain how the Zoning Ordinances' limitation of the use of properties zoned as "cabana houses" exclusively to "projects in North Myrtle Beach" furthers "the general purpose of guiding development in accordance with existing and future needs and promoting the public health, safety, morals, convenience, order, appearance, property, and general welfare" for the City of North Myrtle Beach.

ANSWER: Plaintiff herein incorporates by reference its Answer to Interrogatory #17, and supplements with the following: This requirement operates to encourage and support local, private developments and their corresponding homeowner's associations (as opposed to non-local, corporate enterprises) by providing them with a private beach club and access point to the beach. It also encourages investment in the City rather than in projects outside of the City. Ultimately, this requirement is reasonable and has a tendency to promote the general welfare of the adjoining properties and the R-4 residential district specifically and the City generally.

19. Please explain how the Zoning Ordinance's requirement that "[a] cabana house shall be owned and maintained by a homeowners' association with a maintenance agreement submitted and approved by the planning department" furthers "the general purpose of guiding development in accordance with existing and future needs and

promoting the public health, safety, morals, convenience, order, appearance, property, and general welfare” for the City of North Myrtle Beach.

ANSWER: Plaintiff herein incorporates by reference its Answers to Interrogatory #17 and #18, and supplements with the following: This requirement supports the aesthetics of the residential district, because it encourages the upkeep and slightly landscaping, which is reasonable and has a tendency to promote the general welfare of the adjoining properties and the R-4 residential district specifically and the City generally.

20. When the City of North Myrtle Beach issued the March 19, 2019 letter to Sun Acq, LLC, was the City aware of the following facts:

- a. The owner at the time, NMB Ocean Club Partners, LLC, was not a homeowners’ association;
- b. The property was being used as a private beach club that had members who did not reside in the City of North Myrtle Beach;
- c. That Sun TRS OC intended to use the cabana house as an amenity for registered guests of Carolina Pines RV Resort.

ANSWER: Plaintiff was unaware of all of these alleged facts.

Respectfully submitted,

/s/ Cheryl D. Shoun

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Attorneys for Plaintiff
CITY OF NORTH MYRTLE BEACH

March 24, 2022
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the Plaintiff's Answers to Defendant's Interrogatories and Plaintiff's Responses to Defendant's Request for Production to their respective email address on March 24, 2022 as follows:

Richard H. Willis, Esquire
Williams Mullen
1230 Main Street, Suite 330
Columbia, SC 29201

VIA EMAIL ONLY: rwillis@williamsmullen.com

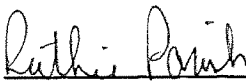

Nexsen Pruet, LLC
205 King Street, Suite 400
Charleston, SC 29401
(843) 577-9440

Exhibit U

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
CASE NO. 2021-CP-26-07489

CITY OF NORTH MYRTLE BEACH,

Plaintiff,

VS.

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

Defendants.

DEPOSITION OF JAMES WILLIAM WOOD, JR.

DATE TAKEN: June 15, 2022

TIME BEGAN: 8:06 a.m.

TIME ENDED: 10:10 a.m.

LOCATION: North Myrtle Beach City Hall
1018 Second Avenue South
North Myrtle Beach, South Carolina
29582

REPORTED BY: Rita Rodriguez
Court Reporter
Notary Public for South Carolina

DRAFT COPY

1 way functionally with the types of rooms and
2 arrangements that you would normally see in a
3 single-family house. And the purpose of that was
4 to ensure that they could be compatible with
5 surrounding residential properties.

6 Q. "In close proximity to the oceanfront." What
7 kind of proximity are we talking about?

8 A. I would think, to me that means either on the
9 oceanfront or possibly across the street in the
10 second row.

11 Q. And then the next part of that says, "to be used
12 by projects in North Myrtle Beach not located
13 near the ocean."

14 What are "projects"?

15 A. That could range anywhere from condominium
16 projects that might be three or four blocks off
17 the ocean or further. It could be single-family
18 subdivisions, it could be any sort of coherent
19 collection of housing units on a tract of land.

20 Q. Could it be an RV park?

21 A. My interpretation would be that RV parks are not
22 specifically excluded from the definition of
23 projects. So, my interpretation would be that
24 that would be inclusive of RV parks.

25 Q. Do you know if the term "projects" is defined

Exhibit V

Sec. 23-7. Penalties for violation.

Violation of the provisions of this chapter or failure to comply with any of its requirements (including violations of conditions and safeguards established in connection with grants of variances or special exceptions) shall constitute a misdemeanor. Any person who violates this chapter or fails to comply with any of its requirements shall upon conviction thereof be fined as provided in section 1-6. Each day such violation continues shall be considered a separate offense. The owner or tenant of any building, structure, premises or part thereof, and any architect, builder, contractor, agent or other person who commits, participates in, assists in or maintains such violation may each be found guilty of a separate offense and suffer the penalties herein provided. Nothing herein contained shall prevent the city from taking such other lawful action as is necessary to prevent or remedy a violation.

(Ord. No. 88-35, 11-1-88; Ord. No. 93-27, § 11, 8-2-93)

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 TRS
CAROLINA PINES RV, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2021-CP-26-07489

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
RENEWED MOTION FOR PARTIAL
SUMMARY JUDGMENT**

INTRODUCTION

The Memorandum in Support (“**Memorandum in Support**”) of the Renewed Motion for Summary Judgment (“**Renewed Motion**”) filed by Defendants Sun TRS Ocean Club, LLC, and Sun TRS Carolina Pines, LLC (collectively, “**Defendants**”) requests this Court to overturn decades of precedent that (1) favors the exercise of the inherent police power of a municipality to engage in zoning for the public welfare without judicial interference; (2) requires the presumption of the constitutionality of a municipality’s zoning plans; (3) instructs courts not to use the Dormant Commerce Clause as a “roving license” to decide what activities are appropriate for local governments to undertake and what activities must be the province of private market competition; and (4) holds a local law does not violate the Dormant Commerce Clause and is not discriminatory where it has incidental negative effects on some out-of-state market participants and does not reduce or curtail access to interstate markets.

Make no mistake: what Defendants seek would result in large-scale ramifications on all zoning ordinances, not just within the City of North Myrtle Beach (the “**City**”), but across the State of South Carolina and the United States. As they are wont to do, Defendants misconstrue the

facts, which, at minimum, creates a number of genuine issues of material fact sufficient to deny their Renewed Motion. Further, Defendants fail to acknowledge two key facts: (1) they knew of the zoning ordinances at issue prior to purchasing the property, but concealed their intended use of the property in their communications with the City’s Zoning Department prior to purchase, and therefore they come into this Court with unclean hands; and (2) neither Defendants nor their guests are excluded from participating the City’s markets or from accessing the beaches up and down the Grand Strand. Instead, the zoning ordinances at issue merely prohibit Defendants from owning one particular type of special exception—i.e., a cabana house—found within one specific zoning district within the entire City—i.e., the City’s R-4 Resort Residential District. Defendants have presented *no* evidence they are excluded from shuttling their guests to one of the City’s several public beach access points or from owning and operating a recreational club within any of the other zoning districts, including the Resort Commercial district, which covers four stretches of oceanfront property. Most importantly, Defendants failed to establish any substantial effect, much less any effect, on interstate commerce sufficient to trigger a Dormant Commerce Clause inquiry. Thus, their forty-five (45) page brief never leaves the ground.

Defendants take great pride in being subsidiaries of Sun Communities, Inc. (“**Sun Communities**”), which owns interests in six hundred and seventy-one (671) manufactured housing, recreational vehicle (“**RV**”) resorts, and marinas. (Def. Memorandum in Support, p. 11.) Indeed, they are proud to be a part of the “largest business of its kind in the United States.” (Def. Memorandum in Support, p. 11.) Defendants’ hubris, however, has led them to believe they are above the law, can act without impunity, and run their businesses as they see fit.¹ But there is *no*

¹ Indeed, according to James Shortle, President of the Seas Cloisters I Homeowners Association, it was evident to him that Defendants’ “plan was to see what they could get away with,” because when he asked Mindy Kirtley, a then-Regional Vice President and now a Divisional Vice President affiliated with Sun Communities, why Defendants purchased the cabana house if they knew the

constitutional right to do business as Defendants want, if the resulting operation burdens environmental, traffic-pattern, economic-viability, and the land-use-planning interests of the host municipality. Lastly, Defendants have not cited any cases in which stricter scrutiny under the Dormant Commerce Clause was applied to a municipal **zoning** ordinance as opposed to other types of municipal ordinances. This Court should decline to overturn a municipal zoning ordinance on the basis of the Dormant Commerce Clause. Based on the foregoing as well as for the reasons set forth below, this Court should deny Defendants' Renewed Motion.

LEGAL STANDARD

A. General Summary Judgment Standard

Summary judgment is proper when “there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 114–15, 410 S.E.2d 537, 545 (1991) (quoting 10 Wright & Miller, *Federal Practice and Procedure* § 2716, p. 643 (1983)) (citing *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990); *Irby v. Richardson*, 278 S.C. 484, 298 S.E.2d 452 (1982)).

Under Rule 56(c) of the South Carolina Rules of Civil Procedure, “the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990)). When considering the appropriateness of summary judgment, “the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party.” *Id.*

It is well settled that “disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty*

zoning ordinances barred them from doing so, she responded “I saw this and I had to have it.” (Ex. I, Sea Cloisters Rule 30(b)(6) Depo. Tr., p. 88, ll. 6–23.)

Lobby, Inc., 477 U.S. 242, 248 (1986). Ultimately, the relevant inquiry is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is *so one-sided* that one party must prevail as a matter of law.” *Id.*, 477 U.S. at 251–52 (emphasis added).

B. Dormant Commerce Clause

The Supreme Court of the United States has identified “three broad categories of activity that Congress may regulate under its commerce power.” *United States v. Lopez*, 514 U.S. 549, 558 (1995). “First, Congress may regulate the use of the channels of interstate commerce.” *Id.* “Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.” *Id.* “Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.” *Id.* at 558–59 (internal citations omitted).

“Besides being an affirmative grant of power, the Commerce Clause also has a ‘negative sweep’ that restricts the power of states to regulate interstate trade.” *Medigen of Kentucky, Inc. v. Pub. Serv. Comm’n of W. Virginia*, 985 F.2d 164, 165–66 (4th Cir. 1993) (citing *Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298, 309 (1992), *overruled on other grounds by S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018)). “[T]he negative implications of the Commerce Clause, often referred to as the Dormant Commerce Clause, prohibit state action that unduly burdens interstate commerce.” *Travelscape, LLC v. S.C. Dep’t of Revenue*, 391 S.C. 89, 104, 705 S.E.2d 28, 36 (2011) (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997)).

There is a two-step analysis to the Dormant Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578–79 (1986). The first-tier approach states when a law “directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests,” the law will generally be struck

down. *Id.* at 579. However, the law can still survive if it “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Oregon Waste Sys., Inc. v. Dep’t of Env’t Quality of State of Or.*, 511 U.S. 93, 101 (1994)). Alternatively, when a law “has only indirect effects on interstate commerce and regulates evenhandedly, [courts] have examined whether the [governing body’s] interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.” *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The latter test, i.e. the second-tier approach, is often known as the *Pike* balancing test.

Notably, Defendants are only claiming a violation of the Dormant Commerce Clause based on its alleged activities substantially affecting interstate commerce. (Defs. Memorandum in Support, pp. 25–29.) The Supreme Court’s Dormant Commerce Clause decisions show what types of state or local laws are not discriminatory, i.e. do not substantially affect interstate commerce: “A state or local law is not discriminatory where it (1) has incidental negative effects on *some* (but not all) out-of-state market participants and (2) does not reduce or curtail access to interstate markets.” *Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1244–45 (11th Cir. 2012) (emphasis in original) (citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978)). Further, “[t]here is no constitutional right to do business” in a company’s optimally preferred manner “if the resulting operation burdens environmental, traffic-pattern, economic-viability, and land-use-planning interests of the host municipality.” *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 1012 (E.D. Cal. 2006).

Ultimately, the Supreme Court of the United States has instructed the Dormant Commerce Clause “is ***not a roving license*** for [] courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market

competition.” *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007) (emphasis added) (finding it is “not the office of the Commerce Clause to control the decision of the voters” on how their local government operates). This instruction perhaps has been on the minds of courts across the country upon review of zoning ordinances specifically, because as of 1996, there have been “*no cases* in which stricter scrutiny under the [Dormant] Commerce Clause was applied to a zoning ordinance.” *See Texas Mfrs. Hous. Ass’n, Inc. v. City of La Porte*, 974 F. Supp. 602, 612 (S.D. Tex. 1996) (emphasis added). Further, none of Defendants’ cited cases involve zoning ordinances either.

C. Specific Case Law Regarding Summary Judgment in an Interstate Commerce Context

The initial determinations in a Dormant Commerce Clause analysis, even prior to determining which of the two-tiered approaches to take, are (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.”). Barring any obvious substantial effect on interstate commerce, the issue of whether the effect on interstate commerce is substantial is a question of fact, which warrants the denial of summary judgment when genuine issues of material fact exist. As set forth by the Fifth Circuit Court of Appeals, dismissals of Dormant Commerce Clause claims are usually “premature,” as “[c]laims that turn on intent and effects typically require factual development.” *See NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 327 (5th Cir. 2022) (citing *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (recognizing that Commerce Clause decisions require a “sensitive, case-by-case analysis of purposes and effects); *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm’n*, 945 F.3d 206, 218 (5th Cir. 2019)

(noting that “discriminatory intent is factual matter”); *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 545 (4th Cir. 2013) (reversing the Rule 12 dismissal of dormant Commerce Clause purpose and effects claims because of the “fact-intensive quality of the substantive inquiry”); *Cachia v. Islamorada*, 542 F.3d 839, 840–41 (11th Cir. 2008) (reversing the dismissal of a discriminatory-effects claim); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 334 (4th Cir. 2001) (denying summary judgment because whether the challenged law discriminated in its effects or purpose were “[q]uite obviously . . . questions of fact”)).

For example, in *Synagro-WWT, Inc. v. Rush Twp., Penn.*, 204 F. Supp. 2d 827 (M.D. Pa. 2002), a sewage company challenged a municipality’s ordinance requiring sewage companies to comply with certain procedural requirements. The municipality moved to dismiss. The federal district court held that, “at this stage of the proceedings we are not in the position to judge [] the Ordinance’s effect on interstate commerce” *Id.* at 843 (citing *Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F.Supp.2d 245, 255 (D.N.J.2000) (denying a motion to dismiss a Dormant Commerce Clause claim where the effects on commerce were yet unclear)). Likewise, in *Indep. Coin Payphone Ass’n, Inc. v. City of Chicago*, 863 F. Supp. 744 (N.D. Ill. 1994), pay telephone companies brought an action against the City of Chicago, its zoning administrator, and its director of revenue, challenging the validity of zoning ordinances authorizing city officials to prohibit public pay telephones within city limits. The City of Chicago moved to dismiss. The federal district court held whether the nature and quantity of interstate calls placed on the pay telephones had a substantial effect on interstate commerce for the companies to maintain a claim under the Dormant Commerce Clause was a “fact question” sufficient to deny the motion to dismiss. *Id.* at 753–54. *See also City of Los Angeles v. Cnty. of Kern*, No. CV 06 5094 GAF(VBKX), 2006 WL 3073172, at *8 (C.D. Cal. Oct. 24, 2006) (noting

whether the “practical operation” of the regulation at issue works to discriminate against interstate commerce is a question of fact).

Criminal cases dependent upon effects on interstate commerce have also resulted in courts finding whether there are sufficient effects on interstate commerce is a question of fact. *See, e.g., United States v. Nukida*, 8 F.3d 665, 672 (9th Cir. 1993) (“[I]t is clear that . . . the determination of whether [the defendant’s] actions resulted in sufficient effects on interstate commerce is essentially factual, and therefore inappropriate for resolution on a pretrial motion to dismiss or on this appeal.”) (collecting cases); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 478 (10th Cir. 1990) (affirming a jury instruction noting that it “is a question of fact . . . to determine whether a particular defendant’s conduct involves such interstate commerce”); *United States v. Harrold*, No. 4:19CR627SNLJ(SPM), 2020 WL 1172207, at *5–6 (E.D. Mo. Feb. 4, 2020), *report and recommendation adopted sub nom. United States v. Perry*, No. 4:19CR000627 SNLJ, 2020 WL 1170640 (E.D. Mo. Mar. 11, 2020), *and report and recommendation adopted*, No. 4:19CR000627 SNLJ, 2020 WL 1180722 (E.D. Mo. Mar. 11, 2020).

Perhaps the most important case in this line of cases is *Norfolk S. Corp. v. Oberly*, 632 F. Supp. 1225 (D. Del. 1986), *aff’d*, 822 F.2d 388 (3d Cir. 1987). In *Norfolk Southern*, the Delaware legislature passed the Delaware Coastal Zone Act, which prohibited certain coal operations by plaintiffs in the coastal zone. Although the federal district court found the *Pike* balancing test likely applied, it also held that “[e]ven if strict scrutiny were applicable, it should not be applied on summary judgment because material issues of fact exist as to the extent of any disproportionality” in the alleged discrimination. *Id.* at 1237.

RELEVANT FACTS, INCLUDING DISPUTED MATERIAL FACTS

This action concerns certain property, commonly referred to and designated as Lot 1, Block 18-A, Tilghman, located in the City of North Myrtle Beach (the “**Property**”), which is subject to the City’s Code of Ordinances. A cabana house (“**Cabana House**”) is located on the Property, which is located at 1814 North Ocean Boulevard, North Myrtle Beach 29582. The use and ownership of the Cabana House is at issue in this action. Throughout the following recitation of the facts, this Memorandum will highlight the material facts for which there is a genuine dispute.

A. The City’s Zoning Plan

The City employs a zoning plan, much like virtually every other municipality or similar-tiered governmental entity across the State of South Carolina and the United States. The purpose of the zoning plan is set forth within Section 23-1 of the City’s Code of Ordinances: “to guide development 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). Some of the other express purposes for zoning considerations include preventing “the overcrowding of land,” avoiding “undue concentration of population,” lessening “congestion in the streets,” facilitating “the creation of a convenient, attractive, and harmonious community,” regulating “the density and distribution of populations and the uses of buildings, structures and land for trade, industry, residence, [and] recreation,” facilitating “the adequate provision or availability of transportation, police and fire protection, water, sewage, schools, parks, and other recreational facilities,” and furthering “the public welfare in any other specified regard.” North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-1(2), (3), (5), (6) & (8) (1984).

Pursuant to Section 23-16 of the City’s Code of Ordinances, the City created and utilizes twenty separate primary zoning districts and seven overlay zones. The Cabana House at issue in this case falls under the zoning district referred to as R-4, which covers the Resort Residential District, and falls under both the Coastal Protection Overlay Zone and the Oceanfront Overlay Zone. North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-16 (1984); *see also* Interactive Zoning Map, North Myrtle Beach, <https://nmb.maps.arcgis.com/apps/webappviewer/index.html?id=cf0cf557a10b4c39bb74ad6cb34fe838> (last visited July 30, 2023).² The stated purposes of the Coastal Protection Overlay Zone are “to control erosion, preserve and maintain the beach and its environs, safeguard property, and promote safety and the welfare of the community.” North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-31(1)(a) (1984). The defined purpose of the R-4 zoning district is:

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 (1984).³

² Here, and elsewhere within this brief, the City cites to matters of public record, including publications and factual information located in postings on the City’s websites. The Court may take judicial notice of these facts. *See Smith v. Bush*, No. CV 8:17-2775-MGL-JDA, 2017 WL 5900088, at *2 n.* (D.S.C. Nov. 13, 2017), *report and recommendation adopted*, No. CV 8:17-2775-MGL-JDA, 2017 WL 5889247 (D.S.C. Nov. 29, 2017) (“The Court may take judicial notice of matters of public record, including factual information located in postings on government websites.”); *see also Philips v. Pitt Cnty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (finding courts “may properly take judicial notice of matters of public record”); *Mitchell v. Newsom*, CA No. 3:11-0869-CMC-PJG, 2011 WL 2162723, *3 n. 1 (D.S.C. May 10, 2011) (collecting cases indicating that courts may take judicial notice of governmental websites), *adopted by*, 2011 WL 2162184 (D.S.C. June 1, 2011); *Williams v. Long*, 585 F. Supp. 2d 679, 686–88 & n.4 (D. Md. 2008) (collecting cases indicating that postings on government websites are inherently authentic or self-authenticating).

³ Notably, for planning purposes, the City also categorizes certain land use classes within each of

B. Sections 23-22 and 23-2 of the City's Code of Ordinances

Section 23-22 covers the types of uses allowed within the R-4 zoning district, but it also allows for certain special exceptions. Special exceptions 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) (emphasis added). One such special exception is a cabana house. 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) (attached hereto as **Exhibit A**). As demonstrated by the bolded and italicized language, there are two separate conditions outlined in this section: (1) that the Cabana House be used by “projects in North Myrtle Beach,” (the “**Project Ordinance**”); and (2) that the Cabana House be owned and operated by a homeowner's association (the “**HOA Ordinance**”).

Five cabana houses have been granted as special exceptions in the City. Four out of five of these cabana houses are owned and used by homeowners' associations for projects within the

these districts and overlay zones, to include Highway Commercial, Mixed Use, Neighborhood Mixed Use, Residential Suburban, Residential Neighborhood, and Residential Urban. The Property and Cabana House at issue in this case are categorized in the Residential Neighborhood land use class, which is meant for medium-density activities and structures as opposed to other classes supporting higher densities, such as Neighborhood Mixed Use, Mixed Use, and Residential Urban. See Appendix B, Future Land Use Map & Compliance Index, The City of North Myrtle Beach Comprehensive Plan (Summer 2018), *available at* <https://www.nmb.us/DocumentCenter/View/97/Full-2018-Comprehensive-Plan-PDF?bidId=> (last visited July 30, 2023).

City.⁴ The notable exception is the Cabana House at issue in this case. Because none the Defendants operates as a homeowners' association and the project for which the Defendants use the Cabana House is the RV resort located in Conway, South Carolina, Defendants' ownership and use violate both the Project Ordinance and the HOA Ordinance.

C. Defendants' Purchase of the Property and Cabana House

Defendants allege it was "well known" the Property was not owned by a homeowners' association or used by a project within the City prior to Defendants' purchase of the Property. (Defs. Memorandum in Support, p. 8.) This "fact" is the first of many disputed and material facts. The implication Defendants hope this Court accepts is that the City was aware the Property has never been owned by a homeowners' association or used by a project within the City. However, Defendants' assertion here is disputed, because the City's Rule 30(b)(6) designee testified the City was never aware the Property had never been owned by a homeowners' association or used by a project within the City. (Ex. B, City's Rule 30(b)(6) Depo. Tr., pp. 57, ll. 10–16.)

Relatedly, a second disputed and material fact concerns Defendants' allegation of the City's

tacit acquiescence to almost 12 years of ownership of the Beach Club by entities that were not homeowners' associations, caused both the seller of the Property and Sun to reasonably believe that Sun's intended ownership and use of the Property, of which the City was well aware, was consistent with the City's interpretation of its Zoning Ordinance.

(Defs. Memorandum in Support, p. 10.) Defendants misconstrue these "facts," which is

⁴ Defendants note some of the other cabana houses approved as special exceptions within the City were not owned by homeowners' associations until years later. (Defs. Memorandum in Support, p. 8, n.15.) However, each of these cabana houses were being used by projects located within the City, and were, as far as the City is aware, in the process of being fully developed by the original developer, before transitioning the project common area assets and amenities to a homeowners' association. Defendants' note here should be seen for what it is: a distraction.

underscored by the absence of any citation to the record. The City never tacitly acquiesced to any violation of the Project Ordinance or HOA Ordinance and the City was certainly not “well aware” of Defendants’ intended ownership and use of the Property. Further, the City contests Defendants were reasonable to believe their intended ownership and use was consistent with the City’s interpretation of the Project Ordinance and HOA Ordinance. Indeed, Defendants never expressly asked the City whether their intended ownership and use was consistent with the City’s ordinances, because Defendants just assumed they could use the Property in the same manner as the prior owner. (Ex. C, Defs. Rule 30(b)(6) Depo. Tr., p. 371, l. 11 – p. 373, l. 2.)

The combination of the above “facts” ultimately leads to the third disputed, material fact. Again, without any citation to the record, Defendants brazenly aver their “ownership and use [of the Cabana House was] expressly authorized by the Zoning Administrator for the City prior to purchase.” (Defs. Memorandum in Support, p. 3.) The City did no such thing and vehemently disputes this alleged “fact.” In actuality, Defendants *never* informed the Zoning Administrator at the time, Paul Blust (“**Mr. Blust**”), how they intended to use the Property, much less that they were purchasing the Property. Instead, on March 18, 2019, an agent of Defendants merely requested a zoning letter that set forth (1) the applicable zoning classification, (2) what the applicable permitted uses were, and (3) whether the premises or the improvements thereon (as opposed to the ownership and operation) were in violation of any zoning ordinances. (Ex. D, Jaffe E-mail of Mar. 18, 2019.) This evidence suggests Defendants intentionally concealed their intended use of the Property, which is damning. Nevertheless, on March 19, 2019, Mr. Blust dutifully responded by answering exactly what Defendants had requested of him. He informed the Defendants’s agent that (1) the property was zoned as R-4 Resort Residential, (2) the Cabana House was permitted as a special exception, subject to the use regulations set forth in the R-4

zoning district, and (3) as of the date of Mr. Blust's letter, there were no known zoning violations on the property. (Ex. E, Mr. Blust Letter of Mar. 19, 2019.) Mr. Blust directly answered the questions asked of him, but at no time was he informed of Defendants' intended use (or even purchase of the Property), such that he could have knowingly provided authorization for Defendants' ownership or use. Defendants' strained interpretation of Mr. Blust's letter is at best obtuse, and at worst, an intentionally deceptive argument. Regardless, this "fact" is unquestionably a material and disputed one, sufficient to deny Defendants' Renewed Motion.

On or about February 15, 2019, Defendants entered into a Real Estate Purchase and Sale Agreement with the prior owner of the Property ("**Seller**"). (Defs. Memorandum in Support, p. 9.) As Defendants recount, the Seller of the Property warranted "the operation of the [Cabana House] compl[ied] in all respects with all Permitted Exceptions and all applicable laws, ordinances, codes, rules and regulations, including those pertaining to zoning," and that there was "no existing facts or conditions which may result in the issuance of, [sic] any violations of any building, zoning, safety, fire, environmental, health or other code, laws, ordinances, or regulations" (Defs. Memorandum in Support, p. 9.) However, Defendants conveniently ignore that the Seller of the Property had actual or constructive knowledge of the Project Ordinance and the HOA Ordinance. Indeed, prior to selling the property, the Seller obtained an e-mail from Mr. Blust, which set forth the R-4 zoning district standards. (Ex. F, Watts E-mail.) Further, this e-mail was "incorporated into the closing file maintained by the law firm that conducted the closing for the sale of the Property that is the subject of this action." (Ex. G, Resp. to City's Third Set of Interrogatories, p. 3.) Presumably, this e-mail being incorporated into the closing file is the reason for Defendants' admissions that they knew of both the Project Ordinance and the HOA Ordinance prior to the purchase of the Property. (Ex. H, Resp. to City's First Set of Requests for Admission, pp. 1-3.)

Defendants' admission here cannot be understated: they have admitted to knowing both the Project Ordinance and the HOA Ordinance applied to the Cabana House, yet purchased it anyway and intentionally violated said ordinances. Thus, rather than the City's "tacit acquiescence" being the issue, it is Defendants' intentional conduct that has led to their predicament. Ultimately, Defendant Sun TRS Ocean Club, LLC, became the owner of the Property on or about May 10, 2019, and used it in conjunction with Defendant Sun TRS Carolina Pines RV, LLC,⁵ which is the owner and operator of a RV resort located in or near Conway, South Carolina.

D. Defendants' Use of the Cabana House

This RV resort contains eight-hundred and twenty-nine (829) transient sites and one hundred and fifty-nine (159) annual sites. (Defs. Memorandum in Support, p. 12.) Further, the RV resort operates and maintains over thirty (30) on-site amenities. (Defs. Memorandum in Support, p. 12.) Defendants' intent for the Property was to use the Property for guests and residents of the RV resort located in Conway, South Carolina, essentially as an additional amenity it offers their guests, like the ones it provides on-site. Defendants shuttled their guests and residents to the Cabana House, but did not charge for transportation to or access of the Cabana House amenity.

As the fourth disputed, material fact, Defendants allege "the City was directly involved with approving and permitting" their use of shuttle transportation of their guests to the Cabana House. (Defs. Memorandum in Support, p. 12.) However, there is *no* evidence of any approval or permitting the City provided for Defendants to shuttle RV resort guests to the Cabana House. The City was *not* aware of Defendants' use of the Property in this way, nor did the City become aware until on or about July 12, 2021. Of note, the Cabana House is located between Sea Cloisters I and

⁵ Defendant Sun TRS Carolina Pines, LLC is a separate entity affiliated with the RV resort that handles the non-core revenue flows of the RV resort, such as retail sales and food and beverage sales.

Sea Cloisters II (collectively, “**Sea Cloisters**”), which are condominiums governed by separate homeowners’ associations. The two presidents of the homeowners’ associations affiliated with both Sea Cloisters condominiums submitted a complaint regarding Defendants’ use of the Cabana House, which will be discussed in more detail below.

Before turning to the Sea Cloisters’ complaint, it is important to highlight that cabana houses are subject to additional use restrictions (hereinafter referred to as the “**Use Ordinances**”) within the City’s Code of Ordinances, which the City alleges Defendants have violated as well, including:

1. That a *homeowner’s association* shall have been established for the project and a *maintenance agreement* has been submitted to the planning department.

...

3. That the use of the house be *limited to bathing and change of clothing facilities*, and occasional use as guest quarters and other similar uses.

4. That the special exception will be in *substantial harmony with the area in which it is to be located*.

5. That the special exception will *not be injurious to the adjoining property*.

North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-22(4)(d) (1984) (emphasis added) (also attached hereto as **Exhibit A**). Defendants operated the Cabana House without a maintenance agreement on file for the duration of their ownership through the initiation of this litigation.⁶ Further, Defendants not only marketed the Cabana House for weddings and special events, but they also held at least three weddings and two other events there, which is a commercial activity not allowed under the ordinances referenced above. Lastly, Defendants’ use has not been in substantial harmony with the surrounding area, and it has been injurious to the adjoining

⁶ After litigation ensued in this case, Defendants submitted a maintenance agreement to the City on February 2, 2022. Although there was a clear violation of this particular condition in the past, it has now been rectified.

properties, in the following non-exhaustive ways: (1) the installation of exterior lights that are too bright according to the City's Code of Ordinances and interfere with the nighttime hours of the owners in the adjoining properties; (2) the failure to upkeep landscaping (resulting from, in part, the absence of any maintenance agreement); (3) vehicular and foot traffic across the adjoining properties, which has led to unauthorized parking, damage to landscaping, and altercations between Defendants' guests and adjacent property owners; and (4) boisterous noise, including loud music and foul language, from events and gatherings at the Cabana House and its pool. Therefore, there have been clear violations of the Use Ordinances, in addition to Defendants' improper ownership.

These violations of the Use Ordinances resulted in Sea Cloisters conducting an investigation into whether Defendants were violating any ordinances within the City's Code of Ordinances. Here is where the next disputed, material fact arises. Defendants allege Sea Cloisters were "well aware" the Property was not owned and operated by a homeowner's association and not being used exclusively by a project within the City, and that despite this knowledge, Sea Cloisters did not report the zoning infractions by the prior owner of the Cabana House, because the prior owner "did not disturb the residents of those projects." (Defs. Memorandum in Support, p. 9.) However, Defendants are inducing this Court to assume, by implication, that Sea Cloisters knew of the operative ordinances at the time in question. However, Mr. Shortle, on behalf of Sea Cloisters I, testified they did not know the prior owner's ownership and use "was an issue," i.e. they did not know about the existence of the Project Ordinance and HOA Ordinance at that time, and Sea Cloisters only learned about them when they "went looking for something that [they] could do" to mitigate or prohibit Defendants' injurious conduct. (Ex. I, Sea Cloisters Rule 30(b)(6) Depo. Tr., p. 33, l. 22 – p. 34, l. 18.) Once Sea Cloisters became aware of the pertinent ordinances,

they submitted a complaint to the City on or about July 12, 2021, which was the first time the City became aware of Defendants' violations. (Ex. J, Sea Cloisters Complaint.)

E. Defendants' Lack of Responsiveness and Initial Stages of Litigation

In August 2021, following receipt of the aforementioned Sea Cloisters' complaint, the City Manager, Mike Mahaney ("**Mr. Mahaney**"), attempted one or more phone calls and e-mails to Troy Bittner ("**Mr. Bittner**"), who served as the manager of the RV resort, in order to discuss the ordinance violations and attempt to resolve the issues informally. After his attempts to contact Mr. Bittner went ignored, Mr. Mahaney directed a cease and desist letter to be sent. On September 2, 2021, a cease and desist letter was submitted to Sun Communities, Inc., located in Michigan, and to the Carolina Pines RV Resort, located in Conway, South Carolina. (Ex. K, Cease and Desist Letter.) Having received no substantive response to this cease and desist letter over the next two months, the City instituted this action on November 11, 2021. Despite Defendants' lack of responsiveness, Defendants allege there are no studies showing "that homeowner's associations are uniquely responsive to the City's interest." (Defs. Memorandum in Support, p. 19.) This dispute over the necessity of a study constitutes another genuine issue of material fact, because the City does not believe a study is necessary, given the City's experience with Defendants specifically and experience with other homeowners' associations and corporations generally. The City's experience is important context and evidence to rely upon in creating and enforcing local zoning ordinances.

The following day, on November 12, 2021, the City filed a Motion for Temporary Restraining Order and Preliminary Injunction. At a hearing on this motion, on January 10, 2022, the City and Defendants agreed to a consent order, which was signed by the Court the same day and entered on the following day, January 11, 2022. Defendants agreed to the use limitations set

forth in the consent order. As stated by Defendants in their Memorandum in Support, Defendants are only moving for summary judgment on the Project Ordinance and HOA Ordinance, and are not challenging the Use Ordinances in their Renewed Motion, with the exception of the first clause of Section 23-22(4)(d)(1).

F. Citation versus Declaratory Judgment

Defendants aver “the City has spent an inordinate amount of time focusing on what it contends are problematic ‘use’ issues” involving Defendants’ activities at the Cabana House, which Defendants contend are better addressed by issuing ordinance citations rather than through a declaratory judgment action. (Defs. Memorandum in Support, p. 21, n.31.) Again, another disputed and material fact arises. Throughout discovery and in this case, Defendants have suggested the City should have pursued compliance via its citation authority rather than through a declaratory judgment action. The City certainly has the authority to issue citations for ordinance violations, including zoning ordinance violations, via Section 23-7 of the City’s Code of Ordinances, which is attached here to as Exhibit L.⁷

However, as testified to by the City’s Rule 30(b)(6) designee, “a citation would not be an effective tool to cure [Defendants’] violation[s], because no amount of writing citations, no amount of paying penalties or fines, can possibly cure the requirement that the [P]roperty be owned by a homeowner[’]s association for a project located in the City.” (Ex. B, City’s Rule 30(b)(6) Depo. Tr., p. 83, ll. 15–23.) Further, the Use Ordinances in and of themselves cannot effectively gain compliance with a corporate entity, because a corporate entity will simply view a five-hundred-

⁷ Throughout discovery and this case, Defendants have also implied the City’s only recourse in this case was to issue a citation pursuant to Section 23-7, allegedly because this Section is the only provision within the zoning code provides for enforcement mechanisms and the only one detailed is a citation. However, the last sentence of Section 23-7 expressly states: “Nothing herein contained shall prevent the city from taking such other lawful action as is necessary to prevent or remedy a violation.” North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-7 (1984).

dollar (\$500) fine as the cost of doing business. For example, it is undisputed weddings and events occurred at the Cabana House, which the City views as a violation of the Use Ordinances. If only the Use Ordinances existed and the City desired to prohibit Defendants from hosting events, the City's sole recourse would be issuing a citation. In response, one would reasonably expect Defendants to view the citation as the cost of doing business and either merely consume the cost or pass that cost onto the customer. Five hundred dollars (\$500) after all is a drop in the bucket for most weddings these days. Thus, contrary to Defendants' contention the "use" issues are immaterial to the resolution of their Renewed Motion, one of the principal ways to view the validity of the Project Ordinance and HOA Ordinance is to examine what would inevitably result if only the Use Ordinances existed.

G. Answers to Interrogatories

Early in the course of discovery in this case, Defendants asked a number of written interrogatories to which the City timely answered on March 24, 2022. Defendants have latched onto one particular answer—the City's answer to Interrogatory No. 18—claiming the City's "candid admissions concede [the] case." (Defs. Memorandum in Support, pp. 18, 38–39.) Defendants are incorrect. The City's answer to Interrogatory No. 18, on its face, states it incorporates portions from the previous answer, which Defendants purposefully avoid addressing. The City's answer to Interrogatory No. 17 expressly states the HOA Ordinance and, by extension, the Project Ordinance in response to Interrogatory No. 18:

support[] the homogeneous and harmonious use of the property alongside adjacent properties, all of which are, after all, located within a residential district. Specifically, the restriction[s] support[] the homogeneous and harmonious use because the [Property] is located between adjoining, beach-front condominium developments with their own respective homeowner's associations. These adjoining properties share the same name (Sea Cloisters I and Sea Cloisters II), they are essentially mirror-images in their design and

layout, and the two homeowner's associations coordinate with and mutually-support each other. Requiring there to be a stretch of three homeowner's associations, rather than allowing for a commercial enterprise engaging in non-residential, commercial uses of the property at best, or creating a nuisance at worst, between such close homeowner's associations, is reasonable and has a tendency to promote the general welfare of the adjoining properties and the R-4 residential district specifically and the City generally.

(Ex. M, City's Answers to Defs.' First Set of Interrogatories, pp. 9–10.) In other words, the Project Ordinance works in tandem with the rest of the zoning plan, including the HOA Ordinance and the Use Ordinances. It supports the homogeneity of the R-4 zoning district in which it is located, as the City has stated from the beginning, despite Defendants ignoring the incorporation by reference noted above. Regardless, to the extent Defendants contend this is a material fact, it is a genuinely disputed one sufficient to deny Defendants' Renewed Motion.⁸

H. Effects on Interstate Commerce

Likely the most important material and disputed fact is Defendants' allegation that their use of the Cabana House specifically and the Project Ordinance and HOA Ordinance generally create a substantial effect on interstate commerce. (Defs. Memorandum in Support, pp. 13–15, 25–

⁸ Regardless, the City is not bound by its answer to Interrogatory No. 18, which can be supplemented with further discovery and at the trial of this matter. After all, “[t]he general rule governing the use of answers to interrogatories is that under ordinary circumstances they do not limit proof.” Fed. R. Civ. P. 33 advisory committee’s note to 1970 amendment (citing *Pressley v. Boehlke*, 33 F.R.D. 316, 317 (W.D.N.C. 1963) (“Although his answer [to an interrogatory] now, unless carefully framed, can possibly embarrass him at the trial, it is not, of course, a bar to asserting a different position at the time of trial.”); see also *Fidelity & Deposit Co. of Maryland v. Hudson United Bank*, 653 F.2d 766, 777 (3d Cir. 1981) (holding that interrogatory answers are not judicial admissions); *Hurtado v. Balerno Int’l Ltd.*, 408 F. Supp. 3d 1315, 1329 (S.D. Fla. 2019) (“Courts have held that deposition testimony and interrogatory answers do not rise to the level of judicial admissions and thus can be retracted by trial testimony.”). South Carolina courts have taken a similar approach and hold interrogatory answers are *not* admissions and can be supplemented with further discovery and at trial. *Wright v. Hiester Const. Co.*, 389 S.C. 504, 519, 698 S.E.2d 822, 830 (Ct. App. 2010) (holding an interrogatory answer is not an admission); see also *Coves Darden, LLC v. Ibanez*, No. 2014-000339, 2016 WL 4379419, at *7 (S.C. Ct. App. Aug. 17, 2016) (Kondoruos, J., concurring) (noting “the interrogatory answer was not a judicial admission because no court had taken a prior position”).

29.) This allegation runs at the heart of this case and is not only an intensely factual inquiry, but a hotly-disputed matter. Contrary to Defendants’ factual assertions, they simply cannot prove a substantial effect on interstate commerce.

First, it is undisputed that Defendants, prior to the consent order entered in this case, did not collect *any* revenue from their RV resort guests using Cabana House. (Ex. C, Defs. Rule 30(b)(6) Depo. Tr., p. 349, ll. 11–23.) Defendants never generated any revenue, because they never charged their RV resort guests for accessing the Cabana House. (Ex. N, Martucci Depo. Tr., p. 130, l. 24 – p. 131, l. 2.) Likewise, if Defendants were able to use the Cabana House in the future for its RV resort guests, Defendants intend to keep its access and use free-of-charge for its RV resorts guests. (Ex. O, Maynora Depo. Tr., p. 73, ll. 16–24.)

Looking for another way to generate some effect on interstate commerce, Defendants speculate that their RV resort guests who visited the Cabana House would patronize local restaurants and shopping locations in the vicinity. (Defs. Memorandum in Support, p. 12.) This alleged “fact” is based purely on conjecture and assumptions. Defendants rely on the testimony of Christopher Martucci, a former employee of Defendants who they terminated (“**Mr. Martucci**”). Mr. Martucci stated he believed guests at the Cabana House would patronize a local bar or restaurant, but he never physically observed them doing so, because the basis for that assertion was just based on conversations he had where he informed guests of what local bars or restaurants were in the vicinity. (Ex. N, Martucci Depo, p. 132, l. 2 – p. 133, l. 14.) Even if we are to believe those guests actually patronized a local business based on his conversations, Mr. Martucci conceded he only had a “few” of those conversations. (Ex. N, Martucci Depo, p. 133, ll. 12–14.) Thus, viewed in the light most favorable to the City, it cannot be said guests visiting the Cabana

House substantially affected interstate commerce via patronizing local shops, much less accessing the free-of-charge Cabana House itself.

Because Defendants cannot factually demonstrate any substantial effect on interstate commerce, they resort to bootstrapping the alleged effects of the Project Ordinance and HOA Ordinance onto the Grand Strand tourism industry altogether. Defendants' imply this entire industry is jeopardized by the ordinances. According to Defendants, "tourism is big business in the Grand Strand that necessarily involves interstate commerce." (Defs. Memorandum in Support, p. 15.) That it may be, but Defendants have not established the Cabana House, a free-of-charge amenity, has contributed in any meaningful or substantial way to interstate commerce. A scientific approach in analyzing whether a cabana house has any effect on interstate commerce is to compare what effect the closure of the Cabana House in this case has had on Defendants' bottom line. Coincidentally, the consent order entered in January 2022 has allowed for direct comparison of Defendants' revenue when the Cabana House was operational and when the Cabana House was effectively closed pending this litigation. 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, in 2022, when the Cabana House was effectively closed for the RV resort guests, Defendants generated \$11,154,491.29, more than two million dollars (\$2 million+) more in revenue than when the Cabana House was offered as an amenity. Apparently, Defendants are generating more income when the Cabana House is closed than when it is open. To be sure, Defendants will likely claim the number of RV sites available for rent increased in the 2022 calendar year as compared to the 2021 year, thereby accounting for the increase in revenue. However, the same number of sites exist so far for the year 2023 as in 2022, and Defendants have generated more revenue in July 2023 year-to-date than in July 2022 year-to-date, again with the Cabana House being closed. The City

anticipates Defendants will contest these facts, but the facts support the City's arguments and, at minimum, create a genuine issue of material fact sufficient to deny Defendants' Renewed Motion.

In an attempt to turn the tables, Defendants allege the City "has a financial incentive to foster the type of restrictions found in Sections 23-2 and 23-22, as it relates to cabana houses, to ensure that visitors to the area decide to stay within the City's limits." (Defs. Memorandum in Support, p. 14.) This alleged "fact" constitutes another genuine and disputed issue of material fact. First, Defendants have not demonstrated any financial motivation in the legislative history of the ordinances. In fact, Defendants themselves have cited to the City's Rule 30(b)(6) testimony, which establishes that rather than a financial interest, the City has an interest in promoting a family-oriented beach and a dispersed development plan as opposed to a high-density, heavily-concentrated one:

The thinking that City Council had at the time was that [the City] wanted to be sure that the City did not form or develop in a manner similar to Miami where there were dozens and dozens of [] highrise oceanfront hotels and condo projects that would completely obscure the view of the ocean and enjoyment of the area as more of a family beach. And so they felt that one way to accomplish that would be to provide or promote a way for projects to be located off of the beach but still take advantage of that oceanfront amenity.

(Defs. Memorandum in Support, p. 17; Ex. B, City's Rule 30(b)(6) Depo. Tr., p. 32, ll. 16–25.)

The legislative history of the ordinances supports the City's position as well. (Ex. X, Request for City Council Consideration of Nov. 19, 2001.) Second, any alleged financial incentive is so tangential that the financial implications cannot be quantified and certainly have not been quantified by Defendants. Third, Defendants' arguments are backwards. As Defendants have shown, the City's economy is based on tourism and the City welcomes visitors and markets to prospective visitors from across the country; it is spurious to claim the City has an incentive in restricting tourism or engaging in economic protectionism.

Ultimately, Defendants have not proffered any facts demonstrating they are excluded from participating in the City's markets or from accessing the beaches up and down the Grand Strand. Two factual points are important here. First, Defendants never searched outside of the R-4 Resort Residential zoning district when trying to locate a beachfront access point to use for its RV resort guests; indeed, the Seller of the Property initiated the contact with Defendants and Defendants never looked back. (Ex. C, Defs. Rule 30(b)(6) Depo. Tr., p. 364, l. 10 – p. 365, l. 2.) However, the City employs a zoning district called RC, for Resort Commercial, which covers four stretches of oceanfront property. *See* North Myrtle Beach, S.C., Code of Ordinances ch. 23, art. II, § 23-27 (1984). Defendants have not demonstrated they are excluded from owning and operating a cabana house, club house, or other similar recreational establishment within the RC zoning district. Second, Defendants themselves acknowledge they can utilize the City's and Horry County's transportation networks for the benefit of their guests, because they have been offering complementary shuttle service to public beaches in lieu of shuttling its guests to the Cabana House during the pendency of the consent order. *See Frequently Asked Questions (FAQ)*, Carolina Pines RV Resort, Sun Outdoors, <https://www.sunoutdoors.com/south-carolina/sun-outdoors-myrtle-beach> (last visited July 30, 2023) (screenshot attached hereto as **Exhibit P**). Further, to the extent Defendants claim the Cabana House's capability of serving as a bathing and change of clothing facility makes it more valuable than just a public access point to the beach, the City already provides restroom and shower facilities to the public at multiple public beach access points. *See* Interactive Parking Map with Special Amenities Available, North Myrtle Beach, <https://nmb.maps.arcgis.com/apps/webappviewer/index.html?id=c6734faa50f84296a87495866d70a96e> (last visited July 30, 2023). The City *never* prevented or prohibited Defendants from using a public beach access point or a public parking lot for a drop-off or pickup point for their guests to

access and enjoy the miles of beaches the City offers. (Ex. C, Defs. Rule 30(b)(6) Depo. Tr., p. 205, l. 24 – p. 206, l. 3.) In fact, the City has specifically agreed with another homeowner’s association affiliated with an approved cabana house for said association to shuttle its members to a public parking location for drop-off and pickup of its guests accessing its cabana house and the adjacent beach. (Ex. Q, Barefoot HOA Depo Tr., p. 24, ll. 13–24; p. 31, l. 5 – p. 32, l. 19; Ex. R, Barefoot Agreement, p. 3.) Defendants are equally welcome to coordinate with the City to use a drop-off and pickup location for its RV resort guests wanting to access any of the numerous public beach access points, many with changing facilities. These facts completely rebut and undermine any argument by Defendants that they are excluded from the market.

Based on the foregoing, Defendants have not established the requisite factual record required to prove their use of the Cabana House specifically and the Project Ordinance and HOA Ordinance generally create a substantial effect on interstate commerce, especially given the reasonable alternatives they have at hand to access the City’s markets and beaches.

ARGUMENT

Defendants’ Renewed Motion suffers from the same fatal flaw as their original Motion: Defendants have not and cannot demonstrate any substantial effect, much less any effect, on interstate commerce sufficient to trigger the application of a Dormant Commerce Clause analysis. Defendants’ forty-five-page brief can be summarized by one of their telling arguments: “All the discovery the City seeks cannot change the literal terms of the Zoning Ordinance, which is where the constitutional violation lies.” (Defs. Memorandum in Support, p. 14.) By this line, Defendants show their hand. They want this Court to look no further than the Project Ordinance and HOA Ordinance themselves, rather than doing what this Court is first required to do under the law, i.e. to examine whether any effect, substantial or otherwise, exists on interstate commerce. Defendants

have fundamentally misapplied the Dormant Commerce Clause standard in doing so. The City respectfully submits Defendants have not established **any** effect on interstate commerce. To the extent Defendants have established a scintilla of an effect, then in the alternative, there exists a genuine issue of material fact on the degree of the substantiality in effect. Ultimately, this Court should deny Defendants' Renewed Motion, because the Project Ordinance and the HOA Ordinance do not Violate the Dormant Commerce Clause.

A. Policy Considerations Favor the City.

There are a number of policy considerations that should frame the Court's initial approach to this case, all of which favor the City's position. First, South Carolina courts **must** presume the constitutionality of municipal ordinances at the outset. *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) ("A municipal ordinance is a legislative enactment and is presumed to be constitutional.") (quoting *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1992)). This presumption is a strong one. *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965) ("There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application."). Therefore, "every presumption [must] be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution." *City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (quoting *Moseley v. Welch*, 209 S.C. 19, 26–27, 39 S.E.2d 133, 137 (1946)). "[T]he power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which [must] be exercised carefully and cautiously, **as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations.**" *McMaster*, 395 S.C. at

504–05, 719 S.E.2d at 662–63 (emphasis added) (quoting *Rush*, 246 S.C. at 276, 143 S.E.2d at 531).

Second, courts should be careful to avoid abuses that could arise from too strict enforcement of the Dormant Commerce Clause. The Supreme Court of the United States has held the Dormant Commerce Clause “is ***not a roving license*** for [] courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition.” *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007) (emphasis added) (finding it is “not the office of the Commerce Clause to control the decision of the voters” on how their local government operates). The Supreme Court further stated that although the Commerce Clause (and its negative implications) limit the ability of localities to regulate or otherwise burden the flow of interstate commerce, “it does not elevate free trade above all other values.” *Maine v. Taylor*, 477 U.S. 131, 151 (1986). “As long as a [municipality] does not needlessly obstruct interstate trade or attempt to ‘place itself in a position of economic isolation,’ it retains broad regulatory authority to protect the health and safety of its citizens” *Id.* (internal citation omitted). Similar to the presumption applied in South Carolina courts to local ordinances, the Supreme Court of the United States has also expressed courts “should be particularly hesitant to interfere with [local government] efforts under the guise of the Commerce Clause” when traditional local government functions are at issue. *United Haulers Ass’n, Inc.*, 550 U.S. at 343. Of course, “zoning and land use regulation remain peculiarly local government functions.” John J. Delaney et al., *Elements of the Planning Process—Local Legislative Body*, 1 Handling the Land Use Case § 1:6 n.1 (3d ed.).

Third, Defendants are seeking, in part, a facial challenge to the ordinances. (Defs. Memorandum in Support, p. 29.) However, “[a] facial challenge to a legislative Act is, of course,

the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Doe v. State*, 421 S.C. 490, 502, 808 S.E.2d 807, 813 (2017) (applying the Salerno standard to a statute); *State v. Legg*, 416 S.C. 9, 15, 785 S.E.2d 369, 372 (2016) (same). Fourth and finally, the summary judgment standard applies in this case, which requires “the evidence and its reasonable inferences [to] be viewed in the light most favorable to the nonmoving party.” *Baughman*, 306 S.C. at 114–15, 410 S.E.2d at 545.

Based on the foregoing, this Court should consider the presumptions in favor of the City, the warnings from the Supreme Court of the United States in abusing the Commerce Clause and by extension its negative implications, and the high burden imposed upon Defendants in proving their case on summary judgment. All of these policy considerations favor the City, and these considerations, in conjunction with the substantive reasons set forth herein, warrant denial of Defendants’ Renewed Motion.

B. The Project Ordinance and HOA Ordinance Do Not Implicate the Commerce Clause, Rendering the Dormant Commerce Clause Unavailing.

Defendants aver “this constitutional issue is not fact-dependent” due to their facial challenge. (Def. Memorandum in Support, p. 4, n.6.) However, in denying Defendants’ original Motion for Partial Summary Judgment, this Court previously held “a more comprehensive factual record is desirable to fairly determine the appropriate result.” (Ex. S, Court Order of Nov. 28, 2022.) Had this Court believed this issue was not fact-dependent, it would not have issued such an order. Further, it would run counter to the Court’s prior order to hold the Project Ordinance and HOA Ordinance are facially invalid now. By implication of the Court’s prior order, the Project Ordinance and the HOA Ordinance are *not* facially invalid, because the Court would have so ruled previously if they were and a more comprehensive factual record would not be necessary.

Clearly, the issue of whether interstate commerce is affected is a fact-dependent inquiry. To that end, the Supreme Court's Dormant Commerce Clause decisions show when interstate commerce is implicated. The resulting conclusion from these opinions is that the Project Ordinance and the HOA Ordinance do not implicate interstate commerce.

In *Wickard v. Filburn*, 317 U.S. 111 (1942), which the Supreme Court has recognized as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity,” *Lopez*, 514 U.S. at 560, the Court held the Agricultural Adjustment Act of 1938 was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices. The Court upheld a penalty imposed against a farmer for harvesting home-consumed wheat, because such home-consumed wheat would have a substantial influence on wheat prices and market conditions in the aggregate. *Id.* Similarly, in *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), an ordinance prevented the **selling** of **all** milk processed and bottled outside of a five-mile zone of the municipality. The Court struck down the ordinance due to the substantial effect the milk processing monopoly would have on interstate commerce. *See id.* What is evident here is that the courts should focus on whether an ordinance affects the price of a good or service **and** whether an ordinance completely excludes a market participant altogether from the marketplace.

In the handful of paragraphs where Defendants pay marginal attention to the substantial effects test, they principally rely on the case of *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564 (1997). (Defs. Memorandum in Support, pp. 25–29.) However, that case concerned a state tax (as opposed to a zoning ordinance) that applied regardless of where the plaintiff was located in the state, such that the plaintiff faced discrimination throughout the market. Again, the Supreme Court was focused on the complete exclusion from the marketplace, i.e. the

completely inability to operate without a discriminatory tax imposed.

In the case at bar, cabana houses are designed as special-exception amenities to be owned and utilized by homeowners' associations, which are non-profit, social welfare organizations. The zoning of a special-exception amenity is vastly different from regulations prohibiting the selling and consumption of goods, like wheat and milk, in an entire local market. Further, the ordinances at issue only apply in one zoning district, meaning Defendants do not face the same type of complete exclusion or discrimination as in *Camps Newfound*. Defendants self-selected purchase of a property in the R-4 zoning district, which is a **residential** district with more regulations on ownership and use, when they could have purchased property in other zoning districts, such as the Resort Commercial zoning district with beachfront access. Alternatively, Defendants could and still can coordinate with the City for a drop-off and pickup location near a public beach access point, with changing facilities if they so desire, without the need for even purchasing a physical structure. Defendants suggest interstate commerce is implicated here, as was found in *Camps Newfound*, because the RV resort, like the camp in *Camps Newfound*, offers a service akin to a hotel and advertises its resort nationwide, both of which generates the transportation of persons across state lines. (Def. Memorandum in Support, pp. 27–28.) However, Defendants are making an unsupported leap in logic. In *Camps Newfound*, the service offered, i.e. a camp, was being directly infringed upon by a discriminatory tax. However, Defendants face no such direct restriction on their service offered, i.e. the operation of their RV resort. Only a tangential amenity is being regulated here, rather than the entire operation like in *Camps Newfound*. With or without the Cabana House, Defendants will and have operated akin to a hotel and advertise nationwide. While their RV resort may implicate interstate commerce, their use of the Cabana House is separate

and distinct and Defendants have not shown how the Cabana House itself and the ordinances at issue implicate interstate commerce.

The critical inquiry is whether the two ordinances at issue substantially affect interstate commerce, not whether the RV resort implicates interstate commerce. As set forth more fully above in Section H of the factual background portion of this Memorandum, it is undisputed Defendants never generated any revenue from this free-of-charge amenity. Further, Defendants have not demonstrated any commerce conducted by visitors to the Cabana House in its vicinity. The best way to assess whether any interstate commerce is affected is to see if there has been any effect on Defendants' bottom line. As stated above, 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, in 2022, when the Cabana House was effectively closed for the RV resort guests, Defendants generated \$11,154,491.29, more than two million dollars (\$2 million+) more in revenue than when the Cabana House was offered as an amenity. Defendants are generating *more* income when the Cabana House is closed than when it is open. Defendants have not presented any facts demonstrating their inability to own and operate a cabana house has in any way affected interstate commerce. Further, they are not completely excluded from the marketplace like in *Dean Milk* or in *Camps Newfound*.

Defendants have not and cannot provide to this Court any case law in which a zoning ordinance like the one at bar was held to the stricter standard of the Dormant Commerce Clause. The nature of municipal zoning is extremely important context in this case, which in-and-of-itself distinguishes this case from all of the cases cited by Defendants, which do not concern zoning. In fact, in the case of *Texas Manufactured Housing Association, Inc. v. City of La Porte*, 974 F. Supp. 602, 612 (S.D. Tex. 1996), the federal district court noted that the plaintiff had cited "to no cases

in which stricter scrutiny under the Commerce Clause was applied to a zoning ordinance” and held definitively: “This Court declines to be the first.” In *Texas Manufactured Housing*, the plaintiff brought a constitutional challenge a municipal zoning ordinance that excluded manufactured homes from R-1 residential zoning districts. *Id.* at 602–05. Notably, manufactured homes were not excluded in other residential zoning districts. *See id.* at 610–11. The federal district court found stricter scrutiny under the Dormant Commerce Clause was inapplicable, because any potential effect on interstate commerce was incidental and the zoning ordinance was evenhanded. *Id.* at 608–14.

Likewise, in *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987 (E.D. Cal. 2006), the plaintiff brought a constitutional challenge to a municipal zoning ordinance that prohibited the development of discount superstores containing a full service grocery department. The federal district court held:

[The] Ordinance does not erect barriers against interstate commerce. The Ordinance prevents any retailer, whether in-state or out-of-state, from establishing the discount superstore marketing format in [the city]. This *leaves the market open to all* local or foreign retailers of all local or foreign products, except in the discount superstore format. The Commerce Clause does *not* protect the particular structure or methods of operation of a retail market. Nor does it give an interstate business the right to conduct its business in what it considers the most efficient manner, for the Constitution protects the interstate market, not particular interstate firms.

The Ordinance does not discriminate against interstate commerce because any retailer can locate and do business in [the city], with any employees or managers, offering any products, except in the legislatively defined discount superstore format. *There is no constitutional right to do business in a retailer’s optimally profitable store configuration*, if the resulting operation burdens environmental, traffic-pattern, economic-viability, and land-use-planning interests of the host municipality. There is no suggestion any out-of-state retailer cannot successfully do business marketing out-of-state goods in [the city] if it is not permitted to do so as a discount superstore.

Id. at 1012 (emphasis added) (internal citations and quotation marks omitted). Similarly, the Dormant Commerce Clause does not confer on Defendants a constitutional right to own and operate a cabana house in the City’s R-4 residential zoning district, when the remainder of the market is available to Defendants and/or when they are able to use public parking and beach access points to shuttle guests to and from the coastline. Both *Texas Manufactured Housing* and *Turlock* are more apt comparisons with the case at bar, because they both deal with zoning ordinances, unlike *Camps Newfound*. Any effect on interstate commerce here, if any, is purely incidental and the ordinances are constitutionally sound. *See Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1244–45 (11th Cir. 2012) (holding a local law is not discriminatory “where it (1) has incidental negative effects on *some* (but not all) out-of-state market participants and (2) does not reduce or curtail access to interstate markets”) (emphasis in original) (citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978)).

Context matters. “Zoning is a matter of particular importance to state and local governments. As a result, [] courts have traditionally been somewhat hesitant to interfere in the zoning process.” *Randy’s Sanitation, Inc. v. Wright Cnty., Minn.*, 65 F. Supp. 2d 1017, 1029 (D. Minn. 1999) (citing *Night Clubs, Inc. v. City of Ft. Smith*, 163 F.3d 475, 479 (8th Cir. 1998)); *see also Pomponio v. Fauquier Cnty. Bd. of Sup’rs*, 21 F.3d 1319, 1327 (4th Cir. 1994) (“We also have reiterated that state and local zoning and land use law is particularly the province of the State and that federal courts should be wary of intervening in that area in the ordinary case.”). Admittedly, the Project Ordinance at issue recognizes projects within the City, which may create a distinction with projects outside of the City. But most, if not all, zoning regulations create inclusive and exclusive distinctions. After all, the basic purpose of zoning is to create different zones for land use and development for the benefit and general welfare of the community. *See*

North Myrtle Beach, S.C., Code of Ordinances ch. 23, art. II, § 23-1 (1984) (“[T]he general purposes of this chapter are to guide development 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”). Several courts have recognized the inherently discriminatory nature of zoning regulations. *See, e.g., Stuten v. Beebe*, 588 F.2d 560, 565 (6th Cir. 1978) (“All zoning plans have inherent within them a discrimination between the various land uses permitted thereunder.”); *Bay Area Addiction Rsch. & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 733 (9th Cir. 1999) (noting “the inherently discriminatory nature of zoning”); *Thai Meditation Ass’n of Alabama, Inc. v. City of Mobile, Alabama*, No. 1:16- CV-395-TFM-MU, 2019 WL 2250275, at *13 (S.D. Ala. May 24, 2019), *aff’d*, 980 F.3d 821 (11th Cir. 2020) (finding true that “zoning laws inherently distinguish between uses and necessarily involve selection and categorization”); *Church of Scientology of Georgia, Inc. v. City of Sandy Springs, Ga.*, 843 F. Supp. 2d 1328, 1371 (N.D. Ga. 2012) (same) (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234 (11th Cir. 2004)).

Therefore, to take Defendants’ assertions to their logical conclusion would mean to view all zoning distinctions and classifications as facially discriminatory, rendering all zoning plans violative of the Dormant Commerce Clause. For example, there is a stretch of oceanfront property in the City classified as Single-Family Residential, otherwise known as R-1. Defendants are not allowed to operate an RV resort in this zoning district (or a cabana house for that matter). Does that violate the Dormant Commerce Clause? Of course not. But Defendants’ arguments suggest they should be allowed to own and use property however they see fit, wherever they see fit, which is not constitutionally sound. *See Turlock*, 483 F. Supp. 2d at 1012; *see also Randy’s Sanitation*, 65 F. Supp. 2d at 1029 (“Randy’s asks this Court, on the basis of two zoning decisions, to declare

that those decisions [denying him a conditional use permit] had the ‘effect of discriminating against interstate commerce.’ Those decisions may have had such an effect, but no more so than would any commonplace zoning decision preventing a distributor from building a distribution warehouse in a residential zone.”).⁹ Consequently, it is not an exaggeration to state a ruling in favor of Defendants would create large-scale ramifications for zoning plans across the State of South Carolina and the rest of the United States. Every commonplace zoning requirement that allows certain uses in certain areas and other uses in other areas would be suspect under the Dormant Commerce Clause. This Court should avoid this possibility and reject Defendants’ arguments.

In sum, the City has not placed itself in economic isolation. *See Maine v. Taylor*, 477 U.S. 131, 151 (1986) (“As long as a [municipality] does not needlessly obstruct interstate trade or attempt to ‘place itself in a position of economic isolation,’ it retains broad regulatory authority to protect the health and safety of its citizens”) (internal citation omitted). Because it relies on the tourism industry, the City has no incentive to discriminate against interstate commerce. Instead, it appropriately uses its broad zoning authority to design a development plan that maintains a family-oriented and dispersed community, rather than a high-rise, commercialized beachfront. *See id.* Based on the foregoing, Defendants’ Renewed Motion must be denied.

⁹ Another case—*McBurney v. Young*, 667 F.3d 454 (4th Cir. 2012), *aff’d*, 569 U.S. 221 (2013)—is instructive as well. *McBurney* concerned the Virginia Freedom of Information Act (“VFOIA”), which limited access rights to public records to citizens of the Commonwealth of Virginia. The Fourth Circuit opinion, which was affirmed by the Supreme Court, held the *Pike* balancing test was more appropriate, even though the statute facially discriminated against non-citizens, because interstate commerce was not implicated. *Id.* at 468–70. The Fourth Circuit also noted “[n]othing in VFOIA burdens ‘the flow of interstate commerce.’ At most, it prevents [plaintiff] from using his ‘chosen way of doing business,’ but it does not prevent him from engaging in business in the Commonwealth.” *Id.*

C. In the Alternative, the Ordinances Advance Legitimate Local Purposes.

Assuming *arguendo* a substantial effect on interstate commerce exists, the ordinances at issue nevertheless survive constitutional scrutiny, because they advance “legitimate local purpose[s] that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Oregon Waste Sys., Inc. v. Dep’t of Env’t Quality of State of Or.*, 511 U.S. 93, 101 (1994)).

There are multiple legitimate reasons for restricting the ownership and use of cabana houses in the R-4 district to projects and homeowners’ associations within the City. First, homeowners’ associations are effectively quasi-governmental entities. *Woodward v. Bd. Of Directors of Tamarron Ass’n of Condo. Owners, Inc.*, 155 P.3d 621, 624 (Colo. App. 2007) (noting the “quasi-governmental functions” homeowners’ association serve); *Chantiles v. Lake Forest II Master Homeowners Assn.*, 37 Cal. App. 4th 914, 922, 45 Cal. Rptr. 2d 1, 5 (1995) (citing *Cohen v. Kite Hill Cmty. Assn.*, 142 Cal. App. 3d 642, 651, 191 Cal. Rptr. 209, 214 (Ct. App. 1983)). As such, these entities are more responsive to the City, as evidenced by the deposition testimony from the City Manager, Mr. Mahaney, and by the RV resort’s manager, Mr. Bittner, ignoring Mr. Mahaney’s attempts at informal resolution. (Ex. T, Mike Mahaney Depo. Tr., p. 8, l. 3 – p. 9, l. 1.) Defendants suggest this testimony is conclusory, but we have direct evidence in this case of the lack of responsiveness by Defendants in responding to the City’s inquiries. Further, Defendants contend their “substantial economic resources are relevant,” because they have the means to maintain a high-end facility. (Def’s. Memorandum in Support, p. 11, n.22.) However, Defendant’s substantial economic resources work in the exact opposite manner. Rather than being used for the good of their neighbors, Defendants’ resources make them immune from compliance, because, as mentioned previously, they will simply view a five-hundred-dollar (\$500) fine as the cost of doing business in order to host sunrise weddings and late night events with loud music. Ultimately,

homeowners' associations are more responsive to their similarly-situated neighbors rather than a commercial project that has little connection to the City or its neighbors, which supports homogenous development and continuity in the R-4 district.

Second, there are quality of life issues created when shuttling hundreds of RV resort guests from outside the City to a fairly small cabana house sitting between two condominium complexes. And point in fact, Defendants were shuttling hundreds of guests to the Cabana House during the summer of 2021. (Ex. U, Cabana House Log.) Mr. Mahaney identified several, including traffic congestion, shuttle buses backing out and/or conducting drop-off and pick-up near a four-lane highway, noise from the pool deck, and late night activities. (Ex. T, Mike Mahaney Depo. Tr., p. 33, ll. 3–5; p. 39, ll. 5–13; p. 51, l. 24 – p. 52, l. 2.) The City's Code of Ordinances themselves demonstrate density issues, the maintenance of order, adequate transportation nodes, and the general welfare are all purposes in the creation of the zoning classifications as well. North Myrtle Beach, S.C., Code of Ordinances ch. 23, art. II, § 23-1(2), (3), (5), (6) & (8) (1984). The City certainly has legitimate concerns in hundreds of vacationers filtering through a small access node in the immediate vicinity and proximity to a residential neighborhood zone when the City has already provided public access points to the beach that can accept and withstand mass public access.

Third, in *Texas Manufactured Housing*, the federal district court found the “preservation of property values” as a legitimate local interest. 974 F. Supp. at 612. Notably, three City employees and the Rule 30(b)(6) designee testified to the depreciation of property value being a concern of theirs relative to the ordinances at issue in this case. (Ex. T, Mike Mahaney Depo. Tr., p. 30, ll. 9–23; Ex. V, James Wood Depo. Tr., p. 50, ll. 22–25; Ex. W, Ben Caldwell Depo. Tr., p. 46, ll. 10–19; Ex. B, City's Rule 30(b)(6) Depo. Tr., p. 125, ll. 1–13.) Defendants contend the City

has not shown any impact on property values for Sea Cloisters. (Defs. Memorandum in Support, p. 43.) However, Mr. Shortle, as the Sea Cloisters' Rule 30(b)(6) designee, expressly testified that if Defendants are not prohibited from using the Cabana House, then it is "drastically going to affect our [] property value and quality of life." (Ex. I, Sea Cloisters Rule 30(b)(6) Depo. Tr., p. 60, l. 17 – p. 61, l. 9.) Further, the City anticipates at the trial of this matter that other property owners in Sea Cloisters will testify as to the impact on their property values as well. *See S.C. State Highway Dep't v. Wilson*, 254 S.C. 360, 370, 175 S.E.2d 391, 397 (1970) (holding a property owner "who is familiar with his property and its value, is allowed to give his or her estimate as to the value of the land or damages thereto"). Thus, Defendants' assertions are belied by the existing record and will likely be further rebutted with additional evidence at trial.

These rationales are not exhaustive either. Further discovery and a trial in this matter may elicit additional legitimate municipal interests. Based on the foregoing, the City's legitimate interests are sufficient to survive even the strictest constitutional scrutiny.

CONCLUSION

Based on the foregoing, this Court should deny Defendants' Renewed Motion. First, the ownership and use of special exception cabana houses in the R-4 district do not substantially affect interstate commerce, rendering the Dormant Commerce Clause analysis flawed from the outset. Assuming *arguendo* interstate commerce is implicated, there are only indirect or incidental effects on interstate commerce, rendering the *Pike* balancing test more appropriate. However, even under a strict scrutiny analysis, the local benefits and legitimate purposes underlying the Project Ordinance and HOA Ordinance outweigh any alleged (and to date unproven) burden on interstate commerce. The City respectfully requests this Court to deny Defendants' Renewed Motion and grant such further relief as this Court deems just and proper.

Respectfully submitted,

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August 2, 2023
Charleston, South Carolina

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 TRS
CAROLINA PINES RV, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2021-CP-26-07489

**PLAINTIFF’S BENCH BRIEF
REGARDING DEFENDANTS’
DORMANT COMMERCE CLAUSE
COUNTERCLAIM**

Plaintiff, the City of North Myrtle Beach (the “City” or “Plaintiff”), by and through its undersigned counsel, hereby submits this bench brief regarding the Dormant Commerce Clause Counterclaim asserted by Defendants Sun TRS Ocean Club, LLC, Sun TRS Carolina Pines, LLC, and Sun TRS Carolina Pines RV, LLC (collectively, “Defendants”). For the reasons set forth below, Defendants’ Dormant Commerce Clause Counterclaim fails as a matter of law.

I. RELEVANT FACTUAL BACKGROUND

1. 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.

2. 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) (emphasis added).

3. 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).

4. Cabana houses, as special exceptions, are subject to additional use restrictions within the City's Code of Ordinances, including:

1. That a *homeowner's association* shall have been established for the project and a *maintenance agreement* has been submitted to the planning department.

. . .

3. That the use of the house be *limited to bathing and change of clothing facilities*, and occasional use as guest quarters and other similar uses.

4. That the special exception will be in *substantial harmony with the area in which it is to be located*.

5. That the special exception will *not be injurious to the adjoining property*.

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

5. This action concerns certain property, commonly referred to and designated as Lot 1, Block 18-A, Tilghman, located in the City of North Myrtle Beach (the "**Property**"), which is subject to the City's Code of Ordinances.

6. A cabana house ("**Cabana House**") is located on the Property, which is located at 1814 North Ocean Boulevard, North Myrtle Beach 29582.

7. 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.

8. 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 and remains the owner of the Property.

9. Sun Carolina Pines RV, LLC is the owner and operator of a recreational vehicle (“RV”) resort located at 5800 Highway 90, Conway, South Carolina 29526.

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

11. 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.

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

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

14. 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.

15. 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.

16. 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.

17. Despite this knowledge, Defendants did not 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.

18. To date, Defendants have never applied 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.

19. 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. It is clear from the record the ordinances at issue were meant to provide for noncommercial amenity use that does not have to do with commerce or any sort of economic enterprise.

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

21. Further, the City does not 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 location within the City for beach access in the summer months of 2023.

22. Defendants' number of reservations and revenue generated from their RV resort have only increased from 2021 to 2022 to 2023, despite the closure of the Cabana House due to the consent order entered on January 11, 2022. Thus, any link between the Cabana House and an effect on interstate commerce is extremely attenuated, if there is any link at all.

II. RELEVANT LAW AND ARGUMENT

A. Policy Considerations Favor the City.

23. First, South Carolina courts ***must*** presume the constitutionality of municipal ordinances at the outset. *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) ("A municipal ordinance is a legislative enactment and is presumed to be constitutional.") (quoting *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1992)). This

presumption is a strong one. *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965) (“There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application.”). Therefore, “every presumption [must] be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution.” *City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (quoting *Moseley v. Welch*, 209 S.C. 19, 26–27, 39 S.E.2d 133, 137 (1946)). “[T]he power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which [must] be exercised carefully and cautiously, **as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations.**” *McMaster*, 395 S.C. at 504–05, 719 S.E.2d at 662–63 (emphasis added) (quoting *Rush*, 246 S.C. at 276, 143 S.E.2d at 531).

24. Second, courts should be careful to avoid abuses that could arise from too strict enforcement of the Dormant Commerce Clause. The Supreme Court of the United States has held the Dormant Commerce Clause “is **not a roving license** for [] courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition.” *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007) (emphasis added) (finding it is “not the office of the Commerce Clause to control the decision of the voters” on how their local government operates). The Supreme Court further stated that although the Commerce Clause (and its negative implications) limit the ability of localities to regulate or otherwise burden the flow of interstate commerce, “it does not elevate free trade above all other values.” *Maine v. Taylor*, 477 U.S. 131, 151 (1986). “As long as a [municipality] does not needlessly obstruct interstate trade or attempt to ‘place itself in a position

of economic isolation,’ it retains broad regulatory authority to protect the health and safety of its citizens” *Id.* (internal citation omitted). Similar to the presumption applied in South Carolina courts to local ordinances, the Supreme Court of the United States has also expressed courts “should be particularly hesitant to interfere with [local government] efforts under the guise of the Commerce Clause” when traditional local government functions are at issue. *United Haulers Ass’n, Inc.*, 550 U.S. at 343. Of course, “zoning and land use regulation remain peculiarly local government functions.” John J. Delaney et al., *Elements of the Planning Process—Local Legislative Body*, 1 *Handling the Land Use Case* § 1:6 n.1 (3d ed.). As such, the Supreme Court of the United States “has consistently held that a state’s power to regulate commerce is at its zenith in areas traditionally of local concern” such as zoning. *See Amisub of S.C., Inc. v. S.C. Dep’t of Health & Env’t Control*, 424 S.C. 80, 90, 817 S.E.2d 633, 638 (Ct. App. 2018) (citation omitted).

25. Third, Defendants are seeking, in part, a facial challenge to the ordinances. (Defs. Memorandum in Support, p. 29.) However, “[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Doe v. State*, 421 S.C. 490, 502, 808 S.E.2d 807, 813 (2017) (applying the Salerno standard to a statute); *State v. Legg*, 416 S.C. 9, 15, 785 S.E.2d 369, 372 (2016) (same).

26. Lastly, the recent case of *Ani Creation, Inc. v. City of Myrtle Beach Board of Zoning Appeals*, 440 S.C. 266, 890 S.E.2d 748 (2023), is instructive. In that case, nine smoke shops and tobacco stores had a conforming use prior to the city passing a zoning overlay district that prohibited the operation of such stores in the city’s downtown. *Id.* at 274, 890 S.E.2d at 752. The Supreme Court of South Carolina explained at great length the presumption of the constitutionality of municipal ordinances and that courts should not generally overturn or disturb them, especially

when they are “fairly debatable.” *Id.* at 278–79, 890 S.E.2d at 754 (citing *Rushing v. City of Greenville*, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975) (“The Court will not overturn the action of the City if the decision is fairly debatable because the City's action is presumed to have been a valid exercise of power and it is not the prerogative of the Court to pass upon the wisdom of the decision.”)). Despite using the property in conformity with a zoning plan that was subsequently changed, the Supreme Court nevertheless denied all of the stores’ constitutional challenges. Although the Dormant Commerce Clause was not at issue in that case, it is revealing of how much deference is given to municipalities in enacting zoning plans. How much more so in the case at bar when the ordinances preexisted Defendants’ purchase of the Property by over two decades.

B. Commerce Clause and Its Negative Implications, Generally

27. The Supreme Court of the United States has identified “three broad categories of activity that Congress may regulate under its commerce power.” *United States v. Lopez*, 514 U.S. 549, 558 (1995). “First, Congress may regulate the use of the channels of interstate commerce.” *Id.* “Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.” *Id.* “Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.” *Id.* at 558–59 (internal citations omitted).

28. “Besides being an affirmative grant of power, the Commerce Clause also has a ‘negative sweep’ that restricts the power of states to regulate interstate trade.” *Medigen of Kentucky, Inc. v. Pub. Serv. Comm’n of W. Virginia*, 985 F.2d 164, 165–66 (4th Cir. 1993) (citing *Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298, 309 (1992), *overruled on other grounds by S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018)). “[T]he negative implications of the Commerce

Clause, often referred to as the Dormant Commerce Clause, prohibit state action that unduly burdens interstate commerce.” *Travelscape, LLC v. S.C. Dep’t of Revenue*, 391 S.C. 89, 104, 705 S.E.2d 28, 36 (2011) (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997)).

29. There is a two-step analysis to the Dormant Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578–79 (1986).

C. Initial Burden on Defendants

30. Before turning to the two-step analysis to the Dormant Commerce Clause, there is an initial burden a party must prove in order to sustain a challenger under the Dormant Commerce Clause. The initial determinations are (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.”). These initial determinations of whether any effect on interstate commerce exists, and if so, whether the effect is substantial, are factual ones in which the moving party bears the burden.

31. The factors used in order to make this assessment are derived from *Lopez*, cited above, as well as *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).

32. Defendants cannot meet their burden under this framework based on the aforementioned facts.

33. The first *Lopez-Morrison* factor favors the City. The critical inquiry is whether the two ordinances at issue substantially affect interstate commerce, not whether the RV resort implicates interstate commerce or whether the RV resort participates in the overarching tourism market for the Grand Strand area. As set forth above, it is undisputed Defendants never generated any revenue from this free-of-charge amenity. Further, Defendants have not demonstrated any commerce conducted by visitors to the Cabana House in its vicinity. The Project Ordinance and HOA Ordinance merely regulate a special exception amenity rather than a commercial activity. Indeed, the special exception here was designed explicitly for *noncommercial* activity. Therefore, the first *Lopez-Morrison* factor weighs in favor of the City.

34. In considering the second *Lopez-Morrison* factor, the City created an express jurisdictional element to limit the ordinances reach: the ordinances only apply in the R-4 zoning district, meaning the ordinances are limited in reach and the Defendants are not completely excluded from the market.

35. In *Wickard v. Filburn*, 317 U.S. 111 (1942), which the Supreme Court has recognized as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity,” *Lopez*, 514 U.S. at 560, the Court held the Agricultural Adjustment Act of 1938 was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices. The Court upheld a penalty

imposed against a farmer for harvesting home-consumed wheat, because such home-consumed wheat would have a substantial influence on wheat prices and market conditions in the aggregate.

Id.

36. Similarly, in *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), an ordinance prevented the **selling** of **all** milk processed and bottled outside of a five-mile zone of the municipality. The Court struck down the ordinance due to the substantial effect the milk processing monopoly would have on interstate commerce. *See id.* What is evident here is that the courts should focus on whether an ordinance affects the price of a good or service **and** whether an ordinance completely excludes a market participant altogether from the marketplace.

37. Defendants also rely on the case of *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564 (1997). However, that case concerned a state tax (as opposed to a zoning ordinance) that applied regardless of where the plaintiff was located in the state, such that the plaintiff faced discrimination throughout the market. Again, the Supreme Court was focused on the complete exclusion from the marketplace, i.e. the complete inability to operate without a discriminatory tax imposed.

38. In the case at bar, cabana houses are designed as special exception amenities to be owned and utilized by homeowners' associations, which are non-profit, social welfare organizations. The zoning of a special exception amenity is vastly different from regulations prohibiting the selling and consumption of goods, like wheat and milk, in an entire local market. Further, the ordinances at issue only apply in one zoning district, meaning Defendants do not face the same type of complete exclusion or discrimination as in *Camps Newfound*. Defendants self-selected purchase of a property in the R-4 zoning district, which is a **residential** district with more regulations on ownership and use, when they could have purchased property in other zoning districts, such as the

Resort Commercial zoning district with beachfront access. Alternatively, Defendants could and still can coordinate with the City for a drop-off and pickup location near a public beach access point, with changing facilities if they so desire, without the need for even purchasing a physical structure.

39. Defendants suggest interstate commerce is implicated here, as was found in *Camps Newfound*, because the RV resort, like the camp in *Camps Newfound*, offers a service akin to a hotel and advertises its resort nationwide, both of which generates the transportation of persons across state lines. However, Defendants are making an unsupported leap in logic. In *Camps Newfound*, the service offered, i.e. a camp, was being directly infringed upon by a discriminatory tax. However, Defendants face no such direct restriction on their service offered, i.e. the operation of their RV resort. Only a tangential amenity is being regulated here, rather than the entire operation like in *Camps Newfound*. With or without the Cabana House, Defendants will and have operated akin to a hotel and advertise nationwide. While their RV resort may implicate interstate commerce, their use of the Cabana House is separate and distinct and Defendants cannot establish how the Cabana House itself and the ordinances at issue implicate interstate commerce.

40. Regarding the third *Lopez-Morrison* factor, 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. It is clear from the record the ordinances at issue were meant to provide for noncommercial amenity use that does not have to do with commerce or any sort of economic enterprise.

41. In considering the fourth *Lopez-Morrison* factor, and tangentially the first *Lopez-Morrison* factor as well, it is telling whether there has been any effect on Defendants' bottom line. 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, in 2022, when the Cabana House was effectively closed for the RV resort guests, Defendants generated \$11,154,491.29, more than two million dollars (\$2 million+) more in revenue than when the Cabana House was offered as an amenity. Defendants are generating *more* income when the Cabana House is closed than when it is open. Defendants have not presented any facts demonstrating their inability to own and operate a cabana house has in any way affected interstate commerce. Further, they are not completely excluded from the marketplace like in *Dean Milk* or in *Camps Newfound*.

D. Two-Tier Analysis

42. The first-tier approach states when a law “directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests,” the law will generally be struck down. *Id.* at 579. However, the law can still survive if it “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Oregon Waste Sys., Inc. v. Dep’t of Env’t Quality of State of Or.*, 511 U.S. 93, 101 (1994)). Alternatively, when a law “has only indirect effects on interstate commerce and regulates evenhandedly, [courts] have examined whether the [governing body’s] interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.” *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The latter test, i.e. the second-tier approach, is often known as the *Pike* balancing test.

43. Defendants cannot provide to this Court any case law in which a zoning ordinance like the one at bar was held to the stricter standard of the Dormant Commerce Clause. The nature of municipal zoning is extremely important context in this case, which in-and-of-itself distinguishes

this case from all of the cases cited by Defendants, which do not concern zoning. In the case of *Texas Manufactured Housing Association, Inc. v. City of La Porte*, 974 F. Supp. 602 (S.D. Tex. 1996), the plaintiff brought a constitutional challenge a municipal zoning ordinance that excluded manufactured homes from R-1 residential zoning districts. *Id.* at 602–05. Notably, manufactured homes were not excluded in other residential zoning districts. *See id.* at 610–11. The federal district court found stricter scrutiny under the Dormant Commerce Clause was inapplicable, because any potential effect on interstate commerce was incidental and the zoning ordinance was evenhanded. *Id.* at 608–14. The attenuation was important in *Texas Manufactured Housing* and so it should be in this case as well.

44. In *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987 (E.D. Cal. 2006), the plaintiff brought a constitutional challenge to a municipal zoning ordinance that prohibited the development of discount superstores containing a full service grocery department. The federal district court held:

[The] Ordinance does not erect barriers against interstate commerce. The Ordinance prevents any retailer, whether in-state or out-of-state, from establishing the discount superstore marketing format in [the city]. This ***leaves the market open to all*** local or foreign retailers of all local or foreign products, except in the discount superstore format. The Commerce Clause does ***not*** protect the particular structure or methods of operation of a retail market. Nor does it give an interstate business the right to conduct its business in what it considers the most efficient manner, for the Constitution protects the interstate market, not particular interstate firms.

The Ordinance does not discriminate against interstate commerce because any retailer can locate and do business in [the city], with any employees or managers, offering any products, except in the legislatively defined discount superstore format. ***There is no constitutional right to do business in a retailer's optimally profitable store configuration***, if the resulting operation burdens environmental, traffic-pattern, economic-viability, and land-use-planning interests of the host municipality. There is no suggestion any out-of-state retailer cannot successfully do business marketing

out-of-state goods in [the city] if it is not permitted to do so as a discount superstore.

Id. at 1012 (emphasis added) (internal citations and quotation marks omitted).

45. Similarly, the Dormant Commerce Clause does not confer on Defendants a constitutional right to own and operate a cabana house in the City’s R-4 residential zoning district, when the remainder of the market is available to Defendants and/or when they are able to use public parking and beach access points to shuttle guests to and from the coastline. Both *Texas Manufactured Housing* and *Turlock* are more apt comparisons with the case at bar, because they both deal with zoning ordinances, unlike *Camps Newfound*. Any effect on interstate commerce here, if any, is purely incidental and the ordinances are constitutionally sound. *See Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1244–45 (11th Cir. 2012) (holding a local law is not discriminatory “where it (1) has incidental negative effects on *some* (but not all) out-of-state market participants and (2) does not reduce or curtail access to interstate markets”) (emphasis in original) (citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978)).

46. Context matters. “Zoning is a matter of particular importance to state and local governments. As a result, [] courts have traditionally been somewhat hesitant to interfere in the zoning process.” *Randy’s Sanitation, Inc. v. Wright Cnty., Minn.*, 65 F. Supp. 2d 1017, 1029 (D. Minn. 1999) (citing *Night Clubs, Inc. v. City of Ft. Smith*, 163 F.3d 475, 479 (8th Cir. 1998)); *see also Pomponio v. Fauquier Cnty. Bd. of Sup’rs*, 21 F.3d 1319, 1327 (4th Cir. 1994) (“We also have reiterated that state and local zoning and land use law is particularly the province of the State and that federal courts should be wary of intervening in that area in the ordinary case.”). The Project Ordinance at issue recognizes projects within the City, which may create a distinction with projects outside of the City. But most, if not all, zoning regulations create inclusive and exclusive distinctions. After all, the basic purpose of zoning is to create different zones for land use and

development for the benefit and general welfare of the community. *See* North Myrtle Beach, S.C., Code of Ordinances ch. 23, art. II, § 23-1 (1984) (“[T]he general purposes of this chapter are to guide development 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”).

47. Several courts have recognized the inherently discriminatory nature of zoning regulations. *See, e.g., Stuten v. Beebe*, 588 F.2d 560, 565 (6th Cir. 1978) (“All zoning plans have inherent within them a discrimination between the various land uses permitted thereunder.”); *Bay Area Addiction Rsch. & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 733 (9th Cir. 1999) (noting “the inherently discriminatory nature of zoning”); *Thai Meditation Ass’n of Alabama, Inc. v. City of Mobile, Alabama*, No. 1:16- CV-395-TFM-MU, 2019 WL 2250275, at *13 (S.D. Ala. May 24, 2019), *aff’d*, 980 F.3d 821 (11th Cir. 2020) (finding true that “zoning laws inherently distinguish between uses and necessarily involve selection and categorization”); *Church of Scientology of Georgia, Inc. v. City of Sandy Springs, Ga.*, 843 F. Supp. 2d 1328, 1371 (N.D. Ga. 2012) (same) (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234 (11th Cir. 2004)).

48. Therefore, to take Defendants’ assertions to their logical conclusion would mean to view all zoning distinctions and classifications as facially discriminatory, rendering all zoning plans violative of the Dormant Commerce Clause. For example, there is a stretch of oceanfront property in the City classified as Single-Family Residential, otherwise known as R-1. Defendants are not allowed to operate an RV resort in this zoning district (or a cabana house for that matter). Does that violate the Dormant Commerce Clause? Of course not. But Defendants’ arguments suggest they should be allowed to own and use property however they see fit, wherever they see fit, which is not constitutionally sound. *See Turlock*, 483 F. Supp. 2d at 1012; *see also Randy’s Sanitation*,

65 F. Supp. 2d at 1029 (“Randy’s asks this Court, on the basis of two zoning decisions, to declare that those decisions [denying him a conditional use permit] had the ‘effect of discriminating against interstate commerce.’ Those decisions may have had such an effect, but no more so than would any commonplace zoning decision preventing a distributor from building a distribution warehouse in a residential zone.”).¹

49. In fact, Defendants’ arguments were essentially attempted (unsuccessfully) in the case of *Flava Works, Inc. v. City of Miami, Fla.*, 800 F. Supp. 2d 1182 (S.D. Fla. 2011). In *Flava Works*, the City of Miami prohibited the operation of an adult entertainment business in a R-4 residential district, which was challenged on Dormant Commerce Clause grounds. The court held the following:

The City has a local public interest in preserving residential areas free of the operation of businesses to ensure safety, and prevent traffic, congestion, overcrowding, or parking concerns, to list a few reasons. Any effects on interstate commerce as a result of this ordinance are, at most, incidental. Thus, the ordinance does not run afoul of the Dormant Commerce Clause.

Id. at 1193.

50. It is not an exaggeration to state a ruling in favor of Defendants would create large-scale ramifications for zoning plans across the State of South Carolina and the rest of the United States. Every commonplace zoning requirement that allows certain uses in certain areas and other uses in other areas would be suspect under the Dormant Commerce Clause. This Court should avoid this

¹ Another case—*McBurney v. Young*, 667 F.3d 454 (4th Cir. 2012), *aff’d*, 569 U.S. 221 (2013)—is instructive as well. *McBurney* concerned the Virginia Freedom of Information Act (“VFOIA”), which limited access rights to public records to citizens of the Commonwealth of Virginia. The Fourth Circuit opinion, which was affirmed by the Supreme Court, held the *Pike* balancing test was more appropriate, even though the statute facially discriminated against non-citizens, because interstate commerce was not implicated. *Id.* at 468–70. The Fourth Circuit also noted “[n]othing in VFOIA burdens ‘the flow of interstate commerce.’ At most, it prevents [plaintiff] from using his ‘chosen way of doing business,’ but it does not prevent him from engaging in business in the Commonwealth.” *Id.*

possibility and reject Defendants’ arguments. Otherwise, adult entertainment businesses may start popping up next to elementary schools.

51. In sum, the City has not placed itself in economic isolation. *See Maine v. Taylor*, 477 U.S. 131, 151 (1986) (“As long as a [municipality] does not needlessly obstruct interstate trade or attempt to ‘place itself in a position of economic isolation,’ it retains broad regulatory authority to protect the health and safety of its citizens”) (internal citation omitted). Because it relies on the tourism industry, the City has no incentive to discriminate against interstate commerce. Instead, it appropriately uses its broad zoning authority to design a development plan that maintains a family-oriented and dispersed community, rather than a high-rise, commercialized beachfront. *See id.* Based on the foregoing, Defendants’ Dormant Commerce Clause counterclaim must be dismissed.

D. Legitimate Local Purposes

52. Assuming *arguendo* a substantial effect on interstate commerce exists, the ordinances at issue nevertheless survive constitutional scrutiny, because they advance “legitimate local purpose[s] that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Oregon Waste Sys., Inc. v. Dep’t of Env’t Quality of State of Or.*, 511 U.S. 93, 101 (1994)).

53. There are multiple legitimate reasons for restricting the ownership and use of cabana houses in the R-4 district to projects and homeowners’ associations within the City.

54. First, homeowners’ associations are effectively quasi-governmental entities. *Woodward v. Bd. Of Directors of Tamarron Ass’n of Condo. Owners, Inc.*, 155 P.3d 621, 624 (Colo. App. 2007) (noting the “quasi-governmental functions” homeowners’ association serve); *Chantiles v. Lake Forest II Master Homeowners Assn.*, 37 Cal. App. 4th 914, 922, 45 Cal. Rptr. 2d 1, 5 (1995) (citing

Cohen v. Kite Hill Cmty. Assn., 142 Cal. App. 3d 642, 651, 191 Cal. Rptr. 209, 214 (Ct. App. 1983)). As such, these entities are more responsive to the City in the context of a residential zoning district and a special exception use that does not implicate a business license. This responsiveness concern is evidenced by the testimony from the City Manager, Mr. Mahaney, and by the RV resort's manager, Mr. Bittner, ignoring Mr. Mahaney's attempts at informal resolution. Further, to the extent Defendants contend their substantial economic resources are relevant, because they have the means to maintain a high-end facility, these substantial economic resources work in the exact opposite manner. Rather than being used for the good of their neighbors, Defendants' resources make them immune from compliance, because, they will simply view a five-hundred-dollar (\$500) fine as the cost of doing business in order to host sunrise weddings and late night events with loud music. Point in fact, Defendants' charged exactly \$500 for the rental cost of the Cabana House for certain events they hosted, while not charging any rental cost for facilities at their RV resort. Ultimately, homeowners' associations are more responsive to their similarly-situated neighbors rather than a commercial project that has little connection to the City or its neighbors, which supports homogenous development and continuity in the R-4 district.

55. Second, there are quality of life issues created when shuttling hundreds of RV resort guests from outside the City to a fairly small cabana house sitting between two condominium complexes. And point in fact, Defendants were shuttling hundreds of guests to the Cabana House during the summer of 2021. There are several issues that result from that intensity of use, including traffic congestion, shuttle buses backing out and/or conducting drop-off and pick-up near a four-lane highway, noise from the pool deck, potential for trespassing and altercations, and late night activities. The City's Code of Ordinances themselves demonstrate density issues, the maintenance of order, adequate transportation nodes, and the general welfare are all purposes in the creation of

the zoning classifications as well. North Myrtle Beach, S.C., Code of Ordinances ch. 23, art. II, § 23-1(2), (3), (5), (6) & (8) (1984). The City certainly has legitimate concerns in hundreds of vacationers filtering through a small access node in the immediate vicinity and proximity to a residential neighborhood zone when the City has already provided public access points to the beach that can accept and withstand mass public access.

56. Third, in *Texas Manufactured Housing*, the federal district court found the “preservation of property values” as a legitimate local interest. 974 F. Supp. at 612. Notably, three City employees and the Rule 30(b)(6) designee testified to the depreciation of property value being a concern of theirs relative to the ordinances at issue in this case. Defendants contend the City has not shown any impact on property values for Sea Cloisters. However, residents of Sea Cloisters expressly testified that if Defendants are not prohibited from using the Cabana House, then it is going to affect their property values and quality of life. *See S.C. State Highway Dep’t v. Wilson*, 254 S.C. 360, 370, 175 S.E.2d 391, 397 (1970) (holding a property owner “who is familiar with his property and its value, is allowed to give his or her estimate as to the value of the land or damages thereto”).

57. Based on the foregoing, the City’s legitimate interests are sufficient to survive even the strictest constitutional scrutiny.

III. CONCLUSION

For all the reasons set forth above, Defendants’ Dormant Commerce Clause Counterclaim fails as a matter of law.

Respectfully submitted,

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October 31, 2023

Charleston, South Carolina

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 TRS
CAROLINA PINES RV, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2021-CP-26-07489

**PLAINTIFF’S BENCH BRIEF
REGARDING DEFENDANTS’ DUE
PROCESS COUNTERCLAIM**

Plaintiff, the City of North Myrtle Beach (the “City” or “Plaintiff”), by and through its undersigned counsel, hereby submits this bench brief regarding the Due Process Counterclaim asserted by Defendants Sun TRS Ocean Club, LLC, Sun TRS Carolina Pines, LLC, and Sun TRS Carolina Pines RV, LLC (collectively, “Defendants”). For the reasons set forth below, Defendants’ Due Process Counterclaim fails as a matter of law.

I. RELEVANT FACTUAL BACKGROUND

1. 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.

2. 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) (emphasis added).

3. 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).

4. Cabana houses, as special exceptions, are subject to additional use restrictions within the City's Code of Ordinances, including:

1. That a *homeowner's association* shall have been established for the project and a *maintenance agreement* has been submitted to the planning department.

. . .

3. That the use of the house be *limited to bathing and change of clothing facilities*, and occasional use as guest quarters and other similar uses.

4. That the special exception will be in *substantial harmony with the area in which it is to be located*.

5. That the special exception will *not be injurious to the adjoining property*.

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

5. This action concerns certain property, commonly referred to and designated as Lot 1, Block 18-A, Tilghman, located in the City of North Myrtle Beach (the "**Property**"), which is subject to the City's Code of Ordinances.

6. A cabana house ("**Cabana House**") is located on the Property, which is located at 1814 North Ocean Boulevard, North Myrtle Beach 29582.

7. 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.

8. 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 and remains the owner of the Property.

9. Sun Carolina Pines RV, LLC is the owner and operator of a recreational vehicle (“RV”) resort located at 5800 Highway 90, Conway, South Carolina 29526.

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

11. 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.

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

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

14. 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.

15. 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.

16. 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.

17. Despite this knowledge, Defendants did not 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.

18. To date, Defendants have never applied 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.

II. RELEVANT LAW AND ARGUMENT

A. Presumed Knowledge

1. "Citizens are charged with knowledge of existing law. Accordingly, cognizance of city ordinances is presumed." *Labruce v. City of N. Charleston*, 268 S.C. 465, 467, 234 S.E.2d 866, 867 (1977) (internal citation omitted); *see also In re Estate of Holden*, 343 S.C. 267, 278, 539 S.E.2d 703, 710 (2000) ("Everyone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests.") (quoting *Smother's v. U.S. Fidelity and Guar. Co.*, 322 S.C. 207, 210–11, 470 S.E.2d 858, 860 (Ct. App. 1966)); *Conclusive presumptions and presumptions relating to knowledge of law or facts*, Trial Handbook for South Carolina Lawyers § 12:3 (5th ed.) ("Persons are conclusively presumed to know the existing law.").

2. "This [presumption] includes knowledge of statutes, *Ex parte Wessinger*, 235 S.C. 239, 245, 111 S.E.2d 13, 16 (1959), as well as knowledge of the common law, *O'Shields v. Caldwell*, 207 S.C. 194, 35 S.E.2d 184 (1945)." *Conclusive presumptions and presumptions relating to knowledge of law or facts*, Trial Handbook for South Carolina Lawyers § 12:3 (5th ed.).

3. "It is no excuse the parties were unaware of the applicable zoning laws" *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 334, 730 S.E.2d 282, 288 (2012) (Toal, J., concurring).

4. Regardless of the degree of Defendants' actual knowledge of the City's zoning ordinances in this case, Defendants are charged with following the law regarding special exceptions, whether arising from statutory law or from the common law, including the law related to special exceptions.

B. Special Exception

5. “[U]nlike the variance, which creates a vested right and runs with the land, the special exception is personal to the grantee.” 36 *Causes of Action* 2d 583 (Originally published in 2008) (citing Am. Jur. 2d, *Zoning and Planning* § 753; C.J.S., *Zoning & Land Planning* § 297).

6. In other words, authorization for use as a special exception does not create a vested right nor does it run with the land.¹

7. For example, in the case of *County of Cook v. Monat*, 365 Ill. App. 3d 167, 847 N.E.2d 689 (2006), the county filed a suit against two defendants for violating zoning ordinances by keeping two horses on their property in an unincorporated portion of Cook County. Defendants claimed they were entitled to a special use, which was granted to the previous owner of their property, and that the special use ran with the land. *Id.* at 168, 847 N.E.2d at 690. Under the specific facts of *Monat*, the Illinois appellate court found the special use was limited to prior owners and their then-existing horses and did not apply to the defendants as subsequent owners. *Id.* at 181, 847 N.E.2d at 700.

8. “[L]ikewise, a Missouri appellate court ruled, without discussion, that a special use permit which did not contain limits or restrictions on transferability does not run with the land (*City of Sugar Creek v. Reese*, 106 S.W.3d 615, 616 (Mo. Ct. App. 2003)).” *Id.* at 180, 847 N.E.2d at 700.

9. Further, the Supreme Court of Virginia has also held a special use designation does not run with the land. *Shoosmith Bros. v. Cnty. of Chesterfield*, 268 Va. 241, 246, 601 S.E.2d 641, 643

¹ Of note, “[t]he term ‘special exception’ has now given way in most zoning ordinances to the terms conditional use and special use; most courts now consider all three terms to be interchangeable.” *Definition*, Discretionary Land Use Controls § 3:1; *see also* 83 Am. Jur. 2d *Zoning and Planning* § 712 (“The terms ‘special exception’ and ‘conditional use,’ as employed in the zoning law, are essentially interchangeable A ‘conditional use’ is nothing more than a special exception which falls within the jurisdiction of the municipal legislative body rather than the zoning hearing board.”).

(2004).

10. Based on the foregoing law and facts, including the material change in ownership and use by Defendants as compared to the original owner who obtained special exception approval, Defendants should have applied for authorization to use the Property as a special exception cabana house use.

11. The application for special exception authorization was an administrative remedy that Defendants failed to pursue.

C. No Property Interest

12. To have a property interest in a benefit, one must have a “legitimate claim of entitlement to it.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

13. Even had Defendants applied for special exception authorization, a municipal board of zoning appeals has “significant discretion in deciding whether to grant [an] application for a special exception,” and because of that significant discretion, a landowner possesses “no legitimate claim of entitlement, and thus no property right [to a special exception] cognizable under due process clause.” *Biser v. Town of Bel Air*, 991 F.2d 100, 104 (4th Cir. 1993); *see also Horne v. Mayor & City Council of Baltimore*, 349 F. App’x 835, 840 (4th Cir. 2009) (finding factors such as harmony with and injury to the zoning district’s purpose and neighboring properties to afford the board of zoning appeals significant discretion, such that plaintiff possessed no protectable property interest); *Richmond Corp. v. Bd. of Cnty. Comm’rs for Prince George’s Cnty.*, 254 Md. 244, 256–57, 255 A.2d 398, 404–05 (1969) (finding plaintiff should have applied for a special exception, noting plaintiff did not have a vested right, nor any right to proceed without obtaining a special exception permitting the intended use first, and holding denial of special exception application was not unreasonable, arbitrary, or capricious).

19. Section 23-22 of the City’s Code of Ordinances sets forth that one is not entitled to special exception use as a cabana house. *See* North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-22(4) (1984) (“Owing to their potential negative impact on the community and surrounding areas, the following uses [such as use as a cabana house] *may* be approved as special exceptions by the board of zoning appeals[.]”) (emphasis added).

20. Thus, Defendants cannot claim entitlement to use of the Cabana House as a special exception.

D. Due Process

14. “In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law.” *Harbit v. City of Charleston*, 382 S.C. 383, 394–95, 675 S.E.2d 776, 782 (Ct. App. 2009), *as amended* (May 4, 2009) (citing *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004)).

15. “The State’s deprivation of the property interest must fall so far beyond the outer boundaries of legitimate governmental authority that no process could remedy the deficiency.” *Id.* (citing *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 328 (4th Cir. 2005)).

16. “A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property.” *Id.* (citing *Bear Enters. v. County of Greenville*, 319 S.C. 137, 141, 459 S.E.2d 883, 886 (Ct. App. 1995)). “In reviewing a substantive due process challenge to a zoning ordinance, we must determine whether the ordinance bears a reasonable relationship to any legitimate government interest.” *Id.* (citing *Sunset*, 357 S.C. at 430, 593 S.E.2d at 470). In the zoning context, it must be clear that the governmental action ““has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial

relation to the public health, the public morals, the public safety or the public welfare in its proper sense.”” *Nectow v. Cambridge*, 277 U.S. 183, 187–88 (1928) (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)); *see also Sylvia Dev. Corp. v. Calvert Cnty., Md.*, 48 F.3d 810, 827 (4th Cir. 1995) (holding a due process claim in the zoning context “can survive only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state’s traditional police power through zoning”).

17. A violation of substantive due process does not occur when one does not possess a property interest. *Harbit*, 382 S.C. at 395, 675 S.E.2d at 782 (“The City did not violate [the plaintiff’s] substantive due process rights when it denied his rezoning application. First, [the plaintiff] did not have a prior property interest in commercial zoning. While [the plaintiff] may have purchased the property with the expectation that City Council would grant his application, this alone is insufficient to establish a violation of his constitutional rights.”).

18. Defendants have neither a vested property right in the special exception use of the Property as a cabana house from the original owner nor did they even apply for authorization for the right to use as such. *See Biser v. Town of Bel Air*, 991 F.2d 100, 104 (4th Cir. 1993); *see also Richmond Corp. v. Bd. of Cnty. Comm’rs for Prince George’s Cnty.*, 254 Md. 244, 256–57, 255 A.2d 398, 404–05 (1969).

19. Because Defendants have no property right to a special exception that is cognizable under the Due Process Clause, Defendants’ Due Process Counterclaim is without merit.

III. CONCLUSION

For all the reasons set forth above, Defendants’ Due Process Counterclaim fails as a matter of law.

Respectfully submitted,

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October 31, 2023

Charleston, South Carolina

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 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), SCRCPP). 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.

IV. CONCLUSION

Based on the foregoing, this Court should grant the City’s 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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Attorneys for Plaintiff
CITY OF NORTH MYRTLE BEACH

November 30, 2023
Charleston, South Carolina

From: [Tamasitis, John](#)
To: [Seals, William Law Clerk \(Caroline Barker\)](#)
Cc: [Rhett D. Ricard](#); [Cheryl D. Shoun](#); [Willis, Richard](#); [Tyer, Sara](#); [Gibbs, Brian](#); [Laura O. Patat](#); [Seals, William Secretary \(Anna Meetze\)](#)
Subject: City of NMB v. Sun TRS, et al. - Sun Defendants" Proposed Order [WMIMAN-IWOVRIC.FID2375620]
Date: Friday, November 10, 2023 3:33:55 PM
Attachments: [Sun Defendants Proposed Final Order.docx](#)
[Sun Defendants Bench Brief - Inverse Condemnation,Regulatory Taking 11-10-23.pdf](#)

Ms. Barker,

Per Judge Seals' instructions at the conclusion of trial last week, attached is Defendants' proposed order in the above-referenced action. Also attached is Defendants' bench brief on the Inverse Condemnation/Regulatory Taking counterclaim in response to the City's bench brief on the same issue.

Thank you for your consideration of both and please let us know if you need anything further from the Defendants.

John



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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,	)	
	)	(DEFENDANTS' PROPOSED)
vs.	)	FINAL ORDER
	)	
SUN TRS OCEAN CLUB LLC, SUN TRS	)	
CAROLINA PINES LLC, and SUN	)	
CAROLINA PINES RV LLC,	)	
	)	
Defendants.	)	

Plaintiff City of North Myrtle Beach seeks a declaration from this Court that Defendants ownership and use of its property at 1814 N. Ocean Boulevard in North Myrtle Beach, South Carolina (the “Property”) as a cabana house violates two sections of the City’s Zoning Ordinance and asks this Court for an order that Defendants’ ownership and use of the Property as a cabana house to “immediately cease and desist.” In response, Defendants contend that the applicable sections of the Zoning Ordinance, as interpreted and applied by the City, violate the dormant Commerce Clause of the U.S. Constitution, and request the Court to declare those portions of those sections unconstitutional and permanently enjoin their continued enforcement.¹

The applicable sections of the Zoning Ordinance at issue purport to restrict the ownership and operation of beachfront cabana houses to homeowners’ associations established for projects in North Myrtle Beach, and confine access to such cabana houses exclusively to persons owning

¹ Defendants also filed counterclaims under the Fourteenth Amendment Due Process and Equal Protection Clauses and asserted a counterclaim for Inverse Condemnation/Regulatory Taking of the Property based on the City’s claim for relief. Defendants voluntarily withdrew their Fourteenth Amendment challenges and, for the reasons set forth herein, the Court need not address the Defendants’ Regulatory Taking claim because the Court finds that the City is not entitled to the relief sought.

or renting homes or units in those projects. Defendants contend that these restrictions discriminate against interstate commerce on their face, in their effect, and in their purpose.

FINDINGS OF FACT

1. Defendants are wholly owned subsidiaries of Sun Communities, Inc., a publicly traded Real Estate Investment Trust that, through its subsidiaries, develops and operates manufactured housing communities, recreational vehicle resorts, and marinas. As of September 30, 2022, Sun Communities, Inc. and its subsidiaries own and operate 671 communities in the United States and internationally, consisting of over 180,000 developed sites and over 48,000 wet slips and dry storage lots. (*See* Defs' Ex. 53).

2. Defendant Sun TRS Ocean Club, LLC ("Sun") has an agreement with Defendant Sun Carolina Pines RV LLC ("RV Resort"), whereby it permits the RV Resort to use the Property (and the cabana house) as a private beach club for guests staying at the RV Resort in Conway (the "Beach Club"). The Property also honors individual memberships to the Beach Club issued under previous ownership, some of whom do not reside in North Myrtle Beach. (*See* Defs' Ex. 9).

3. Approximately 69% of the guests who have made reservations at the RV Resort since its opening on July 1, 2019, are from outside South Carolina. The RV Resort has entertained more than 90,000 reservations since the beginning of operations, and provides an array of on-site amenities (including a waterpark, arcade, miniature golf, etc.), standalone cottages for short- and long-term renting, a general store, a restaurant, and importantly, access to the South Carolina coastline. (*See* Defs' Ex. 5). There are currently 829 guest sites at the RV Resort, which includes 162 annual sites where guests rent and reside on an annual basis.

4. The primary attraction of the RV Resort in Conway is its proximity to the beach. In addition to the on-site amenities, the RV Resort provides shuttle transportation as part of an

all-inclusive package that departs throughout the day to public beach access points, as well as a variety of locations, including shopping destinations and other tourist attractions in the area.

5. The Beach Club, along with other cabana houses in the City owned by Barefoot Resort Residential Owners Association, Inc. (“Barefoot”), the Links Golf and Racquet Club Homeowners Association, Inc. (the “Links”), and Tidewater Plantation Community Association, Inc. (“Tidewater”), all provide private access to the beach. As the City explained at trial, the cabana house special exception was created to “direct investment away from the coastline”—i.e., cabana houses allow the coastline to remain unimpeded by high-rises and the associated traffic, while also providing beach access to “projects” within the City not located on the beachfront.

6. Tourism is the largest economic driver in the Grand Strand and, more specifically, North Myrtle Beach. The economic impact of tourism to the area is substantial. In 2022, 17.2 million visitors traveled to the Grand Strand and, out of that number, Destination NMB (an affiliate of the North Myrtle Beach Chamber of Commerce) estimated between three (3) and five (5) million people visited the City of North Myrtle Beach. Importantly, lodging accommodations and short-term “transient” rentals dominate the real estate market in North Myrtle Beach.

7. The City funds the marketing of its tourism industry through the collection of state accommodation taxes. The accommodations tax is levied on overnight accommodation for things such as hotels, motels, short-term rentals, and other resorts (such as campgrounds and RV parks). After collection, a portion of the money raised through the state accommodation tax is then returned to the local area where the tax was originally assessed to be utilized for marketing the area’s tourism. The accommodation taxes raised in the local area through lodging and short-term rentals help fund Destination NMB in its mission to bring more tourism to the area.

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

A structure utilizing single-family design and development standards in close proximity to the oceanfront **to be used by projects in North Myrtle Beach** not located near the ocean. The use of the cabana house shall be limited to drop-off and parking area, bathing, changing clothes and similar uses. Additionally, it can be used as an occasional guest quarters and similar residential uses. A cabana house shall be owned and maintained **by a homeowner's association** with a maintenance agreement submitted and approved by the planning department.

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

9. The R-4 Resort Residential District Zoning Ordinance permits mixed uses of dwellings, hotels, motels, inns, accessory uses for each of the preceding, and for resort accommodations. *See* North Myrtle Beach, S.C., Code § 23-22(2). It also has a provision providing for special exceptions. *Id.* Regarding the special exception for cabana houses (which was enacted in 1996), section 23-22 provides, in relevant part: “**That a homeowner's association shall have been established for the project** and a maintenance agreement has been submitted to the planning department.” North Myrtle Beach, S.C., Code § 23-22(4)(d)(1) (emphasis added).

10. Similar geographic limitations for property ownership and use pertaining to a “cabana house” do not exist anywhere else in the R-4 Resort Residential District. Under the City’s interpretation of section 23-2, for a cabana house to be permitted, its use must be “exclusively” limited to a project (and its guests) within the City.

11. Under applicable South Carolina law, homeowners’ associations must register their governing documents in the county where the property owned by its members is located. *See* S.C. Code Ann. § 27-30-130(A)(1). Therefore, any homeowners’ association with a cabana house in North Myrtle Beach must necessarily be a local homeowners’ association under the City’s interpretation of its Zoning Ordinance and must be registered in Horry County. Homeowners’

associations for projects outside the city limits cannot own or use the cabana house under the Zoning Ordinance's literal terms.²

12. On or around March 28, 2005, Pan, LLC acquired the Property in an undeveloped state with the intention of building a high-rise condominium project. Pan, LLC's efforts were blocked by the adjoining neighbors, Sea Cloisters I & II Homeowners' Associations ("Sea Cloisters"), based on a December 31, 1979 deed restriction that limits the use of the Property to a "clubhouse for recreational purposes."

13. The Restrictive Covenants for the Property provide, in relevant part: "Said property shall be used only for recreational purposes and the improvement of said property shall be limited to a clubhouse for recreational purposes." The Restrictive Covenants are silent about who is authorized to own and use the Property, or where they must reside. (Defs' Ex. 16).

14. In May 2007, Pan, LLC applied to the City's Board of Zoning Appeals for a special exception to construct an oceanfront cabana house on the Property for the use of Seabrook Plantation, located in the City. When Pan, LLC's Special Exception Application was submitted, the Property was zoned, as it is now, in the R-4 Resort Residential District.

15. According to the City, the municipal interests furthered by the residency requirement imposed by sections 23-2 and 23-22 include: "responsiveness," "quality of life," and "preservation of local property values." However, the City has not conducted any study or analysis as to how these interests are furthered by the residency restrictions.

16. The City's witnesses testified at trial that "economic considerations" (including the preservation of property values) were factors in the development of the cabana house special

² The City's Director of Planning and Development, Jim Wood, testified at trial, in a seeming reversal of the City's past interpretation, that the homeowners' association did not necessarily have to be located within City limits; however, on cross-examination he was unable to explain how, in a practical sense, that would occur based on a plain reading of the Zoning Ordinance.

exception and all agreed, at one point or another, that the restrictions encouraged investment in the City rather than in projects outside of the City.

17. On June 18, 2007, the City's then-zoning administrator, Paul Blust, informed Pan, LLC via a letter that its Special Exception Application had been approved. The Board of Zoning Appeals found that the proposed use of the building was consistent with the limitations set forth in the Zoning Ordinance. (Defs' Ex. 4). The City did not require or specify that Pan, LLC deed the property to Seabrook Plantation's homeowners' association as a condition of operations.

18. The City testified at trial that, although the Zoning Ordinance is silent on the issue, any subsequent owner of the Property should have applied for a new special exception after it purchased the Property. The City acknowledges, however, that it has not required reapplication by any subsequent owner of this or any other cabana house located in the City.³

19. After receiving approval for a cabana house, Pan, LLC constructed the Beach Club. At the time of construction, Pan, LLC did not have, nor did it create a homeowners' association to own the Property.

20. Following construction of the Beach Club, the Property was conveyed several times to other limited liability companies. The special exception for the Property was never rescinded. None of these prior owners of the Property were homeowners' associations, nor was the Beach Club ever used exclusively by a "project" located in the City.

21. Immediately prior to Sun's purchase, the Property and Beach Club were being operated as a private, for-profit membership club by NMB Ocean Club Partners, LLC, with no restrictions on the residency of its members. NMB Ocean Club Partners, LLC also obtained two

³ Prior to trial, the City's former Zoning Administrator, Mr. Blust, testified in his deposition that it was not necessary for subsequent owners to reapply for a special exception once granted by the City. (Court Ex. 3, Blust Dep. Tr. 48:13-22).

separate business licenses from the City to operate the Beach Club in 2017 and 2019, respectively. In May 2018, NMB Ocean Club Partners, LLC attended a Technical Review Committee meeting to seek guidance from City officials on how to convert the private beach club to a restaurant. (Defs' Ex. 32).⁴ The City never issued a cease-and-desist letter to NMB Ocean Club Partners, LLC regarding its ownership and operation of the Beach Club, from August 2017 to May 2019.

22. In late 2018, NMB Ocean Club Partners, LLC approached Defendants, inquiring as to whether they would have an interest in acquiring the Property for use by the RV Resort's guests. On February 15, 2019, Sun entered into a Real Estate Purchase and Sale Agreement with NMB Ocean Club Partners, LLC (the "Purchase Agreement"). (Defs' Ex. 9).

23. Pursuant to the Purchase Agreement, NMB Ocean Club Partners, LLC warranted "to the best of Seller's knowledge" that the Property and Beach Club complied in all respects with all applicable ordinances pertaining to zoning and there were no existing facts or conditions which would result in the issuance of any zoning violations with respect to the Property. (*Id.*)

24. Prior to closing the sale of the Property and during the due diligence period, Sun, through its lawyers, requested a zoning letter from the City, inquiring about the current zoning and use of the Property and whether the Property or the Beach Club were subject to any violations of the Zoning Ordinance. On March 19, 2019, Mr. Blust, as then-Zoning Administrator for the City, sent Sun a letter (the "Zoning Letter") stating that the Beach Club was "permitted as a cabana house and has been legally used as such since construction. As of the date of this letter, there are no known zoning violations on the property." (*See* Defs' Ex. 2). Mr. Blust testified that he did not check to see if the Property or the Beach Club were owned by a homeowners' association or

⁴ While the minutes from the Technical Review Committee Meeting contain a statement from the Zoning Department that a private beach club is not permitted in the R-4 District, Mace Watts, the managing member for the club owner and an attendee at the meeting, testified at trial that this was never communicated to him by the City at any time.

whether the Beach Club was being used by a “project” within the City. Rather, he visually inspected the Property from his vehicle, thought it was not in use, and concluded that because it was not in use on the day he was there, it was not in violation of the Zoning Ordinance.

25. The seller of the Property and Sun both testified that while they were generally aware of the Zoning Ordinance, they nonetheless were led to believe that Sun’s intended ownership and use of the Property was consistent with the City’s interpretation of its Zoning Ordinance, due to the statements in the Zoning Letter and the City’s knowing acquiescence to almost 12 years of ownership by entities that were not homeowners’ associations for “projects” within the City.⁵

26. On May 3, 2019, NMB Ocean Club Partners, LLC conveyed the Property along with the Beach Club to Sun via a general warranty deed, which was recorded with the Horry County Register of Deeds on May 10, 2019. Sun purchased the Property for approximately \$2.5 million to use the Beach Club as an amenity for the RV Resort’s guests.

27. Between May 3, 2019, and September 2, 2021, the RV Resort operated the Beach Club for its guests, without any complaints from the City, shuttling its guests from Conway to and from the facility.

28. On September 2, 2021, after receipt of a complaint from Sea Cloisters, the City sent a cease-and-desist letter (the “Cease-and-Desist Letter”) to Sun asserting for the first time that its ownership and use of the Property and the Beach Club, along with the related shuttle services to and from the RV Resort, were violative of the Zoning Ordinance. The Cease-and-Desist Letter alleged that Defendants were operating the Property and Beach Club in violation of sections 23-2

⁵ Jon Colman, head of acquisitions for Sun Communities, Inc., testified that had he been informed by the City that it did not believe that a private beach club was permitted in the R-4 District, or that it must be owned by a homeowners’ association established for a project in North Myrtle Beach, he would have stopped the transaction and sought a meeting with the City to determine if Defendants could own and operate the Beach Club for guests of the RV Resort in Conway.

and 23-22 of the Zoning Ordinance because, *inter alia*, the Beach Club was not owned and maintained by a homeowners' association for a project in North Myrtle Beach. (Defs' Ex. 29).

29. Several of the City's witnesses (residents of Sea Cloisters) testified regarding their objections to the operation of the Beach Club by the Defendants from May 3, 2019, through September 2, 2021. Specifically, those witnesses objected to Defendants hosting weddings and a child's birthday party at the Beach Club, occasionally serving food and beverage (including alcohol) on the premises, and allegedly violating lighting and noise ordinances as promulgated by the City. The City contends that those purported "commercial uses" of the Beach Club violated the Zoning Ordinance. They also testified that Beach Club users occasionally trespassed on Sea Cloisters' property, parked in their parking lots, and got into an altercation with a Sea Cloisters property owner in the Summer of 2021.

CONCLUSIONS OF LAW

Notwithstanding anecdotal complaints about past use of the Beach Club by Defendants, there are two critical issues that control the outcome of this litigation:

- (1) Whether the applicable sections of the Zoning Ordinance have a substantial effect on interstate commerce, so as to implicate the dormant Commerce Clause; and
- (2) Whether the residency requirement set forth in sections 23-2 and 23-22, which require 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.

I. Substantial Effect on Interstate Commerce

The threshold question regarding whether the applicable sections of the Zoning Ordinance have a substantial effect on interstate commerce is to determine what is being regulated. The City contends that restrictions on the use of a cabana house is the regulation at issue, and because a

cabana house cannot be used for commercial purposes and Defendants' cabana house was used as a free-of-charge amenity, sections 23-2 and 23-22 do not have any effect on interstate commerce.

However, as Defendants pointed out repeatedly at trial, they are not disputing the constitutional validity of the operational conditions set forth in sections 23-2 and 23-22 of the Zoning Ordinance. Instead, Defendants are challenging the ownership restrictions for cabana houses in the City, that require the cabana house to be owned and operated by a homeowners' association established for the exclusive use of a project located in North Myrtle Beach. Accordingly, the proper analysis of whether those sections substantially effect interstate commerce must be focused on "who may own or use" a cabana house within the R-4 District, not "how it may be used."

"The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979). The Supreme Court has identified three broad categories of activity that Congress may regulate under its commerce power: *First*, Congress may regulate the use of the channels of interstate commerce; *second*, Congress has the authority to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce; and *third*, Congress's commerce power includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially effect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

Between 1936 and 1995, the United States Supreme Court did not find any federal laws unconstitutional as exceeding the scope of Congress's commerce power. Then in *Lopez*, the Court declared unconstitutional the Gun-Free School Zones Act of 1990, which made it a federal crime to have a gun within 1,000 feet of a school. *Id.* at 551. The Court ruled that the relationship

between school safety (a noneconomic activity) and interstate commerce was too attenuated to uphold the law as a valid exercise of Congress's commerce power. *Id.* at 567-68. The Court followed the *Lopez* decision with its ruling in *United States v. Morrison* in 2000, in which the Court declared unconstitutional the civil damages provision of the Violence Against Women Act, which created a federal cause of action for victims of gender-motivated violence. 529 U.S. 598, 601 (2000). In *Morrison*, the Court expounded on the *Lopez* decision holding that Congress cannot regulate noneconomic activity by simply finding such activity has a substantial effect on interstate commerce when looked at cumulatively. *Id.* at 617-18.

Then, in 2005, the Court upheld Congress's Controlled Substances Act as a proper exercise of its power under the Commerce Clause, holding Congress had the authority to prohibit the local cultivation and use of marijuana despite state law to the contrary. *Gonzales v. Raich*, 545 U.S. 1 (2005). In so holding, the Court reaffirmed its decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), and upheld the application of the Controlled Substances Act to the growth of marijuana for intrastate personal use, noting that the regulated economic activities related to the production and consumption of a commodity for which there is an established—albeit illegal—interstate market. *Raich*, 545 U.S. at 19. The majority in *Raich* distinguished the case from *Lopez* and *Morrison* explaining that those cases dealt with statutes regulating noneconomic activity and, as a result, fell entirely outside of Congress's commerce power. *Id.* at 23-26.⁶

The lesson from *Lopez*, *Morrison*, and *Raich* is that the substantial effect on interstate commerce analysis is predicated on whether the local activity being regulated is economic or noneconomic in nature. In matters dealing with the regulation of local economic activities, like

⁶ The Court cautioned parties about relying too heavily on *Lopez* and *Morrison*, and explained that the respondents in *Raich*, “[i]n their myopic focus, . . . overlook[ed] the larger context of modern-era Commerce Clause jurisprudence preserved by those cases” and, even in the respondents’ narrow analysis, “read those cases far too broadly.” *Id.* at 23.

the applicable sections of the Zoning Ordinance at issue, the long-standing principles of *Wickard* apply, and Congress’s commerce power “extends to those activities intrastate which so effect interstate commerce . . . as to make the regulation of them appropriate means to the effective execution of granted power to regulate ‘interstate commerce.’” *Wickard*, 317 U.S. at 124. Accordingly, local economic activity, viewed in the aggregate along with similarly situated entities engaged in the same activity, which has a substantial cumulative economic effect on interstate commerce falls within the ambit of the dormant Commerce Clause.

This distinction is highlighted in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997), where the Supreme Court held that an otherwise generally applicable state property tax violated the dormant Commerce Clause because its exemption for property owned by charitable institutions excluded organizations operated principally for the benefit of nonresidents. *Id.* at 571-595. The appellant in *Camps Newfound* was the operator of a non-profit outdoor church camp that brought an action challenging the constitutionality of Maine’s property tax exemption statute for charitable institutions. The town argued that the dormant Commerce Clause jurisprudence was inapplicable to the case because interstate commerce was not implicated, due to the non-profit nature of the campground. *Id.* at 572.

The Court disagreed and explained that even though the camp did not make a profit, it unquestionably “engaged in commerce,” not only as a purchaser of goods, but also as a provider of goods and services. The Court noted that the camp marketed those services, together with an opportunity to enjoy the natural beauty of an inland lake in Maine, to campers who were attracted to the facility from other states. *Id.* at 572-73. The Court emphasized that the record reflected the camp operator advertised for campers in out-of-state periodicals and that its recruiting efforts were

successful; 95 percent of its campers came from out-of-state, and the attendance of these campers necessarily generated transportation of persons across state lines. *Id.* at 573.

The Supreme Court explained that summer camps were comparable to hotels that offer their guests goods and services to be consumed locally. To bolster its analysis, the Supreme Court cited *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964),⁷ for the proposition that interstate commerce is substantially affected by the activities of hotels that solicit patronage through national advertising media. *Id.* Accordingly, the Supreme Court stated that discrimination “that limits the access of nonresidents to summer camps creates a similar impediment . . . [e]ven when business activities are purely local; if ‘it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.’” *Id.* at 573-74 (quoting *Heart of Atlanta*, 379 U.S. at 258). The Supreme Court held that the services the camp operator provided to its principally out-of-state campers clearly had a substantial effect on interstate commerce, as did state restrictions on making those services available to nonresidents. *Id.* at 574.⁸

The guidance with respect to effect on interstate commerce in *Camps Newfound* is directly applicable to this case. The RV Resort advertises its product, including the Beach Club, nationally through its website and social media platforms, and those efforts have proven successful; 69% of the RV Resort’s guests are from out-of-state. Likewise, the RV Resort markets its various other amenities, together with an opportunity to enjoy the natural beauty of the South Carolina coastline, to guests throughout the country. The RV Resort engages in commerce, as a purchaser of goods

⁷ In that case, the Supreme Court held that commerce was substantially affected by private race discrimination that limited access to the hotel and thereby impeded interstate commerce in the form of travel. *Heart of Atlanta*, 379 U.S. at 244.

⁸ The Supreme Court’s analysis in *Camps Newfound* focused exclusively on the operations of the campground at issue to determine whether the dormant Commerce Clause was implicated. The Court did not need to resort to a market analysis of other campgrounds because it was clear from its review of the campground and the tax exemption statute that both had a substantial effect on interstate commerce.

and as a provider of services and transports its guests throughout the local area whether to the Beach Club or to other various other locations, including locations in North Carolina, via its shuttle service. And, like *Camps Newfound*, the attendance of the RV Resort's guests necessarily generates the transportation of persons across state lines as part of interstate commerce.

This apt comparison between the case at bar and *Camps Newfound* is bolstered by analyzing the ownership and use of the other cabana houses in the City. Tidewater's homeowners' association utilizes its cabana house to host gatherings of property owners at what it considers to be its "most popular amenity" and promoted the cabana house on its website. Barefoot's association also markets its cabana house and other community amenities on its website and holds community-sponsored events at its cabana house where neighbors gather. The Links' cabana house is open not only to owners of the timeshares in the community but also to its guests and short-term renters as well, regardless of where they reside.⁹ Further, as the City admitted, there is no prohibition on the use of a cabana house by short-term "transient" renters, and there are no restrictions on cabana house owners advertising their amenity to the public.

The RV Resort is comparable to hotels or short-term rental providers that offer their guests goods and services that are consumed locally. These platforms, which comprise a significant part of the tourism economy in the Grand Strand, clearly have a substantial effect on interstate commerce, as does the residency requirement's restrictions on making those services available to nonresidents. *Cf. C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994). Likewise, the services that the RV Resort provides, which includes access to the Beach Club to its principally out-of-state guests, along with the residency requirement prohibiting ownership of a cabana house by Sun, also have a substantial effect on interstate commerce.

⁹ The limits on the use of the cabana house to just owners in certain communities are creations of those specific associations, and not mandated by the City.

II. Dormant Commerce Clause

The Commerce Clause grants Congress the power to regulate interstate and foreign commerce. U.S. Const. art. I, § 8, cl.3. “Although the [Commerce] Clause is framed as a positive grant of power to Congress,” the Supreme Court has “long held that this Clause also prohibits state laws that unduly restrict interstate commerce.” *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 588 U.S. ___, 139 S.Ct. 2449, 2459 (2019). “This negative command prevents a State [or local government] from jeopardizing the welfare of the Nation as a whole by placing burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.” *Am. Trucking Ass’ns v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 433 (2005).

“The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in state economic interests by burdening out-of-state competitors.” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38, (2008) (internal quotations and citations omitted). “‘The common thread among those cases in which the Court has found a dormant Commerce Clause violation is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.’” *Amisub of S.C., Inc. v. S.C. Dep’t of Health & Env’t Control*, 424 S.C. 80, 88, 817 S.E.2d 633, 637 (Ct. App. 2018) (quoting *McBurney v. Young*, 569 U.S. 221, 235 (2013)).

In addition to state laws, the dormant Commerce Clause applies equally to local and municipal laws. “[A] State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State rather than through the State itself.” *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Nat. Res.*, 504 U.S. 353, 361 (1992). The dormant Commerce Clause “invalidate[s] local laws

that impose commercial barriers or discriminate against an article of commerce by reason of its origins or destination out of State.” *C & A Carbone, Inc.*, 511 U.S. at 390 (emphasis added).

In conducting the discrimination inquiry, the Court is required to focus on discrimination against interstate commerce—not just the discrimination against the *specific parties* before it. *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013). Focusing only on discrimination against individual entities “improperly narrows the scope of the judicial inquiry and has the baneful effect of precluding certain meritorious claims. For while the burden on a single firm may have but a negligible impact on interstate commerce, the effect of the law as a whole and in the aggregate may be substantial.” *Id.*

Discrimination in this context “simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Colon Health Ctrs.*, 733 F.3d at 542-43. A law that is found to discriminate against interstate commerce “puts it on death’s doorstep,” and can only survive if it advances a legitimate local purpose that cannot be adequately served by any reasonable nondiscriminatory alternatives. *Hignell-Stark v. City of New Orleans*, 46 F.4th 317, 328 (5th Cir. 2022).¹⁰

Laws challenged under the dormant Commerce Clause are examined using a two-step analysis. However, the antidiscrimination principle lies at the “very core” of the Supreme Court’s dormant Commerce Clause jurisprudence, regardless of which step of analysis is at play. *Nat’l Pork Producers Council v. Ross*, 143 S.Ct. 1142, 1153 (2023). The first step, and the only step relevant to this case, is when the regulation directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests. In

¹⁰ To date, only one such U.S. Supreme Court case has been able to meet this exceedingly high standard. See *Maine v. Taylor*, 477 U.S. 131 (1986) (holding Maine’s ban on the importation of out-of-state bait fish was constitutional, even though the law discriminated against interstate commerce on its face, because Maine had no other means to prevent the spread of parasites to its unique, native fish species).

such cases, the Supreme Court has “generally struck down the statute without further inquiry.” *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Unless “demonstrably justified by a factor unrelated to economic protectionism, a ‘discriminatory law is virtually *per se* invalid.’” *Brown v. Hovatter*, 561 F.3d 357, 363 (quoting *Davis*, 553 U.S. at 338).¹¹

A. The Zoning Ordinance’s “Residency Requirement” on the Ownership and Access of a Cabana House Plainly Discriminates Against Interstate Commerce.

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

Sections 23-2 and 23-22 essentially create a residency requirement for ownership of a cabana house in the R-4 District in that they exclude the ownership and utilization of cabana houses from entities located anywhere outside of the City’s limits. The fact that the applicable sections

¹¹ The second step of the analysis under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), only applies where a statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental. Lower courts regularly misconstrue the requisite analysis under the dormant Commerce Clause. If the Court finds that a law or regulation discriminates against interstate commerce, then 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 City offered no argument at trial that the *Pike* test applies here.

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

Both the City Manager and Destination NMB testified that the economic bloodline of the City is tourism. Accordingly, the City has “erect[ed] an economic barrier protecting a major local industry against competition from without the state” by enacting the applicable sections of the Zoning Ordinance which “plainly discriminate[] against interstate commerce.” *Dean Milk*, 340 U.S. at 354. Through sections 23-2 and 23-22, the City ensures that only local residents can benefit economically from ownership of a cabana house on the City’s coastline in the R-4 District.

The City’s geographic restriction discriminates on its face against non-local projects.¹² The City does not just make it more difficult for non-local entities to compete in the market for visitors who want private beach access through a cabana house in the R-4 District; it forbids them from participating altogether. And the City will not grant a special exception to own a cabana house, unless the cabana house is owned and operated exclusively by a homeowners’ association for a project in the City. The upshot is that only residents of the City may participate in the market to own and use a cabana house in the R-4 Resort Residential District.

The City’s representatives testified on multiple occasions that an RV Resort is

¹² Indeed, Mr. Wood testified at trial that the restriction against non-local projects from ownership of a cabana house in the R-4 district is exclusionary “on its face.”

encompassed by the term “project.” Hotels, residential developments that consist of short-term rental properties located in the City, and RV Resorts located outside of the City that participate in the short-term vacation rental market, are “substantially similar.” *Davis*, 553 U.S. at 342 (explaining that the only form of discrimination that implicates the dormant Commerce Clause is discrimination between “substantially similar entities”). All are private entities, not public entities carrying out traditional government functions. *See id.* at 341-43. And all seek to compete in the highly competitive market for recreational access to the South Carolina coastline. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997). Non-local projects want to offer the same beach access services to the same customers in the same locations as projects located within the City. The only difference between them, and the one emphasized by the residency requirement, is that one group does not reside in North Myrtle Beach. Accordingly, the residency requirement set forth in sections 23-2 and 23-22 directly discriminates against interstate commerce.

A recently decided case out of the Fifth Circuit Court of Appeals is particularly instructive on the nature of the restrictions before the Court here. In *Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (5th Cir. 2022), homeowners who sought to operate short term rentals (“STRs”) and the company providing services for STR owners brought a Section 1983 claim against the City of New Orleans, alleging, *inter alia*, violations of the dormant Commerce Clause, based on the city’s ordinance requiring licenses to operate STRs. In 2016, the city decided to offer licenses¹³ to property owners to rent their homes for less than thirty (30) days. *Id.* at 321. One year into the initial licensing regime, the city commissioned a study to reevaluate its STR policies and found that the rapid proliferation of STRs brought nuisances to the city. *Id.* Specifically, it discovered that STRs in residential neighborhoods “had lowered residents’ quality of life.” *Id.* The study

¹³ The license in *Hignell-Stark* is akin to the special exception permit at issue in this case.

also determined that expansion of STRs into residential neighborhoods led to “a loss of neighborhood character,” and it collected “anecdotal evidence” that the increasing STR market had made housing less affordable to residents. *Id.* Because of the study, the city revised its STR licensing regime in 2019 and imposed a local residency requirement for STRs in residential neighborhoods. *Id.* The policy provided that no person could obtain a license to own an STR unless the property was also “the owner’s primary residence.” *Id.*

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

The Fifth Circuit further explained that because the residency requirement in the new licensing regime discriminated against interstate commerce, it was in “big trouble because ‘a discriminatory law is virtually *per se* invalid.’” *Id.* (quoting *Davis*, 553 U.S. at 338). The Fifth Circuit held that the residency requirement discriminated on its face against non-local property owners because it forbade them from participating in the STR market in residential neighborhoods altogether¹⁴ and even though the city did not adopt the residency requirement to protect its residents from interstate competition, “the dormant Commerce Clause prohibits more than laws with protectionist purposes. It also prohibits laws that discriminate against interstate commerce

¹⁴ In *Hignell-Stark*, the Fifth Circuit rejected the city’s argument that the ordinance allowed out-of-staters to own short-term rentals in **nonresidential** neighborhoods because “even if the residency requirement merely imposes a discriminatory burden on interstate commerce, it still qualifies as discriminatory.” 46 F.4th at 327. The City here has made the same unavailing argument with respect to beachfront cabana houses in other areas outside of the R-4 District.

on their face.” *Id.* at 325-327 (citation omitted). According to the Fifth Circuit, ““the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory.”” *Id.* at 327 (quoting *Or. Waste Sys., Inc. v. Dep’t of Env’t Quality of Or.*, 511 U.S. 93, 100 (1994)).

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

Additionally, section 23-2 provides that a cabana house must be owned by a local homeowners’ association. Section 23-22(4)(d)(1) provides, in relevant part, that a homeowners’ association must be established for the local project utilizing the cabana house. 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.

Moreover, in response to Interrogatories propounded by Defendants regarding the purpose behind the geographical ownership restrictions set forth in Sections 23-2 and 23-22 of the Zoning Ordinance, the City stated: “This requirement operates to encourage and support local, private developments and their corresponding homeowner’s associations (as opposed to non-local, corporate enterprises) by providing them with a private beach club and access point to the beach. It also encourages investment in the City rather than in projects outside of the City.” This candid explanation of the purpose behind the residency requirement, coupled with the City’s repeated testimony at trial acknowledging the explanation is telling. The City admits that one of the purposes behind these restrictions is economic protectionism—to incentivize investment in the City while restricting or outright prohibiting ownership and use from outside the City. *Dean Milk*, 340 U.S. at 354. Incentivizing local commerce at the expense of interstate commerce is one of the chief evils the Commerce Clause seeks to prevent and renders the challenged portions of the Zoning Ordinance unconstitutional. *See Carbone*, 511 U.S. at 390.

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

B. The City Cannot Withstand its Constitutional Burden.

The conclusion that the residency requirement for ownership of a cabana house discriminates against interstate commerce puts it “on death’s doorstep.” *Hignell-Stark*, 46 F.4th at 328. The restrictions can “survive only if [they] advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Id.*

The City offered three separate interests that are served by the restrictions in sections 23-2 and 23-22: (1) responsiveness, (2) quality of life, and (3) preservation of property values. Defendants did not dispute that these are legitimate interests; however, all can be adequately served by reasonable nondiscriminatory alternatives; therefore, none of them can justify the restrictions.

First, the City claims that the homeowners’ association ownership requirement is necessary to address its “responsiveness” concerns. The City claims that it has a more successful track record dealing with homeowners’ associations and believes they are more responsive to the City’s concerns, addressing issues more quickly than other forms of entities. Granted, the City has not conducted any studies to back up this assertion, but believes its anecdotal impressions are sufficient. While the homeowners’ association ownership requirement might help the City achieve its responsiveness goal, the Court needs to look no further than the Zoning Ordinance’s penalty provision found in section 23-7 to find reasonable nondiscriminatory alternatives available to the City to ensure responsiveness. Section 23-7 provides that violations of the conditions and safeguards established in connection with special exceptions, like cabana houses, shall constitute a misdemeanor, and any person who violates the Zoning Ordinance shall, upon conviction thereof, be fined in an amount not exceeding \$500.00, imprisonment for a period not exceeding 30 days, or both. Each day such violation continues shall be considered a separate offense. Accordingly, this enforcement mechanism could be utilized to ensure owners of cabana houses are responsive

to requests from the City. The City could also increase the penalties imposed on cabana house owners who fail to respond to the City when an issue arises. This would create a stronger incentive to quickly respond to the City when called upon and would also help the City fund any increase in its enforcement efforts.¹⁵

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

The City's legitimate concerns about quality of life are achievable by enforcement of the remaining provisions in section 23-22, which govern the use of approved cabana houses. For example, section 23-22(4)(d)(4) requires that use of a cabana house must be "in substantial harmony with the area in which it is to be located." Additionally, the use of a cabana house may "not be injurious to the adjoining property" or "discourage or negate the use of surrounding property for use(s) permitted by right." North Myrtle Beach, S.C. Code § 23-22(4)(d)(5)-(6). And again, as stated above, enforcement of these provisions, through Section 23-7, would not only incentivize cabana house owners and users to adhere to the requirements set forth in Section 23-22, but would also fund increased enforcement. The City has not shown that these interests can only be served by requiring Defendants to cease and desist owning and operating the Beach Club.

Third, the City claims preservation of property values is another interest served by the discriminatory residency requirement for cabana houses. However, as discussed in detail above,

¹⁵ Notwithstanding the City's arguments that these enforcement tools would not be meaningful to a large corporation like Sun Communities, Inc., Defendants' witnesses testified otherwise. Having never availed itself of these enforcement tools, the City cannot be heard to claim that they would be ineffective.

increased enforcement of the other provisions already identified in section 23-22 through the enforcement mechanism provided for in section 23-7 present a clear reasonable alternative method for achieving the City's interest in preserving property values.

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

CONCLUSION

Based on the foregoing, the Court finds that the residency requirement 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. By their explicit terms, sections 23-2 and 23-22 impose an unconstitutional burden on interstate commerce without any justification. 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 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 City is permanently enjoined from enforcing those restrictions against Defendants as well as against any other current or future owners of cabana houses in the R-4 Resort Residential District. The Court requests that the above-captioned parties propose a Scheduling Order for the second jury phase of this trial to consider Defendants' associated damages pursuant to 42 U.S.C. §§ 1983 and 1988.

IT IS SO ORDERED.

Rhett D. Ricard

From: Seals, William Law Clerk (Caroline Barker) <wsealslc@sccourts.org>
Sent: Monday, November 13, 2023 9:18 AM
To: Rhett D. Ricard
Cc: Tamasitis, John; Cheryl D. Shoun; Willis, Richard; Tyer, Sara; Gibbs, Brian; Laura O. Patat; Seals, William Secretary (Anna Meetze)
Subject: Re: City of NMB v. Sun TRS, et al. - Sun Defendants' Proposed Order [WMIMAN-IWOVRIC.FID2375620]
Attachments: image001.jpg; Order.docx

Good morning,

Thank you for your email. Please consider the City's Proposed Order received by and accessible to the Court. If I may be of any further assistance, please do not hesitate to let me know.

Sincerely,
Caroline Barker

Caroline H. Barker
Law Clerk to the Honorable William H. Seals, Jr.
Circuit Court Judge At-Large, Seat 6
Chief CP Administrative Judge, 15th Judicial Circuit
103 North Main Street
Marion, South Carolina 29571
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On Nov 10, 2023, at 4:23 PM, Rhett D. Ricard <RRicard@maynardnexsen.com> wrote:

*** EXTERNAL EMAIL: This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***
Good afternoon, Ms. Barker,

Please see attached for the City's proposed order in the subject-line case.

Respectfully,

Rhett D. Ricard

Associate

|

Complex Litigation

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South Carolina

29401

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From: Tamasitis, John <jtamasitis@williamsmullen.com>

Sent: Friday, November 10, 2023 3:27 PM

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Subject: City of NMB v. Sun TRS, et al. - Sun Defendants' Proposed Order [WMIMAN-IWOVRIC.FID2375620]

Ms. Barker,

Per Judge Seals' instructions at the conclusion of trial last week, attached is Defendants' proposed order in the above-referenced action. Also attached is Defendants' bench brief on the Inverse Condemnation/Regulatory Taking counterclaim in response to the City's bench brief on the same issue.

Thank you for your consideration of both and please let us know if you need anything further from the Defendants.

John

[Williams Mullen]

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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

**ORDER**

This matter came before the Court, as a bench trial, which commenced on October 31, 2023, and concluded on November 3, 2023. Plaintiff, the City of North Myrtle Beach (the “**City**” or “**Plaintiff**”), in its action for a declaratory judgment seeks a declaration of violations of certain municipal zoning ordinances. In response, Defendants Sun TRS Ocean Club, LLC, Sun TRS Carolina Pines, LLC, and Sun Carolina Pines RV, LLC<sup>1</sup> (collectively, “**Defendants**”), in their Amended Answer and Counterclaims alleges the pertinent municipal zoning ordinances are unconstitutional under the Dormant Commerce Clause and the Due Process Clause and that the City’s actions constitute a violation of 42 U.S.C. § 1983 and an Inverse Condemnation / Regulatory Taking.<sup>2</sup> For the reasons set forth below, this Court finds in favor of the City and denies all causes of action asserted by Defendants.

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<sup>1</sup> 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.

<sup>2</sup> Defendants originally alleged the municipal zoning ordinances at issue were unconstitutional under the Equal Protection Clause as well. However, Defendants, with consent of the City, stipulated to the dismissal of the Equal Protection Clause counterclaim on July 10, 2023. Additionally, during opening statement, Defendants stated affirmatively that they were not going to present any evidence in support of their Due Process Clause counterclaim.



## **I. FINDINGS OF FACT**

### **A. The City's Zoning Purposes, Generally**

1. The City's general purposes underlying its zoning ordinances are: "to guide development 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).

This Order will refer to these two definitional requirements as the “Project Requirement” and the “HOA Requirement,” respectively.

11. Cabana houses, as special exceptions, are subject to additional use restrictions within the City’s Code of Ordinances, including:

1. That a *homeowner’s association* shall have been established for the project and a *maintenance agreement* has been submitted to the planning department.

...

3. That the use of the house be *limited to bathing and change of clothing facilities*, and occasional use as guest quarters and other similar uses.

4. That the special exception will be in *substantial harmony with the area in which it is to be located*.

5. That the special exception will *not be injurious to the adjoining property*.

North Myrtle Beach, S.C., Code of Ordinances Ch. 23, Art. II, § 23-22(4)(d) (1984) (emphasis added). Defendants are not challenging these use restrictions, except to the extent they require a homeowner’s association to be 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.

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 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 Project Requirement and HOA Requirement, 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.

## II. CONCLUSIONS OF LAW

### A. Dormant Commerce Clause

#### i. Policy Considerations

39. First, South Carolina courts **must** presume the constitutionality of municipal ordinances at the outset. *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) (“A municipal ordinance is a legislative enactment and is presumed to be constitutional.”) (quoting *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1992)). This presumption is a strong one. *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965). Therefore, “every presumption [must] be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution.” *City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (quoting *Moseley v. Welch*, 209 S.C. 19, 26–27, 39 S.E.2d 133, 137 (1946)). “[T]he power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which [must] be exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations.” *McMaster*, 395 S.C. at 504–05, 719 S.E.2d at 662–63 (quoting *Rush*, 246 S.C. at 276, 143 S.E.2d at 531).

40. Second, courts should be careful to avoid abuses that could arise from too strict enforcement of the Dormant Commerce Clause. The Supreme Court of the United States has held the Dormant Commerce Clause “is *not a roving license* for [] courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition.” *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007) (emphasis added) (finding it is “not the office of the Commerce Clause to control the decision of the voters” on how their local government operates). The Supreme Court further stated that although the Commerce Clause (and its negative implications) limit the ability of localities to regulate or otherwise burden the flow of interstate commerce, “it does not elevate free trade above all other values.” *Maine v. Taylor*, 477 U.S. 131, 151 (1986). “As long as a [municipality] does not needlessly obstruct interstate trade or attempt to ‘place itself in a position of economic isolation,’ it retains broad regulatory authority to protect the health and safety of its citizens . . . .” *Id.* (internal citation omitted). Similar to the presumption applied in South Carolina courts to local ordinances, the Supreme Court of the United States has also expressed courts “should be particularly hesitant to interfere with [local government] efforts under the guise of the Commerce Clause” when traditional local government functions are at issue. *United Haulers Ass’n, Inc.*, 550 U.S. at 343. Of course, zoning and land use regulation remain peculiarly local government functions. As such, the Supreme Court of the United States “has consistently held that a state’s power to regulate commerce is at its zenith in areas traditionally of local concern” such as zoning. *See Amisub of S.C., Inc. v. S.C. Dep’t of Health & Env’t Control*, 424 S.C. 80, 90, 817 S.E.2d 633, 638 (Ct. App. 2018) (citation omitted).

41. Third, “[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under



which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Doe v. State*, 421 S.C. 490, 502, 808 S.E.2d 807, 813 (2017) (applying the *Salerno* standard to a statute).

42. Lastly, the recent case of *Ani Creation, Inc. v. City of Myrtle Beach Board of Zoning Appeals*, 440 S.C. 266, 890 S.E.2d 748 (2023), is instructive. In that case, nine smoke shops and tobacco stores had a conforming use prior to the city passing a zoning overlay district that prohibited the operation of such stores in the city’s downtown. *Id.* at 274, 890 S.E.2d at 752. The Supreme Court of South Carolina explained at great length the presumption of the constitutionality of municipal ordinances and that courts should not generally overturn or disturb them, especially when they are “fairly debatable.” *Id.* at 278–79, 890 S.E.2d at 754 (citing *Rushing v. City of Greenville*, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975)). Further, the Supreme Court denied all of the stores’ constitutional challenges, despite the stores originally using the properties in conformity with a zoning plan that was subsequently changed. Although the Dormant Commerce Clause was not at issue in *Ani Creation*, much deference was given to municipalities in enacting zoning plans. How much more so in the case at bar when the ordinances preexisted Defendants’ purchase of the Property by over two decades.

## **ii. The Commerce Clause and Its Negative Implications, Generally**

43. The Supreme Court of the United States has identified “three broad categories of activity that Congress may regulate under its commerce power.” *United States v. Lopez*, 514 U.S. 549, 558 (1995). “First, Congress may regulate the use of the channels of interstate commerce.” *Id.* “Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.” *Id.* “Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially

affect interstate commerce.” *Id.* at 558–59 (internal citations omitted).

44. “Besides being an affirmative grant of power, the Commerce Clause also has a ‘negative sweep’ that restricts the power of states to regulate interstate trade.” *Medigen of Kentucky, Inc. v. Pub. Serv. Comm’n of W. Virginia*, 985 F.2d 164, 165–66 (4th Cir. 1993) (citing *Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298, 309 (1992), *overruled on other grounds by S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018)). “[T]he negative implications of the Commerce Clause, often referred to as the Dormant Commerce Clause, prohibit state action that unduly burdens interstate commerce.” *Travelscape, LLC v. S.C. Dep’t of Revenue*, 391 S.C. 89, 104, 705 S.E.2d 28, 36 (2011) (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997)).

**iii. Initial Burden on Defendants and the Lopez-Morrison Factors**

45. Defendants are only challenging the City’s power to regulate activities that substantially affect interstate commerce.

46. There is an initial burden a party must prove in order to sustain a challenge under this theory. The initial determinations are (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.”). These initial determinations of whether any effect on interstate commerce exists, and if so, whether the effect is substantial, are factual ones for which the moving party bears the burden.

47. The factors used in order to make this assessment are derived from *Lopez*, cited above, as well as *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).

48. Defendants have not met their burden based on the aforementioned facts.

**1) First Factor: Relation to Commerce**

49. The first *Lopez-Morrison* factor favors the City. The critical inquiry is whether the two ordinances at issue substantially affect interstate commerce, not whether the RV resort implicates interstate commerce or whether the RV resort participates in the overarching tourism market for the Grand Strand area.

50. “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).

51. 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), or even a short-term rental unit as in *Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (5th Cir. 2022).

52. Even if a cabana house as an amenity use is construed to affect the travel of people in and out of the City, it is undisputed Defendants never directly generated any revenue from this free-of-charge amenity. Further, Defendants have not demonstrated any commerce conducted by visitors to the Cabana House in its vicinity. Neither have they established how their customers have borne an increased cost as a result of the closure of the Cabana House. *See 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.”). Lastly, and as set forth more fully below, Defendants’ financial records indicate no harm to their bottom line.

53. The Project Requirement and HOA Requirement merely regulate a special exception amenity rather than a commercial activity involving the exchange of goods and services. Indeed, the special exception here was designed explicitly for *noncommercial* activity.

## **2) Second Factor: Jurisdictional Limitation**

54. In considering the second *Lopez-Morrison* factor, the City created an express jurisdictional limit: the ordinances *only* apply in the R-4 Resort Residential District, meaning the ordinances are limited in reach and the Defendants are not completely excluded from the market.

55. In *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), an ordinance prevented the *selling* of *all* milk processed and bottled outside of a five-mile radius of the municipality. The Court struck down the ordinance due to the substantial effect the milk processing monopoly would have on interstate commerce. *See id.* What is evident is the focus should be on whether a regulation affects the price of a good or service as well as whether a regulation completely excludes a market participant from the marketplace.

56. Defendants generated no direct income from the Cabana House and failed to demonstrate whether the Cabana House had any effect on the price of the site reservations at the RV resort. Neither have Defendants established 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.

57. Defendants rely on the case of *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564 (1997). However, *Camps Newfound* concerned a state tax (as opposed to a zoning ordinance) that applied regardless of where the plaintiff was located in the state, such that the plaintiff faced incurring a direct cost throughout the entire market. The Supreme Court was focused on the complete exclusion from the marketplace, i.e. the completely inability to operate without a discriminatory tax imposed.

58. In the case at bar, cabana houses are designed as special exception amenities to be owned and utilized by homeowners' associations, which are non-profit, social welfare organizations. The zoning of a special exception amenity is different from regulations prohibiting the selling and consumption of commodities in an entire local market. Further, the ordinances at issue only apply in one zoning district, meaning Defendants do not face the same type of complete exclusion or discrimination as in *Camps Newfound*. Defendants' self-selected purchase of a property in the R-4 zoning district, which is a **residential** district, and their attempt to use said property as a special exception without seeking prior approval, is their own doing, when they could have purchased property in other zoning districts, such as the Resort Commercial zoning district that contains beachfront lots. Alternatively, Defendants can shuttle and indeed have shuttled guests to and from public beach access points in the City, with changing facilities if they so desire, without the need for even purchasing a physical structure.

59. Defendants suggest interstate commerce is implicated here, because the RV resort, like the camp in *Camps Newfound*, offers a service akin to a hotel and advertises its resort nationwide, both of which implicate the transportation of persons across state lines. However, Defendants are making an unsupported leap in logic. In *Camps Newfound*, the service offered, i.e. a camp, was being directly infringed by a discriminatory tax. However, Defendants are not incurring a similar cost infringement on their service offered, i.e. a RV resort. Only a tangential amenity is being regulated here, rather than the imposition of a tax on the primary operation as in *Camps Newfound*. With or without the Cabana House, Defendants will operate akin to a hotel and advertise nationwide with no obvious increase in cost. While the RV resort may implicate interstate commerce, their use of the Cabana House is separate and distinct. Defendants have not established that the Cabana House specifically and the Project Requirement and the HOA Requirement generally implicate interstate commerce, especially given the jurisdictional limitations.

### **3) Third Factor: Legislative History**

60. Regarding the third *Lopez-Morrison* factor, 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. It is clear from the record the ordinances at issue were meant to provide for a limited noncommercial amenity use and there was no intent to regulate commerce or any sort of economic enterprise.

### **4) Fourth Factor: Attenuation**

61. In considering the fourth *Lopez-Morrison* factor, it is telling whether there has been any effect on Defendants' bottom line. 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.

62. Defendants asserted their occupancy rate—which is calculated by the total number of reservations divided by the total number of sites available for reservation—suffered at the RV resort following the closure of the Cabana House due to the Consent Order. However, Defendants failed to account for the over seventeen percent (17%) increase in the number of sites available at the RV resort by December 2021 due to their expansion of the RV resort. When the 2021 reservations are normalized to the number of sites available in 2022, it is clear Defendants’ occupancy rate, from year-through-September 2021, 2022, and 2023, steadily increased. Thus, the most reasonable interpretation of Defendants’ alleged loss in occupancy is not due to the Cabana House closure, but to the increase in available sites. Defendants simply have not demonstrated any effect on their financial wellbeing due to their inability to own and operate a cabana house, such that any effect on interstate commerce, much less their bottom line, is extremely attenuated.

#### *iv. Two-Tier Analysis*

63. Assuming *arguendo* that the Project Requirement and the HOA Requirement create a substantial effect on interstate commerce, the analysis proceeds to a two-step inquiry. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578–79 (1986). The first-tier approach states when a law “directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests,” the law will generally be struck down. *Id.* at 579. However, the law can still survive if it “advances a legitimate

local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Oregon Waste Sys., Inc. v. Dep’t of Env’t Quality of State of Or.*, 511 U.S. 93, 101 (1994)). Alternatively, when a law “has only indirect effects on interstate commerce and regulates evenhandedly, [courts] have examined whether the [governing body’s] interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.” *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The latter test, i.e. the second-tier approach, is often known as the *Pike* balancing test.

64. Defendants have not provided to this Court any legal authority in which a special exception like the one at bar, or an analogous accessory use, was held to the stricter standard of the Dormant Commerce Clause. The nature of municipal zoning is extremely important context in this case, which in-and-of-itself distinguishes this case from the cases cited by Defendants, many, if not most, of which do not concern zoning. In the case of *Texas Manufactured Housing Association, Inc. v. City of La Porte*, 974 F. Supp. 602 (S.D. Tex. 1996), the plaintiff brought a constitutional challenge a municipal zoning ordinance that excluded manufactured homes from R-1 residential zoning districts. *Id.* at 602–05. Notably, manufactured homes were not excluded in other residential zoning districts. *See id.* at 610–11. The federal district court found stricter scrutiny under the Dormant Commerce Clause was inapplicable, because any potential effect on interstate commerce was incidental and the zoning ordinance was evenhanded. *Id.* at 608–14. The attenuation was important in *Texas Manufactured Housing* and so it should be in this case as well.

65. In *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987 (E.D. Cal. 2006), the plaintiff brought a constitutional challenge to a municipal zoning ordinance that prohibited the development of discount superstores containing a full service grocery department. The federal district court held:



[The] Ordinance does not erect barriers against interstate commerce. The Ordinance prevents any retailer, whether in-state or out-of-state, from establishing the discount superstore marketing format in [the city]. This *leaves the market open to all* local or foreign retailers of all local or foreign products, except in the discount superstore format. The Commerce Clause does *not* protect the particular structure or methods of operation of a retail market. Nor does it give an interstate business the right to conduct its business in what it considers the most efficient manner, for the Constitution protects the interstate market, not particular interstate firms.

*The Ordinance does not discriminate against interstate commerce because any retailer can locate and do business in [the city], with any employees or managers, offering any products, except in the legislatively defined discount superstore format. There is no constitutional right to do business in a retailer's optimally profitable store configuration, if the resulting operation burdens environmental, traffic-pattern, economic-viability, and land-use-planning interests of the host municipality.*

*Id.* at 1012 (emphasis added) (internal citations and quotation marks omitted).<sup>3</sup>

66. Similarly, the Dormant Commerce Clause does not confer on Defendants a constitutional right to own and operate a cabana house in the City's R-4 Resort Residential District, when the remainder of the market is available to Defendants and/or when they are able to use public parking and beach access points to shuttle guests to and from the coastline. Both *Texas Manufactured Housing* and *Turlock* are more apt comparisons with the case at bar, because they both deal with zoning ordinances, unlike *Camps Newfound*. Any effect on interstate commerce here, if any, is purely incidental and the ordinances are constitutionally sound. *See Fla. Transp. Servs., Inc. v.*

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<sup>3</sup> Another case—*McBurney v. Young*, 667 F.3d 454 (4th Cir. 2012), *aff'd*, 569 U.S. 221 (2013)—is instructive as well. *McBurney* concerned the Virginia Freedom of Information Act (“VFOIA”), which limited access rights to public records to citizens of the Commonwealth of Virginia. The Fourth Circuit opinion, which was affirmed by the Supreme Court, held the *Pike* balancing test was more appropriate, even though the statute facially discriminated against non-citizens, because interstate commerce was not implicated. *Id.* at 468–70. The Fourth Circuit also noted “[n]othing in VFOIA burdens ‘the flow of interstate commerce.’ At most, it prevents [plaintiff] from using his ‘chosen way of doing business,’ but it does not prevent him from engaging in business in the Commonwealth.” *Id.*

*Miami-Dade Cnty.*, 703 F.3d 1230, 1244–45 (11th Cir. 2012) (holding a local law is not discriminatory “where it (1) has incidental negative effects on *some* (but not all) out-of-state market participants and (2) does not reduce or curtail access to interstate markets”) (emphasis in original) (citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978)).

67. Context matters. “Zoning is a matter of particular importance to state and local governments. As a result, [] courts have traditionally been somewhat hesitant to interfere in the zoning process.” *Randy’s Sanitation, Inc. v. Wright Cnty., Minn.*, 65 F. Supp. 2d 1017, 1029 (D. Minn. 1999) (citing *Night Clubs, Inc. v. City of Ft. Smith*, 163 F.3d 475, 479 (8th Cir. 1998)); *see also Pomponio v. Fauquier Cnty. Bd. of Sup’rs*, 21 F.3d 1319, 1327 (4th Cir. 1994) (“We also have reiterated that state and local zoning and land use law is particularly the province of the State and that federal courts should be wary of intervening in that area in the ordinary case.”). The Project Requirement recognizes projects within the City, which may create a distinction with projects outside of the City. But most, if not all, zoning regulations create inclusive and exclusive distinctions. After all, the basic purpose of zoning is to create different zones for land use and development for the benefit and general welfare of the community. Further, 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.

68. Several courts have recognized the inherently discriminatory nature of zoning regulations. *See, e.g., Stuten v. Beebe*, 588 F.2d 560, 565 (6th Cir. 1978) (“All zoning plans have inherent within them a discrimination between the various land uses permitted thereunder.”); *Bay Area Addiction Rsch. & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 733 (9th Cir. 1999) (noting

“the inherently discriminatory nature of zoning”); *Thai Meditation Ass’n of Alabama, Inc. v. City of Mobile, Alabama*, No. 1:16- CV-395-TFM-MU, 2019 WL 2250275, at \*13 (S.D. Ala. May 24, 2019), *aff’d*, 980 F.3d 821 (11th Cir. 2020) (finding true that “zoning laws inherently distinguish between uses and necessarily involve selection and categorization”); *Church of Scientology of Georgia, Inc. v. City of Sandy Springs, Ga.*, 843 F. Supp. 2d 1328, 1371 (N.D. Ga. 2012) (same) (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234 (11th Cir. 2004)).

69. Therefore, to take Defendants’ assertions to their logical conclusion would mean to view all zoning distinctions and classifications as facially discriminatory, rendering all zoning plans violative of the Dormant Commerce Clause. *See Randy’s Sanitation*, 65 F. Supp. 2d at 1029 (“Randy’s asks this Court, on the basis of two zoning decisions, to declare that those decisions [denying him a conditional use permit] had the ‘effect of discriminating against interstate commerce.’ Those decisions may have had such an effect, but no more so than would any commonplace zoning decision preventing a distributor from building a distribution warehouse in a residential zone.”).

70. In fact, Defendants’ arguments were essentially attempted (unsuccessfully) in the case of *Flava Works, Inc. v. City of Miami, Fla.*, 800 F. Supp. 2d 1182 (S.D. Fla. 2011). In *Flava Works*, the City of Miami prohibited the operation of an adult entertainment business in a R-4 residential district, which was challenged on Dormant Commerce Clause grounds. The court held the following:

The City has a local public interest in preserving residential areas free of the operation of businesses to ensure safety, and prevent traffic, congestion, overcrowding, or parking concerns, to list a few reasons. Any effects on interstate commerce as a result of this ordinance are, at most, incidental. Thus, the ordinance does not run afoul of the Dormant Commerce Clause.

*Id.* at 1193.

71. In sum, the City has not placed itself in economic isolation. *See Maine v. Taylor*, 477 U.S. 131, 151 (1986). Quite to the contrary, because it relies on the tourism industry, the City has no incentive to discriminate against interstate commerce and does not do so by the promulgation and enforcement of the Project Requirement or the HOA Requirement. Instead, it used its broad zoning authority to design a zoning plan that maintains a family-oriented and dispersed community, rather than a high-rise, commercialized beachfront that suffers from a lack of ocean visibility and access.

**v. *Legitimate Local Purposes***

72. Again, assuming *arguendo* a substantial effect on interstate commerce exists, the ordinances at issue nevertheless survive constitutional scrutiny, because they advance “legitimate local purpose[s] that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Oregon Waste Sys., Inc. v. Dep’t of Env’t Quality of State of Or.*, 511 U.S. 93, 101 (1994)).

73. As stated above, there are multiple legitimate reasons for restricting the ownership and use of cabana houses in the R-4 district to projects within the City and to homeowner’s associations, a few of which will be discussed here.

74. First, homeowners’ associations are effectively quasi-governmental entities. *Woodward v. Bd. Of Directors of Tamarron Ass’n of Condo. Owners, Inc.*, 155 P.3d 621, 624 (Colo. App. 2007) (noting the “quasi-governmental functions” homeowners’ association serve); *Chantiles v. Lake Forest II Master Homeowners Assn.*, 37 Cal. App. 4th 914, 922, 45 Cal. Rptr. 2d 1, 5 (1995) (citing *Cohen v. Kite Hill Cmty. Assn.*, 142 Cal. App. 3d 642, 651, 191 Cal. Rptr. 209, 214 (Ct. App. 1983)). Given cabana houses are designed to be used in a noncommercial manner and the inability to regulate by issuing a business license, the City’s requirement for an HOA to own and operate cabana houses serves as a reasonable alternative method of ensuring compliance and

responsiveness to the City and its zoning ordinances. The testimony of the City demonstrated these entities are more responsive to the City in the context of a residential zoning district and a special exception use. This responsiveness concern is evidenced by the testimony from the City Manager and the City's Rule 30(b)(6) Representative and by the RV resort's manager ignoring the City's attempts at informal resolution. Further, Defendants are effectively immune from compliance, because a five-hundred-dollar (\$500) fine is likely to be viewed as the cost of doing business in order to host events. Tellingly, Defendants' charged exactly \$500 for the rental cost of the Cabana House for certain events they hosted, while not charging any fee for facilities at their RV resort. Ultimately, the ordinances support homogenous development and compatibility in this district.

75. Second, there are quality of life issues created when shuttling hundreds of RV resort guests from outside the City to a fairly small cabana house sitting between two condominium complexes. And point in fact, Defendants were shuttling hundreds of guests to the Cabana House during the summer of 2021. There are several issues that result from that intensity of use, including traffic congestion, shuttle buses backing out and/or conducting drop-off and pick-up near a four-lane highway, noise from the pool deck, potential for trespassing and altercations, and late night activities. The City's Code of Ordinances demonstrate density issues, the maintenance of order, adequate transportation nodes, and the general welfare are all purposes in the creation of the zoning classifications as well. North Myrtle Beach, S.C., Code of Ordinances ch. 23, art. II, § 23-1(2), (3), (5), (6) & (8) (1984). The City certainly has legitimate concerns in hundreds of vacationers filtering through a small access node in the immediate vicinity and proximity to a residential neighborhood zone when the City has already provided public access points to the beach that can accept and withstand mass public access.

76. Third, in *Texas Manufactured Housing*, the federal district court found the "preservation

of property values” as a legitimate local interest. 974 F. Supp. at 612. Notably, City representatives testified to the depreciation of property value being a concern of theirs relative to the ordinances at issue in this case. Further, residents of Sea Cloisters expressly testified that if Defendants are not prohibited from using the Cabana House, then it is going to affect their property values and quality of life. *See S.C. State Highway Dep’t v. Wilson*, 254 S.C. 360, 370, 175 S.E.2d 391, 397 (1970) (holding a property owner “who is familiar with his property and its value, is allowed to give his or her estimate as to the value of the land or damages thereto”).

77. Based on the foregoing, the City’s legitimate interests are sufficient to survive even the strictest constitutional scrutiny.

#### **B. Due Process Clause**

78. To have a property interest in a benefit, one must have a “legitimate claim of entitlement to it.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). A violation of substantive due process does not occur when one does not possess a property interest. *Harbit v. City of Charleston*, 382 S.C. 383, 395, 675 S.E.2d 776, 782 (Ct. App. 2009), *as amended* (May 4, 2009) (“[The plaintiff] did not have a prior property interest in commercial zoning. While [the plaintiff] may have purchased the property with the expectation that City Council would grant his application, this alone is insufficient to establish a violation of his constitutional rights.”).

79. “[U]nlike the variance, which creates a vested right and runs with the land, the special exception is personal to the grantee.” 36 *Causes of Action* 2d 583 (Originally published in 2008) (citing Am. Jur. 2d, *Zoning and Planning* § 753; C.J.S., *Zoning & Land Planning* § 297). In other words, authorization for use as a special exception does not create a vested right nor does it run with the land. *See County of Cook v. Monat*, 365 Ill. App. 3d 167, 847 N.E.2d 689 (2006), *City of Sugar Creek v. Reese*, 106 S.W.3d 615 (Mo. Ct. App. 2003); *Shoosmith Bros. v. Cnty. of*

*Chesterfield*, 268 Va. 241, 601 S.E.2d 641 (2004).<sup>4</sup>

80. Based on the foregoing law and facts, including the material change in ownership and use by Defendants as compared to the original owner, Defendants should have applied for authorization to use the Property as a special exception cabana house use. Even had Defendants applied for special exception authorization, a municipal board of zoning appeals has “significant discretion in deciding whether to grant [an] application for a special exception,” and because of that significant discretion, a landowner possesses “no legitimate claim of entitlement, and thus no property right [to a special exception] cognizable under due process clause.” *Biser v. Town of Bel Air*, 991 F.2d 100, 104 (4th Cir. 1993); *see also Horne v. Mayor & City Council of Baltimore*, 349 F. App’x 835, 840 (4th Cir. 2009); *Richmond Corp. v. Bd. of Cnty. Comm’rs for Prince George’s Cnty.*, 254 Md. 244, 256–57, 255 A.2d 398, 404–05 (1969).

81. Defendants do not possess a vested property right in the special exception use of the Property as a cabana house. Because Defendants have no property right to a special exception, Defendants’ Due Process Counterclaim is without merit.

### **C. Takings Clause**

82. A fundamental element for a regulatory inverse condemnation to exist is whether a governmental body has committed affirmative conduct. *Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76, 80 (2005). In this case, the City has not committed any affirmative conduct. Given that the applicable ordinances were in effect prior to Defendants’ purchase of the Property, the City’s decision to enforce the ordinances upon learning of Defendants’ violations can hardly

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<sup>4</sup> Of note, “[t]he term ‘special exception’ has now given way in most zoning ordinances to the terms conditional use and special use; most courts now consider all three terms to be interchangeable.” *Definition*, Discretionary Land Use Controls § 3:1; *see also* 83 Am. Jur. 2d *Zoning and Planning* § 712.

be viewed as anything more than routine municipal regulation. Indeed, Defendants had no rights to the special exception cabana house to begin with, such that a taking never occurred here. Numerous cases are instructive demonstrating a taking has not occurred here. *See Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995); *Wooten v. S.C. Coastal Council*, 333 S.C. 469, 510 S.E.2d 716 (1999); *Mackenzie v. City of Rockledge*, 920 F.2d 1554 (11th Cir. 1991); *City of Virginia Beach v. Bell*, 255 Va. 395, 498 S.E.2d 414 (1998); *Anello v. Zoning Board of Appeals of the Village of Dobbs Ferry*, 89 N.Y.2d 535, 678 N.E.2d 870 (1997); *Kim v. City of New York*, 90 N.Y.2d 1, 681 N.E.2d 312 (1997); *Gazza v. New York State Dep't of Env't Conservation*, 89 N.Y.2d 603, 679 N.E.2d 1035 (1997); *Basile v. Town of Southampton*, 89 N.Y.2d 974, 678 N.E.2d 489 (1997); *Columbia Venture, LLC v. Richland Cnty.*, 413 S.C. 423, 776 S.E.2d 900 (2015).

### III. CONCLUSION

83. Defendants' constitutional challenges are unsupported. Defendants have not met their initial burden of establishing the Project Requirement or the HOA Requirement substantially affect interstate commerce. Even assuming *arguendo* a substantial effect on interstate commerce exists, the City's legitimate local interests are sufficient to survive either of the two-tier analyses under the Dormant Commerce Clause. Additionally, Defendants have no right to the special exception use of a cabana house to begin with and the ordinances in question predate their purchase and use of the Cabana House by over two decades. Therefore, Defendants' assertions as to violations of the Due Process Clause and the Takings Clause are without merit. Likewise, Defendants cannot establish a violation of 42 U.S.C. § 1983. For the reasons set forth above, this Court finds the ordinances at issue are valid and enforceable and declares Defendants' ownership and use of the Property as a special exception are in violation of the City's Code of Ordinances.



STATE OF SOUTH CAROLINA \* COURT OF COMMON PLEAS  
COUNTY OF HORRY \* TRANSCRIPT OF RECORD

-----X  
CITY OF NORTH MYRTLE BEACH, \*  
Plaintiff, \*  
vs. \* Case No. 2021-CP-26-07489  
SUN TRS OCEAN CLUB, LLC, \*  
et al. \*  
Defendants. \*  
-----X

August 9, 2023  
(Heard in Georgetown, SC)

B E F O R E:

The Honorable William Seals, Presiding Judge

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RV, LLC, et al.

Court Reporter: Bobbi Fisher, RPR  
SC Official Court Reporter III

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E X H I B I T S

(None.)

## P R O C E E D I N G S

(The following proceedings started at 12:12 p.m.)

THE COURT: So we have three motions today; is that correct?

MR. WILLIS: Yes, Your Honor. We're going to withdraw the motion to vacate the consent order given the fact that we have got a trial date now in October. We can probably live with the cabana house being closed for a month, so...

THE COURT: Okay.

MR. WILLIS: The season is over, so we'll withdraw that motion. So it will just be two. Mr. Tamasitis will argue the summary judgment motion.

THE COURT: Okay. I'm ready whenever you are.

MR. TAMASITIS: Thank you, Your Honor.

## ARGUMENT ON BEHALF OF THE DEFENDANTS

MR. TAMASITIS: May it please the Court, Your Honor? John Tamasitis on behalf of the Sun defendants in this case, along with co-counsel Dick Willis. This is my first time in the court, Your Honor, so can you see the PowerPoint slide that we're going to be presenting?

THE COURT: Yes.

MR. WILLIS: Okay. Great.

First off, I want to thank the Court for indulging us in setting up this hearing. I think everyone is aware

1 that the defendants are looking forward to trying this  
2 case, and we're glad you could accommodate us here in  
3 Georgetown.

4 THE COURT: Thank you.

5 MR. WILLIS: On our renewed motion for partial  
6 summary judgment is the dormant commerce clause claim, the  
7 defendants are asking the Court to grant the defendant's  
8 motion to declare that the applicable provisions in  
9 Sections 23-2 and 23-22 of the City zoning ordinance as  
10 unconstitutional for violation of the dormant commerce  
11 clause.

12 The common thread among the Supreme Court's dormant  
13 commerce clause cases is that state or local governments  
14 are interfering with the natural functioning of an  
15 interstate market, and they do that either through, one,  
16 prohibition or, two, burdensome regulation.

17 The City suggests in its memo in opposition that  
18 there is no interstate market implicated by the cabana  
19 house ordinances in this case. According to the City, the  
20 ownership of a beachfront cabana house for the use of  
21 projects not located near the ocean that was created by  
22 the City Council to direct an economic investment away  
23 from the beachfront but allow such investment elsewhere  
24 within the City so as to promote tourism has no interstate  
25 commerce impact and, thus, no market implications.

1           As we were driving over this morning, Your Honor,  
2           from Columbia, I was thinking about that opening and  
3           wanted to share -- and we'll discuss this later on in the  
4           presentation -- but this quote from the City in their  
5           30(b)(6) deposition that we were -- we had asked the  
6           question of what is the reasoning behind the ordinance  
7           itself. And the City's deponent testified "the thinking  
8           that the City Council had at the time was that the City  
9           wanted to be sure that the City did not form or develop in  
10          a manner similar to Miami, where there were dozens and  
11          dozens of high-rise oceanfront hotels and condo projects  
12          that would completely obscure the view of the ocean and  
13          enjoyment of the area as more of a family beach. And so  
14          they felt one way to accomplish that would be to provide  
15          or promote a way for the projects to be located off the  
16          beach but still take advantage of that oceanfront  
17          amenity."

18          Your Honor, the overarching idea there is that the  
19          City created the cabana house exception to direct  
20          investment away from the beachfront. And what kind of  
21          investment? Well, they talk about that as high-rise  
22          condos and other projects that's undefined in the zoning  
23          ordinance. That directing of investment away from the  
24          beachfront and allowing for a cabana house to then stand  
25          in place for them to have that private beach access

1       inextricably links the project and the cabana house. And  
2       that's important here because the analysis under the  
3       interstate commerce clause and the analysis of Congress's  
4       commerce powers is that that linkage creates the evidence  
5       that's necessary to show that there is interstate commerce  
6       implicated in this case.

7               Some contends that the market that's at issue here  
8       is the tourism market generally, and the ownership and use  
9       of the cabana house for a private beach access is part of  
10      the services that these projects offer its guests more  
11      specifically. In the competitive tourism market for  
12      visitors to the Grand Strand, it doesn't just have a  
13      substantial effect on interstate commerce; we contend it  
14      is a direct part of interstate commerce. It is this  
15      market as to the cabana house that Sun is prohibited from  
16      engaging in simply because of where they are located.

17              This is a residency requirement, and the zoning  
18      ordinance presents a burdensome regulation against Sun and  
19      other similarly situated projects as to the tourism market  
20      more broadly through the discrimination of non-local  
21      enterprises.

22              Importantly, the City has admitted that the RV  
23      resort -- or the RV resort is encompassed by the term  
24      "project" in Sections 23-2 and 23-22 of the zoning  
25      ordinance. And that term "project" is undefined anywhere

1 else. And all would be well in this case if the project  
2 at issue was located within the city and managed by a  
3 local homeowners association.

4 Additionally, the City acknowledges that there are  
5 no prohibitions on commercial projects from using a cabana  
6 house. To argue that a material fact -- factual dispute  
7 precludes a determination as to whether the cabana house  
8 at issue and the zoning ordinance's provisions governing  
9 the ownership and use of cabana houses has a substantial  
10 effect on interstate commerce so as to implicate the  
11 dormant commerce clause ignores the common sense analysis  
12 set forth in the case law.

13 To be short, Defendants contend that they do not  
14 just have a substantial effect on interstate commerce. We  
15 contend that the project at issue in this case as well as  
16 the cabana house and the zoning ordinance directly are  
17 involved in interstate commerce.

18 What is even more telling is that the City has put  
19 all of its proverbial eggs in this basket along with the  
20 broad policy considerations that they lead their memo off  
21 with. Apparently, the City anticipates that the Court is  
22 going to latch on to the City's repeated mantra that  
23 interstate commerce analysis is a fact-intensive process  
24 that can never be handled at the summary judgment stage.  
25 The City is wrong. This is because the City knows that if

1 the Court finds that the dormant clause is implicated in  
2 this case, the applicable sections of the zoning ordinance  
3 are per se invalid. It reminds me of the old saying from  
4 law school from some of my law professors: When the law  
5 is on your side, bang on the law. When the facts are on  
6 your side, bang on the facts. And when you have neither,  
7 bang on the table.

8 From the City's part, it appears they're going to  
9 bang on policy in the memo and try to direct the Court's  
10 attention away from what is truly at issue in this case.  
11 Before I begin our full analysis, I want to dispel a few  
12 assertions made in the City's memo upfront.

13 Your Honor, this is the map of the project, and  
14 you'll see -- it's been pulled off Google Maps. We have  
15 got the little red marker there that shows the location of  
16 the beach club or the cabana house; I'll use those two  
17 terms interchangeably. If you notice across the street  
18 from the beach club that pool area, that is actually the  
19 Tilghman Beach and Golf Resort located in the R-4 resort  
20 residential district. And down the street is the Ocean  
21 Club Resort. The R-4 resort residential district is not  
22 exclusively a residential area by definition. It includes  
23 resorts, hotels, restaurants, and residential areas.

24 Section 23-2, Your Honor, of the zoning ordinance  
25 deals with the definition of cabana house, and then



1 Section 23-22 talks about the use provisions for those  
2 cabana houses. This issue involves -- this case really  
3 involves approximately 21 words in the entire zoning  
4 ordinance for the City. It does not represent a wholesale  
5 takedown of the zoning ordinance. It doesn't represent a  
6 threat to zoning ordinances across the state, and it  
7 doesn't threaten the national land use planning efforts  
8 throughout the country, as the City warns in its memo.

9 Also, the City repeatedly states that the Sun  
10 defendants have cited to no case law striking down the  
11 zoning ordinance under strict scrutiny in the dormant  
12 commerce clause and that Courts have never found that the  
13 zoning ordinance that discriminated against interstate  
14 commerce directly was ever subject to the per se invalid  
15 analysis set down by the Supreme Court or at least the  
16 City says it couldn't find such a case. Unfortunately,  
17 the City has not read the cases cited by Sun defendants  
18 closely enough.

19 Indeed, the case of Hignell-Stark vs. City of New  
20 Orleans, the Fifth Circuit case that we cite extensively  
21 and discuss for its residency requirement, that case  
22 was -- involved a striking down of a zoning ordinance  
23 under strict scrutiny. I also have a complaint from that  
24 case that was filed in the district court that discusses  
25 the zoning ordinance and the enactment of that zoning

1 ordinance, and it shows clearly that it was a zoning  
2 ordinance in that case that was struck down under strict  
3 scrutiny. That case is on all fours with the facts  
4 presented here. Make no mistake, what the City's zoning  
5 ordinance does here is create a residency requirement for  
6 the ownership and use of the cabana house.

7 Additionally, Your Honor, if I may approach the  
8 bench...

9 THE COURT: Yes.

10 MR. TAMASITIS: I have seven additional cases that  
11 we have been able to find. Do you want me to leave them  
12 here or...

13 Thank you.

14 Your Honor, these are seven additional cases that we  
15 have found where a Court has struck down a zoning  
16 ordinance under strict scrutiny for directly  
17 discriminating against interstate commerce. There are two  
18 sister cases from the Eleventh Circuit to go along with  
19 the Fifth Circuit case that we have cited as well as other  
20 cases from the district and state courts across the  
21 country. Suffice it to say, Your Honor, you are not  
22 alone, as the City would have made you to believe that you  
23 are dealing with a case by yourself in these set of facts.

24 Finally, I want to briefly discuss the disputed  
25 material facts that the City so clearly laid out in its

1 memo. Your Honor, what we did was we went through the  
2 City's memo and looked at each disputed fact that it  
3 clearly identifies: Fact number one, second fact. We  
4 went through those and created a chart. We have the  
5 citation of what they're cited for in the memo. And then  
6 a discussion of what those facts actually represent. Each  
7 one of those facts are either, one, not facts at all but  
8 are legal conclusions, or two, go towards whether the City  
9 had knowledge of Sun defendant's ownership and use of the  
10 beach club and the property prior to bringing the lawsuit,  
11 the latter of which directly is -- are directly relevant  
12 to Sun defendants' government estoppel argument or  
13 affirmative defense and our due process claim, but they  
14 are not material for today's analysis.

15 So, Your Honor, the next slide, this is the analysis  
16 for the dormant commerce clause when dealing with  
17 discrimination. We have presented this to Your Honor  
18 before in our previous hearing, so we're going to kind of  
19 track through this and discuss the analysis based on the  
20 facts that are presented here today as well as some of the  
21 legal analysis that are set forth in the case law.

22 The City's memo and its arguments hinge on two broad  
23 assertions. First, that zoning ordinances are somehow  
24 special or maybe more applicable special exceptions to the  
25 dormant commerce clause in the Constitution. Second, the

1 dormant commerce clause, according to the City, is not  
2 implicated in this case because Sun's ownership and use of  
3 the cabana house and the applicable provisions of the  
4 zoning ordinance do not have a substantial effect on  
5 interstate commerce. I want to take each one of those up  
6 one by one.

7 First, zoning ordinances aren't special. In  
8 addition to the Hignell-Stark case, we have provided seven  
9 additional cases that have used zoning ordinances in the  
10 same way as any state or local law with respect to the  
11 dormant commerce clause. Additionally -- and I would  
12 point to the Court to the Camps Newfound case that dealt  
13 with the non-profit campground that was not eligible for  
14 the State's full real estate tax exemption because it  
15 operated principally for the benefit of nonresidents.  
16 That was cited and discussed in our memo.

17 Although the City argues that this case was focused  
18 on the campground's complete exclusion from the  
19 marketplace, the City would again be wrong in how it's  
20 reading that case. Instead, the opinion -- the majority  
21 of the discussion primarily dealt with whether a  
22 non-profit organization, such as the campground in that  
23 case, in a purely state/local issue such as real estate  
24 taxes, much like zoning ordinances, could implicate the  
25 dormant commerce clause, and the Supreme Court, I believe,

1 stated in that case that this is the first time they're  
2 looking at whether or not a real estate tax issue would be  
3 subject to the dormant commerce clause analysis.

4 The Town argued in Camps Newfound that Congress has  
5 no power to enact taxes on real estate, much like the City  
6 argues here today that zoning is purely a local issue.  
7 However, the Supreme Court explained that states may not  
8 impose real estate taxes in a manner that discriminates  
9 against interstate commerce, and the same holds true for  
10 zoning ordinances. And this is critical. I think the  
11 City believes -- the City is right that there is a  
12 presumption of validity for state and local laws, that  
13 there's no question about that. The case law is clear.  
14 But to a point, Your Honor -- to a point to where they run  
15 up against the constitution, they're invalid.

16 And this is actually a quote from Camps Newfound,  
17 and this is as the Supreme Court instructed, "To allow a  
18 state or local government to avoid the strictures of the  
19 dormant commerce clause by simple device of labeling its  
20 law or regulation in a certain way would destroy the  
21 barrier against economic protection that the Constitution  
22 provides." And that's what we're really after here, is  
23 that a zoning ordinance is not special and unique and is  
24 exempt from the Constitutional analysis. It is a state or  
25 local law just like any other.

1           And also talking about the presumption of validity  
2 as discussed by the City, it's just a presumption that can  
3 surely be rebutted if the facts and the evidence present  
4 otherwise.

5           Based on the cases provided and the cases cited, it  
6 is clear that courts do not hold zoning ordinances as  
7 uniquely special with respect to the dormant clause  
8 analysis. Sure, zoning ordinances are fundamentally  
9 local, and they may be inherently discriminatory, as the  
10 City has discussed, but that does not mean they can run  
11 afoul of the U.S. Constitution. Zoning ordinances are not  
12 a special exception to the Constitution. The City's  
13 policies considerations, though they do warrant  
14 consideration, do not apply when a zoning ordinance is  
15 clearly unconstitutional, as Sections 23-2 and 23-22 are  
16 in this case.

17           Next, Your Honor, I want to slowly go through this  
18 interstate commerce issue and whether or not there's a  
19 substantial effect on interstate commerce. The City  
20 devotes almost its entire memo to this, and I think it  
21 does warrant us to walk through it. Again, Your Honor,  
22 the defendants don't contend that we had a substantial  
23 effect on interstate commerce. We believe we're in the  
24 stream of commerce, and we think that the zoning ordinance  
25 is the same thing. It's even above that. I don't think

1 we have a question of substantial effects. I think it is  
2 interstate commerce.

3 The City's main argument throughout the memo is that  
4 the dormant commerce clause is not implicated in this case  
5 because the ownership and use of the cabana house and the  
6 zoning ordinances provisions related to the same are not  
7 enough. They suggest that it has no effect on interstate  
8 commerce, as a matter of fact.

9 It should be noted first, Your Honor, that the  
10 analysis required by this case in the dormant commerce  
11 clause is not to be focused on Sun defendants alone but  
12 it's to be focused on whether the zoning ordinance  
13 discriminates against interstate commerce. The Sun  
14 defendants are simply the lens through which the Court  
15 views this analysis. The only limited view as to Sun is  
16 whether or not it has standing, which we do.

17 And so you could take everything we discuss here  
18 today -- and I have done it before when I'm looking  
19 through the cases -- to say, well, what if we were a condo  
20 association in Calabash, North Carolina? Would the  
21 analysis still be the same? And I would suggest to Your  
22 Honor that they are, and it shows that this, one, directly  
23 implicates interstate commerce and, two, is discriminatory  
24 against interstate commerce.

25 So before we discuss the City's analysis, let's

1 discuss the actual Congress's commerce power. I know this  
2 is going to sound like Common Law 101, Your Honor, but it  
3 helped me to kind of get my hands around this, and so I  
4 just wanted to walk through this very quickly.

5 In Hughes vs. Oklahoma, which we have cited in our  
6 case -- I believe the City actually cites to it, too --  
7 the Supreme Court stated that the definition of commerce  
8 is the same when relied on to strike down or restrict  
9 state legislation as when on relied to support  
10 congressional action.

11 So, interestingly, in support of this argument, the  
12 City cites to the case of Wickard v. Filburn. And I  
13 remember having this case brought to me by Tommy Crocker  
14 in the University of South Carolina School of law and was  
15 kind of shocked that this would actually be there, but  
16 we're going to go through the facts.

17 This represents the outermost reaches of Congress's  
18 commerce power, and it is still good law. So if the Court  
19 recalls, Mr. Filburn was a small-time farmer in Ohio who  
20 harvested more acres of wheat than his allotment under the  
21 Agricultural Adjustment Act of 1938. Mr. Filburn was then  
22 penalized under the Act, and he argued that the extra  
23 wheat that he produced in violation of the law was  
24 actually for his own private consumption and had no effect  
25 on interstate commerce since it had never actually been



1 placed on the market. The Court disagreed and found that  
2 commerce clause gives Congress the power to regulate  
3 prices in the industry and the law at issue was rationally  
4 related to that legitimate goal.

5 The Court reasoned that Congress could regulate  
6 activity within a single state under the commerce clause  
7 even if each individual activity had a trivial effect on  
8 interstate commerce so long as the interstate activity in  
9 the aggregate -- and that, I think, that was the key word  
10 -- in the aggregate would have a substantial effect on  
11 interstate commerce. Indeed, after Wickard, along with  
12 NLRB vs. Jones & Laughlin Steel and U.S. vs. Darby, from  
13 1937 until 1935 [sic], not one federal law was declared  
14 unconstitutional as exceeding the scope of Congress's  
15 commerce power. This changed in 1995 with the rulings in  
16 Lopez and Morrison under the Rehnquist court. In Lopez,  
17 the Court found that the Congress power -- the Court  
18 finally did find the Congress power's outer limit, and it  
19 was noneconomic activity. That case involved the Gun-Free  
20 School Zone Act passed by Congress that made it a federal  
21 crime to have a gun within 1,000 feet of a school. The  
22 Court said that's too far.

23 The Supreme Court held that the relationship to  
24 interstate commerce was too tangential and uncertain to  
25 uphold the law as a valid exercise in the Congress power

1 and further explained that noneconomic activities could  
2 only be valid under the Congress power if there was a  
3 direct link between the activity and interstate commerce.  
4 In Morrison, the Court struck down the civil damages  
5 provision under the Violence Against Womens Act. Same  
6 type of analysis as noneconomic activity. And Morrison  
7 went a little bit further by saying that Congress cannot  
8 regulate any noneconomic activity unless it has a finding  
9 that there's that direct link to interstate commerce.

10 So, Your Honor, after Lopez and Morrison, we exist  
11 under -- pardon me -- we exist under the current test for  
12 what is in and what is out of bounds in a commerce power,  
13 and going back to Hughes v. Oklahoma, what's in and out of  
14 bounds for the dormant commerce clause.

15 There are three broad categories of activities that  
16 Congress may regulate under its commerce power: One,  
17 channels of interstate commerce, so roads, bridges, and  
18 things like that; two, authority to regulate and protect  
19 the instrumentalities of interstate commerce or persons or  
20 things in interstate commerce; and three, those activities  
21 having a substantial relation to interstate commerce,  
22 i.e., those activities that substantially affect  
23 interstate commerce.

24 Based on the lessons from Lopez and Morrison, we can  
25 break down that third section into two types of

1 activities: Local -- or economic and noneconomic.  
2 Noneconomic activities have to show a direct link between  
3 the activity and interstate commerce. Under economic  
4 activity, Your Honor, Wickard still applies, and if you  
5 can show that activity in the aggregate has a substantial  
6 effect on interstate commerce, it's good.

7 Under this backdrop, let's analyze the City's  
8 arguments. First, the City argues that the beach club  
9 here has never generated a profit, and reservations have  
10 gone up since the beach club has closed. This, according  
11 to the City, is proof positive that interstate commerce is  
12 not substantially affected by the cabana house or by the  
13 zoning ordinance.

14 Let's forget that this analysis that is to the  
15 zoning ordinance affect more broadly and should not just  
16 be limited to Sun and take the City up on its offer to  
17 discuss this particular fact.

18 Setting aside the all-inclusive nature of the RV  
19 resort and how it doesn't charge for any of its amenities,  
20 much like hotels or other inclusive resorts don't, in  
21 Camps Newfound, the Supreme Court held that a non-profit  
22 campground implicated interstate commerce even though it  
23 didn't generate a profit. More specifically, the Supreme  
24 Court stated that it already held that the dormant  
25 commerce clause is applicable to activities without the

1 intention of earning a profit.

2 Indeed, the Court went on to say, "We see no reason  
3 why a nonprofit character and enterprise should exclude  
4 from coverage of either the affirmative or negative aspect  
5 of the commerce clause." There are a number of lines of  
6 commerce in which both for-profit and non-profit entities  
7 participate. Some are education institutions, hospitals,  
8 childcare facilities, research organizations, museums may  
9 generate significant earnings and some operate for  
10 not-for-profit. I would lump into that group homeowners  
11 associations as well.

12 The Court concluded this analysis by citing to  
13 Wickard and explaining that, for the purposes of the  
14 commerce clause analysis, any categorical distinction  
15 between the activities of profit-making enterprises and  
16 not-for-profit profit entities is, therefore, wholly  
17 illusory.

18 So for the Court's purposes in this case, Your  
19 Honor, you can disregard the City's arguments regarding  
20 the profits of the beach club.

21 Next, the RV resort as the project and the beach  
22 club as the cabana house are inextricably linked in this  
23 analysis because the zoning ordinance links them. As we  
24 talked about earlier, Your Honor, the City's explanation  
25 for the justification of the special exception

1 acknowledges an interstate market for these facilities.  
2 By linking the project and the cabana house, you are  
3 saying that we are creating this cabana house exception so  
4 that we can continue to bring in interstate commerce to  
5 the City; we just don't want it on the beach front.

6 It makes complete sense. Their concern was to have  
7 a place like Miami where there would be a bunch of  
8 high-rises on the beach; they didn't want that. So what  
9 they did was they created an opportunity for projects,  
10 investment to come into the city to build off the  
11 beachfront but then also have access to private beach  
12 front access through these cabana houses. That was the  
13 purpose behind the zoning ordinance. It makes complete  
14 sense. The problem is they went afoul when they started  
15 to create a residency requirement for those projects that  
16 can have access to the beach clubs.

17 Coupling this reality with the competition for  
18 short-term rentals and visitors to the local area -- and  
19 the City cannot deny that regulations affecting private  
20 beachfront access for resorts and projects located off the  
21 beach in a tourist community has a substantial impact on  
22 the interstate commerce. Indeed, we contend that the  
23 zoning ordinance, again, not only has a substantial effect  
24 on interstate commerce but is directly involved in  
25 interstate commerce.

1           We also want to note that Sea Cloisters, which is  
2 the condominium units next to us, rents their units to  
3 short-term renters -- and they also have beachfront access  
4 -- as does The Links resort that rents to short-term  
5 renters who then give their renters beachfront access  
6 through their cabana house, and so would Barefoot, if it  
7 was not subject to a voluntary consent order governing its  
8 use.

9           All of these facts, which are undisputed, are  
10 discussed at length in our memo. Going back to Camps  
11 Newfound, which, again, dealt with a similar fact pattern  
12 and was focused on the interstate commerce implications,  
13 the RV resort, like the camp in that case and like hotels  
14 or other resorts and projects in the Grand Strand, engages  
15 in interstate commerce as a producer of goods and services  
16 and naturally involves interstate travel. We cited that  
17 69 percent of visitors to the RV park are from outside the  
18 state of South Carolina.

19           Further, the RV resort markets its product and the  
20 cabana house naturally. The RV resort's product, in large  
21 part, is access to the coastline and the natural resources  
22 of South Carolina's beaches, which the beach club supports  
23 and enhances. These ring true to the same findings that  
24 were made by the Supreme Court in Camps Newfound.

25           However, the burden to zoning ordinance regulations in

1 this case like -- however, the burden to zoning ordinance  
2 regulations in this case, like the Supreme Court found in  
3 Camps Newfound, falls squarely on nonlocal projects, both  
4 to the natural resources and to the related services.

5 It should not be surprising -- and we wanted to note  
6 this out -- that the Supreme Court in Camps Newfound made  
7 it clear that the dormant commerce clause has long applied  
8 to the service industries. This clear link between the  
9 project and the cabana house, both in the facts presented  
10 in this case and as exists in the zoning ordinance, cannot  
11 be understated because it's fatal to this City's arguments  
12 against interstate commerce.

13 Without the project, there is no cabana house, and  
14 it is the project that is discriminated against in both  
15 23-2 and 23-22 of the zoning ordinance. Any cabana house,  
16 according to the City, must be exclusively used by a  
17 project located within the city. It must be managed by a  
18 local homeowners association, according to the ordinance.  
19 This link dispels any argument the City may have that  
20 interstate commerce is not substantially effected, because  
21 you necessarily have to analyze whether the project at  
22 issue has a substantial effect on interstate commerce.  
23 There is no doubt that the RV resort in this case has a  
24 substantial effect on interstate commerce.

25 In conclusion, there is no question that the zoning

1 ordinance directly implicates interstate commerce, and the  
2 RV park and the beach club not only have a substantial  
3 effect but are continually engaged in interstate commerce  
4 on a daily basis. And as I'm sure the Court noticed,  
5 there was not one fact in dispute based on our discussions  
6 related to this issue. That's not because we hid them  
7 from you; it's because we haven't found any. This part of  
8 the analysis is just straightforward common sense based on  
9 the language of the zoning ordinance.

10 Okay. So I want to transition real quick, Your  
11 Honor. Now that we have discussed the interstate commerce  
12 analysis, we believe it's settled. The analysis from here  
13 out is pretty straightforward, so I'll move forward on  
14 that.

15 Going back to our slide, which we'll walk to the  
16 next step, Question 2 is, "Does the ordinance discriminate  
17 against an interstate commerce on its face in its effect  
18 or in its purpose?" We believe Section 23-2 and 23-22 do  
19 all three. The City has not really addressed this  
20 analysis in the memo, but I'll run through it all the same  
21 and address certain issues raised by the City in their  
22 interstate commerce analysis that are more properly folded  
23 into this.

24 For our purposes today, Sun is arguing that the  
25 zoning ordinance clearly discriminates against interstate



1 commerce; thus, Sun contends that the specific provisions  
2 in Sections 23-2 and 23-22 are per se invalid.

3 The other analysis under the Pike test, which the  
4 City has worked to try to get this case under, is  
5 discussed in our memo, especially based on the recent  
6 Supreme Court case that came out about, and it's where a  
7 statute regulates against interstate commerce  
8 even-handedly and only has an incidental effect on  
9 interstate commerce. That issue is not present here.

10 The definition of discrimination under the dormant  
11 commerce clause is fairly straightforward and simple.  
12 Discrimination simply means differential treatment of  
13 in-state and out-of-state economic interests that benefit  
14 the former and burden the latter. State or local laws in  
15 violation of the dormant commerce clause do it in two main  
16 ways: They either restrict market participation -- and  
17 let me make a point here. They restrict market  
18 participation; they don't necessarily have to require  
19 total exclusion of market participation. Or they  
20 condition the participation in interstate market on the  
21 in-state or local processes of goods.

22 Notably, a discriminatory law is no less  
23 discriminatory because it applies to the same -- to people  
24 of all states, including the people of the state enacting  
25 such a law. The restrictions we are dealing with here is

1 essentially a residency requirement to own and use a  
2 cabana house in North Myrtle Beach, much like the  
3 residency requirement discussed at length in  
4 Hignall-Stark.

5 And while we're on the subject, I'll take a moment  
6 to address the City's contention that Sun is not excluded  
7 from the market because we could acquire beachfront  
8 property somewhere else in another district. This is a  
9 great example of how the City fundamentally misapplies the  
10 case law and principles before the Court.

11 First, the City discusses that we still have access  
12 to the transportation modes at the beach club. The use of  
13 the City's transportation modes and the value of beach  
14 access presumes an interstate market. Those are  
15 instrumentalities and channels of commerce.

16 Second, the City has admitted and has never backed  
17 away from the interpretation that an RV park or other  
18 similar resort is contemplated by the use of the undefined  
19 term "project" in the zoning ordinance; thus, if Sun's RV  
20 park was located in North Myrtle Beach, there would be no  
21 issues. The issue is because it's located outside of the  
22 city.

23 If Sun's project is barred from entering into the  
24 market to purchase and use a cabana house because it's not  
25 local and it's not managed by a local HOA, then if Sun

1 was, say, operating an RV park like the North Myrtle Beach  
2 RV Resort and Dry Dock Marina and had a local HOA, then  
3 everything would be fine here today.

4 So the RV park, because it's located in Conway, is  
5 excluded. It doesn't matter -- we don't have to look to  
6 other places it could have gone. If we were to take  
7 another project, say, in Calabash, North Carolina, and  
8 drop it down into this analysis, the zoning ordinance  
9 would still be unconstitutional. We just happen to be the  
10 ones here that have to argue it. So it does not change  
11 the analysis that the zoning ordinance can't stand just  
12 because we could have gone to another place to look for  
13 beachfront property. What is at issue is, is it  
14 unconstitutional now, and that's the case here today, Your  
15 Honor.

16 Moreover, the R-4 resort as a district, as I've  
17 talked about in the past, is not strictly residential. It  
18 necessarily includes resorts and other similar projects.  
19 The cases cited by the City on this issue, which I think  
20 was Exxon vs. Governor of Maryland, the Texas  
21 Manufacturing case and the City of La Porte, and the  
22 Walmart Stores case versus the City of Turlock all deal  
23 with cases where the alleged restrictions placed on the  
24 market participants applied to every participant whether  
25 local, nonlocal, state, or out of state. The restrictions

1 were the same. It just challenged the way they wanted to  
2 do business. They wanted to be a big box store. Well,  
3 you couldn't do that. It didn't challenge you couldn't be  
4 a big box store because you're located in Detroit. That  
5 wasn't the requirement. And that's how those cases differ  
6 from the case here.

7 Finally, just one more thing on the City's argument  
8 that because the City relies on the tourism industry, the  
9 City has no incentive to exclude anyone from the market.  
10 Again, the City is overstating the party's position here.  
11 Of course the City wants to incentivize tourism but is  
12 doing so in this case by favoring those projects located  
13 in the city and expressly excluding those that do not  
14 reside in the city. This is a classic case of economic  
15 protection in which the dormant commerce clause forbids.  
16 And we also discuss the tax revenue implications and  
17 benefits by the City in doing this type of work that's in  
18 our memo.

19 Now that we have laid the groundwork, let's discuss  
20 the discrimination. Again, this was never discussed by  
21 the City in their memo, so presumably, they agree with  
22 this analysis. First, requiring the cabana house be used  
23 exclusively by a project located within North Myrtle Beach  
24 discriminates against interstate commerce on its face.  
25 The words say what they say. There's not much more we can

1 say about this. It's very clear from looking at the  
2 ordinance itself. This, therefore, is a residency  
3 requirement, and as the lessons in Hignall-Stark  
4 elucidated, those directly discriminate against non-local  
5 projects and are unconstitutional in the dormant commerce  
6 clause.

7 Second, requiring the property where the cabana  
8 house to be located to be owned by a homeowners  
9 association and requiring the project to be managed by a  
10 homeowners association also discriminates against  
11 interstate commerce in its effect because, under South  
12 Carolina law, the governing documents of a homeowners  
13 association must be recorded in the Register of Deeds  
14 office in the county where the property owned by the  
15 association is located in order for it to be enforceable.

16 The same is true on the South Carolina Horizontal  
17 Property Act. Accordingly, in its effect, the homeowners  
18 association requirement for both the property and the  
19 administration of the project -- and when I say  
20 "property," I mean the cabana house -- the cabana house  
21 and the property and the project, since they both must  
22 necessarily be in North Myrtle Beach, violates the dormant  
23 commerce clause because the association for both must  
24 exist and be registered in Horry County.

25 Going back to the Calabash, North Carolina, example,

1 you cannot have a homeowners association in Calabash,  
2 North Carolina, own and operate a cabana house in North  
3 Myrtle Beach because it would violate the homeowners  
4 association provision.

5 Thinking back to our homeowners asso- -- and that's  
6 what I -- so, thus, the homeowners association requirement  
7 is a separate residency requirement masquerading as a  
8 responsiveness interest, according to the City. And it's  
9 unconstitutional for the same reasons the exclusive  
10 location of the project is. You cannot separate the two  
11 because, again, the zoning ordinance links them.

12 Third, Your Honor, Section 23-2 and 23-22  
13 discriminate against interstate commerce in their purpose.  
14 By the City's own admission, "We have provided the  
15 responses to the interrogatories where the City has stated  
16 that it utilizes the restrictions in 23-2 and 23-22 to  
17 encourage investment in the City rather than projects  
18 outside of the City."

19 The City suggests in its memos that its lawyers  
20 could amend those answers to get around this issue. That  
21 might be true, but the argument is further bolstered by  
22 the City explaining that, under its interpretation, a  
23 cabana house must be exclusively used by a project in  
24 North Myrtle Beach; otherwise, according to the City's  
25 designee in their 30(b)(6) deposition, if they did not

1 have the exclusivity requirement, it would violate the  
2 intent of the ordinance.

3 As we laid out -- we also laid out the direct  
4 economic incentive for the City to direct resources and  
5 participation in tourism into the City rather than  
6 outside.

7 Now, Your Honor, while the Supreme Court has said  
8 that the purpose of the ordinance is not dispositive on  
9 the issue either way, it doesn't matter if the City had a  
10 purpose, if it's facially discriminatory or discriminatory  
11 -- it's discriminatory in its effect, it's still  
12 unconstitutional, or if there is a purpose, then it just  
13 becomes another brick in the wall. And so we think it's  
14 helpful to explain the purpose here for Your Honor because  
15 it shows the intent of the City in creating the zoning  
16 ordinances the way that they did.

17 Based on this analysis, it's clear that 23-2 and  
18 23-22 discriminate against interstate commerce on its  
19 face, in its effect, and in its purpose. On its face are  
20 the exclusivity of local projects; in its effect because  
21 the project in the -- the project needs to be managed by a  
22 local homeowners association and the property needs to be  
23 owned by a local homeowners association; and in its  
24 purpose, by the City's own admission.

25 Now, we get to the City's burden because in -- based

1 on the analysis, if we show discrimination, then the  
2 burden shifts to the City, and the City cannot withstand  
3 its constitutional burden here, because it does fall under  
4 strict scrutiny.

5 What the City must show at this stage -- if the  
6 Court finds that the zoning ordinance discriminates  
7 against interstate commerce -- is that the restrictions in  
8 23-2 and 23-22 must advance legitimate local purposes that  
9 cannot be adequately served by any reasonable  
10 nondiscriminatory matters.

11 Put up here, Your Honor, a Fourth Circuit case,  
12 Environmental Technology Council vs. Sierra Club, this was  
13 actually South Carolina law restricting in-state treatment  
14 and disposal of hazardous waste generated in other states.

15 Your Honor, the Court in the Fourth Circuit in that  
16 case said that the State -- and we'll say here the City --  
17 faces a heavy burden in justifying its discriminatory  
18 practices. To survive summary judgment, the City must  
19 demonstrate issues of fact regarding whether the laws  
20 are justified by the valid factor unrelated to economic  
21 protectionism, and if so, that there are no neutral  
22 alternatives available.

23 For the purposes of the argument today, we do not  
24 dispute that the City has advanced legitimate local  
25 purposes: Quality of life, responsiveness, preservation



1 of property values. There is no empirical data to back  
2 that up or studies to support that analysis, but for  
3 today's argument, we'll agree that those are valid,  
4 legitimate local purposes.

5 What we do contend is that is the City has not  
6 sustained its burden by showing issues of fact that there  
7 are no non-discriminatory alternatives available. Indeed,  
8 the City doesn't even try to do it in its brief. We have  
9 tried for them and set forth a listing on them. Indeed,  
10 in the same Fourth Circuit case that we just discussed,  
11 the Court noted that the Supreme Court has upheld such  
12 discriminatory laws only when the justification was  
13 justified by the threat of death or disease. That's it.

14 And we cited one case, Maine vs. Taylor, in our  
15 memo, which is the only case where the Supreme Court  
16 actually said it was discriminatory law, satisfies direct  
17 scrutiny, which was dealing with predatory fish in Maine.

18 No such threat exists under the facts presented  
19 before the Court today, and the City has not presented any  
20 facts on this issue, much less disputed ones. That  
21 satisfied their heavy burden under this strict scrutiny.  
22 Instead, the City simply lists out why their illegitimate  
23 purposes are reasonable. And, again, for purposes of the  
24 argument today, we'll agree with them.

25 Now, Your Honor, in striking down these ordinances,

1 I do want to discuss the practical effect, because we are  
2 asking for a big thing, and were are asking you to strike  
3 down the zoning ordinance that was, for all intents and  
4 purposes, was effected by a local government.

5 Here are the practical effects of the Court ruling  
6 that the restrictions set forth in Sections 23-2 and 23-22  
7 are unconstitutional. The use provisions in 23-22 would  
8 remain in place, as does the enforcement provision set  
9 forth in Section 23-7 of the zoning ordinance that we  
10 discuss in our memo.

11 The Court's ruling would only impact, at most, 21  
12 words in the entire zoning ordinance, and the value of the  
13 in property for cabana houses will necessarily go up as  
14 the market for them would be expanded significantly. And  
15 the City is not excluded from adding additional use  
16 provisions to Section 23-22 to better manage the operation  
17 of the cabana houses. There's nothing precluding them of  
18 that. They just can't discriminate against the interstate  
19 commerce.

20 Further, there is no statewide or national impact to  
21 zoning ordinances by the Court ruling and granting the  
22 motion for summary judgment any more than the recent  
23 ruling out of the Fifth Circuit has had the short-term  
24 rental restrictions. The City's claim of a national land  
25 use crisis is merely fear mongering, intended to generate

1 a result. They're not based on reality. However, if the  
2 Court ultimately rules that the zoning ordinance is  
3 constitutional, the practical effect of that decision will  
4 result in a court order, per the City's complaint,  
5 declaring Sun's ownership of the property must immediately  
6 cease and desist. What happens then? Would it be the  
7 City's contention that the Court must order Sun to sell  
8 the property? Would we do it on the courthouse steps?  
9 How would that work?

10 While the City made claim declaring that a certain  
11 portion of the zoning ordinance unconstitutional is a big  
12 deal, what are the City's own demands here?

13 Based on everything we have said here today, Your  
14 Honor, we ask that the Court grant the motion for summary  
15 judgment and declare the restrictions set forth in 23-2  
16 and 23-22, that we have discussed, unconstitutional as  
17 violations of the dormant commerce clause is a matter of  
18 law. There are no material facts in dispute, and the  
19 Court's declaration that the sections of the zoning  
20 ordinance at issue are unconstitutional is warranted under  
21 long-standing precedent and case law.

22 We are glad to offer proposed orders at the  
23 conclusion of the hearing or have the Court require us to  
24 submit competing proposed orders to chambers for  
25 consideration. And further, Your Honor, if the Court is

1 reticent to grant the motion and would prefer to have  
2 testimony as to certain factual issues, we have looked; we  
3 can't find them, but if the Court believes that there are  
4 some, that there needs testimony on the discrete factual  
5 issues to get further into the interstate commerce  
6 analysis, we're happy to do so.

7 Defendants have not shied away from wanting a trial  
8 in this case, and to be honest, this case will likely go  
9 on appeal, and so we want the record to be as clean as  
10 possible, Your Honor, and I think that's best for all  
11 parties.

12 Thank you, Your Honor.

13 THE COURT: Thank you.

14 MR. WILLIS: Just one second.

15 THE COURT: Yes, sir.

16 MR. WILLIS: Just a second, Your Honor. We'll see  
17 if Mr. Tamasitis can read my handwriting.

18 THE COURT: Okay.

19 MR. TAMASITIS: I have had two years of practice,  
20 Your Honor.

21 (Pause in the proceedings.)

22 MR. TAMASITIS: Your Honor, just two clarifying  
23 points. When we discuss the analysis that needs to be  
24 done today and I have discussed that the Court is not to  
25 just look at Sun in a vacuum and the facts to Sun but is

1 to look at the interstate market as a whole, that is to  
2 say, as I mentioned, if there was the similar facts and  
3 scenarios in Calabash, North Carolina, that analysis would  
4 then -- you have to look at it globally. It's not just to  
5 limit the analysis to Sun.

6 The second piece, Your Honor, is that what the City  
7 knew or what we were aware of prior to purchasing the  
8 property is immaterial to this case -- immaterial to this  
9 motion. It's because we're already in this position. It  
10 has to go to our estoppel argument and to our due process  
11 argument. It does not have to go to the dormant clause  
12 analysis.

13 Thank you, Your Honor.

14 THE COURT: All right. Thank you.

15 MR. RICARD: Good afternoon, Your Honor.

16 THE COURT: Good afternoon.

17 MR. RICARD: We had some trouble with UPS delivering  
18 binders. So, if it's okay -- and may I approach to  
19 provide some binders? Excuse me. The memo in opposition  
20 to the renewed motion for summary judgment, and this is  
21 our memo in support of our motion to compel.

22 THE COURT: Thank you.

23 ARGUMENT ON BEHALF OF THE PLAINTIFF

24 MR. RICARD: All right. Good afternoon again, Your  
25 Honor. May it please the Court?

1 I'm going to start kind of big picture, and then  
2 I'll try to narrow a focus into the genuine issues of  
3 material fact that are present in this case, and then I'm  
4 going to conclude with a focus on the case law regarding  
5 dormant commerce clause as well as some of the arguments  
6 that you just heard from counsel for Defendants.

7 Essentially, Your Honor, to distill what Defendants  
8 want in this case -- and they admitted to you that what  
9 they're asking is a big ask; you just heard that from  
10 counsel. They're asking this Court to allow them, as  
11 commercial enterprises, to operate and own property in a  
12 residential district. Essentially, they want to operate  
13 wherever and however they want to within the City, and  
14 that's just not kosher with zoning laws and zoning across  
15 America.

16 What they're arguing is that they're not allowed to  
17 operate however and wherever they want, that impacts  
18 interstate commerce, and therefore, it triggers strict  
19 scrutiny under the dormant commerce clause.

20 And so to take Defendant's position to its logical  
21 conclusion would spell the end of zoning as we know it.  
22 And I'll highlight this by just giving you an example.  
23 Let's say a party wants to operate a strip club in a  
24 residential district. That's not allowed under the City  
25 zoning ordinance and that's not allowed in a lot of

1 different city ordinances across South Carolina and across  
2 the United States. That is facially discriminatory;  
3 right? A strip club is not allowed to operate and own a  
4 property in a residential district, certainly not within  
5 500 feet or 1,000 feet of an elementary school.

6 So these types of zoning laws can be facially  
7 discriminatory under Defendant's kind of analysis here,  
8 but the reason it's not discriminatory is that these types  
9 of entities can be allowed to operate elsewhere within the  
10 City and elsewhere within other municipalities, just in a  
11 different zoning district. So they're not discriminated  
12 against. It's just a matter of the City being able to use  
13 its inherent police power to direct where things go, to  
14 protect property values in residential districts, control  
15 traffic, direct intensity of use in commercial zones.

16 This is all just basic, basic inherent exercise of  
17 police powers that the City has always had the right to  
18 do. And, in fact, Your Honor, this exact situation with a  
19 strip club -- or, excuse me, an adult establishment  
20 happened in a case called Flava Works, Inc. vs. City of  
21 Miami, Florida. I did not cite this in our memo in  
22 opposition, and so I'll give the citation:  
23 800 F.Supp. 2d 1182. It's from the Southern District of  
24 Florida in 2011.

25 The plaintiff wanted to operate an adult

1 establishment in an R-4 residential district similar to  
2 the R-4 residential district that we have here in this  
3 case. And the plaintiff challenged that zoning ordinance  
4 on dormant commerce clause grounds, amongst some other  
5 causes of action.

6 The Court rejected that argument and held, "The City  
7 has a local public interest in preserving residential  
8 areas free of the operation of businesses to ensure safety  
9 and prevent traffic congestion, overcrowding, or parking  
10 concerns, to list a few reasons. Any effects on  
11 interstate commerce as a result of this ordinance are at  
12 most incidental." That's a direct quote from the opinion.

13 And that's exactly what we have here, Your Honor.  
14 But instead of an adult establishment, it's a cabana  
15 house. And what happened here is that Defendants got  
16 their eyes on the cabana house, which is a special  
17 exception that is available in one particular zoning  
18 district inside the City, but there's no complete  
19 exclusion -- and I'll pick back up on this point later --  
20 there's no complete exclusion from the market for the  
21 Defendants to operate and own property elsewhere within  
22 the City and have a recreation establishment like they  
23 want.

24 But according to their own testimony, the  
25 defendant's 30(b)(6) designees, they did not look anywhere



1 else for beachfront property. They didn't look anywhere  
2 else. They found this cabana house, and they wanted to  
3 operate it as a commercial recreation establishment, which  
4 is just not allowed under the special exception features  
5 of the zoning ordinances.

6 In fact, they had to have it -- quote, "had to have  
7 it," according to the deposition testimony of one of the  
8 witnesses, and we would, obviously, encourage the Court to  
9 hear that testimony live in the trial upcoming.

10 And here's the rub though: The project ordinance  
11 and the HOA ordinance that apply to owning and operating a  
12 cabana house in the R-4 residential district just don't  
13 allow them to; right? The project ordinance requires the  
14 cabana house to be used by a project in the city, and it's  
15 undisputed that Defendants are not a project within the  
16 City. And the HOA ordinance requires the cabana house to  
17 be owned and operated by an HOA, and it's undisputed that  
18 the defendants are not operating as an HOA.

19 And these are separate ordinances, Your Honor. And  
20 so I'll take a quick aside here and suggest if the Court  
21 is somehow inclined to rule in Defendant's favor, it can  
22 only rule in Defendant's favor for the project ordinance.  
23 There's nothing about the HOA ordinance that could even  
24 come close to arguably impacting interstate commerce.

25 But, regardless, owning and operating a cabana house

1 here is in violation of the ordinances, and the timeline  
2 is damning. First, the defendants knew of the existence  
3 of the ordinances prior to purchasing the property. I  
4 want to repeat that. They knew of these ordinances prior  
5 to purchasing the property and still bought it  
6 nevertheless. That shows what Defendants, as commercial  
7 entities, believed they can operate. They essentially  
8 believe they can operate above the law.

9 They concealed their intentions from the City in how  
10 they wanted to use the property and cabana house. And  
11 once they began using it unlawfully -- they transported  
12 hundreds of guests through a small beach access point in a  
13 residential neighborhood and disturbing the peace -- they  
14 then hoped they could get away with it, but if push came  
15 to shove and they did get caught, they figured they could  
16 just point the finger and say, "Well, it's happened in the  
17 past, so it's okay for us to be able to do it now."

18 They spent a significant portion of their brief  
19 arguing that, hey, because the City has never enforced the  
20 ordinances before on the prior owners of the property,  
21 well, that just means that anything and everything can be  
22 allowed in this particular case. Well, the City just  
23 didn't know of the violations prior. The cabana house  
24 wasn't being used really.

25 And so, here, the prior owners did not do the same

1 thing. The intensity of the use by the prior owners was  
2 negligible.

3 And so, essentially, Defendant's argument is, "Oh,  
4 well, officer, I know I was speeding, but did you see the  
5 previous ten cars in front of me? They were speeding too  
6 and you didn't catch them." That excuse doesn't work for  
7 speeding, and it doesn't work here.

8 The ordinances apply. Defendants have violated  
9 them. Once the City became aware of these violations,  
10 they took action. And so that's the big picture of this  
11 case, Your Honor.

12 And, at this point, I'm going to drill down and talk  
13 to you a little bit about the genuine issues of material  
14 fact. There's a lot of them, Your Honor. Defendants  
15 filed a 45-page memo. We responded with, I believe, a  
16 39-page memo. And I'm not trying to be facetious here  
17 when I say there has to be a genuine issue of material  
18 fact, you know, somewhere within these briefs. Right?  
19 But I'll highlight them for you specifically. And it  
20 looks like Defendants have provided you a list as well.

21 The first is Defendants allege it was well known the  
22 property was not owned by a homeowners association or used  
23 by a project within the City prior to Defendant's purchase  
24 of the property. That's not true, and it's completely  
25 belied by the City's deposition testimony.

1           Second issue of material fact: Defendants allege  
2 the City tacitly acquiesced to prior violations of the  
3 ordinance. Again, not true. There's a dispute over that.

4           Third: Defendants allege their belief that they  
5 could use the cabana house in the way that they wanted to  
6 was reasonable. Again, that is a fact in dispute.  
7 Defendants concealed how they wanted to use the property.  
8 They never reported to the City they were purchasing the  
9 property and explained to them how they wanted to use it,  
10 and they never requested whether it was okay for them to  
11 own and operate a cabana house as a commercial enterprise.

12           Fourth: Defendants allege that their use and  
13 ownership was expressly authorized by the zoning  
14 administrator prior to purchase. Your Honor, that is an  
15 incredible assertion by Defendants. I'm shocked that they  
16 can say it was expressly authorized. That is a complete,  
17 complete, complete fact that is in the dispute. That did  
18 not happen in this case. In fact, it was a concealment of  
19 how they wanted to use the property.

20           Fifth: Defendants allege that the City was directly  
21 involved with approving and permitting their use of  
22 shuttle transportation of their guests to the cabana  
23 house. There is no documentary evidence supporting this  
24 allegation at all. It comes from the testimony of a  
25 former employee of Defendants, one who was terminated by

1 Defendants, and we respectfully submit that that's  
2 mistaken testimony that will be rebutted at trial.

3 Sixth: Defendants allege Sea Cloisters -- the  
4 neighboring property, Sea Cloisters -- was aware of the  
5 zoning violations taking place by the prior owners but did  
6 nothing. Again, that is not true. That's a leap in logic  
7 from the deposition testimony of Sea Cloisters, and we  
8 contend that Sea Cloisters will testify to this Court that  
9 they were not aware of the ordinances at issue in this  
10 case until Defendants began using the property unlawfully.

11 Seventh: Defendants suggest responsiveness of HOAs  
12 needs to be supported by a study. We disagree. The  
13 City's experience specifically in this case with  
14 Defendants and historically with other HOAs is that HOAs  
15 tend to be more responsive than commercial enterprises.  
16 And the facts of this case support the City's position  
17 here because, when this all became known to the City, the  
18 City reached out multiple times on multiple occasions to  
19 representatives of Defendants, and for two months, we  
20 heard nothing. We heard nothing for two months. That's  
21 called a lack of responsiveness, and it supports the  
22 purpose that's underlying the HOA ordinance in this case.

23 Eighth: The defendants have suggested the City's  
24 only recourse in this case is to pursue citations rather  
25 than a declaratory judgment action. They didn't spend a

1 lot of time in their oral argument about this point, but  
2 that's completely false, Your Honor. Section 23-7 of the  
3 City's code of ordinance allows any other lawful remedy to  
4 be pursued by the City. We don't have to just simply  
5 issue a citation when there's violations.

6 And the prime reason why the City did not do so is  
7 because that would be viewed as the cost of doing business  
8 by Defendants. I'm not sure if Your Honor is keeping up  
9 with the trends these days with weddings, but back in the  
10 old days, you know, when my parents got married, they got  
11 married at the church. You know, they had, like, a little  
12 reception in the church gathering area, and the biggest  
13 expense maybe was a wedding cake that somebody down the  
14 street would make for them. Right? These days, weddings  
15 are tens of thousands of dollars, if not hundreds of  
16 thousands of dollars.

17 And so what they want to do and what they have done  
18 is hosted weddings at this cabana house as a commercial  
19 enterprise. And so a \$500 citation to host a wedding?  
20 That will just be eaten as the cost of doing business for  
21 them. They will either eat it or they will just pass it  
22 along to a willing bride and groom and their family, who  
23 is more than willing to pay \$500 for a location when  
24 venues often are costing thousands of dollars. Again,  
25 respectfully, Your Honor, there is a dispute as to whether

1 a citation would be effective in this case.

2 Ninth: Defendants believe one of the City's answers  
3 to interrogatories has conceded the case, but Defendants  
4 have misconstrued that answer, and they have hidden how  
5 Defendants -- excuse me - how the City has responded to  
6 the answer to Interrogatory No. 17. They didn't put that  
7 on the slide for you, but if you go back and look, we have  
8 attached it to our memo in opposition. It's clear that  
9 the City has multiple reasons as to why the project  
10 ordinance and the HOA ordinance are important in this  
11 case.

12 Lastly and most importantly, there is a genuine  
13 issue of material fact as to whether interstate commerce  
14 is implicated in this case. And this is the biggest one.  
15 Before I turn to that specifically, Your Honor, I would  
16 just note that, you know, going through Defendant's list  
17 of material facts that they have put in bunny quotes here,  
18 my response to this, Your Honor, is, if they were not  
19 material, why were these facts included in Defendant's  
20 brief? They obviously thought they were material and  
21 would help this Court analyze this case. And so if  
22 they're not material now, then why were they included in  
23 Defendant's brief? The City literally pulled quotations  
24 from the defendant's brief and responded to them and said,  
25 "Oh, nope, this is a material fact that's in dispute." So

1 to come to this Court and say they're no longer material  
2 just is belied by the circumstances here, Your Honor.

3 Turning to the interstate commerce clause, Your  
4 Honor, and the case law that underlies it. For the  
5 defendants to prevail, they must prove that the project  
6 ordinance and the HOA ordinance -- both of them; again,  
7 they're separate. They can be separated. Both of them  
8 have a substantial effect on interstate commerce. That's  
9 a high burden in these circumstances.

10 In a recent case coming from the United States  
11 Supreme Court -- this is cited by Defendants, actually;  
12 it's National Pork Producers Council vs. Ross, 143 Supreme  
13 Court 1142, it came out earlier this year -- the Supreme  
14 Court held "to state a claim under the dormant commerce  
15 clause, a party must show plausibly -- must show facts  
16 plausibly suggesting a substantial harm to interstate  
17 commerce. Facts that render that outcome a speculative  
18 possibility are not enough."

19 We contend there's no evidence of impact on  
20 interstate commerce, but at best, Your Honor -- at best,  
21 Defendants have only shown a speculative possibility,  
22 which is not sufficient. First, it's undisputed that  
23 Defendants have not collected any revenue from their RV  
24 resort using the cabana house. And you saw a slide about,  
25 well, the dormant commerce clause can still apply to



1 non-profits. And the defendants have cited to the case of  
2 Camps Newfound. That case is distinguishable, Your Honor.  
3 That case did involve a non-profit, which we believe is  
4 different, but it also involved a tax -- a statewide tax  
5 which would be implemented and applied to the plaintiff in  
6 that case no matter where it was going to own and operate  
7 a camp across the state of Maine. They were completely  
8 excluded from the market without having to pay that  
9 additional tax.

10 That's not what we have here. We have a for-profit  
11 business operating an RV resort in Conway, South Carolina,  
12 that's not discriminated against out in Conway, but they  
13 want to use the cabana house as a special exception just  
14 within one zoning district, and they're not excluded from  
15 the market at all. And so the burden is on them to show  
16 how they are being impacted by this ordinance.

17 There's -- they spent some time in the brief -- they  
18 didn't spend any time in the oral argument about this,  
19 Your Honor, but there's only speculation that the guests  
20 of the cabana house maybe on a few occasions patronized  
21 local establishments in the vicinity of the cabana house.  
22 But, again, that's not enough.

23 Third: Due to the consent order in this case, Your  
24 Honor, we have actually had the opportunity to examine  
25 Defendant's bottom line when the cabana house was open and

1 when the cabana house has been closed as a result of the  
2 consent order.

3 And to be sure, Defendants raise a good point that,  
4 hey, in order to analyze the dormant commerce clause, you  
5 have to understand kind of the aggregate. You have to  
6 look at the impacts on others as well.

7 But if Defendants can't show an impact on their  
8 bottom line, I don't know how they're going to show an  
9 impact in the aggregate. And what the facts have shown in  
10 this case, Your Honor, is that, according to their own  
11 profit and loss statements, they are generating more  
12 income now when the cabana house has been closed than when  
13 they were when it was open. That demonstrates there's  
14 been no impact on their bottom line.

15 And why would there be? The whole point for going  
16 to an RV resort -- and I believe they phrase it as a  
17 glampground -- is to go to the glampground. There's over  
18 30 amenities at this RV resort. The guest and visitors  
19 and patrons of the RV resort are not going there  
20 exclusively for the cabana house. They're going there  
21 primarily for the RV resort. And in addition, they have  
22 some experiences with the free amenities. This is vastly,  
23 vastly different than the cases that have been cited by  
24 Defendants.

25 One of those cases that you heard about was the

1 Wickard case where growing wheat in your own house impacts  
2 interstate commerce. Well, it does because it impacts the  
3 price of goods and services that are being offered; right?  
4 And it's very similar to Dean Milk, a case coming out of  
5 Madison, Wisconsin. The milk producer was operating  
6 outside of the -- I think it was a five-mile radius in  
7 that case, and the milk producer was completely excluded  
8 from selling his milk products inside the City.

9 And so it makes sense that that would have an impact  
10 on your bottom line; right? If you are completely  
11 excluded, you're not able to make money within the City.  
12 That is not what's happening here, for three reasons.  
13 First, Defendants are still operating their RV resort. A  
14 free amenity here is completely different from selling  
15 milk into a market.

16 And, again, they're not completely excluded. In the  
17 case that the City has cited in its brief, I'll mention  
18 here, Texas Manufactured Housing Association Incorporated  
19 vs. The City of La Porte, 974 F.Supp. 602. It's coming  
20 out of the Southern District of Texas in 1996. In that  
21 case, a municipal zoning ordinance excluded manufactured  
22 homes from the R-4 residential zoning district. Again,  
23 arguably, a facial discriminatory zoning ordinance.  
24 However, the Court held that strict scrutiny did not apply  
25 because Defendants can operate and sell manufactured homes

1 elsewhere within the City of La Porte, just not within  
2 that one zoning district.

3 And, again, this was backed up in another case  
4 called Walmart Stores, Incorporated, vs. The City of  
5 Turlock. Again, I remember kind of back in the '90s that  
6 the old Walmarts used to be pretty -- you know, they were  
7 big but they weren't like the super centers that started  
8 to develop in the early 2000s. And so that's what  
9 happened in 2006 in California. Walmart wanted to come in  
10 and have one of their super deluxe Walmart stores, right,  
11 that had a grocery and all the extra space and that sort  
12 of thing. The Court held, in the Eastern District of  
13 California, said there's no constitutional right to do  
14 business where one wants to or as one wants to if the  
15 resulting operation burdens environmental, traffic  
16 pattern, economic viability, and land use planning  
17 interest of the host municipality. Again, that is exactly  
18 what we have here in this case.

19 I believe it was Slide 15 on Defendant's PowerPoint  
20 presentation that suggested, hey, for there to be an  
21 impact on interstate commerce, all you have to show is a  
22 restriction of market participation or the curtailing of  
23 movement of goods. Defendants haven't shown that here.  
24 The RV resort guests clearly are still continuing to come  
25 to the RV resort. So there hasn't been any curtailing of

1 the movement of people, which would be the goods or  
2 services here in this case. There hasn't been any  
3 restriction because they're still coming, and actually,  
4 they're coming in far more numbers than they were when the  
5 cabana house was open.

6 Likewise, again, I have already explained kind of  
7 the first point. They can go operate in another zoning  
8 district if they'd like. In fact, there's already -- I  
9 Defendants mentioned this earlier -- there's already a  
10 beachfront RV resort that's operating in the City of North  
11 Myrtle Beach, and the defendants could do the same thing,  
12 but they didn't want to.

13 But there's a second reason as well; they can  
14 shuttle their guests to any number of public access points  
15 on the beach -- public access points within the city that  
16 also have changing facilities and shower facilities and  
17 restrooms and that sort of thing. And, in fact,  
18 Defendants have done that. They just chose not to do it  
19 in the City of North Myrtle Beach perhaps because of this  
20 litigation, but instead, they have been shuttling folks  
21 down to Myrtle Beach at one of their public access points.

22 In actuality, another project within the city called  
23 Barefoot has done the same thing. They use a public  
24 parking lot in the City of North Myrtle Beach to shuttle  
25 their guests to. Defendants haven't shown anything

1 anywhere that they have been prevented from shuttling  
2 their guests as they want to, to go access the beach.  
3 This is not like what you saw in Dean Milk or the Wickard  
4 case or the Camps Newfound case.

5 The City wants tourism. The City relies on tourism.  
6 We are not setting up an economic isolation by trying to  
7 keep the RV resort guests out of the city. No, we welcome  
8 them. We just want them to comply with the zoning  
9 regulations that simply direct all that traffic, all that  
10 congestion, all that density and intensity of use, we just  
11 want to direct it at the appropriate locations within the  
12 city. Again, that's fundamental zoning principles.

13 Context matters here, Your Honor. Zoning, in  
14 particular, is a matter of importance to local  
15 governments. That's why the Supreme Court has instructed  
16 lower courts not to use the dormant commerce clause as a  
17 roving license -- that's a quote -- not to use it as a,  
18 quote, "roving license" to invalidate a municipality's  
19 lawful exercise of their police powers.

20 In Maine v. Taylor, the Court held as long as a  
21 municipality does not needlessly obstruct interstate trade  
22 or attempt to place itself in a position of economic  
23 isolation, it retains broad authority to zone and exercise  
24 other police powers. The City clearly has not isolated  
25 itself. Defendant's arguments as to all the tourism

1 dollars that flow into the City backfires because we don't  
2 want to engage in economic protectionism. We want to  
3 welcome guests.

4 And so because Maine v. Taylor holds that, hey, as  
5 long as you're not putting yourself in economic isolation,  
6 you're good to go. That's what we have here. We are not  
7 putting ourselves in economic isolation.

8 In the alternative, Your Honor, you have heard some  
9 comments about "Well, it's per se invalid, you know, it's  
10 a high, high burden for the City at that point," but the  
11 City can still survive. The ordinances can still survive  
12 strict scrutiny specifically in this case because of the  
13 legitimate local purposes, and there's three reasons why.  
14 The first is the responsiveness issue. Again, we have  
15 seen directly in the facts of this case but it applies  
16 more generally as well, is that commercial enterprises,  
17 they're not going to be as responsible to a city,  
18 especially in circumstances like these when they have been  
19 alleged to have violated ordinances, when we have got a  
20 multi-million-dollar company who is just going to view  
21 this as the cost of doing business. They didn't respond  
22 for two months, and not until we filed a lawsuit did they  
23 respond to our attempts to try to resolve this case.

24 The quality of life is the second legitimate local  
25 purpose that supports these ordinances, Your Honor. We

1 attached a beach log as one of the exhibits in our memo in  
2 opposition, and you'll see from that beach log, in 2021,  
3 that Defendants were shuttling -- I believe one day it  
4 was, like, 500-something guests through this access node  
5 to the beach.

6 And if you compare that with how the members of  
7 Seabrook Plantation were using it, it's vastly different.  
8 I mean, it's exponentially greater. I mean, you might  
9 have a handful of members of Seabrook Plantation, which  
10 were some of the prior users of the cabana house. Again,  
11 maybe a handful on any given day in the summer peak  
12 season. But we're talking hundreds of guests being  
13 filtered by the RV resort.

14 And so that intensity of use, that density of  
15 population that's trying to be shuttled and transported  
16 into this small access node towards the beach is an area  
17 that's going to cause disturbances and, in fact, did cause  
18 disturbances to a residential neighborhood.

19 Third, Your Honor, are the property values that are  
20 at issue. The property values in the neighboring  
21 properties we contend will diminish and have diminished  
22 because of the RV resort's use of the property. And the  
23 property values, as a legitimate local purpose, was upheld  
24 in that Texas Manufacturing house case that I spoke about  
25 earlier. Because, again, if you have got, you know, an



1 upscale or a nicer neighborhood trying to allow  
2 manufactured homes as neighbors is probably going to  
3 impact the property values in an R-1 district, but the  
4 Texas court held, hey, the manufactured home area can be  
5 zoned into a different area of the city, and that's just a  
6 matter of trying to help property values, and that's a  
7 legitimate local purpose.

8 So for those reasons, Your Honor, we contend that  
9 the City's ordinances are constitutional. We respectfully  
10 request that the Court deny Defendant's motion for summary  
11 judgment. Pending any questions, I'll conclude.

12 THE COURT: Would you like a five-minute reply?

13 MR. TAMASITIS: Yes, Your Honor.

14 ARGUMENT ON BEHALF OF THE DEFENDANTS

15 MR. TAMASITIS: Briefly, Your Honor -- and this is  
16 to clean up the record. I had not handed out the  
17 printed-off versions of the PowerPoint slide. I don't  
18 want to inundate you with more paper, but just so it's  
19 there for a reference.

20 Your Honor, I want to be brief, and I don't want to  
21 take up too much of the Court's time because the City did  
22 kind of hit on a lot of the topics we have already  
23 discussed.

24 This is what I want to focus on first, Your Honor.  
25 The proper scope of analysis in this case is not to focus

1     against individual firms. It's not to focus on Sun and  
2     Sun's lack of responsiveness. And it's not to focus on  
3     Sun and Sun's -- how many people they bring to the cabana  
4     house. It's to focus -- that would be improper under the  
5     guidance from the Fourth Circuit and have the baneful  
6     effect of precluding certain meritorious claims. Because  
7     while the burden on a single firm may be negligible, it's  
8     the effect on interstate commerce that matters.

9             The City wants to focus this on us and look how bad  
10    Sun defendants are. That's not the case. It's does the  
11    ordinance have a substantial effect on interstate commerce  
12    and then does it discriminate against interstate commerce.

13            My co-partner, Mr. Ricard, talked about the strip  
14    club in the case that he discussed. He always finds those  
15    R-4 districts. Makes it hard on me. R-4 residential  
16    district -- not resort residential, residential district,  
17    no strip clubs allowed. And that's for everyone. The R-4  
18    district in that case, you're not allowed to have a strip  
19    club. Period. It doesn't matter who you are, where  
20    you're from. Doesn't matter.

21            In the Texas Manufacturing case, you are not allowed  
22    to have manufacturing homes in this district. No one at  
23    all. Period.

24            Walmart case. You are not allowed to have big box  
25    stores in the City of Turlock. It doesn't matter where

1 you're from, who you are. You can't have them.

2 Those are valid. Those are not discriminatory  
3 against interstate commerce. What is, is when you say RV  
4 resort in North Myrtle Beach, you're fine, you can have a  
5 cabana house. RV resort in Conway? You're out. Why?  
6 Because of where you're located.

7 Homeowners association in Calabash, North Carolina,  
8 you can't have a cabana house in North Myrtle Beach.  
9 Homeowners association in North Myrtle Beach, yeah, you're  
10 fine. That's discriminating against interstate commerce.  
11 That's the discrimination we're talking about here in this  
12 case.

13 And then, finally, Your Honor, he talks about how --  
14 and he kind of passed through it that the homeowners  
15 association, that can't at all ever impact interstate  
16 commerce. The Supreme Court said non-profit organizations  
17 like homeowners associations, they're not special just  
18 like zoning ordinances aren't special. They're  
19 incorporated in the state, they are non-profits entities,  
20 and they can have an impact on interstate commerce.

21 Barefoot, The Links, Tidewater have a cabana house.  
22 They have short-term renters. They're engaged in the  
23 market. And short-term renters, as according to the Fifth  
24 Circuit, has an impact on interstate commerce.

25 Finally, Your Honor, I have talked about this but

1 the focus of the analysis needs to be not just on Sun. It  
2 needs to be on what the zoning ordinance does to  
3 interstate commerce. You have a project, and you have a  
4 cabana house, a property. Those two are linked by the  
5 zoning ordinance. When you link them to the zoning  
6 ordinance, the project itself that necessarily impacts  
7 interstate commerce means the zoning ordinance necessarily  
8 impacts interstate commerce.

9 And in the tourism industry, in the City of North  
10 Myrtle Beach, that's a big market, and to exclude entities  
11 and homeowners associations because they are not located  
12 in the city is discrimination against that market and  
13 discrimination against interstate commerce.

14 Thank you again for your time, Your Honor. And,  
15 again, thank you for hosting us today.

16 THE COURT: I'll give you a five-minute reply as  
17 well.

18 MR. RICARD: I don't believe I have one, Your Honor.  
19 Thank you. If it pleases the Court, we can begin with the  
20 next motion?

21 THE COURT: Sure.

22 ARGUMENT ON BEHALF OF THE PLAINTIFF

23 MR. RICARD: Your Honor, this next motion, I  
24 believe, the last one that we'll discuss today given the  
25 renewed motion to vacate has been withdrawn, is the City's

1 motion to compel the answers by the Rule 30(b)(6)  
2 designees of the defendants to be binding. Over 250  
3 times, the designees responded in their deposition, "I  
4 don't know." And likewise, the phrase "not aware" was  
5 said 24 times. And our brief covers the various topics  
6 and provides excerpts of the pertinent portions of  
7 Defendant's deposition and explains to this Court how  
8 their preparation was inadequate. So I'm not going to  
9 belabor all of them here, but I'm going to provide one  
10 prime example.

11 We noticed the topic of the employment relationship  
12 with a former employee of Defendants, Mr. Christopher  
13 Martucci. And we were specifically noticed that we were  
14 interested in asking questions about his termination.

15 Ms. Kirtley, one of the Rule 30(b)(6) designees, was  
16 identified as the one that was going to be able to address  
17 this topic because there were two designees that were  
18 identified, but she was the one that was going to testify  
19 to this topic.

20 There were no objections by Defendants prior to the  
21 deposition of this topic. When specifically asked why  
22 Mr. Martucci was terminated, Ms. Kirtley said she did not  
23 know, as she said very often in her deposition. The best  
24 she could answer was that there was some violation of  
25 policy, but she could not identify what policy was at

1 issue.

2 When asked why she didn't know the answer to that  
3 question, she said, well, she was not the one that fired  
4 him. We reminded her that she was testifying as the  
5 corporate representative and that she was on notice to be  
6 able to testify as to why he was terminated. She said she  
7 did not know and she did not look at his termination  
8 paperwork -- termination paperwork, by the way, that has  
9 not been produced by Defendants in this case.

10 This exchange is a microcosm of how the entire  
11 deposition went, Your Honor. Ms. Kirtley apparently did  
12 not want to be there, and in fact, she walked out, along  
13 with the other designee, during our first session, without  
14 any warning to the City. So we had to conduct a second  
15 session of the deposition. There was simply a complete  
16 disregard of the importance of the depositions.

17 You will likely hear and have seen in Defendants'  
18 memorandum in opposition that the defendants have offered  
19 a substitute or one or more substitutes to be able to  
20 testify and kind of replace their two previous designees.

21 Two things to say about this offer that Defendants  
22 have made. The first is, that inherently demonstrates  
23 that they have acknowledged their initial two designees  
24 were inadequately prepared. But second and more  
25 importantly, a substitute is not sufficient in this case.

1 Case law holds that, when producing an unprepared  
2 Rule 30(b)(6) witness, that's tantamount to a failure to  
3 appear. An appropriate sanction would be to deem the  
4 non-responsive answers as binding such that contrary  
5 evidence cannot be offered at the trial. This type of  
6 sanction is appropriate because if corporations can freely  
7 supplement or contradict the testimony of their  
8 Rule 30(b)(6) designees, then the purpose and integrity of  
9 this process would be severely undermined. After all, as  
10 the Court of Appeals in South Carolina has noted in the  
11 case of Scott v. Greenville Housing Authority, 353 S.C.  
12 639, the whole point of this proces is to prevent trial  
13 from becoming a guessing game or having one party ambush  
14 the other, and that's effectively what would happen in  
15 this case without the sanction.

16 The City would just end on an alternative argument,  
17 Your Honor, that if this Court is inclined to allow  
18 Defendants to substitute, we would respectfully request  
19 they pay our costs and fees for the substituted deposition  
20 because we're going to have do it all over again. And so  
21 that would be the only way in which an alternative option  
22 like that would be fair and equitable is if our attorney's  
23 fees and costs would be compensated.

24 And so for the reasons I have outlined, Your Honor,  
25 we respectfully request that our motion to compel be

1 granted.

2 THE COURT: All right. Reply?

3 ARGUMENT ON BEHALF OF THE DEFENDANTS

4 MR. WILLIS: Your Honor, I think I can maybe  
5 shortstop this pretty quick, and this is -- I don't mean  
6 to cast aspersions on opposing counsel, but this is  
7 serious. In preparing for the argument last night, I  
8 talked with Mr. Tamasitis, and I said I didn't notice an  
9 affirmation in the City's motion to compel that they had  
10 conferred with you before filing it as is required under  
11 Rule 11. And John said they haven't. And they didn't.

12 And after they filed the motion, then we made an  
13 offer to resolve this dispute by providing another witness  
14 who can get the City the information that they're seeking,  
15 at least as to some of the "I don't knows," which would  
16 clear it up. And I said, "Well, did Mr. Ricard or the  
17 City respond to that offer?"

18 And, Your Honor, it's in a letter -- and I would  
19 hand up a copy of it at this point. It's attached as an  
20 exhibit to our brief. But here's the letter we sent after  
21 we got the City's motion that did not certify that an  
22 effort to resolve the motion had been made.

23 And we offered to provide another witness because,  
24 yes, Ms. Kirtley, who is a high school graduate, this was  
25 a difficult process for her. She was asked a number of



1 intensely personal questions. She was embarrassed by  
2 Mr. Ricard by asking questions about a personal bankruptcy  
3 that had nothing to do with the case, and yeah, she  
4 clammed up. And there were some things that she had been  
5 prepared on that she knew -- the Martucci firing is one  
6 example because there's documents that deal with that, and  
7 she drew a blank. And that happens sometimes at 30(b)(6)  
8 depositions. And when that happens, it's the burden on  
9 the producing the party, the defendant, to come up with  
10 someone else who can answer the questions, which we're  
11 happy to do. We're not going to bring someone in at trial  
12 to change the testimony.

13 And so we reached out to Mr. Cooper, and we said,  
14 "Who else can we provide?" And he provided us with a  
15 gentlemen named Jonathan Colman. Mr. Colman was a senior  
16 executive with Sun. He was the vice president of  
17 acquisitions of Sun at the time this cabana house was  
18 purchased. So he has direct personal knowledge of the due  
19 diligence that was done, the purchase that was made. He  
20 was there. He can review the records, and he can answer  
21 any questions that Mr. Ricard may have on that subject  
22 where Ms. Kirtley drew a blank because she wasn't there at  
23 the time.

24 And we have offered to provide that witness. Your  
25 Honor, we'll be glad to pay the costs of the deposition.

1 I don't think we should have to pay Mr. Ricard's  
2 attorney's fees because he's going to be getting  
3 additional information that's going to be germane to the  
4 case, but this gentleman will be at trial. We'll be glad  
5 to provide him to give additional 30(b)(6) deposition  
6 testimony.

7 And we also mentioned to Mr. Ricard that we would  
8 provide Ms. Maynora -- is that her name? -- who is the  
9 current manager to talk about practices since the filing  
10 of the lawsuit, which Ms. Kirtley was not conversant with.

11 So we have made a good faith effort, Your Honor, to  
12 revolve this dispute, but the City didn't even bother to  
13 respond to that letter. They never even acknowledged it.  
14 They did not mention it in their motion to you that that  
15 offer had been made.

16 And, Your Honor, that is -- I mean, I hate to be  
17 hard-nosed, but that is -- this is not a  
18 form-over-substance problem with their motion. As Rule 11  
19 requires, all motions filed shall contain an affirmation  
20 that the movant's counsel, prior to filing the motion, has  
21 communicated orally or in writing with opposing counsel  
22 and has attempted in good faith to resolve the matter  
23 contained in the motion unless the movant's counsel  
24 certifies that consultation will serve no useful purpose  
25 or could not be timely held.

1           And the rule goes on to say, if that affirmation is  
2 not in the pleading, the pleading shall be stricken, not  
3 "may be stricken in the discretion of the Court" but  
4 "shall be stricken." It's mandatory. The Court does not  
5 have any choice.

6           Now, we're not asking Your Honor -- we thought long  
7 and hard about what we should ask in response to the  
8 City's motion. We're not asking Your Honor to deny the  
9 motion to compel. We don't have anything to hide here.  
10 We don't have anything to conceal. We want to provide the  
11 City with the opportunity to take discovery on any  
12 legitimate issue in this case, because we don't want that  
13 to hold up the opportunity for us to get the relief that  
14 we need for a \$2-1/2 million cabana house that we bought  
15 that we can't use.

16           So we have not asked the Court to deny the motion.  
17 We're not asking the Court to sanction Mr. Ricard for not  
18 making that affirmation that Rule 11 says that the Court  
19 can do. All we want Your Honor to do is order the City to  
20 follow the rules, and that would involve withdrawing the  
21 motion, conferring with us on whatever issues the City  
22 might have, and making a good faith attempt to resolve it.  
23 That would involve taking Mr. Colman's deposition, asking  
24 him the questions that Ms. Kirtley said "I don't know" to.  
25 It would also involve looking at documents that might

1 answer questions. And then if, at that time, there's  
2 still a problem, well, we can come back to Your Honor, and  
3 we can talk about it, because frankly, Your Honor, Sun  
4 communities doesn't know everything. There may be some  
5 questions that Mr. Ricard poses that they simply don't  
6 know the answer to, in which case the answer would be "I  
7 don't know," and we'd have to live with that.

8 We don't know how many people came to a wedding and  
9 whether alcohol was served. The answer to those questions  
10 is "I don't know." No one knows that. There are no  
11 records that reflect that. If that's the case, so be it.

12 But it's not appropriate to come into this court and  
13 ask for a sanction against a defendant when you don't  
14 comply with the mandatory rules to confer with us before  
15 making the motion.

16 So we'd just ask the Court to hold this in abeyance.  
17 Mr. Tamasitis and Mr. Ricard will get together. We're  
18 glad to offer Mr. Colman as a deponent. We can do that by  
19 Zoom or we can bring him down here. The reason we didn't  
20 designate him in the first place, Your Honor, is he's a  
21 former employee. He's retired. We had to reach out and  
22 ask him if he was willing to do this. Fortunately,  
23 there's enough good will there that he said, "Yes, I'm  
24 happy to come testify about that."

25 So we have offered a solution. The City's ignored

1 it, and they've ignored the rule as well. So, based on  
2 that, Your Honor, we'd ask that simply the motion be held  
3 in abeyance and Your Honor direct the City to comply with  
4 the rule. Thank you.

5 THE COURT: Brief reply?

6 FINAL ARGUMENT BY THE PLAINTIFF

7 MR. WILLIS: Yes, Your Honor, and I'll just try to  
8 respond just to the Rule 11 issue. My recollection is  
9 there was a conversation that we had; I was just trying to  
10 look at the deposition to see if it was captured on the  
11 record, but I don't believe it was.

12 But I recall a conversation with opposing counsel  
13 regarding there being a lot of "I don't know"s and that we  
14 were going to have to seek relief. We were also facing --  
15 so I'll make that affirmation now that I believe that a  
16 Rule 11 consultation was made, but if that wasn't  
17 sufficient, at a minimum what we have here is -- it would  
18 be futile, because, obviously, there's a disagreement.  
19 And, secondly, there wasn't a whole lot of time because we  
20 were facing trial within, I think, days of Ms. Kirtley's  
21 second session of her deposition.

22 So for those reasons, Your Honor, we don't believe  
23 that the Rule 11 issue should be factored into the Court's  
24 decision here. And, again, for all the reasons we stated  
25 before, we'd respectfully request that the motion be

1 granted. Thank you.

2 FINAL ARGUMENT ON BEHALF OF THE DEFENDANTS

3 MR. WILLIS: Your Honor, just very briefly. The  
4 rule doesn't say "have a conversation." The rule says you  
5 must make an affirmation in writing in your pleadings that  
6 you have engaged in a good faith consultation, an effort  
7 to resolve this issue. That was not done.

8 And the only thing this Court can do is strike it.  
9 We're not even asking you to do that. We're just asking  
10 you to encourage -- to suggest to Mr. Ricard that he  
11 respond to our letter and he engage with us in a good  
12 faith negotiation to try to solve whatever problem he has  
13 with the "I don't know"s. Thank you, Your Honor.

14 THE COURT: All right. I'll take it under as  
15 advisement and let you know something within a week.

16 MR. TAMASITIS: Your Honor, I believe we did mention  
17 with Ms. Scalice that we would talk about the scheduling  
18 order for this case, if that's possible.

19 THE COURT: That's fine with me.

20 MR. TAMASITIS: And I think the only issue,  
21 Mr. Ricard, is that the discovery deadline -- that the  
22 City proposed no discovery deadline. Defendants disagree  
23 with that; that, in order to get ready for this trial,  
24 there needs to be a discovery deadline, and so we have  
25 proposed October 2nd as a discovery deadline in the

1 proposed scheduling order that we have sent. I have got  
2 copies; I can hand them up.

3 I don't know, Rhett, what's your take on this?

4 MR. RICARD: Your Honor, so just really briefly, I  
5 mean, we don't see anything in the rules that requires  
6 there to be a discovery deadline. We're not agreeable to  
7 it for a couple of reasons, the first being, if this case  
8 doesn't go to trial in October because we're No. 3 on the  
9 list, we would like the ability to continue engaging in  
10 discovery.

11 And, again, the second reason would be is there's  
12 nothing in the rules that requires there to be a discovery  
13 deadline.

14 An additional point, Your Honor, is -- you know, I  
15 don't know exactly how defendants will feel about this,  
16 but there's -- we mentioned that the consent order has  
17 been in place, and so every month, we get updated profit  
18 and loss statements, seeing how their bottom line is being  
19 impacted and the occupancy rate and all that stuff. You  
20 didn't hear too much about the occupancy rate issue today,  
21 but the defendants have been supplementing each time that  
22 we request supplementation for that discovery to be  
23 produced. And so we don't want that to stop at the  
24 beginning of October if, you know, trial is not going to  
25 be until later in October or perhaps even later than that.

1           So, for all those reasons, we would request that the  
2 City's proposed scheduling order be adopted that does not  
3 have a discovery deadline.

4           MR. WILLIS: Your Honor, under Rule 26(e), we have a  
5 duty to supplement all the way through trial. The  
6 discovery deadline doesn't change our duty under the  
7 rules. I haven't been involved in a case where there  
8 hasn't been a discovery deadline. Otherwise, you could be  
9 sent serving discovery requests up until the eve of trial,  
10 which I don't think is appropriate here.

11           I think the language we asked for was October 2nd,  
12 2023, all discovery requests must be served in time.  
13 Depositions may be taken after a specified time period by  
14 agreement of counsel and for reasons for good cause shown  
15 so that, you know, we put it in there, that, hey, we can  
16 come to an agreement -- a reasonable agreement to have a  
17 deposition taken after October 2nd. We just need to talk  
18 through it. But there needs to be a deadline.

19           THE COURT: All right. Let me take a look at it.  
20 I'll let you know something on that too.

21           MR. WILLIS: Thank you, Your Honor. Appreciate it.

22           MR. RICARD: Thank you, Your Honor.

23           (The above matter concluded at 1:46 p.m.)  
24  
25



CERTIFICATE OF COURT REPORTER

State of South Carolina )

County of Horry )

RE: City of NMB v. Sun TRS Ocean Club, et al.

I, Bobbi J. Fisher, Registered Professional Reporter (RPR) and Official Court Reporter III for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the hearing of the captioned case in the Court of Common Pleas for Horry County, South Carolina, on the 9th of August, 2023.

Submitted: October 16, 2023

\_\_\_\_/s/ Bobbi Fisher\_\_\_\_\_

Bobbi J. Fisher, RPR

Official Court Reporter III

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STATE OF SOUTH CAROLINA \* COURT OF COMMON PLEAS  
 COUNTY OF HORRY \* TRANSCRIPT OF RECORD

-----X  
 CITY OF NORTH MYRTLE BEACH, \*  
 Plaintiff, \*  
 vs. \* Case No. 2021-CP-26-07489  
 SUN TRS OCEAN CLUB, LLC; \*  
 SUN TRS CAROLINA PINES, LLC; \*  
 AND SUN TRS CAROLINA PINES \*  
 RV, LLC, \*  
 Defendants. \*  
 -----X

October 31-November 1, 2023

BENCH TRIAL - VOLUME I

B E F O R E:

The Honorable William Seals, Presiding Judge

A P P E A R A N C E S:

Rhett Ricard, Esq.  
 Cheryl Shoun, Esq.  
 Attorneys for the Plaintiff

John Tamasitis, Esq.  
 Richard Willis, Esq.  
 Brian Gibbs, Esq.  
 Attorneys for the Defendant

Court Reporter: Bobbi Fisher, RPR  
 SC Official Court Reporter III

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| 4  | 16 | Blust Email to Watts 1/31/19        | 61 | 61 |
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| 6  | 18 | February '19 Email Chain with Title | 61 | 61 |
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| 8  | 19 | March 2019 Email Chain with Title   | 61 | 61 |
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| 11 | 21 | April 2019 Email Chain - Title      | 61 | 61 |
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1 DEFENDANT'S EXHIBIT

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| 5  | 3   | Sun Requests to City re: Zoning     | 61  | 61    |
| 6  |     | Letter 3/18/19                      |     |       |
| 7  | 4   | Blust Letter to Powell re: Approval | 61  | 61    |
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| 9  |     | 6/18/07                             |     |       |
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| 10 |    | Holding Co LLC - 6/25/12            |    |    |
| 11 | 18 | NMBOC Holding Co. Deed to NMBOC     | 61 | 61 |
| 12 |    | Holding II - 4/28/17                |    |    |
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| 15 | 20 | Sapphire LLC Deed to NMB Ocean Club | 61 | 61 |
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| 24 |    | Program Report - FY 2022            |    |    |
| 25 | 27 | MB Convention & Visitors Bureau     | 61 | 61 |

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| 24 |    | Beach Club                          |    |    |
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| 4  |    | Assn. Beachfront Cabana             |    |    |
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## P R O C E E D I N G S

(The following proceedings started at 10:00 a.m.)

THE COURT: Is there anything we need to take up before we begin?

MR. RICARD: Yes, Your Honor. Two matters from the plaintiff. We have two motions, the first of which I believe is by consent. There are three defendants in this case, one of which we are moving this Court to substitute to just adequately name the appropriate party. Right now there's a defendant named Sun TRS Carolina Pines RV, LLC. In actuality, the TRS should be deleted. So we're moving the Court to make a substitution for Sun Carolina Pines RV, LLC.

THE COURT: Any objection?

MR. TAMASITIS: No, Your Honor.

MR. RICARD: Thank you, Your Honor.

Our second motion I believe is contested. We filed last week a motion for in camera review and a motion to compel. This is a discovery motion. We would ask that it be heard pretrial, Your Honor. We're not asking for a ruling this second or after it's heard, but we would request a ruling prior to the plaintiff's close of our case-in-chief; the reason being as it might effect how we end up closing out our case-in-chief.

THE COURT: All right.



1 MR. RICARD: I have got a binder, if the Court would  
2 like, with the motion and with the exhibits. I'm happy to  
3 bring that up.

4 THE COURT: Okay.

5 MR. RICARD: Your Honor, so there's two different  
6 categories of documents that the City is requesting that  
7 Defendants produce. The first regards some email  
8 communications between Defendants and their attorneys. As  
9 background, this Court obviously knows the concerns -- the  
10 case concerns a cabana house. One of the employees,  
11 Mr. Dennis Onken, was the food and beverage director for  
12 the RV resort, and he -- during his deposition, which  
13 occurred a few weeks ago, he testified in his deposition  
14 that he was the one at Defendant's location that had the  
15 good sense, the common sense to go ask the City for  
16 permission to serve and provide food and beverage services  
17 at the cabana house, and so he does. And he has a  
18 conversation with Paul Blust, the Zoning Administrator at  
19 the time.

20 Mr. Blust tells him definitively that food and  
21 beverage services are not permitted for cabana houses, and  
22 Mr. Onken, not once but twice, relays that guidance from  
23 the City to higher management at the defendants.

24 At that point in time, there's a flurry of emails.  
25 There's perhaps a dozen or so, and we have got a privilege

1 log that's attached to the motion for the documents that  
2 we'd like the Court to review in camera. And we also  
3 added a few documents; we wanted to provide the Court with  
4 an updated privilege log, Your Honor. With your  
5 permission, I'll approach.

6 And for the record, the updated -- it has  
7 highlights, Your Honor, on one of the back pages. And  
8 Defendants received a copy of the updated privilege log  
9 that we have highlighted.

10 But you'll see, Your Honor, in the highlighted  
11 portion there's a string of emails that occur -- that  
12 appear to be regarding Mr. Onken's email chain to higher  
13 management. And, obviously, Plaintiff hasn't had the  
14 opportunity to review those. But the attorney-client  
15 privilege, although it's a strong privilege, it's not  
16 absolute. Whenever there are issues where Plaintiff has a  
17 substantial need for documents, the attorney-client  
18 privilege can be broken in two.

19 Additionally, Your Honor, we're not standing here  
20 today alleging that any malfeasance has occurred on the  
21 part of opposing counsel, but there is an exception for  
22 crime fraud. And although it may not have been known at  
23 the time when these communications were occurring, when  
24 Mr. Onken testified a few weeks ago that he was under the  
25 impression that this was not allowed -- this food and

1 beverage service was not allowed and then submits that  
2 instruction and that guidance from the City to upper  
3 management and these emails occur -- these emails, which  
4 do not concern the counsel that are sitting here at the  
5 table; I want to make that clear, but they concerned that  
6 the counsel that Defendants were utilizing, I assume, up  
7 in Michigan where their headquarters are.

8 And those emails occur. We would request at this  
9 time, Your Honor, that a prima facie case has been  
10 established by the City in order for this Court to do an  
11 in camera review. We're not asking for an immediate  
12 production of documents. We believe that the appropriate  
13 procedure at this point is for the Court to review the  
14 emails that have been highlighted in this privilege log.

15 There's a second category of documents as well, Your  
16 Honor. This concerns Mr. Jonathan Colman. Mr. Colman was  
17 designated as the defendant's 30(b)(6) designee in their  
18 reconvened deposition. And at that deposition, Mr. Colman  
19 brought with him a number of different records, and we  
20 have laid it out in our brief, but he referred to those  
21 notes and records, and then he also offered for the City  
22 to examine them. He said you're welcome to look at these.

23 And because of that, Your Honor, we're arguing that  
24 waiver of the attorney-client privilege has occurred.  
25 Defendants have produced some of the documents, but they

1 have redacted other portions of them and they have  
2 withheld other pages from those notes and records as well.

3 But because Mr. Colman was testifying on behalf of  
4 Defendants -- he was the corporate designee. He is the  
5 one that controls that privilege. The client had the  
6 privilege, and currently, those documents are being  
7 withheld despite the fact that he's committed waiver, not  
8 only by bringing them to the deposition, referencing them  
9 in the deposition, but also offering for the City to  
10 examine them.

11 And so we do believe that an in camera review would  
12 not even be necessary for this category of documents. We  
13 believe that the Court, under those facts that we have  
14 laid out in the motion, can go ahead and compel  
15 production. However if the Court feels it necessary,  
16 we're not going to object to an in camera review of those  
17 first. But, in any case, Your Honor, we'd respectfully  
18 request that our motion be granted. Thank you.

19 THE COURT: All right.

20 Any reply to both motions?

21 MR. GIBBS: May it please the Court? Brian Gibbs  
22 for the Sun defendants.

23 As you just heard, the City has asked for two  
24 separate sets of documents, and I'll discuss each in turn.  
25 First, they're asking for some emails between Dennis Onken

1 and Sun's outside counsel that relate to the use of food  
2 and beverage at the Beach Club.

3 The City is alleging that Sun's attorneys engaged in  
4 criminal activity in these emails, and Your Honor, that's  
5 simply not the case here. It's also insulting that the  
6 City is accusing us, through Sun's outside counsel, of  
7 covering up criminal conspiracy in this case. These  
8 emails are simply privileged communications between Sun's  
9 outside counsel and its client.

10 Counsel for Sun defendants has reviewed all of the  
11 emails and has repeatedly informed the City that they're  
12 communications under attorney-client privilege. The City  
13 has also doubled down and asked for additional emails that  
14 relate to this as well as we filed our memorandum in  
15 opposition to their motion to compel. However, we are  
16 happy to provide these emails for the Court to review and  
17 are confident that the Court will find them to be  
18 privileged communications.

19 Second, the City is seeking documents that John  
20 Colman, who is the 30(b)(6) designee, referenced during  
21 his deposition. There's three separate documents that are  
22 in this, one of which is a letter that was written by  
23 counsel outlining counsel's mental impressions and trial  
24 strategy; another one is a timeline with explanations of  
25 relevant and critical events that happened that was also

1 created by counsel; and the third are some handwritten  
2 notes between Mr. Colman and Sun defendant's counsel  
3 in preparation for his 30(b)(6) deposition.

4 I will note, Your Honor, that the redacted version  
5 of these notes has been provided to the City, and most of  
6 the notes were provided. There's only a very small  
7 portion of them that have been redacted, and those  
8 redactions are all privileged information.

9 Mr. Colman, despite his designation as a 30(b)(6)  
10 witness for Sun did not have the ability to waive the  
11 attorney-client privilege regarding these emails. The  
12 City's argument that Colman could waive this privilege is  
13 akin to arguing that Colman had the authority to sell the  
14 property in the deposition simply because he was the  
15 30(b)(6) representative of the company at that time.  
16 That's simply not how waiver works. Mr. Colman is not the  
17 client here; Sun Defendants are.

18 Further, these documents are also protected by work  
19 product, and Mr. Colman is not able to waive that.  
20 However, Sun defendants are also happy to provide these  
21 documents for the Court's review, and we're confident that  
22 the Court will find them privileged as well.

23 THE COURT: Thank you.

24 MR. GIBBS: Would you like a copy?

25 THE COURT: Thank you.

1 All right. Anything else before we begin?

2 MR. RICARD: Nothing else from the plaintiff.

3 THE COURT: Anything else from the defense?

4 MR. TAMASITIS: Yes, Your Honor, just a couple of  
5 housekeeping matters. There are going to be depo  
6 designations in this case. Up to Your Honor how you want  
7 us to proceed with that, if you'd prefer live testimony or  
8 if you'd like us just to go ahead and submit them to you.  
9 Totally up to you. Whatever you want to do.

10 MR. RICARD: We only intend to introduce, Your  
11 Honor, one deposition designation, and our request would  
12 be to read it through. We can try to speed up and maybe  
13 capture just some of the key portions if the Court's  
14 concerned about just efficiency purposes. But we have no  
15 objection to however Defendants --

16 THE COURT: Let's go ahead and do it live. You're  
17 the only case I have got this week. We can do it as quick  
18 or as slow as you want to do it.

19 MR. TAMASITIS: So we'll do it live?

20 THE COURT: I'm fine, yes.

21 MR. TAMASITIS: The other thing, Your Honor, is,  
22 with respect to evidence, opposing counsel and Sun  
23 defendant's counsel, we have created exhibit notebooks of  
24 the exhibits that are agreed upon for admissibility.  
25 We'll share copies with them, we'll share copies with the

1 Court, the clerk, everything we can.

2 And then I believe there are five or six documents  
3 where the City has objected to it on the grounds of, I  
4 think, hearsay. Some of them are relevancy.

5 THE COURT: And y'all have read the Allstate case?

6 MR. RICARD: Yes, Your Honor.

7 THE COURT: I know what hearsay is. Let's put them  
8 in. I'll evaluate them.

9 MR. TAMASITIS: All right, Your Honor. So what we  
10 can do then is we'll just update our notebooks to include  
11 those documents. And I believe that is all we have got.

12 Is there anything else?

13 MR. RICARD: Yes, Your Honor. Just on the  
14 objections piece. If it's okay with the Court, we'll just  
15 note them for the record, and I understand that you'll  
16 take it and consider it in a nonjury fashion.

17 And then I think last for housekeeping, we do have  
18 some technology, Your Honor, so before we do openings,  
19 there may be other points in time during the course of  
20 trial where we may have some tech stuff going on, but  
21 we'll do our best.

22 And one of those will be one of our witnesses  
23 probably later this afternoon intends to appear -- I think  
24 with the consent of opposing counsel -- to appear via Zoom  
25 or Webex, so we're going to try and make that work as



1 well.

2 THE COURT: That sounds good.

3 MR. TAMASITIS: Thank you, Your Honor.

4 THE COURT: All right. Thank you.

5 Would the plaintiff like to give a brief opening  
6 statement?

7 MR. RICARD: Sure, Your Honor.

8 Your Honor, before I begin, we're going to try to do  
9 a PowerPoint here. With your permission, may I approach  
10 with the PowerPoint slides just to introduce them into the  
11 record?

12 THE COURT: Certainly.

13 Is that an exhibit?

14 MR. RICARD: Well, I think it's just going to be for  
15 the record, Your Honor.

16 COURT REPORTER: Are we marking this or no?

17 MR. RICARD: I wasn't going to mark it for the  
18 record, Your Honor. I just wanted to put it in as...

19 MR. WILLIS: Your Honor, may I suggest? These  
20 demonstrative exhibits, since this is a nonjury trial,  
21 might eventually be relevant. I'm just suggesting maybe  
22 we mark it for identification rather than offering them  
23 in.

24 MR. RICARD: Sure. I have no objection.

25 MR. WILLIS: So you'll have a record of it.

1 THE COURT: All right. We'll give that back to the  
2 court reporter.

3 MS. SHOUN: Your Honor, you did tell us we could  
4 move as slow as we want.

5 THE COURT: You can move as slow as you want to go.  
6 That's fine. I spent eight hours yesterday in a mental  
7 health seminar. Go as slow as you want to go.

8 [Courtroom laughter.]

9 COURT REPORTER: So am I going to mark this  
10 Defendant's 1?

11 MR. RICARD: Plaintiff's.

12 COURT REPORTER: I'm sorry. You're right.  
13 Plaintiff 1 for ID only.

14 MR. RICARD: Yeah, for ID only. That would be  
15 great.

16 (Plaintiff's Exhibit No. 95, PowerPoint Slide Set,  
17 was marked for identification only.)

18 OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

19 MR. RICARD: All right. Good morning, Your Honor.  
20 May it please the Court?

21 Forgiveness, not permission. That's what this case  
22 is about. The ordinances at issue in this case have  
23 existed for years. Defendants purchased this property  
24 over two decades after the ordinances were promulgated.  
25 Defendants knew about the ordinances. They knew they

1     couldn't own the property, they knew they couldn't use the  
2     property, and they purchased it anyways. They are asking  
3     this Court for forgiveness. They're asking this Court to  
4     bail them out when, instead, they should have asked for  
5     permission from the City prior to their purchase.

6             This is a zoning case, Your Honor. Zoning is a  
7     unique and exclusively local function. It's the realm of  
8     local elected officials and a dedicated staff to work on  
9     comprehensive plans over the course of years and to  
10    institute ordinances that support those comprehensive  
11    plans.

12            It makes for good policy that judges in courts don't  
13    often have to interfere in these local zoning disputes.  
14    Zoning ordinances are designed to support a municipality's  
15    comprehensive plan, and the City of North Myrtle Beach has  
16    a number of purposes for its zoning ordinance. Those  
17    general purposes are to guide development -- the orderly  
18    development of the City to promote a number of different  
19    factors, including public health, safety, morals,  
20    convenience, in addition to a number of others.

21            And in support of these goals, the City further  
22    delineates other important considerations, providing for  
23    adequate light, air, and open space. And you'll hear in  
24    this case that part of that factor is ocean visibility.

25            Another consideration is the preventing of the

1 overcrowding of land to avoid undue concentration of  
2 population and to lessen congestion. Traffic is always a  
3 concern for a tourist destination like the City of North  
4 Myrtle Beach.

5 Other considerations are creating a harmonious  
6 community; not having incompatible neighboring properties;  
7 protecting scenic and ecologically sensitive areas, the  
8 beach being an obvious example of that; regulating the  
9 density and distribution of populations and the uses of  
10 buildings and land for commercial uses and residential  
11 uses. So a distinction between those, Your Honor, will be  
12 important. And the intensity of use that's based off the  
13 densities is something you'll also hear as a concern. And  
14 of course with the intensity of use comes issues such as  
15 the security and safety from fire, flood, and other health  
16 issues.

17 In the late -- in late 1995 and early into 1996, the  
18 City of North Myrtle Beach promulgated an ordinance that  
19 allowed for a specific type of special exception. That  
20 special exception was in the R-4 resort residential  
21 district, and that use was cabana houses. This is a  
22 residential district, and the City wanted to provide an  
23 allowance for a noncommercial amenity. I'm going to  
24 repeat that: A noncommercial amenity. And you'll see  
25 that in the legislative history.

1           And that amenity was for inland developers to  
2 shuttle guests to the beach. And you're going to hear  
3 testimony as to why all the goals that I just discussed  
4 are going to be supported by that ordinance.

5           Now, Defendants are going to try to focus you in on  
6 just one of those goals: An economic consideration. But,  
7 again, as we have already discussed, there are a number of  
8 goals that are outlined in the City's code of ordinances  
9 that ultimately will be supported -- that ultimately are  
10 supported by the use in these ordinances.

11           So what are the ordinances? There's a definition  
12 for cabana houses. It's a fairly long definition, Your  
13 Honor, so I'm going to try to break it down for you. The  
14 first is, it has to be used by a project within the City.  
15 And so that's highlighted in the ordinance.

16           The second requirement is what we call the HOA  
17 requirement. The cabana house has to be limited and owned  
18 and operated by an HOA, a homeowners association. And  
19 then the third consideration, third requirement are the  
20 use ordinances. And I'm not going to put these on the  
21 screen, but, in the definition, it already talks about the  
22 use is going to have to be limited to a noncommercial  
23 capacity for a limitation to the changing of clothes and  
24 beach access, essentially. And there's going to be a  
25 number of use ordinances that will be found later on in

1 the ordinances and that we'll go through during the course  
2 of this trial. But those are the three main requirements  
3 that are outlined in the definition of cabana houses.

4 This case concerns property located at 1814 North  
5 Ocean Boulevard in North Myrtle Beach. Like I indicated,  
6 there's a structure on that property. It's close to 5,000  
7 square feet. It includes a pool and a beach access over  
8 the dune walkway. And it's also squeezed between two  
9 condominium projects: Sea Cloisters I and Sea  
10 Cloisters II.

11 It was built in 2007, and the original developers,  
12 they wanted to build a high-rise condominium but that  
13 wasn't allowed due to restrictive covenants on the  
14 property that limit the property to only being used for a  
15 recreational facility. And so those restrictive covenants  
16 are separate and distinct from the ordinances that have  
17 been passed by the City of North Myrtle Beach, although  
18 there is some congruence between the two.

19 So instead of being able to build a high-rise  
20 condominium, which would otherwise be allowed in the R-4  
21 district, the original developers instead seek to apply  
22 for a special exception, and that special exception was a  
23 cabana house. The City approved that special exception  
24 for those original developers and for them alone.

25 The original owners of the property don't have much

1 success. The 2008 recession hits, and the project for  
2 which the cabana house was being built, Seabrook  
3 Plantation, it never gets fully developed. The cabana  
4 house then changes hands, but, again, the subsequent  
5 owners never have much success, and it's never used that  
6 much over the next decade or so.

7 The immediate owner prior to Defendants finds out  
8 about the construction of an RV resort in Conway, South  
9 Carolina, and that prior owner reaches out to Defendants  
10 and asks them if they're interested in buying this  
11 property and to get it off his hands.

12 This is where Sun Carolina Pines RV, LLC, comes in.  
13 It's a subsidiary of Sun Communities, Incorporated. So  
14 Sun Communities is the larger entity that's headquartered  
15 in Michigan, and it owns around 670 manufactured housing  
16 communities, RV resorts, and marinas across the United  
17 States and I believe the United Kingdom as well.

18 Sun Communities mostly have RV destinations, and  
19 they're concentrated really in four states -- Florida,  
20 Michigan, California, and Texas -- but they have expanded  
21 over the years. Approximately a decade or more ago, they  
22 began looking at the Grand Strand area to establish an RV  
23 resort, and they specifically looked at purchasing  
24 existing RV resorts on the beach, but they ultimately  
25 decided to look more inland instead.

1           In 2017, they purchase the land in Conway and  
2       conduct the ground-breaking for the RV resort in 2018.  
3       And that RV resort is owned and operated by Sun Carolina  
4       Pines RV, LLC.

5           There were no plans -- no plans or efforts at that  
6       time to purchase beachfront property for the use as an  
7       amenity, but in 2019, when they're approached by the prior  
8       selling [sic] wanted to get the cabana house off his  
9       hands, Defendants quickly jump on them. Defendants go  
10      through a four-month due diligence period. They obtain  
11      multiple documents explaining to them what the zoning  
12      ordinances are and they apply to them.

13          Defendants, you'll see, admit to knowing the  
14      applicable ordinances prior to their purchase, and despite  
15      knowing they couldn't own and operate the cabana house,  
16      they choose to purchase the property anyways, and they  
17      closed in May of 2019.

18          You'll hear that it gets worse, Your Honor.  
19      Defendants begin making plans to use it in a commercial  
20      capacity as well, despite that not being a permitted use.  
21      They never go through the process of applying for a  
22      special exception use.

23          Now, these problems of their ownership and operation  
24      were not immediately noticeable to the City or to the  
25      cabana house's immediate neighbors, Sea Cloisters I and



1 II. The grand opening of the RV resort wasn't until the  
2 fall of 2019, and so the cabana house's use was fairly  
3 limited during the summer of 2019. And then, of course,  
4 COVID happens in March of 2020, and so the first half of  
5 2020, the cabana house is not used very much then either.

6 But late 2020 and in the early season of 2021,  
7 things change. The Grand Strand and the entire Southeast  
8 opens up a lot quicker than other parts of the country.  
9 Tourists that are fleeing closed-down parts of the  
10 country, such as from the north and upper midwest and out  
11 west as well, they start fleeing -- or, excuse me, not  
12 fleeing but start vacationing down to the Grand Strand  
13 area and to the southeast in general in 2021.

14 The RV industry at that time is booming. Defendants  
15 themselves are shuttling hundreds of guests in the cabana  
16 house in the summer of 2021, which leads to noise issues,  
17 it leads to trespassing issues, and even leads to an  
18 altercation or two.

19 Defendants also host events and serve food and  
20 beverage services despite knowing that that was not a  
21 permitted use. At this point, the neighboring owners  
22 begin complaining to their HOA, Sea Cloisters I HOA and  
23 Sea Cloisters II HOA. And, ultimately, those two HOAs  
24 file a written complaint with the City in July of 2021,  
25 and that's when the City discovers for the very first time

1 that Defendant's violation of the zoning ordinance. And  
2 you may hear Defendant's claim otherwise, but the evidence  
3 you will hear will not support their claim. This is the  
4 first time, in July of 2021, that the City realizes the  
5 issues surrounding Defendant's ownership and operation of  
6 the cabana house.

7 Ultimately, we're going to contend that these  
8 ordinances are valid and enforceable, and we intend to  
9 prove that Defendants have violated and by their continued  
10 ownership continue to violate the zoning ordinances at  
11 issue in this case.

12 In response, Your Honor, Defendants have asserted  
13 counterclaims on various constitutional grounds; I believe  
14 there's three that are current at this point. I believe  
15 it started with four, but there's three at this point.

16 Because this is an opening statement, we're going to  
17 refrain from making argument as to the law and to the  
18 merits of Defendant's counterclaims, but we do want to  
19 frame the issue for one of those counterclaims before the  
20 Court hears the factual record. And that framework  
21 concerns Defendant's counterclaim under the dormant  
22 commerce clause.

23 As the Court is aware from the pretrial motions in  
24 this case, there's a two-tier analysis to the dormant  
25 commerce clause, and the defendants are likely going to

1 want this Court to jump straight to those, but before we  
2 even get to that two-tier analysis, Defendants must first  
3 bear the additional burden of proving that an ordinance,  
4 quote, "substantially affects interstate commerce."

5 And there are four factors that this Court must  
6 consider when examining the factual record, and they come  
7 from two opinions from the Supreme Court of the United  
8 States, and that first case is United States v. Lopez --  
9 case citation, 514 U.S. 549 -- and the case of United  
10 States v. Morrison, citation 529 U.S. 598.

11 And those four factors, which I'll call the  
12 Lopez-Morrison factors, are as follows: First, Defendants  
13 must prove that there must be a relationship to a  
14 commercial activity versus a noncommercial amenity.

15 Second, the Court must consider whether there's a  
16 jurisdictional limitation in place, such as a special  
17 exception use within but one zoning district leaving  
18 commercial activity for other zoning districts.

19 Third, what does the legislative history say? Does  
20 it show whether there's an impact on commerce or an intent  
21 to discriminate or exclude others?

22 And, lastly, whether there's an attenuation between  
23 the activity and a substantial affect on interstate  
24 commerce.

25 Ultimately, Your Honor, the facts are going to bear

1 out the following: The City intended for cabana houses to  
2 be used in a noncommercial manner, and the legislative  
3 history will back that up. The R-4 district, after all,  
4 was and is designed for a residential manner. The City's  
5 special exception for cabana houses are jurisdictionally  
6 limited to R-4, leaving Defendants free to own and operate  
7 commercial activity elsewhere within the City.

8 Defendants never charged their guests for this  
9 amenity, and due to the consent order in this case, which  
10 Defendants agreed to and which closed their cabana house  
11 for most of 2022 and into 2023, despite that closure of  
12 the cabana house, Defendant's reservations at their RV  
13 resort have only increased and, likewise, Defendant's  
14 revenue at the RV resort has only increased. So,  
15 ultimately, there's not going to be evidence of a  
16 substantial effect, if any effect, on interstate commerce.

17 At the end of this trial, Your Honor, we will  
18 respectfully request that you find in favor of the City  
19 and ask that you dismiss Defendant's counterclaims.

20 Thank you.

21 THE COURT: Defense?

22 MR. TAMASITIS: Thank you, Your Honor.

23 OPENING STATEMENT ON BEHALF OF THE DEFENDANT

24 MR. TAMASITIS: Your Honor, like I said, we have got  
25 a PowerPoint slide, and I'll hand it up for purposes of

1 identification.

2 COURT REPORTER: No. 1 for ID.

3 (Defendant's Exhibit No. 61, PowerPoint Slide Set,  
4 was marked for identification only.)

5 MR. TAMASITIS: May it please the Court, Your Honor,  
6 opposing counsel? Your Honor, my name is John Tamasitis,  
7 and along with my co-counsel here, Richard Willis and  
8 Brian Gibbs, as well as our paralegal, Sara Tyer, and our  
9 litigation support specialist, Jim Farmer, we represent  
10 the defendants, Sun TRS Ocean Club, LLC; Sun TRS Carolina  
11 Pines, LLC; and Sun Carolina Pines RV, LLC. We'll  
12 collectively refer to them as the Sun defendants for ease  
13 of review.

14 These entities are all part of an investment  
15 portfolio owned by Sun Communities, Incorporated, which is  
16 a publically traded real estate investment trust that  
17 invests in manufactured housing communities, RV  
18 communities, and marinas. Sun Communities invest in 670  
19 such properties located in the United States, Canada, and  
20 the United Kingdom.

21 What I want to focus today on, Your Honor, is -- for  
22 my opening statement is what this trial is about and what  
23 it's not about. Before I do that, Mr. Ricard did a very  
24 good job of running over the factual background of this  
25 case and how we got here, but I do want to touch on a few

1 things. First, there is a deed restriction on this  
2 property that exists from back in 1979, and that  
3 restriction limits the use of the property -- not  
4 ownership but the use of the property to a clubhouse for  
5 recreational purposes.

6 The property was purchased, as Mr. Ricard alluded  
7 to, by Pan, LLC, in 2005, and it's my understanding that  
8 there was a lawsuit that was filed by Pan against the  
9 neighbors, Sea Cloisters I and Sea Cloisters II. You'll  
10 hear a lot about them in this trial. That lawsuit was to  
11 try to lift the restrictive covenant on the property, and  
12 Pan was unsuccessful in doing so.

13 So, thereafter, Pan asked the City to approve a  
14 special exception for a cabana house, and in 2007, that  
15 special exception was approved. Thereafter, they  
16 constructed the beach club that is currently on the  
17 property.

18 Now, Your Honor, in 2009, Pan begins to -- conveys  
19 the property. The property is conveyed several times for  
20 the next several years. Interestingly, though, the  
21 predecessor in interest to the Sun defendants for this  
22 property was NMB Ocean Club Partners, LLC, which is an  
23 entity that was created by Mace Watts, a local developer  
24 in the Grand Strand.

25 Mr. Watts operated that property under the special

1 exception, which had never revoked or withdrawn or  
2 provided back to the City, as a private membership club  
3 for individuals residing in North Myrtle Beach and some  
4 that did not reside in North Myrtle Beach. And there were  
5 never any issues with Mr. Watts operating the beach club  
6 that way.

7 As Mr. Ricard discussed, in 2019, after Carolina  
8 Pines RV Resort broke ground, Mr. Watts reached out to Sun  
9 Communities acquisitions head, Jonathan Colman, who you'll  
10 hear testimony from in this trial, to ask them if they'd  
11 be interested. And so there was some negotiations, and  
12 Sun ended up purchasing the property for \$2.5 million.

13 Sun also, as part of that transaction, took over  
14 some of the members that were currently members of the  
15 private beach club that Mr. Watts was running.

16 Your Honor, in this chain of title that you'll see,  
17 this mock chain of title, there is never a homeowners  
18 association that owns this property, and it was never  
19 operated for a project exclusively in North Myrtle Beach.  
20 Not once and it isn't today.

21 The other cabana houses that are in the city,  
22 specifically Barefoot, was not owned by a homeowners  
23 association after it was constructed for a period of  
24 almost ten years. The cabana house for The Links Golf and  
25 Racket Club was owned by -- was owned by a corporation

1 until 2018, although its cabana house had been in use and  
2 operation since approximately the 1990s. There will be  
3 testimony in this trial to that effect.

4 Now, I want to talk about the R-4 resort residential  
5 district. Let me repeat that. It's the R-4 resort  
6 residential district, not the R-4 residential district.  
7 This is the zoning map for the immediate area surrounding  
8 the beach club. The R-4 resort residential district is  
9 not residential. According to the City's own planning and  
10 director -- Director of Planning and Development, it's a  
11 mixed use zoning district that, according to him, is  
12 similar to the City's resort commercial district.  
13 Resort-style developments are there, including commercial  
14 facilities, multi-family structures, and resort  
15 accommodations.

16 As a matter of fact, this is kind of a blow-up of  
17 the photo that the City just showed you in their  
18 PowerPoint slide. If you look across the street, that's  
19 the Tilghman Beach and Golf Resort. That's in the R-4  
20 resort residential district.

21 Next to it are the Sea Cloisters properties, and  
22 it's my understanding that the PDD, which you see on the  
23 zoning map, is that parking area right there.

24 This is also the City limit map and an outline of  
25 where the other beach clubs are located in the city. I



1 want to be very clear, Your Honor. Any project or  
2 homeowners association outside of that red line cannot own  
3 a cabana house in the city, whether it's in Calabash,  
4 North Carolina, or whether it's in Little River.

5 Now, let's talk about what this trial is not about.  
6 It's not about weddings and children's birthday parties,  
7 though you'll hear testimony about that. It's not about  
8 the service of food and beverage at the beach club. It's  
9 not about parking disputes, landscaping issues, loud  
10 music, or issues with lighting. It's not about  
11 overcrowding, and it's not about rowdiness. Nevertheless,  
12 the City has identified over half a dozen witnesses who  
13 will testify to only those issues, and none of their  
14 testimony will be relevant to what's important in this  
15 trial.

16 This trial is not about these issues because, if it  
17 was, the City would have followed its normal zoning  
18 enforcement procedures, which are citations and fines, for  
19 these infractions. The City's own 30(b)(6) witness  
20 admitted as such, saying that there is -- when we were  
21 discussing why they brought this lawsuit, if the main  
22 focus is just, you know, not a homeowners association and  
23 not a project in North Myrtle Beach, which we can't fix,  
24 we can't cure -- and his testimony was there's no  
25 reasonable cure for that. He acknowledged that. Said if

1 the complaint were limited to loud and boisterous  
2 activity, those things could be addressed through normal  
3 enforcement of the zoning ordinance.

4 The reason this lawsuit was filed -- and it's in the  
5 City's own complaint -- is not about the noise issues and  
6 it's not about altercations in the parking lots. It's  
7 about the residency requirement that we're going to be  
8 discussing for the majority of this trial.

9 Now, let me be clear, Sun defendants do not dispute  
10 that any of the things Mr. Ricard talked about occurred.  
11 We're not disputing that. We're not disputing there were  
12 weddings. We're not disputing there was overcrowding.  
13 We're not disputing loud noise. There was noise  
14 infractions. We're not disputing lighting issues. None  
15 of that the Sun defendants are disputing, because we  
16 can't.

17 We're also not disputing we're not a homeowners  
18 association and we're not a project located in North  
19 Myrtle Beach. But, again, this is not what this trial is  
20 about.

21 Any evidence introduced in this trial that does not  
22 directly discuss the residency requirement for ownership  
23 and use of a beach club in North Myrtle Beach is nothing  
24 but a red herring. Essentially, the majority of the  
25 City's case is all sound of fury, signifying nothing.

1           Let's talk about something else that this trial is  
2 not about. It's not about what the Sun defendants knew or  
3 should have known about the zoning ordinance prior to  
4 purchasing the property. The City will be intensely  
5 focused on whether Sun defendants had actual knowledge of  
6 the zoning ordinance. They're trying to paint Sun  
7 defendants as some corporate raiders, determined to come  
8 in and pilfer the pristine beaches of North Myrtle Beach.  
9 That's their theory.

10           First, Sun defendants flatly reject these  
11 characterizations. If we look at the zoning letter that  
12 Sun received prior to purchasing the property through its  
13 due diligence, the City said, through its Zoning  
14 Administrator, that "the existing structure on the  
15 property was permitted as a cabana house and has been  
16 legally used as such since construction. As of the date  
17 of this letter, there are no known zoning violations on  
18 the property." That statement by the Zoning Administrator  
19 is wrong. At the time, Mace Watts was operating it for a  
20 private beach club, not limited to projects in North  
21 Myrtle Beach.

22           The City mentioned that the Sun defendants should  
23 have asked permission rather than forgiveness. This is  
24 the permission that they asked for, and this is what they  
25 received.

1           Had Sun defendants known about the issue that we're  
2 here for trial today, they would have either not purchased  
3 the property or worked out a deal. And you'll hear  
4 testimony from John Colman that that's how they handled  
5 all of the issues -- zoning issues that they dealt with  
6 before.

7           However, Sun defendants fully acknowledge that we  
8 should have known and we should have done more to confirm  
9 the Zoning Administrator's conclusions. There are no  
10 white hats in this case, Your Honor. There's only shades  
11 of gray.

12           The Zoning Administrator made a mistake and so did  
13 the Sun defendants. Is that fatal to our municipal  
14 estoppel defense? Well, it is what it is at this point.  
15 But that is not what this trial is really about. Sun's  
16 actual or constructive knowledge or the City's actual or  
17 constructive knowledge of the zoning ordinance and Sun's  
18 use of the property does not change whether or not the  
19 residency requirement at issue in this case is  
20 constitutional or not.

21           Equitable considerations that the City is going to  
22 bring testimony about is not at issue. Discussions,  
23 examples of the things that they're going to show about  
24 how Sun should have known or actually knew or whether or  
25 not their attorneys should be testifying in depositions is

1 just not relevant to the constitutional issue.

2 So let's talk about what this trial is about and the  
3 relevant testimony to evidence that will be presented. As  
4 I said before, this trial is about the residency  
5 requirement imposed by Sections 23-2 and 23-22 of the  
6 zoning ordinance as it applies to ownership and use of  
7 cabana houses in North Myrtle Beach. The residency  
8 requirement as interpreted by the City is essentially  
9 this: that a beach club must be owned and utilized  
10 exclusively by a homeowners association in North Myrtle  
11 Beach; therefore, Sun defendants are not permitted to own  
12 or operate the beach club under the zoning ordinance as  
13 interpreted by the City. That is in their complaint.

14 And, likewise, nor is a similar resort in Calabash,  
15 North Carolina, nor is a homeowners association in Little  
16 River. However, what the Sun defendants will put  
17 testimony on is that the residency requirement  
18 discriminates against interstate commerce on its face, in  
19 its effect and its purpose, and therefore, it's in  
20 violation of the United States Constitution's dormant  
21 commerce clause.

22 The City talked briefly about the dormant commerce  
23 clause analysis, and I just want to clarify some things  
24 that were said. The dormant commerce clause analysis is  
25 that the zoning ordinance -- the first thing that you have

1 to determine, Your Honor, is whether or not the zoning  
2 ordinance substantially affects interstate commerce.  
3 That's number one.

4 Number two, then, is to determine whether or not the  
5 zoning ordinance discriminates against interstate commerce  
6 on its face, in its effect, or in its purpose. We have  
7 briefed this thing forever and a day, and so I think Your  
8 Honor is fully well aware of this.

9 This case -- we're not asking you to do a Pike  
10 analysis. The Pike analysis from the case of Pike v.  
11 Bruce Church is whether or not the zoning ordinance is  
12 neutral on its face but there's district impacts on  
13 interstate commerce that substantially outweigh the  
14 benefits. We don't think that this zoning ordinance is  
15 neutral on its face and, quite frankly, it's completely  
16 discriminatory; however, the National Pork Producers case  
17 from this past summer may have discarded the Pike analysis  
18 altogether, because what the guidance from the Supreme  
19 Court says is that the dormant commerce clause's goal has  
20 always been to root out discrimination. And the Pike  
21 analysis, as I believe Justice Barrett said, was kind of  
22 just to look behind the curtain and to see if is there  
23 really discrimination going on and it's just called  
24 something else.

25 Now, if the Court determines that discrimination

1 exists, the burden then shifts to the City, and it's a  
2 strict scrutiny burden. The City then must show that  
3 there are no reasonable nondiscriminatory alternatives  
4 that exist for a City to achieve its legitimate municipal  
5 interests.

6 So let's talk about each of these in turn, Your  
7 Honor, and the testimony you're about to hear.

8 Whether or not the zoning ordinance has a  
9 substantial effect on interstate commerce, this is where  
10 the City will be placing all of its focus in their  
11 testimony. The definition of interstate commerce, to be  
12 clear, for the dormant commerce clause, is coextensive  
13 with the federal government's commerce power; we all know  
14 how wide that is from law school. We know Wickard v.  
15 Filburn, choosing not to engage in commerce can  
16 substantially affect interstate commerce. The only outer  
17 limit we have seen is from NFIB-Sebelius where the federal  
18 government can't compel you into commerce but it can  
19 compel you to not engage.

20 So the focus, Your Honor, is on whether the zoning  
21 ordinance has a substantial effect on interstate commerce,  
22 not the individual parties before the Court. And this is  
23 from a Fourth Circuit case. The City is going to use its  
24 witnesses to try to paint the beach club as a standalone  
25 operation, that it's not tied to the RV resort, and that

1 the zoning ordinance -- its understanding was that it was  
2 supposed to be noncommercial activity. They're going to  
3 say the beach club has no independent revenue and that  
4 there's no cost for the guests at the RV park to use it.

5 The City is going to ignore the testimony of its own  
6 planning and development director and corporate  
7 representative who stated there is no -- sorry. I asked  
8 him, "And you mentioned the economic development pieces.  
9 We're talking about the restrictions in the zoning  
10 ordinance. And so a large part of it is to protect the  
11 economic interest of the City of North Myrtle Beach."

12 His response was, "Yes."

13 I asked him, "I mean, essentially, it's on its face;  
14 is it not?"

15 And he said, "I would agree with that."

16 The City is also going to ignore the fact that, in  
17 its interrogatory responses, it firmly admitted that the  
18 requirement operates -- this is talking about the limiting  
19 to projects exclusively in North Myrtle Beach, that "the  
20 requirement operates to encourage and support local  
21 private developments and that corresponding homeowners  
22 associations, as opposed to nonlocal corporate  
23 enterprises, by providing them with a beach club and  
24 access point to the beach. It also encourages investment  
25 in the City rather than in projects outside the City."



1           So by the City's own testimony and documents, they  
2           are going to show that this zoning ordinance substantially  
3           effects interstate commerce.

4           There's going to be further evidence that's going to  
5           be provided from the Chambers of Commerce for both Myrtle  
6           Beach and North Myrtle Beach. There will be testimony  
7           from the other cabana houses about how they advertise  
8           their beach clubs, and there's going to be testimony from  
9           the defendant's own property appraisal expert who will  
10          explain the natural effect of this residency requirement  
11          on the market.

12          Finally, to the extent the City wants to focus on  
13          Sun defendants ownership and use of the beach club, as I  
14          have stated before, that analysis also supports a  
15          substantial effect on interstate commerce. You have to  
16          link the beach club and the RV resort. They're one and  
17          the same because the zoning ordinance links the project  
18          and the cabana house.

19          69 percent of guests that attend the RV resort in  
20          Conway are from out of state or out of the nation, for  
21          that matter. The beach club is an amenity to an  
22          all-inclusive resort.

23          And, importantly, like I said, the zoning ordinance  
24          links the beach club and the resort. So the analysis of  
25          the resort's interstate commerce effects and really their

1 participation in interstate commerce is dispositive of  
2 that interstate commerce claim.

3 The zoning ordinance discriminates against  
4 interstate commerce on its face and in its purpose and its  
5 effect. I don't think I need to belabor this point, Your  
6 Honor. The section language says what it says. The law  
7 for homeowners associations in South Carolina is that, in  
8 order for them to be effective, they must be -- the  
9 governing documents must be recorded in the county where  
10 the property that's owned by the homeowners association is  
11 located, and the language in the zoning ordinance says  
12 that the project must also be owned by a homeowners  
13 association, so it naturally has to be a North Myrtle  
14 Beach homeowners association.

15 The testimony from the City's own witnesses that the  
16 purposes behind the residency requirement to exclude HOAs  
17 and projects outside of North Myrtle Beach will also be  
18 presented in this trial.

19 One of the other main questions in this, Your Honor,  
20 as we're going through -- and it's going to come out in  
21 some of the testimony -- is what is the market that Sun  
22 claims that they're being excluded from? It's not just  
23 the market for tourism and it's not the market to go to  
24 the beach. It's the market for the ownership and  
25 operation of a beach club with private beach access within

1 the R-4 resort residential district in North Myrtle Beach.

2 The City highlighted some of their testimony earlier  
3 about, "We could have bought a beach club in another  
4 location." Your Honor, this is not a separate-but-equal  
5 case. We can't just say, "Well, you're not good enough  
6 for the R-4 district, but you can go down to the resort  
7 commercial." You can't exclude any of these districts  
8 unconstitutionally.

9 And so, Your Honor, once that happens, the burden  
10 will then shift and it will shift in the strictest  
11 scrutiny back to the City, for the City to show no  
12 reasonable nondiscriminating alternatives exist to achieve  
13 their municipal interests, and those interests are  
14 responsiveness, quality of life, preservation of property  
15 values, which we take no issue with; however there are no  
16 studies, there's no evidence to support it, and it amounts  
17 to mere ipse dixit.

18 Lastly, Your Honor, before I move on to what we're  
19 going to ask you to do, I do want to talk briefly about  
20 our substantive due process plan. We have done a lot of  
21 looking back on this and a lot of research, and I think  
22 what we have found is that the Fourth Circuit and other  
23 federal circuits have determined that substantive due  
24 process claims in land use cases are rarely, if ever,  
25 successful. There's a rational basis of review, and we

1 don't want to waste the Court's time in trying to parse  
2 out these issues when we have an underlying constitutional  
3 issue -- the dormant commerce claim -- that we think is on  
4 all fours square in front of this judge -- in front of  
5 this Court.

6 All the substantive due process claims in land use  
7 cases that have been successful -- I think the one case is  
8 Marks vs. City of Chesapeake out of the Fourth Circuit.

9 The underlying constitutional issue that the Court didn't  
10 mention it was, it was a freedom of expression issue.  
11 Here, we already have the underlying constitutional issue  
12 there, so, Your Honor, we're not going to be presenting  
13 evidence on the substantive due process claim.

14 Now, this is what we're asking the Court to do.  
15 Mr. Ricard has gone through the statutes at issue. The  
16 first one is going to be the cabana house and the  
17 definition of the cabana house, and the only language in  
18 this that matters for the trial this week, Your Honor, is  
19 the restriction that it has to be used by projects in  
20 North Myrtle Beach. The City's testimony is going to be  
21 that it has to be exclusively used by projects in North  
22 Myrtle Beach. And the last sentence, "The cabana house  
23 shall be owned and maintained by a homeowners  
24 association."

25 23-22, we're only taking issue with subsection

1 (d)(1), which is that "the homeowners association shall  
2 have been established for the project." And so when  
3 reading 23-2 and 23-22 together, as well as looking at the  
4 legislative history, it's clear that it's a homeowners  
5 association established for a project in North Myrtle  
6 Beach, and all that has to be exclusively located therein.

7 So this is what we're asking you to do, Your Honor.  
8 In 23-2, the unconstitutional provisions in North Myrtle  
9 Beach and it being in the homeowners association provision  
10 therein. All of these, by the way, Your Honor, are a  
11 single residency requirement. I know the City has tried  
12 to break them up into three different elements. It's one  
13 residency requirement that we're focused on for the  
14 dormant commerce clause claim. So that's what we'd like  
15 you to do in Section 23-2, Your Honor.

16 In 23-22, it's "the homeowners association shall  
17 have been established for the project." I think it's 20  
18 words; not the entire zoning ordinance, not the entire  
19 section, just 20 words.

20 Finally, Your Honor, if the Court finds that the  
21 zoning ordinance is enforceable, then what? The City has  
22 asked that the Court declare that our ownership of the  
23 property cease and desist. Not just use but ownership.

24 Obviously, that gives rise to a potential takings  
25 claim. The City is asking the Court to declare that an

1 ownership must cease and desist. The affirmative  
2 government action at issue here is the cease-and-desist  
3 letter. That authority is to have someone to assist, and  
4 the owner of the private property is not provided for in  
5 the zoning ordinance.

6 The City's also on notice of the 1979 deed  
7 restriction that only allows the property to be used as a  
8 clubhouse for recreational purposes. They're on notice of  
9 that through the Comprehensive Planning Enabling Act of  
10 1994.

11 The City will also testify that this type of  
12 extralegal authority to, for lack of a better word, take  
13 property from a private citizen for a zoning ordinance  
14 violation has never been exercised, and they're asking the  
15 Court to make that decision.

16 If someone -- if the zoning ordinance is  
17 enforceable, it will deny all economically beneficial use  
18 of the property for the Sun defendants and their  
19 reasonable investment-backed expectations in purchasing  
20 it. The Sun defendants relied on the zoning letter in  
21 this case, and that is -- that reliance on the zoning  
22 letter is an element of the takings claim, and the City's  
23 negligence are relevant to this specific analysis.

24 They'll be forced to sell the property by a court  
25 order. And how would that work? What would that look

1 like? Would we do it on the courthouse steps after the  
2 trial? Or would the property just remain vacate, which  
3 would then destroy all beneficial and economic use of the  
4 property and would be a regulatory taking?

5 Accordingly, if the zoning ordinance is found to be  
6 enforceable, Sun defendants are entitled to just  
7 compensation from the City for the regulatory taking of  
8 its property.

9 I want to make one final point, Your Honor, before I  
10 sit down, on what this trial is not about. And this  
11 occurred to Mr. Willis last night; he texted me pretty  
12 early this morning. This trial is not about whose fault  
13 this is. That's a challenge for us lawyers, because  
14 that's not the lens through which we're trained to view  
15 conflicts.

16 But deciding whose fault this is doesn't resolve the  
17 single issue that matters in this case: Is the residency  
18 requirement enforceable?

19 Regardless of whose fault that is, we still have to  
20 figure that out. There were several lawyers involved in  
21 the transaction and purchase of the beach club. Sun's  
22 outside general counsel; its local closing attorneys, the  
23 Bellamy Law Firm; Shep Guyton, who is a lawyer here in  
24 town; the City's own lawyers, to the extent they reviewed  
25 the zoning letter, all were involved and all missed the

1 impact that this ordinance would have if applied as the  
2 City is interpreting it now, both as to the residency  
3 requirement and as to the City's purported authority to  
4 divest private ownership property. Nobody saw that one  
5 coming. That's everyone's fault. There are no white hats  
6 here. But fault has nothing to do with this trial. It's  
7 only about the enforceability of the residency  
8 requirement.

9 Thank you, Your Honor.

10 THE COURT: Before you sit down -- and I'm going to  
11 have the plaintiff do it as well -- define "substantial."

12 MR. TAMASITIS: Absolutely, Your Honor.  
13 "Substantial" is -- well, to talk about it in a negative,  
14 from what the Supreme Court has said, is that can't be  
15 inference upon inference upon inference. I think Lopez  
16 re: Morrison determined that -- in that case, it was a  
17 gun-free school zone that they passed through the commerce  
18 clause, and Justice Rehnquist said you can't go inference  
19 upon inference upon inference to get to an economic  
20 activity. If it's an economic activity, the case is much  
21 easier. Substantial means more likely than not it has an  
22 effect on interstate commerce, once it's an economic  
23 activity, which we're dealing with here. We're dealing  
24 with an economic activity. We're not dealing with  
25 something that's so attenuated, which I think was one of



1 the factors that Mr. Ricard talked about in his  
2 Lopez-Morrison factors. It's not an attenuated situation.  
3 It's directly -- and the tourism aspect of this that we're  
4 going to discuss makes it so.

5 And so I think that substantial means more than not  
6 -- likely than not it has a substantial effect on  
7 interstate commerce.

8 THE COURT: How about the plaintiff? How do you  
9 define "substantial"?

10 MR. RICARD: Yes, Your Honor. I'll talk about the  
11 law, and then I'll turn to a little bit of the facts that  
12 we anticipate that you're going to hear in this case.

13 So, first, the Lopez-Morrison factors make clear  
14 that the statute has to do with something. It has to do  
15 with an activity that is commercial in nature. And in  
16 this particular case, we're talking about an amenity. The  
17 City designed this amenity to be a noncommercial use.

18 And you'll hear testimony that that's why the HOA  
19 requirement is in existence, because if it were a  
20 commercial activity, you'd have a business license. And  
21 that's how the cities and municipalities all across the  
22 country normally regulate commercial activity.

23 In this case, it's an amenity. So when we're  
24 talking about substantial effect, you have to consider  
25 whether the statute is regulating something commercial in

1 nature.

2 Likewise, the second factor being the legislative  
3 history; is there any evidence from the legislative  
4 history that the City intended to impact interstate  
5 commerce? And in this case, the legislative history,  
6 which the Court will see, does not.

7 Substantial also goes to whether or not there's a  
8 jurisdictional limitation. Opposing counsel just  
9 mentioned the separate but equal. Frankly, this is not a  
10 separate-but-equal situation. Zoning, as the Court knows,  
11 is designed to allow for the orderly development of  
12 properties all across a municipality.

13 And so this is not a situation in which we want bars  
14 next to churches or adult entertainment establishments  
15 next to middle schools. I mean, there is a situation  
16 where cities want zones to be for particular purposes and  
17 other zones for other types of purposes. Again, it goes  
18 back to that zoning ordinance purpose and design that we  
19 talked about in the city that distinguishes between  
20 commercial uses and residential uses.

21 And so when there's a jurisdictional limitation in  
22 place, such as the one that we have here with R-4 -- the  
23 special exception only applying in R-4 -- it leaves the  
24 possibility for there to be other zoning areas where  
25 commercial activity is allowed, and you'll hear testimony

1 as to what those commercial zones are and where they  
2 operate and where defendants could have gone instead.

3 To use one example from the case of Dean Milk --  
4 this is a case out of Wisconsin, and I can provide the  
5 case citation later if you'd like, Your Honor. But Dean  
6 Milk was a situation in which the City of Madison,  
7 Wisconsin, completely excluded all milk producers from  
8 going into the City of Madison, Michigan, a five-mile  
9 radius, from selling their milk products to in-city  
10 residents. And so there was a complete exclusion from the  
11 market. And the Supreme Court founded that that would  
12 substantially affect interstate commerce. Although it's  
13 only a five-mile radius, that would effect interstate  
14 commerce because there's complete exclusion in the market.

15 A similar situation happened in Wickard v. Filburn.  
16 There was a complete exclusion for a farmer to grow wheat  
17 and consume wheat in his own household. Okay? Because  
18 there was a prohibition that said you had to buy wheat in  
19 the market, the Court said that's okay. That's okay,  
20 because if you aggregated that out -- if you aggregated  
21 that out across the entire United States, personal  
22 self-grown wheat consumption would impact interstate  
23 commerce in that situation.

24 And so, again, the Court is focused on situations in  
25 which there's the ability to aggregate and in which there

1 is complete exclusion from the market. Those are  
2 considerations when you're talking about substantial.

3 This particular case is different, Your Honor.  
4 There's no ability -- Defendants are not going to be able  
5 to show evidence of substantiality because -- more  
6 aggregation, because their bottom line has only gone up.  
7 Their reservations at their RV resort have only gone up.

8 And so if they can't show a detriment to their  
9 bottom line, trying to aggregate that out across the  
10 United States is just not possible.

11 And, of course, Your Honor, this is a special  
12 exception use. This is not a permitted use that's allowed  
13 all across the City of North Myrtle Beach. It's, by  
14 design, a special exception. There are very few and far  
15 between cases in the dormant commerce clause that deal  
16 with the zoning context. And, ultimately, Your Honor,  
17 zoning is going to matter, and you're going to hear about  
18 all the reasons as to why the purposes are supported.

19 And so, you know, I know this is technically opening  
20 statement, and I'm probably making a little bit of  
21 argument here, but the Lopez-Morrison factors, we contend,  
22 are the guiding framework for this Court to determine what  
23 counts as substantial.

24 Thank you, Your Honor.

25 THE COURT: All right. Ready to call your first

1 witness?

2 MS. SHOUN: If it please the Court, Your Honor. The  
3 plaintiff would call Ms. Sandra Unger to the stand.

4 THE CLERK: If you'll raise your right hand and  
5 place your left hand on the Bible.

6 SANDRA UNGER,  
7 after having been duly sworn, was examined and  
8 testified to as follows:

9 THE CLERK: If you'll please state your name for the  
10 Court, please.

11 THE WITNESS: Sandra Unger.

12 MS. SHOUN: Your Honor, I am so sorry, but as I  
13 called Ms. Unger to the stand, I was told by my lead  
14 counsel that I was supposed to give the Court exhibit  
15 notebooks. I apologize.

16 THE COURT: Now is a good time.

17 MR. RICARD: I think now might be a good time, Your  
18 Honor, just to go ahead and pass up exhibit binders. So  
19 we've got Plaintiff's exhibits, and I believe the  
20 defendants will produce theirs.

21 MS. SHOUN: And I hate to ask this, too -- and this  
22 is not for me, Your Honor; I'm just going to be honest. I  
23 think there's been a request for a very brief break.

24 THE COURT: Okay. That's fine.

25 MR. WILLIS: Thank you, Your Honor. Appreciate it.

1 THE COURT: 15 minutes good?

2 MR. WILLIS: 67-year-old --

3 THE COURT: No, you need a break.

4 MS. SHOUN: I am sorry, Your Honor.

5 I'm so sorry, Ms. Unger.

6 THE COURT: All right. Let's take a 15-minute  
7 break.

8 MR. WILLIS: Thank you, Your Honor.

9 MS. SHOUN: Thank you.

10 Your Honor, may Ms. Unger step down during the  
11 break?

12 THE COURT: That's fine.

13 MS. SHOUN: Thank you.

14 (A recess was taken from 11:09 a.m. to 11:20 a.m.)

15 (Defendant's Exhibit No. 1 was remarked as  
16 Defendant's Exhibit No. 61.)

17 (Plaintiff's Exhibit No. 1 was remarked as  
18 Plaintiff's Exhibit No. 95.)

19 (Plaintiff's Exhibit Nos. 1 through 94 were  
20 premarked and received into evidence.)

21 (Defendant's Exhibit Nos. 1 through 60 were  
22 premarked and received into evidence.)

23 MS. SHOUN: Thank you, Your Honor. If we may call  
24 Ms. Unger back to the stand.

25 MR. WILLIS: Your Honor, while the witness is

1 approaching, just for the purposes of the record -- and I  
2 realize Your Honor's suggestion or citation of the case to  
3 us that everything comes in, which makes it a lot easier.

4 THE COURT: It does.

5 MR. WILLIS: But for the purposes of the record,  
6 we'd like to have just a continuing objection to testimony  
7 about what we characterize as operational historic issues  
8 having to do with the cabana house under Sun's ownership  
9 on the grounds that it's not relevant. Thank you, Your  
10 Honor. That will keep me from having to jump up and down.

11 THE COURT: That sounds good.

12 MR. TAMASITIS: Your Honor, also -- sorry,  
13 Ms. Shoun. I just wanted to clear up for the record that  
14 the exhibit that we placed into evidence, which was the  
15 PowerPoint slide, is going to be Defendant's Exhibit 61,  
16 not Defendant's Exhibit 1.

17 MR. RICARD: And, likewise, Plaintiff's -- what was  
18 previously identified as Exhibit 1 has now been marked as  
19 Exhibit 95.

20 THE COURT: All right. Sounds good.

21 MS. SHOUN: Now may it please the Court, Your Honor?

22 [Courtroom laughter.]

23 MS. SHOUN: Thank you.

24 DIRECT EXAMINATION  
25

1 BY MS. SHOUN:

2 Q Good morning, Ms. Unger.

3 A Good morning.

4 Q I think that the clerk asked you to state your full  
5 name for the record, and I'm going to extend to you just a  
6 bit of an apology this morning. We do not run like Court  
7 TV. I wish we did, but you see we have off and ons, so  
8 thank you for your patience with us.

9 First, a little bit about you personally, Ms. Unger.  
10 What do you do for a living? Are you employed?

11 A At this time, I'm not employed. I'm a registered  
12 nurse. I worked with Horry County Schools in the early  
13 childhood school for six years.

14 Q Can I ask you to speak up just a little bit too.

15 A So I was a school nurse for six years there, and  
16 prior to that, I did home care.

17 Q Okay. And what did you do before that?

18 A Home care in New York.

19 Q Okay. When did you come to the North Myrtle Beach  
20 area?

21 A I have been coming to North Myrtle Beach for summers  
22 for 35 years. My mom owns a condo over in A Building of  
23 Sea Cloisters I. And then we moved down here eight years  
24 ago.

25 Q So you mentioned Sea Cloisters. Are you familiar --



1 do you -- you're familiar with the -- what we have  
2 referred to as the cabana house, which is technically Lot  
3 18, Tilghman Beach?

4 A Yes, ma'am.

5 Q And are you familiar with that property because of  
6 your familiarity with Sea Cloisters?

7 A Yes.

8 Q Okay. We saw a slide put up before the Court this  
9 morning, and sort of forgive my elementary description of  
10 it, but you work with kids so maybe this will work.

11 For lack of a better way to describe it, there's two  
12 Sea Cloisters buildings, as I understand; is that correct?

13 A There's three.

14 Q There's three. Okay. I'm sorry.

15 So they're almost L-shaped with this cabana house in  
16 the middle of them?

17 A Yes. There's Sea Cloisters I and Sea Cloisters II.  
18 The cabana is in the middle between -- each cluster is a  
19 three-cluster building. So you have three, the cabana,  
20 and then three.

21 Q Okay. Okay. Thus, the L's, I guess, the three  
22 building making an L shape. Okay.

23 A Yeah.

24 Q Now, when did your mom -- when did you start coming  
25 down? About 35 years ago?

1       A       Yes, ma'am.

2       Q       Okay. And during that period of time, were you  
3 coming to the area of North Myrtle?

4       A       Yes. I was coming to Sea Cloisters. She had the  
5 condo, and it was a very cheap vacation.

6       Q       Do you currently reside in Sea Cloisters?

7       A       No. I sold my condo there on July 5th of this year.

8       Q       Who was living with you there?

9       A       My four children and Lawrence Pasciutti.

10      Q       Either before you purchased or during the time you  
11 would visit when your mother was here -- when you were  
12 visiting your mom here, do you have any understanding  
13 relative to the ownership or the use of the cabana house?

14      A       Well, when they had put it up, it was just for  
15 people of the HOA that would come down. There wasn't many  
16 that came and went. Some would use it, but it wasn't, you  
17 know, many.

18      Q       Okay. Over the years, visiting your mom and then  
19 after you purchased in Sea Cloisters, are there renters in  
20 Sea Cloisters?

21      A       Yes, there are. There always has been.

22      Q       And so there's no prohibition there against renters  
23 coming in?

24      A       No, ma'am.

25      Q       Okay. And, generally speaking, is there a way to

1 distinguish, for instance, when renters might be parked in  
2 the Sea Cloisters parking lots?

3 A Oftentimes, you did not know who was parked there.  
4 Some of the Realtors had used little tags over the mirror.  
5 They would hand them out to them. But some didn't. Some  
6 didn't use them.

7 Q Okay. And if you would, please tell the Court,  
8 generally speaking, your first years after moving to Sea  
9 Cloisters, describe what your experience was relative to  
10 the cabana house, what you observed.

11 A There were just a few people that, in the beginning,  
12 you know, that would come down and use the amenities there  
13 and use the beach. It didn't really interfere with us.  
14 They didn't really bother us at first.

15 Q Okay. Were you here for Mr. Tamasitis's opening  
16 statement?

17 A No, ma'am.

18 Q I am going to represent to you that Mr. Tamasitis  
19 made certain statements to the Court that Sun is not going  
20 to dispute issues with noise at the cabana house. Would  
21 you agree with that? Would you agree that there's an  
22 issue as to noise at the cabana house?

23 A Oh, yes.

24 Q And would you tell the Court what your experience is  
25 with that.

1     **A**     Once the buses started coming in, the people were  
2     very loud. It was, you know, quadruple what we ever had  
3     with people coming in. And people were on the beach,  
4     drinking, and very loud, boisterous. Very argumentative  
5     at times if they were parking in our lots and cutting  
6     across our amenities coming in because they would park  
7     their cars in our lots. So now they came from the beach  
8     through the boardwalk by the pool and around.

9     **Q**     Okay. A couple of questions based on your answer  
10    there, please, Ms. Unger. You mentioned buses. Can you  
11    identify the buses that were shuttling people?

12   **A**     Yeah, the campground would be bringing the buses,  
13    and they had the logo. And they would pull in and they  
14    would leave the engines running for about an hour or so,  
15    waiting to either load or unload depending, multiple times  
16    a day.

17   **Q**     And do I understand that it's your testimony that  
18    it's those people who would be dropped from the shuttle  
19    bus who then cut across the amenities and the property of  
20    Sea Cloisters?

21   **A**     Yes, ma'am.

22   **Q**     Okay. Another thing you mentioned was noise, the  
23    boisterousness. Generally speaking, can you describe  
24    that?

25   **A**     You know, children yelling, parents yelling. You

1 know, loud and -- you know, by the end of the day when  
2 they were going back on the bus, extremely loud, with  
3 music playing. That type of thing.

4 Q You also mentioned argumentative. Tell us about  
5 that. Did you have any personal experience with that?

6 A I had a few personal experiences with that. My  
7 condo was close to the parking lot side. Some of my  
8 children drive. We would come back and there would be no  
9 parking. You know, you couldn't find a place to park near  
10 your condo because people from there were coming and  
11 leaving their cars.

12 You know, some occasions, you would say, "Are you  
13 renting here?", you know, to see -- when you saw them  
14 unloading and realize they didn't belong here. And they  
15 would be very aggressive and argumentative if anyone was  
16 to say, you know, "It's private property, please don't  
17 park here."

18 Q So how would you know that those individuals parked  
19 there were coming from the RV resort?

20 A Because they would cut right through the bushes,  
21 killing the bushes and the grass between the two. And you  
22 would see them walk over with all their beach gear or walk  
23 back with all their beach gear.

24 Q And that would be walking to or from the cabana  
25 house?

1       A       Mm-hmm.

2       Q       Is that a yes?

3       A       Yes.

4       Q       Okay. Did you personally have any encounters with  
5 anybody from the RV resort?

6       A       I had a few. One was, you know, a big one in front  
7 of children, which really upset me, because I had asked  
8 the one man who was unloading his car, you know, if he  
9 rented. And he said no, he was unloading. He had, you  
10 know, a baby and children. You know, I said, "Well, could  
11 you please make sure you move your car because you can't  
12 leave it here. It's private property."

13      Q       And did that person then become argumentative with  
14 you?

15      A       He became very nasty. He probably had a four- or  
16 five-year-old child. So I was very careful about what I  
17 said. But he proceeded to curse me out from A to Z and  
18 asked me, you know, how dare I tell him anything, so...

19      Q       Okay. All right. Now, I also represented to you  
20 that Mr. Tamasitis told the Court earlier that Sun is not  
21 going to dispute that there were issues with lighting at  
22 the cabana house. Do you have any personal knowledge of  
23 lighting issues at the cabana house since -- let's say  
24 since roughly you purchased there? Any changes in the  
25 lighting?

1     A     Yeah. They had them directly, you know, pointed  
2     into the condos. There was constantly issues with that.

3     Q     What about events? Are you aware of any events?

4     A     I know they had had numerous ones there because you  
5     could hear it with the noise and the music.

6     Q     And this is at the cabana house?

7     A     Mm-hmm.

8     Q     That's a yes?

9     A     Yes.

10    Q     Just for the record.

11    A     Yes.

12    Q     All right. Thank you.

13           We talked about noise already, so I'm sorry for  
14    going backwards, Ms. Unger. In the last -- since the  
15    purchase by Sun entities or Sun defendants in 2019, have  
16    there been any changes in the cabana house that have  
17    exaggerated or amplified the noise that may emanate from  
18    there?

19    A     I think it was just the sheer number of people and  
20    allowing the music and allowing the events. It just  
21    wasn't done before. I mean, we never had that number of  
22    people. It's like, you know, if you start with, you know,  
23    having 20 people on a weekend and now you're having 500  
24    people in one day, it's a huge amount of people.

25    Q     Is there any equipment that amplifies music?

1       A       I believe they had a different stereo system or  
2       whatever installed because it was much louder. The buses  
3       were much louder. You know, when you're sitting there in  
4       your condo and they're running a bus for an hour outside,  
5       it's constant noise. If they make ten trips in one day,  
6       it's constant noise. Plus the fumes and the -- you know,  
7       just the sounds of the buses pulling in and out. I mean,  
8       you know, they were pulling right into our parking lot.  
9       So they're 500 feet from where I live. You hear it all  
10      day.

11      Q       Yes, ma'am.

12            MS. SHOUN: Beg the Court's indulgence just a  
13      moment.

14      BY MS. SHOUN:

15      Q       Ms. Unger, has the change in use in the cabana house  
16      since roughly 2019 -- well, let me back up and ask you  
17      this: What was the use of the cabana house like, to the  
18      best you can remember, in 2019?

19      A       In the early -- prior to it switching, it was quiet.  
20      It wasn't -- and then once, all of a sudden, the  
21      campground, it started picking up, you know, as we went  
22      forward.

23      Q       And what was it -- if you can remember roughly, what  
24      was it like in 2020, which was COVID era?

25      A       COVID, you know, it wasn't as much because, you



1 know, we were all locked down, so...

2 Q Okay. Okay. And then the changes that you have  
3 told the Court about, those began to occur more as we  
4 opened up, if you will, as a result of it or following  
5 COVID?

6 A Yes, it became where it was a daily thing, the  
7 number of people -- the people who were nasty, aggressive  
8 and drunk, you know, because we didn't have a lot of  
9 people stumbling up from the beach prior to any of this.  
10 You know? And so that was, you know, a huge impact on all  
11 of us when you have four kids.

12 Q What is the impact of you and your children?

13 A Well, some of them had started driving, so now  
14 you're worried about the people backing up and they're so  
15 nasty, you know, that they're going to hit somebody. You  
16 know, they're either going to hit a kid or they're going  
17 to back into one of the kids' cars, because you could see,  
18 you know, they were intoxicated.

19 You worry about theft because we had a lot of theft.  
20 We didn't have that prior. You know? We had things  
21 stolen. Now, all of a sudden, you're locking things up  
22 because you had people wandering through. They were not  
23 wandering through prior to that.

24 Q And just to be clear, was this wandering to and from  
25 the cabana house?

1     **A**     To and from the cabana house and through the parking  
2     lot to go to the beach. So if they didn't feel like going  
3     through the cabana house, they would go right through to  
4     the beach, or back out.

5     **Q**     Through the Sea Cloisters property?

6     **A**     Yeah, to get to their car.

7     **Q**     Did it impact the way you and your family used your  
8     home there?

9     **A**     Yes. We were much more, you know, diligent about  
10    keeping everything locked up, who was walking where, when.  
11    You know, what route up from the beach that we took.

12            You know, obviously, when you have 14-, 15-year-old  
13    girls and people are intoxicated, you don't have them go  
14    on that side. You tell them to go on the other side  
15    because you don't want people saying things to them.

16    **Q**     You mentioned at the beginning, Ms. Unger, that you  
17    no longer live there. Why is that?

18    **A**     It was becoming very noisy. It was an ongoing issue  
19    over there all the time. I, you know, thought about it.  
20    It was a place I loved, I have loved for 35 years. I  
21    still go over often, but living there was probably not the  
22    best choice for the children with what has been going on.

23            And, you know, at one point, they were applying for  
24    bar permits and stuff like that. And, I mean, it was just  
25    not becoming kid friendly anymore. It was a very family

1 orientated culture for 35 years. So many people --  
2 multiple generations are down there, so it's quite often  
3 you see the same people that, you know, your parents had  
4 fun with 30 years ago, and their children.

5 Q Yes, ma'am.

6 A So it became a different culture.

7 Q I think that's all I have for you, Ms. Unger.

8 Please answer any questions from opposing counsel or from  
9 the Court. Thank you.

10 THE COURT: All right. Cross?

11 MR. WILLIS: Thank you, Your Honor. Just a moment.

12 CROSS-EXAMINATION

13 BY MR. WILLIS:

14 Q Ms. Unger, you were a permanent resident?

15 A Yes, sir.

16 Q And at Sea Cloisters I or II?

17 A One.

18 Q And when did you -- I'm sorry; you may have already  
19 responded to this or already responded to questions for  
20 Ms. Shoun for this, but when did you first purchase your  
21 condominium there?

22 A I believe it was October in '18.

23 Q And then you sold it when?

24 A This past July 5th.

25 Q All right. Now, you're aware, are you not, that in

1 January of 2020 when this lawsuit was initiated by the  
2 City, Sun agreed with the City to stop operating the  
3 cabana house for use of RV guests? Are you aware of that?

4 A I believe they were trying to work it out.

5 Q All right. And so, since they weren't using it,  
6 isn't it fair to say that, if there were noise problems in  
7 the last sort of year and a half, there haven't been noise  
8 problems or they haven't been as significant as they were  
9 when there was regular use by the RV guests?

10 A I don't know when they -- you know, it went down or  
11 it stopped because I was also moving in that time, so I  
12 hadn't been outside as much. I know the buses had  
13 stopped.

14 Q All right. You're not here today to tell the Court  
15 that you sold the property in 2023 because of the noise;  
16 correct?

17 A Oh, that wasn't the only reason. It was the number  
18 of people and the people intoxicated. You know, when you  
19 have somebody calling you names like that in front of  
20 five-year-old girls...

21 Q Well, I understand. And certainly --

22 A And being aggressive. I mean, in-your-face nasty.

23 Q Right. But my point is, in the last year and a  
24 half, at least the last two seasons, that has not  
25 occurred; correct?

1     A     This past year I haven't seen any of that.

2     Q     Thank you.

3     A     You know, to that degree at all.

4     Q     Now, the buses that you're referring to, are these  
5     buses or are they vans?

6     A     They look like buses to me. They were  
7     transportation [sic] multiple people. I mean, they  
8     weren't long school buses.

9     Q     All right. When you say "bus" to me, I think of a  
10    school bus --

11   A     They were smaller.

12   Q     -- or a bus for transportation. And a van, to me,  
13   looks like something that you might rent from a U-Haul to  
14   move furniture or something like that.

15           I've got a photograph, and I'm happy to show it to  
16   you.

17   A     Yeah, I would say that's what --

18   Q     It's Exhibit 48. That would be Defendant's Exhibit  
19   48. Is that the bus that you're talking about?

20   A     I think that's one of them. They had different  
21   ones, but I think that another one had windows and stuff.

22   Q     The other one you're talking about, was it roughly  
23   that size?

24   A     I don't know. I thought it was bigger.

25   Q     Do you have any photographs --

1     A     No, sir.

2     Q     -- of the buses?

3     A     No, sir.

4     Q     Now, you complained about boisterous noise, and you  
5     said some of it was occurring on the beach -- right? --  
6     as opposed to in the cabana house?

7     A     You would have it on the beach, but you kind of  
8     expect that on the beach.

9     Q     That was going to be my question.

10    A     Yeah.

11    Q     Don't you sort of expect --

12    A     This is stuff that's outside your -- you know,  
13    literally your door and in the parking lot and coming  
14    across.

15    Q     I certainly understand that.

16           With regard to lighting annoyances, the lights could  
17    be turned off; correct?

18    A     They could be.

19    Q     And if they were, they wouldn't be a problem for you  
20    anymore?

21    A     Well, I guess if they would have when it was asked  
22    of them.

23    Q     Right. And with regard to the events that you  
24    object to, if Sun agrees to not hold anymore events, that  
25    would no longer be a problem; correct?

1       A       Oh, speaking for myself?

2       Q       Yes, ma'am. Well, any resident there. If there are  
3       no more events --

4       A       My mother would not be happy with it because we have  
5       had the increase of having thefts. And if you had people  
6       that were, you know, not cutting across all the time, but  
7       because there has been such a disregard in the past in the  
8       sheer number of people...

9       Q       Listen to my question. I'm just talking about  
10      events. All right? Weddings, parties, that sort of  
11      thing. Those events have stopped; have they not?

12     A       Yes, I believe they have.

13     Q       And they haven't occurred for the last year and a  
14      half, two years; correct?

15     A       I would say the last summer.

16     Q       Well, this consent order shutting down the facility  
17      was entered into in January 2020.

18     A       Okay.

19     Q       So there's been no events since January 2020 --

20           MS. SHOUN: Your Honor, if I may just clarify. If  
21      Mr. Willis -- I'm sorry; I think the consent order is  
22      January 2022.

23           MR. WILLIS: Is that right?

24           MR. TAMASITIS: '21.

25           MR. WILLIS: Okay. Well, we'll get the date. We've

1 got 2022, 2021.

2 MS. SHOUN: It's Exhibit 75.

3 MR. WILLIS: Is there a date on it?

4 MS. SHOUN: Yes, sir.

5 MR. WILLIS: What's the date?

6 MS. SHOUN: January 11th, 2022.

7 BY MR. WILLIS:

8 Q All right. Since January 11, 2022, there haven't  
9 been --

10 A So that would be last year.

11 Q -- any events; correct?

12 Hasn't been any loud noise; correct?

13 A No.

14 Q Hasn't been any -- well, obnoxious, nasty people, I  
15 guess?

16 There haven't been any guests from the RV park  
17 brought to the facility since January of 2021; correct?

18 A I did not see them the last summer.

19 MS. SHOUN: Again, I hate to do this, Your Honor.

20 I'm just objecting as to the date.

21 MR. WILLIS: I thought it was January of 2021.

22 MS. SHOUN: No, it was 2022.

23 MR. WILLIS: 2022. Okay. Please forgive me, Your  
24 Honor. I stand corrected.

25



1 BY MR. WILLIS:

2 Q Now, concerns about theft. You don't have any  
3 evidence of any theft from any -- of any of your property  
4 from anyone at the RV park; correct?

5 A No, I do not.

6 Q With regard to driving concerns, I understand you  
7 had concerns about teenage drivers. If there was no  
8 traffic at all coming from the cabana house, Ocean  
9 Boulevard is still a pretty busy highway; isn't it not?

10 A Yes.

11 Q And you'd still have driving concerns -- certainly I  
12 would -- for any teenager driving on Ocean Boulevard;  
13 correct?

14 A Yes.

15 Q Now, did you ever rent out your condominium when you  
16 weren't staying in it?

17 A I did for two years before COVID.

18 Q And how did that -- can you explain to the Court how  
19 you did that? Did you rent it through --

20 A McMillan.

21 Q That was a rental agency?

22 A Mm-hmm.

23 Q And I assume you charged some sort of rent on a  
24 weekly basis?

25 A Yes, sir.

1 Q What was the amount of rent that you were charging?

2 A I believe it was \$1,500 a week. And we only did it  
3 for four weeks.

4 Q And you would get a certain percentage of that and  
5 another percentage would go to the agency, I assume?

6 A Yes, sir.

7 Q Do you remember how much money you made by renting  
8 out your condominium?

9 A I believe it was about 1,400 a week. It depends  
10 upon the week because it varies, you know, if it's the  
11 busy season or whatever. But we only did it about four  
12 weeks.

13 Q Did you keep track of who you rented to?

14 A I don't get the names of the people, sir.  
15 Mr. McMillan would have that.

16 Q Do you know whether they were limited to residents  
17 of North Myrtle Beach?

18 A I don't know where they were from. They don't  
19 really give us information of who is renting.

20 Q You would expect to rent vacation homes to people  
21 who didn't live in North Myrtle Beach, right, but were  
22 coming from other places?

23 A They could, yeah.

24 Q That's all I have. Thank you very much.

25 THE COURT: Any redirect?

1 MS. SHOUN: Nothing, Your Honor. Thank you.

2 THE COURT: You may step down.

3 If you'll call your next witness.

4 MS. SHOUN: Thank you, Your Honor.

5 The plaintiff would call Lawrence Pasciutti.

6 THE CLERK: Please raise your right hand and place  
7 your left hand on the Bible.

8 LAWRENCE PASCIUTTI,

9 after having been duly sworn, was examined and  
10 testified to as follows:

11 THE CLERK: You may be seated. Please state your  
12 name for the Court, please.

13 THE WITNESS: Lawrence Pasciutti. P, as in Peter,  
14 a-s-c-i-u-t-t-i. Middle initial L.

15 DIRECT EXAMINATION

16 BY MS. SHOUN:

17 Q Thank you, Mr. Pasciutti.

18 Just like I did with Ms. Unger, I'm going to ask you  
19 just a little bit about yourself personally.

20 Are you employed?

21 A I'm currently employed as a teacher for Horry County  
22 Schools at the Myrtle Beach Middle School. I am right now  
23 on sick leave, but I'm still employed.

24 Q And how long have you been in the teaching  
25 profession?

1       A       I have been in the teaching profession -- this would  
2       be my eighth year at Horry County Schools. Eighth year in  
3       the classroom. This would be would be starting my eighth  
4       year.

5       Q       Okay. And prior to going into academics, did you  
6       have some other career in a different field?

7       A       Yes. For roughly 18 years, I worked for the New  
8       York State Department of Environmental Conservation, the  
9       last 13 of which was in the tidal wetlands office. I was  
10      a senior marine resources technician, and I was  
11      responsible for reviewing both for applicable regulations  
12      and environmental impact of land use, property use, docks,  
13      houses, bulkheads, anything within 300 feet of the tidal  
14      wetland boundary. And that would have been both under  
15      Articles 25 and Articles 15 of the New York State  
16      conversation law.

17      Q       Mr. Pasciutti, when did you first start visiting  
18      North Myrtle Beach?

19      A       I started -- the first time I came down would have  
20      been on vacation with Ms. Unger. It would have been the  
21      summer of 2005, I believe. And I came down with her on  
22      and off for several years. Some summers, I came with my  
23      son and her kids. Some years, I didn't.

24              Then in -- well, I don't mean to jump ahead, but  
25      that's when I first started visiting.

1 Q Okay. All right. And, generally speaking, how  
2 would you describe the atmosphere of North Myrtle Beach?  
3 And I'll put that a little bit in context. The atmosphere  
4 of North Myrtle Beach as opposed maybe to Myrtle Beach.

5 A North Myrtle Beach is definitely, in my opinion, a  
6 more family-orientated city as opposed to Myrtle Beach.  
7 It's not quite as ruckus as Myrtle Beach is. And  
8 definitely the Sea Cloisters was a very family-orientated  
9 facility.

10 Q When did you first become familiar with Sea  
11 Cloisters?

12 A The first year that I came down on vacation with  
13 Ms. Unger.

14 Q So roughly 2005?

15 A 2005 or 2004. My memory is a little...

16 Q That's okay. And you heard me give a very rough  
17 description of Sea Cloisters, but, effectively, there are  
18 two buildings in between which there's a property that  
19 we're referring to as the cabana house?

20 A Yes, ma'am. Just for purposes of clarification,  
21 there's two complexes, Sea Cloisters I and Sea Cloisters  
22 II, each of which has three buildings in their complex.

23 Q Right. Yes. Thank you.

24 A And that is -- and they would be the north and south  
25 side of the cabana house.

1 Q And is it fair, then, to describe that, generally,  
2 the cabana house lies between those two complexes?

3 A Yes, ma'am.

4 Q And beginning -- well, let me ask you this: At some  
5 point, did you then become -- did you come to live at Sea  
6 Cloisters on a full-time basis?

7 A Yes. Again, I live with Ms. Unger, and we had  
8 started out at a different house in North Myrtle Beach,  
9 and she bought the condo on the date that she said,  
10 October or whatever of 2019. That's when we started  
11 living at the actual condo.

12 Q Could it have been 2018?

13 A Yes, it could have.

14 Q I'm going by my recollection.

15 A I would have to go through my personal papers to see  
16 exactly when, but...

17 Q Okay. Between the time that you became a resident  
18 at Sea Cloisters and let's say January of 2022, can you  
19 describe generally your experience with the use of the  
20 cabana house as you observed it?

21 A As I observed it, when we first moved into the  
22 condo, the cabana house was used as the amenity center  
23 for -- as a homeowners association for a development that  
24 was inland. The name of the development escapes me; I  
25 apologize.

1           And that was mostly for all residents of that  
2 neighborhood and/or their guests, and most of the access,  
3 frankly, they would come by golf carts. They wouldn't  
4 even come by car. They'd take the golf carts down. And  
5 it was a relatively low volume use.

6       Q     Okay. And then after that -- let's go to, for  
7 instance, 2019. Would the use in 2019 have been  
8 consistent with what you just described?

9       A     It's -- when -- when the Carolina Pines took over  
10 the property, the use started to increase. Okay? They  
11 first came with buses. And they had large and small  
12 buses. They would park in the Sea Cloisters parking lot.  
13 And the use was increasing. Many more people accessing it  
14 as opposed to when it was just a homeowners association.

15      Q     And would it be fair to say that that difference  
16 became noticeable more as we were able to open up things  
17 after COVID?

18      A     Absolutely. It was definitely incremental. It  
19 wasn't "bam" all at once. It increased steadily.

20      Q     And until you moved out of Sea Cloisters -- and  
21 let's try to put a time frame on that too. Let's say up  
22 until your description up until 2022 and then after 2022,  
23 the best that you can formulate that in your mind, then  
24 did the usage -- it lessened after January of 2022?

25      A     Absolutely. When the City entered the order on

1 consent, if you want to say that was January of '22, that  
2 coincided with it becoming much more quieter.

3 Q Okay. And let's talk about quiet. And I don't want  
4 to be repetitive, but, generally speaking, as to the  
5 issues with noise, what were your observations as to the  
6 quiet you had once enjoyed?

7 A My personal observation was there was louder music  
8 that was not just involved with events. It was, again,  
9 stereo systems, people's car radios, increased use of  
10 speakers of people going to and from the beach.

11 In addition, there was a tremendous increase in foot  
12 traffic with people using our parking lot -- our Sea  
13 Cloisters parking lot for their cars, and they were  
14 obviously going to the cabana house. And they would often  
15 walk -- as to repeat, again, what Ms. Unger said -- they'd  
16 walk through the bushes. They would park. They would  
17 disregard the signs on Sea Cloisters, you know, parking  
18 for residents only.

19 Q So did you personally observe the buses then?

20 A Yes, ma'am. At times, the buses would even block in  
21 people that lived in Sea Cloisters while they were  
22 unloading.

23 Q And how do you know those buses were from Carolina  
24 Pines?

25 A They said Carolina Pines on the side.



1 Q Okay. Did you ever observe the buses parked on  
2 Ocean Boulevard?

3 A I personally don't remember them parking on Ocean  
4 Boulevard. When -- yeah, I personally don't remember  
5 that.

6 Q Okay. That's fine.

7 And you talked about people cutting through Sea  
8 Cloisters property. Again, what makes you -- tell the  
9 Court what makes you believe those were Carolina Pines  
10 guests who were shuttled or drove to and from.

11 A They would drive their own -- the biggest problem,  
12 in my opinion, was those who drove themselves. And they  
13 weren't allowed to park in the Carolina parking lot  
14 because they didn't have the permit and that was full.  
15 They would park in our parking lot and walk over from our  
16 parking lot to the cabana house and then go to the beach.

17 So they were obviously Carolina Pines' customers  
18 because they would have the wristbands you would see on  
19 them and they would get checked in there, but they weren't  
20 allowed to park at the cabana house so they would take  
21 advantage of ours.

22 Q And when you say "our parking lot," you do mean Sea  
23 Cloisters?

24 A Again, I mean Sea Cloisters.

25 Q That's okay. That's all right. Just want to make

1 it clear.

2 Did you ever have any personal experiences with  
3 guests or a guest coming from Carolina Pines?

4 A Yes.

5 Q Will you tell us about that, please.

6 A I was Memorial Day weekend; I don't remember which  
7 day of the weekend. I had been down grilling at the grill  
8 area of Sea Cloisters, which is on the -- right near the  
9 sidewalk of Ocean Boulevard. Okay? And it's in between  
10 Sea Cloisters parking lot and the cabana house.

11 So even though I'm a New Yorker, I really got into  
12 making pulled pork and ribs on my Weber kettle. So I  
13 started in the early morning to cook, about 4:00 in the  
14 morning, and I was tending it all day for dinner that  
15 evening. And I saw the cars starting to come in as, you  
16 know, the beach filled up.

17 It would have been in the afternoon, say, between  
18 3:00 and 4:00 that I was down finishing up the grill and  
19 getting it ready and people were now starting to leave the  
20 beach. And a group of people -- two men, at least two,  
21 possibly three children, and a woman were walking from the  
22 cabana house to their Jeep that they had parked at Sea  
23 Cloisters.

24 Traffic within the parking lot was starting to get  
25 very confused at this point with people backing out, you

1 know, hitting each other. So I had said to the people  
2 going to their car, like, "Guys, come on, you got to get  
3 out of here. You're really not supposed to be parking  
4 here. This is private property." And in just that tone  
5 of voice. Maybe it was a little bit New York as far as,  
6 you know, stressing that they get out, but I was even  
7 tone.

8 And they immediately, for lack of a better term, got  
9 right in my face, yelling at me, cursing at me, telling me  
10 to mind my own business. One of the gentlemen accused me  
11 of cursing at his wife because that's what she told him,  
12 and that did not happen.

13 I was only guilty of saying, "Please, you guys got  
14 to get out of here. You shouldn't be here in the first  
15 place." The guy got very, very close to me, literally  
16 within inches of my face. I backed off and it calmed  
17 itself down, but it was intimidating at the time. And he  
18 definitely was under the influence.

19 Q Following up on under the influence, Ms. Unger said  
20 something about attempting to -- and I'm paraphrasing this  
21 so I apologize -- something about trying to secure alcohol  
22 or serve alcohol.

23 Are you familiar with any efforts made by the owners  
24 of the cabana house to secure an alcohol license?

25 A I am familiar with it in the sense that I heard

1 people talk about it. I never saw any application or  
2 anything like that myself.

3 Q Okay.

4 A So I don't have firsthand knowledge.

5 Q Okay.

6 A But I was under the impression that they were  
7 pursuing a liquor license of some sort.

8 Q Now, Mr. Pasciutti, you have talked about the --  
9 seeing people being dropped off or driving and then  
10 cutting through Sea Cloisters property to get to the  
11 cabana house. And you observed them doing that?

12 A Yes, ma'am.

13 Q Okay. Let me ask you a question, Mr. Pasciutti:  
14 Did they have an alternate route to take?

15 A It was inconvenient but yes. Even if they were  
16 using our parking lot, which was bad enough, you know, at  
17 least give us the courtesy of walking to the sidewalk and  
18 over to the next property, walking back. But, you know,  
19 shortest distance between two points.

20 Q So, Mr. Pasciutti, there are sidewalks that could be  
21 used there without cutting through?

22 A Yes. Yes, ma'am.

23 Q Beg your indulgence.

24 I don't have anything further. If you'll answer any  
25 questions from opposing counsel or the Court. Thank you.

1       A       Thank you, ma'am.

2       THE COURT: All right. Cross?

3       MR. TAMASITIS: Yes, Your Honor.

4       Your Honor, permission to roam the well? Thank you.

5                   CROSS-EXAMINATION

6       BY MR. TAMASITIS:

7       Q       Mr. Pasciutti -- that's how you say your name?

8       A       Very good.

9       Q       My name is John. I'm from Philadelphia, so I can  
10      pick up the Yankee stuff.

11       And you're a teacher?

12      A       I'm currently a teacher, yes.

13      Q       Thank you. My mom has been doing public education  
14      for 35 years, so...

15      A       It was my midlife crisis, my second career.

16      Q       Well, good for you. That's a tough second career to  
17      pick.

18       So you started visiting North Myrtle Beach in 2005?

19      A       2004 or '5.

20      Q       Okay. And where did you stay when you visited?

21      A       I stayed at Ms. Unger's mother's condominium.

22      Q       And that's in Sea Cloisters?

23      A       Yes.

24      Q       Did you stay anywhere else? Did you rent anywhere  
25      else when you came down?

1       A       One summer when we came down with a lot of people,  
2       we rented another unit within -- like right near her  
3       mother.

4       Q       Okay. So was that still in Sea Cloisters?

5       A       It was still in Sea Cloisters I, yes.

6       Q       And property near the beach is getting more and more  
7       expensive in North Myrtle Beach since it's starting to  
8       grow; right?

9       A       To my knowledge, yes.

10      Q       Yeah. It's tough to find rental places near the  
11      beach. You got to kind of move away from the beach to get  
12      that price; right?

13      A       As far as I know, yes.

14      Q       And you said -- I know you talked about North Myrtle  
15      Beach is getting busier and busier; right?

16      A       Yes, sir.

17      Q       And that's been going on outside of Sea Cloisters  
18      too?

19      A       Yes.

20      Q       So that's across the city?

21      A       As best I can tell with my personal experience.

22      Q       Yeah. That's kind of the entire South Carolina  
23      coastline, isn't it?

24      A       They're letting too many of us Yankees down.

25      Q       Tell me about it. My parents have just moved to

1 Pawleys -- my parents moved to Pawleys and they're now  
2 complaining about how busy it is.

3 A Yeah.

4 Q So how did you know -- and you testified to this --  
5 how did you know that the beach club was primarily being  
6 used by a development in North Myrtle Beach prior to 2018?

7 A Because it had the name of that development. In  
8 other words, it was -- I want to say Seabrook but that  
9 might not be it. It was a -- the name on the cabana said  
10 Seabrook Property Association or something to that effect.  
11 My memory is not perfect on this. But it was obvious and  
12 common knowledge that that was an amenity center for the  
13 homeowners association.

14 Q Could you turn to Exhibit No. 24 in that book in  
15 front of you, on page 46 of that exhibit. It is Bates  
16 number -- it's going to say at the bottom right-hand  
17 corner Sun-06214.

18 A Defendant's Exhibit 24 and that was Sun-06169?

19 Q 06214.

20 A That's Exhibit 24?

21 Q Yes. Exhibit No. 24. And it's going to be page 46.

22 A Oh, I'm sorry. I was reading the number at the  
23 bottom. My apologies. You said Defendant's Exhibit No.  
24 24?

25 Q Sorry. It's on page 38.

1       A       Okay.

2       Q       Is that the sign that you recall seeing in 2018 or  
3       is that the location of the sign?

4       A       That would be roughly the location of the sign.  
5       This is kind of a small picture and my eyes aren't what  
6       they used to be. The only thing I can read on that sign  
7       is "beach club."

8       Q       And your testimony is it said "Seabrook" on that  
9       sign in 2018?

10      A       That would be my recollection, but that -- that  
11      could be mistaken.

12      Q       It didn't say the Tilghman --

13      A       I mean, it was clear -- if I can just clarify.  
14      Whatever the community was, it was clear -- even when you  
15      spoke to the people that used it -- that it was an amenity  
16      center for the homeowners association.

17      Q       Did it say the Tilghman Beach Club? Does that sound  
18      more familiar?

19      A       That could be. Tilghman is a common name down  
20      there.

21      Q       And you said you spoke with folks there, and they  
22      told you they were from Seabrook?

23      A       They told me they were from that particular --  
24      whatever neighborhood that was the amenity center.

25      Q       And there was nobody else from any other



1 neighborhood that was there?

2 A Not to my knowledge.

3 Q How many times did you speak with them?

4 A Just a couple. Two or three maybe times. Again,  
5 grilling or whatever, you see somebody, you talk to them,  
6 "Hey, how you doing? Where you from?" Especially if they  
7 have a northern accent.

8 Q Makes it easier to talk to them.

9 A Absolutely.

10 Q Did you know who owned the beach club prior to 2018?

11 A No.

12 Q Can you pull up Defendant's Exhibit No. 49? It  
13 should be on your monitor, too, if you want.

14 A Oh, okay. That is easier.

15 Q So is that -- so Sea Cloist- -- where -- can you  
16 show me the beach club? Is it in the middle between Sea  
17 Cloisters, you said?

18 A Yes. It's the building with the teal, for lack of a  
19 better term, roof between the two condo complexes, both to  
20 the north and south. The one to the left would be Sea  
21 Cloisters I. That would be to the south. The one to the  
22 north, which is right in that picture, would be Sea  
23 Cloisters II.

24 Q And what's across the street?

25 A Across the street is Tilghman Towers.

1 Q And that's in the neighborhood?

2 A Yes.

3 Q And I believe this question was asked previously but  
4 there's been none of this loud noises, fighting in the  
5 parking lots from Yankees, drinking alcohol issues since  
6 January of 2022; right?

7 A Not when I was there.

8 Q But you sold your property in July of 2023?

9 A Yes. Again, clarification: It was not my property.  
10 I was living with Ms. Unger. It was her property.

11 Q But the property was sold in 2023?

12 A Yes.

13 Q So it wasn't sold because of those noises and stuff  
14 happening at the beach club; right?

15 A You're asking me to interpret Ms. Unger's thoughts,  
16 which I'd rather not do, but I will clarify: She did on  
17 the stand that that was not the only reason anyway.

18 Q Thanks. No further questions.

19 THE COURT: Any redirect?

20 MS. SHOUN: No, Your Honor.

21 Thank you, Mr. Pasciutti.

22 THE COURT: Have a good day.

23 Call your next witness.

24 MS. SHOUN: Beg the Court's indulgence, Your Honor.

25 Your Honor, the witness that we had -- that we were

1 going to present to the Court with agreement of counsel  
2 that they kindly gave us, we have not been able to contact  
3 her. We put her a little later in the day. May we go  
4 somewhat of the intended order then and do a deposition  
5 designation?

6 THE COURT: That's fine.

7 MS. SHOUN: Is that okay with you guys?

8 MR. TAMASITIS: Yeah, that's fine.

9 MR. WILLIS: Your Honor, one of the advantages of a  
10 non-jury trial is --

11 THE COURT: Absolutely.

12 MS. SHOUN: And Mr. Willis and I spoke at the break,  
13 Your Honor. I think we both earned our dues. We're only  
14 doing non-jury from here on out.

15 MR. WILLIS: And only as second chair.

16 MS. SHOUN: Yes, and only as second chair.

17 THE COURT: And whenever you want a lunch break, you  
18 just tell me, because I can go. It doesn't matter to me  
19 one way or the other.

20 MS. SHOUN: I have always thought that should be a  
21 determination of the court reporter.

22 THE COURT: That's fine with me too.

23 MR. RICARD: Your Honor, what's your preference on  
24 how to read the deposition designations into the record?  
25 Would you prefer there to be somebody on the witness

1 stand? Would you prefer it to be back and forth  
2 between --

3 MR. WILLIS: Ms. Barker, yeah.

4 THE COURT: Is that okay with you?

5 MR. TAMASITIS: It's fine by us, Your Honor. I  
6 guess the one thing we should clarify then is, we have  
7 done designations for this same witness, and they'll be  
8 done in our case-in-chief. I don't mind all of it coming  
9 in right now, if we want to do that, as opposed to your --  
10 I know you were talking affirmative designations and  
11 stuff. I think we just put them all in.

12 MR. RICARD: That's fine.

13 MS. SHOUN: I agree.

14 THE COURT: That sounds good. All right.

15 MR. WILLIS: May we approach, Your Honor?

16 THE COURT: Yes, sir.

17 CAROLINE BARKER

18 was duly sworn to accurately read the designated  
19 deposition of DENNIS ONKEN in this matter as follows:

20 THE CLERK: State your name, please.

21 MS. BARKER: My name is Caroline Barker.

22 MS. SHOUN: Your Honor, one housekeeping matter.

23 May I excuse the first two witnesses --

24 THE COURT: Sure.

25 MS. SHOUN: -- with the Court's permission?

1 Thank you, Your Honor.

2 MR. RICARD: And I'll represent to the Court that  
3 this is the deposition designation of witness, Dennis M.  
4 -- as in Mike -- Onken.

5 If you could please turn to page 7 of this  
6 deposition designation.

7 MR. WILLIS: Your Honor, do you want a copy? I have  
8 got an extra notebook.

9 THE COURT: I'm fine. I'll just listen.

10 MR. RICARD: So we're going to turn to page 7, and  
11 I'll do the questioning and then if you read the answer.  
12 We'll do it like that. Okay?

13 MS. BARKER: Okay.

14 [Deposition Designation as read:]

15 BY MR. RICARD:

16 Q Okay. What's your full name and spell your last  
17 name for the record.

18 MS. BARKER: What is my name?

19 MR. WILLIS: You're playing Mr. Onken.

20 MS. BARKER: On page 7, I don't see that answer.

21 MR. RICARD: There should be a highlighted portion.

22 MS. BARKER: Okay, okay. I'm sorry. My mistake.

23 A Dennis Michael Onken. O-n-k-e-n.

24 Q Okay. When did you first start working for the  
25 Carolina Pines RV Resort?

1 MR. RICARD: We're now on the following page. We're  
2 just going to read the highlighted portions.

3 A March 2019.

4 Q Okay. What made you want to get into the food and  
5 bev industry?

6 A I had been in the food and beverage industry since I  
7 was 15 years old, in 1971, and enjoyed it. When I  
8 graduated from college, I tried something else and I  
9 didn't like that as well and returned to the food and  
10 beverage.

11 Q I've got you. When did you move -- so from 1980 to,  
12 you know, 2018 or so, were you working as, you know, a  
13 restaurant manager in Illinois throughout that time frame  
14 or were you in different states, different locations, that  
15 sort of thing?

16 A I moved to South Carolina in 2004. Prior to that, I  
17 remained in Illinois, and in 2004, I moved to Myrtle  
18 Beach -- the Myrtle Beach area.

19 Q Okay. Let's pick up then in 2004. Where did you  
20 work in Myrtle Beach in 2004?

21 A I began as a unit manager with the Divine Dining  
22 Group in 2004. I remained with them for 14 years. Then I  
23 worked for an independent group of restaurant operators in  
24 Conway. I worked there for a little over two years and  
25 then I became employed with Sun Communities.

1 Q Okay. The Divine Dining Group, what brands were  
2 within that group?

3 A River City Cafe, Ultimate California Pizza, Nacho  
4 Hippo, Bovine Steak House, Divine Fish House, a seafood  
5 place, another seafood place called Bubba's Fish Shack,  
6 and we did a lot of -- and we did on and off Grandma's  
7 Catering.

8 Q What were your roles and responsibilities with the  
9 Divine Dining Group?

10 A I began as an assistant manager, and three months  
11 later, I was promoted to general manager. And I remained  
12 general manager until 2009 where I was named project  
13 coordinator. I was project coordinator from then until  
14 leaving in 2016.

15 Q Okay. All right. So then let's transition to --  
16 you said you worked a little bit -- a little while for an  
17 independent group of operators in Conway. What were they  
18 called?

19 A Bucksport Enterprises. It was two gentlemen who  
20 operated a freestanding restaurant in downtown Conway,  
21 South Carolina, and they had purchased property water  
22 [sic] frontage in Bucksport, South Carolina, south of  
23 Conway, where they developed a restaurant, music hall,  
24 marina, and campground. And I was hired to help with the  
25 development of that property and oversee its management

1 operations.

2 Q What made you want to take that job after working  
3 for so long with the Divine Dining Group?

4 A I was terminated by Divine Dining Group when their  
5 -- along with another [sic] senior managers in 2016. And  
6 so I sought another position, and I was introduced to the  
7 gentleman in Conway.

8 Q Okay. Describe to me the circumstances of your  
9 termination.

10 A The senior partner, the majority partner, sold the  
11 partnership and disbanded his relationship with the chief  
12 operating officer. And the chief operating officer and I  
13 were let go, and the director of operations was assigned  
14 to a lesser position.

15 Q Okay. So just so I understand, was it just kind of  
16 a change in management, basically, and they brought new  
17 people in?

18 A Yes, sir. That's exactly it.

19 Q Okay. Any allegation that you did anything wrong?

20 A Not at the time of my dismissal. When I applied for  
21 unemployment benefits, the company maintained that I had  
22 drank a draft beer without paying for it, and they used it  
23 to qualify their decision to terminate.

24 Q Was that allegation just one instance or was it a  
25 pattern?



1       A       I don't recall that being discussed.

2       Q       Okay. How did you find out that that was the reason  
3       for their denial of employment benefits?

4       A       During a phone [sic], the trial with the  
5       unemployment officer -- office and the senior manager at  
6       the [sic] Divine.

7       Q       Okay. Did you ever challenge that allegation at  
8       all?

9       A       No, sir. I moved on.

10      Q       Mr. Onken, some of these questions I'm going to ask  
11      can sometimes feel intrusive, but I just have to do my job  
12      here. Okay? Did you feel that that allegation was true?  
13      Was it true?

14      A       Can you clarify that? Are you asking -- can you  
15      clarify that?

16      Q       Sure. Absolutely. So you stated that the company  
17      made an allegation that you drank a draft beer without  
18      paying for it. Is that allegation true?

19      A       During the mitigation of the unemployment benefits,  
20      that's true.

21      Q       So you admit that you drank a draft beer from the  
22      company without paying for it?

23      A       Yes.

24      Q       Okay. How often did that happen?

25              MR. TAMASITIS: Objection to the form.

1 MR. RICARD: And there's an objection to the form.

2 BY MR. RICARD:

3 Q Mr. Onken, you still have to answer that question.

4 A Over a 16-year time frame, I would say less than 20  
5 times.

6 Q Was it a similar role and responsibilities as what  
7 you had previously been doing for the Divine Dining Group  
8 or was it different in any way?

9 A It was similar.

10 Q Okay. From there, you went to work for Carolina  
11 Pines RV Resort; is that correct?

12 A Yes, sir.

13 Q Okay. How did you find out about the Carolina Pines  
14 opportunity?

15 A Well, I was aware of the development, as I drove by  
16 it often, and I -- I had a former consulting client from  
17 the City of North Myrtle Beach contact me to tell me that  
18 she had spoken with an employee -- an executive employee  
19 with Sun Committees [sic] and provided my name and  
20 suggested that I reach out to them.

21 Q All right, Mr. Onken. I know we may have covered  
22 this, but just so I'm clear, when did you begin working  
23 for Carolina Pines RV Resort?

24 A I believe the first week of March 2019.

25 Q What was your job title?

1       A     Director of Food and Beverage.

2       Q     Did that job title ever change?

3       A     Yes.

4       Q     What did it change to and when did it change?

5       A     It changed to Director of Resort Food and Beverage,  
6     and I believe that was mid-2020 maybe.

7       Q     What was the -- I mean, it sounds pretty close. Was  
8     there a change in roles and responsibilities with that  
9     change in title?

10      A     No, I think it was related to my compensation.

11      Q     What were your roles and responsibilities as both  
12     the Director of Food and Bev and then the Director of  
13     Resort Food and Bev?

14      A     Well, most of my prior positions included everything  
15     associated with the Food and Beverage Department. In the  
16     Sun Committees [sic] case, when I started, they had a --  
17     the property was maybe 20 percent complete, and they had  
18     some working designs and business plan that had been  
19     prepared that related to the food and beverage operation  
20     that had not really been reviewed by anyone in the  
21     business of food and beverage.

22             And so, initially, I was heavily involved with the  
23     preparation and implementation of the food and beverage  
24     plan, and thereafter, I had a staff of managers that I  
25     oversaw in most situations related to on-property

1 preparation services for delivery of food and beverages.

2 Q Did your roles and responsibilities ever change?

3 A Not really.

4 Q Okay. I assume that your office was located at the  
5 RV resort; is that right?

6 A Yes.

7 Q What options for food and bev were provided for  
8 Carolina Pines? I'm not necessarily asking for menu  
9 items, more like location or sources or, you know,  
10 services more than specific items.

11 A There was a clubhouse area that had two working  
12 kitchens and a bar that provided various food and soft  
13 drinks and liquor and snack items.

14 Q Okay. So was the clubhouse restaurant, was that  
15 separate from the bar?

16 A Well, it had a door. They shared common areas, but  
17 there was a dining room, a bar, two snack bars, and two  
18 kitchens.

19 Q And those were all on site; correct?

20 A Yes.

21 Q Okay. And I think we'll discuss a little bit later  
22 about food and bev options at the cabana house, so we'll  
23 set that aside for the time being.

24 I know you may have described this before as well  
25 but when did you leave employment with Carolina Pines?

1       A       July 1st, 2021.

2       Q       Okay.  Going back to Carolina Pines and your job as  
3       the Director of Food and Bev and the Director of Resort  
4       Food and Bev, who did you report to?

5       A       Troy Bittner.

6       Q       And he was the general manager?

7       A       Yes.

8       Q       In your reporting to Mr. Bittner, did that ever  
9       change with your employment with Carolina Pines?

10      A       No.

11      Q       When you were the Director for Food and Bev and the  
12      Director of Resort Food and Bev, did you supervise  
13      anybody?

14      A       Yes.

15      Q       How many employees?

16      A       Probably 40 hourly, perhaps a touch more, and a  
17      management team of, I think, four was the most.

18      Q       Okay.  Let's focus on the management team that you  
19      were referring to.  Who were those folks?

20      A       I had an Assistant Food and Beverage Manager named  
21      Natasha, and I had another Assistant Food and Beverage  
22      Manager named Chris.  And I had a Beach Club Manager that  
23      did not report to me named Chris and Robin.  Robin kind of  
24      reported to me for the period of three or four weeks.  And  
25      at one point, I had a Food and Beverage Manager named Jim.

1 I can't recall. I had another assistant named Jack and  
2 another assistant that I don't recall.

3 Q Okay. So you named a number of assistants there.  
4 Were they at times working simultaneously together with  
5 you or were these all folks that were sequential? Like  
6 Chris worked for you first and then it turned into Natasha  
7 and then it turned into Jim and then it turned into Jack.  
8 Help me understand the progression.

9 A The basic department setup was myself and then I had  
10 two subordinates, Chris and Natasha, for the bulk of the  
11 time.

12 Q Okay. And what were their roles and  
13 responsibilities, Chris and Natasha's?

14 A Chris had a dual role. He was the manager of the  
15 beach club and reported to Troy. And Natasha was an  
16 assistant manager reporting to me.

17 And, in relation, we separated primarily Natasha was  
18 in charge of the servers and the host and bartenders. And  
19 Chris was in charge of the kitchen and the snack bars.

20 MR. RICARD: Okay. We're going to break here for a  
21 second, Your Honor. There's a confidential portion in  
22 this deposition designation that we'd like to enter in,  
23 and so we'll just note for the record that this portion  
24 would be confidential.

25 (See Confidential Session transcript.)

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1 Open session continues:)

2 MR. RICARD: All right. We're going to turn to page  
3 57.

4 BY MR. RICARD:

5 Q Okay. When you were hired, did you know that a  
6 cabana house was in process for being purchased by the RV  
7 resort?

8 A I did not.

9 MR. RICARD: At this time, Plaintiff's Exhibit No. 1  
10 for that deposition was marked for identification.

11 BY MR. RICARD:

12 Q I will represent to you that this is an email from  
13 August 2019 regarding a business plan. I'll quickly  
14 scroll through. You can see that the email refers to an  
15 attachment which includes in its file name "Beach Club  
16 Business Plan." An attachment is seen in the following  
17 pages within this exhibit, so I'm going to scroll through  
18 this so you have an opportunity to review it and read it.  
19 You just let me know when you're ready for me. You don't  
20 have to read every single word, but I want to make sure  
21 that you familiarize yourself with the document before I  
22 start asking questions. So will you let me when you're  
23 ready for me to scroll through?

24 A Yes. Can you go back up just a touch?

25 Q Sure.

1     A     Right there. Good. Okay. Okay. Okay. Okay.  
2     Okay. Okay. Okay. Okay. Okay.

3     Q     For the record, I'm going to go back to page 1. And  
4     again, Mr. Onken, I'll represent to you that this purports  
5     to be an email from you to Mr. Bittner. Are you familiar  
6     with this email?

7     A     Yes.

8     Q     Okay. And do you recall the beach plan or, excuse  
9     me, the beach club business plan that is attached to this  
10    email?

11    A     I'm certain I wrote it. The file title is my way of  
12    saying why I wrote it and so on, so yes.

13    Q     Okay. Would you agree that this is a fairly  
14    extensive plan?

15    A     That's what I'm sure I was asked to do, yes.

16    Q     Okay. I understand that there were some weddings  
17    and events that took place at the cabana house; is that  
18    right?

19    A     I know of one.

20    Q     Okay. Is that the one that you were referencing,  
21    the light hors d'oeuvres with around 20 or so people?

22    A     No. That was a welcome reception. The wedding I  
23    know about took place, I think, in late to mid March of  
24    2021.

25    Q     Okay. Let's talk first about that welcome party.

1 Who was that for again?

2 A That was for existing members of the beach club that  
3 had been members during its previous ownership.

4 Q So you're referring to members of Seabrook  
5 Plantation?

6 A I wouldn't have known that. I don't know. I know  
7 that was a private -- my recollection is that there were  
8 members of a -- I think they paid dues that provided them  
9 use of the property and some or may not have been. I  
10 don't know if Seabrook's residency was a requirement or  
11 not. I don't know. But I know there were a small number  
12 who chose to remain members after Sun purchased the  
13 property.

14 Q Okay. Do you recall when that event occurred?

15 A I think it was pretty early on, so it would have  
16 been sometime probably mid to late August, I would guess,  
17 of 2019.

18 Q Was there any music that was played?

19 A No.

20 Q Where was it held? Was it, like, around the pool?  
21 Inside? Both? Help me understand where the event was  
22 taking place at the cabana house.

23 A It was on the covered open deck on the second floor  
24 of the property.

25 Q What was served?

1     A     Light hors d'oeuvres, cheese and crackers, fried  
2     mushrooms.

3     Q     What about beverages?

4     A     I believe we had a cooler with soft drinks, I think.  
5     Lemonade, iced tea.

6     Q     Any alcohol service?

7     A     Not that I can recall.

8     Q     Who you were the Sun TRS employees who were present  
9     at that event?

10    A     I expect Troy and Jamie were there, but I don't  
11    recall seeing their faces.  Myself, I think Natasha, and I  
12    think that was it.

13    Q     Do you know if Chris Martucci was there?

14    A     Well, if he was there, then Natasha would not have  
15    been.

16    Q     Okay.  So it probably would have been one or the  
17    other?

18    A     Yes.  And I don't recall.  I can't recall  
19    specifically anyone being there besides myself.

20    Q     Okay.  So the next event that you were aware of that  
21    took place at the beach club was a wedding in 2021?

22    A     Yes.

23    Q     Okay.  So you don't recall any weddings or events  
24    that took place in 2020?

25    A     I don't have any firsthand knowledge.

1 Q What was your involvement with any events or  
2 weddings that took place at the cabana house?

3 A Well, I was completely responsible for the group of  
4 20 for the welcome reception. And after the wedding was  
5 -- had been sold, booked, and arranged by Chris Martucci  
6 and who else, I don't know, and upon his dismissal, I  
7 became saddled, I guess, with implementing the wedding.  
8 And so I had to contact the bride and groom and find out  
9 what they had been told and what they were expecting, and  
10 I summarized that.

11 And Robin Striker was in charge of the event, and I  
12 gave her the checklist and directions for her oversight  
13 and prepared food on the property, which I would have been  
14 involved in, as well as Jim and Jack, and -- well, I don't  
15 know if they were around yet, but Natasha and my hourly  
16 staff. I would have been involved in making sure that  
17 those items were properly prepared and both in a timely  
18 manner and packaged for delivery to the beach club via  
19 Robin.

20 Q Okay. Did Mr. Martucci have any discussions with  
21 you about hosting events at the cabana house?

22 A Well, he would have because it would have required  
23 some oversight of scheduling and purchasing for kitchen  
24 operations. He may very well have asked me my thoughts on  
25 a number of matters, but I don't specifically recall any



1 of them.

2 Q Okay. Would you have approved or disapproved of  
3 weddings and events taking place at the cabana house in  
4 2020?

5 A Could you repeat? Would you clarify that?

6 Q Sure. Would you have approved or disapproved of  
7 events such as weddings taking place at the beach club in  
8 2020?

9 A I previously testified that I thought that the  
10 property should have been an amenity for guests. I  
11 included the peripheral revenues in a business plan that I  
12 was asked to provide as a means for discussion. I felt  
13 that the pressures of servicing 3,000 resident guests at  
14 the RV park was a challenge that -- a difficult change,  
15 and I felt that events that conflicted with that at the  
16 beach club was inappropriate.

17 I was never asked to approve or disapprove of  
18 anything, and so my feelings on that question are really  
19 conjecture. I -- I -- when I [sic] asked, I didn't offer.

20 Q Okay. So who would have been the person that would  
21 have approved for events taking place at the beach club in  
22 2019 and 2020?

23 A Troy Bittner.

24 Q Would that have been the case for 2021 as well?

25 A Yes.

1 Q Okay. So the event that you recall -- the wedding  
2 that you recall in 2021, did you approve that or did  
3 Mr. Bittner approve that?

4 A Mr. Bittner approved that.

5 MR. RICARD: Your Honor, at that time, Plaintiff's  
6 Exhibit No. 4 for identification for the deposition  
7 purposes, which was Bates labeled NMB\_SUN\_00001 was  
8 entered.

9 BY MR. RICARD:

10 Q All right. For the record, I have just handed you  
11 what's been marked as Exhibit 4. Mr. Onken, can you see  
12 what I have just introduced?

13 A Yes.

14 Q Okay. So I'll represent to you that this purports  
15 to be an invoice for a wedding that took place for the  
16 Christensens on April 10th, 2021. Does this ring any  
17 bells for you?

18 A Yes.

19 Q Okay. When you were referring to the wedding that  
20 took place in March of 2021, do you believe that it was  
21 actually this wedding in April of 2021?

22 A Yes.

23 Q Okay. And it says here 75 guests at 6 a.m. at the  
24 beach club. Does that sound right to you, from your  
25 memory?

1       A       Yes.

2       Q       So you recall a wedding there at 6 a.m. on April  
3       10th for 75 guests?

4       A       It was a sunrise service, and yes, I do remember.

5       Q       Okay. Were you present at that wedding?

6       A       No.

7       Q       Who was, as far as employees of Carolina Pines?

8       A       Robin Striker and I don't know anyone else. I'm  
9       sure there were, but none that I directed or...

10      Q       Okay. Do you recall if any music was played?

11      A       I know that there was a DJ.

12      Q       Okay. Do you know where the DJ was set up?

13      A       No.

14      Q       I believe you testified earlier that food was  
15      prepared for the wedding as well?

16      A       Yes.

17      Q       Okay. So can you confirm that alcohol was served at  
18      the wedding?

19      A       See, I know I sent a -- I know I sent a detailed  
20      explanation of the service to the bride, and I believe it  
21      said that they -- that we were providing Bloody Marys and  
22      assorted liquors and that they were welcome to bring  
23      coolers that had their canned beverages. So based on  
24      that, I expected that those items were on property.

25      Q       Okay. Did the beach club -- prior to April 2021,

1 did the beach club have any alcohol license for the  
2 provision or service of alcohol on-site?

3 A No.

4 MR. RICARD: At that point, a healthy comfort [sic]  
5 was taken.

6 BY MR. RICARD:

7 Q Okay. Mr. Onken, are you familiar with the name  
8 Paul Blust?

9 A Yes.

10 Q Who is he?

11 A He's the former Zoning Administrator at the City of  
12 North Myrtle Beach.

13 Q Okay. I'll represent to you that the counsel for  
14 the defendants has identified you as a witness in this  
15 case and they stated that you were expected to testify to  
16 a conversation that you had Mr. Blust in October of 2019  
17 regarding your inquiry as to whether the RV resort could  
18 prepare and sell food and beverage at the beach club.

19 So my question is, what's your testimony going to be  
20 about?

21 A That discussion, I suppose. Whatever questions you  
22 want to know, I'm here to answer your questions.

23 Q What do you recall from that conversation?

24 A I -- well, from that conversation, I recall being  
25 directed to a conference room whereupon Mr. Blust walked

1 in. We had not met prior to that. We exchanged  
2 pleasantries, and I told him who I was with, and we went  
3 over the particulars of -- essentially, I tried to sell  
4 him on how great we were at the RV resort and how it's  
5 such a nice place to go. And he seemed to be interested  
6 in that, and he knew that I was there to discuss the  
7 zoning or to inquire about the zoning of our property on  
8 Ocean Boulevard. And I let him know that our hopes were  
9 to offer some services there, and I asked if there were  
10 any issues related to zoning that he could answer.

11 He -- during that meeting, he said that he was aware  
12 of us. He was aware of our ownership of that building;  
13 that he would research it and get back to me. He said  
14 that he was not certain of all the details of the zoning  
15 and that there may need -- be a need for us to acquire a  
16 variance of some sort in order to do things that were  
17 outside of the zoning. He explained to me what the  
18 process entailed and we said our good-byes. It lasted ten  
19 minutes.

20 Q What was your takeaway from that meeting? I mean,  
21 did you feel like you were approved at that point to do  
22 food and bev services? Did you feel like you had to go  
23 through the variance process? What was the result, in  
24 your mind, as to that meeting?

25 MR. TAMASITIS: Object to the form. You can answer.

1       A       When I left the room, I was unsure how the City  
2       would proceed, and I felt like even, if the existing  
3       zoning was not -- was not prohibitive, that the company  
4       would still have the option or the ability to follow a  
5       variance process prior to doing anything on-site [sic].

6       Q       Okay. So this meeting was in person?

7       A       Yes, sir.

8       Q       At the City's offices?

9       A       Yes.

10      Q       And this was October of 2019?

11      A       Yes.

12      Q       Do you recall roughly when in October that occurred?

13      A       I believe it was the first week of October.

14      Q       What prompted that meeting?

15      A       Well, it was -- as I recall, the beach club had  
16      either none or limited access to anybody during our first  
17      season of operation, and we didn't open until the 20th of  
18      July and the season was over by, you know, the first week  
19      of September that year.

20             So the beach club going season had dwindled. And  
21      sometime after the end of the season, there was  
22      more interest evidently on behalf of the company to pursue  
23      plans for the following season. And so I think that first  
24      thing that would have been prior to that would have been  
25      said to Troy, "Look, we have to make sure what we are able

1 to do there, and we'll go see the guy at the City."

2 And I went to the City and talked to the  
3 receptionist, and she said, "It's a guy named Paul Blust.  
4 Here's his card. Make an appointment" -- or we made an  
5 appointment for a few days later. And that's when I went  
6 and met with him.

7 So what the company intended was not anything that I  
8 was privy to, and I knew what I had sent. I knew that  
9 Mindy Kirtley and those that she worked with were hopeful  
10 that the business could provide ancillary revenues, but I  
11 was not surprised that they wanted to involve me in  
12 furthering that. Troy didn't know anybody at the City.  
13 Chris Martucci didn't know anyone at the City. I was the  
14 only one that had any wherewithal to be able to do any of  
15 that, so I went to see the City.

16 Well, I had been asked to provide a business plan.  
17 The company had named a specific manager at the resort or  
18 for the beach club. I knew that the company had big plans  
19 for events on property.

20 Q Did you have any conversations with Christopher  
21 Martucci about his goals and intent with the cabana house?

22 A Yes.

23 Q Okay. What were his goals and intent with the  
24 cabana house?

25 A His goals were to sell event after event and to make

1 the cabana house a hub for activity -- a hub of activity  
2 for everything from weddings to class reunions.

3 Q Okay. And that would include food and bev service?

4 A Yes.

5 Q And that conversation would have occurred sometime  
6 between August of 2019 and the first week of October of  
7 2019?

8 A He was pretty new and didn't know Mindy all that  
9 well, but I think, as time progressed, he became -- and I  
10 think, as time progressed, he envisioned that avenue as a  
11 feather in his cap that would lead to additional pay and  
12 responsibilities.

13 And so -- but I knew that he thought that we should  
14 have a lot of events in the banquet room at the resort,  
15 and I felt otherwise. And, you know, I agreed to disagree  
16 on that, and Troy knew the same thing. And I felt that,  
17 as I testified earlier, operating the resort food and  
18 beverage was a challenge. We were in a pandemic. We were  
19 short-staffed. We had all kinds of business. We had two  
20 restaurant menus plus bars plus the on-site events, hot  
21 dog roasts, and Oktoberfest and so on.

22 And in order to maximize our results and those  
23 endeavors, I didn't think it was a good idea to be hosting  
24 a lot of events at the beach club, and I -- I did think,  
25 especially early on, that at least we potentially could



1 sell hot dogs and barbecue sandwiches there. And so that  
2 was included then in [sic] the surfboard and some beach  
3 chairs and whatever else. And that was -- you know, I was  
4 doing all that I could to make our property and our resort  
5 something that would be a leader in the industry and make  
6 our guests happy.

7 So I was pleased to be a part of both the business  
8 plan and furthering of that with Mr. Blust and so on, but  
9 I was -- nobody asked me for a vote, and it was just a --  
10 something that I was happy to do.

11 Q So did you take the initiative to go reach out to  
12 Mr. Blust or did somebody direct you to do that?

13 A I was the only person on the team in Conway that had  
14 a good -- that had the good sense and expertise to  
15 accomplish those types of things. So I didn't need to be  
16 told to go to the City, but I knew that if they were going  
17 to be discussions about remodeling, which they used that  
18 time frame to repaint and place -- repaint the place and  
19 fix the pool somehow or another. And I think they did  
20 some sort of concrete work there and changed the gate out,  
21 I think.

22 Anyways, I knew that if these things were going to  
23 be addressed for the coming season, I needed to at least  
24 be sure that we were going to be able to legally  
25 accomplish what some people may believe might be their

1 interest. So I went on my own, although I'm sure I  
2 notified Troy and probably Mindy that I was going to do  
3 so.

4 Q Okay. So it was your idea to go -- you took your  
5 own initiative to go to Mr. Blust?

6 A I don't recall being specifically addressed to do  
7 that, no.

8 Q Okay. But my question is, you took your own  
9 initiative to go see Mr. Blust?

10 A Yes.

11 Q Did you desire to have responsibilities for the food  
12 and bev at the cabana house?

13 A I felt that the fact that Chris Martucci was direct  
14 report to Troy Bittner usurped my authority. And so, in a  
15 perfect world, I would not have named anyone separate from  
16 me as having anything to do with the beach club outside of  
17 the guest services manager, who didn't report to me  
18 anyway. But to have a subordinate directed by somebody  
19 and then I still had my responsibility to direct him, but  
20 I didn't have the true authority to direct him, so that  
21 concerned me.

22 MR. RICARD: At this point in the deposition,  
23 Plaintiff's Exhibit No. 8 to the deposition was entered.  
24 And if I can, I'll display it on the screen.

25 For the record, I'm displaying what's been marked as

1 Plaintiff's Exhibit No. 46.

2 BY MR. RICARD:

3 Q Can you see what I have displayed as what's been  
4 marked as Exhibit 8 for the deposition purposes [sic]?

5 A Can you make it a little larger?

6 Q Okay.

7 A Okay.

8 Q All right. Are you familiar with this email,  
9 Mr. Onken?

10 A Yes.

11 Q Do you recognize your signature block there?

12 A Yes.

13 Q And this is an email that you sent December 20th,  
14 2019; is that right?

15 A Yes.

16 Q Okay. The subject line: CLN. What does that mean?

17 A It was the -- that was the name of the resort. CLN  
18 stood for Carolina Pines.

19 Q Okay. It's like an abbreviation?

20 A Yeah.

21 Q We already spoke about this but Virgie, this is the  
22 licensing individual up at Sun Communities, Incorporated?

23 A Yes.

24 Q Okay. Troy Bittner is the general manager; correct?

25 A Correct.

1 Q And who is Nicole Lewis?

2 A The name did not come to me, but I saw it in another  
3 email. I think it was Virgie's assistant.

4 Q Okay. If you can, can you read this email real  
5 quick and let me know if this is in your line with your  
6 memory and what you just testified to regarding your  
7 conversation with Mr. Blust?

8 A It says, "Virgie, I spoke Mr. Paul Blust, the Zoning  
9 Administrator for the City of North Myrtle Beach, around  
10 the 1st of October in regards to our beach club property  
11 and its use for the preparation and sale of food and  
12 beverage to our patrons. Mr. Blust researched his  
13 departments of zoning details and contacted me to let me  
14 know that we are considered a cabana house, quote, under  
15 their regulations.

16 "He went on to tell me that, while cabana houses can  
17 allow consumption of food and beverage on the property,  
18 there is no allowance for the preparation of or sale of  
19 food or beverages to occupants. He told me that to do so  
20 would require a variance.

21 "He went on to say that a variance may very well be  
22 obtained but that, without one, any commercial preparation  
23 of food or beverage on the property would be disallowed  
24 under the existing zoning of the property.

25 City zoning offices can be reached at

1 (843) 280-5565. Please let me know if I can provide any  
2 additional information. Thanks."

3 Q Okay. So after reading this email, is this -- do  
4 you believe this is in line with what you just testified  
5 to regarding your conversation with Mr. Blust?

6 A Yes.

7 Q Okay. He said all this in person to you at the  
8 in-person meeting?

9 A At the in-person meeting, he was unsure what the  
10 details would be and that he believed that it was a  
11 restrictive classification, and he would have to look it  
12 and he would reply at a later date, either by phone call  
13 or email, I think.

14 That's what I prompted him to provide me a couple of  
15 weeks after personally meeting with him. And following  
16 that, he notified me in another email that said -- I don't  
17 think he used the word "variance" at that point. He said  
18 what the restrictions were.

19 Q Okay. And so, to be clear, you didn't ask him  
20 whether Carolina Pines could own the property, did you?

21 A Never.

22 Q Okay. What would you say?

23 A The -- initially he was -- he was aware in our  
24 conference room discussion that we owned the property and  
25 that we were using the property as an amenity for the

1 resort. That included a drop-off of guests interested in  
2 access to the ocean and use of the pool.

3 He absolutely -- I covered that, and he knew that we  
4 had it and we were using it for that. And I was there to  
5 ask him what, if any, restrictions were in place that were  
6 going to prohibit our licensing primarily for DHEC but for  
7 SLED as well.

8 I knew that SLED was going to require parking and  
9 seating -- covered seating for 40 guests but that DHEC was  
10 what SLED only deals with.

11 Their decision, once the DHEC license was in  
12 place -- they don't license any place for liquor sales  
13 unless there's a DHEC license. And a DHEC license has a  
14 specific line on the application that says what's the  
15 zoning and is it appropriate. So that's what I was going  
16 to talk to Mr. Blust about.

17 Q Okay. Setting aside what you contend Mr. Blust knew  
18 or didn't know -- I mean, you admit you were not inside  
19 his brain so you don't know what he was thinking, do you?

20 MR. TAMASITIS: Objection to the form. You can  
21 answer.

22 A It was clear to me that he was familiar with our  
23 ownership and use to that date, up to the time -- up to  
24 that time at the property. He knew that there were paid  
25 members for that property and that we were servicing both

1       them and guests via bus transport or van transport to the  
2       property.

3               I'm certain that I mentioned that as well, as the  
4       water slides and the pools and the picnic areas and the  
5       whatnots that we had at the Conway property, but -- and...

6       Q       Okay. But you didn't ask him if any of that was  
7       okay; right? You didn't ask him to look into whether that  
8       was approved or not. You asked him to look into whether  
9       food and beverage service was okay; is that fair to say?

10      A       That's correct.

11      Q       So, again, back to my question: You didn't ask him  
12      to look into whether Carolina Pines could use the property  
13      just generally. You only asked him specifically to opine  
14      on whether y'all could provide food and bar service;  
15      correct?

16      A       That's correct.

17      Q       Bear with me one moment.

18               MR. RICARD: Okay. And so, for the record, it was  
19      at this point in the deposition where the plaintiff marked  
20      for identification Exhibit No. 9. This corresponds to  
21      Plaintiff's Exhibit No. 45 for the purposes of trial.

22      BY MR. RICARD:

23      Q       I'm going to start from the bottom of this chain,  
24      Mr. Onken. So just to kind of tie into your earlier  
25      testimony, you mentioned that you met with Mr. Blust at

1 the end of that in-person meeting. Y'all indicated that  
2 there would be some type of follow-up. This first email  
3 in this chain appears to come from you on October 31st,  
4 2019, to Mr. Blust. Is this the follow-up communication  
5 that you were referring to earlier?

6 A Yes.

7 Q Okay. In this email, you say, "We spoke briefly  
8 last week regarding our intended use of the Carolina Beach  
9 Club." After reviewing that sentence, does this refresh  
10 your recollection as to when the conversation may have  
11 occurred? Was it in the last week of October or the first  
12 week of October, or do you not necessarily have a memory  
13 of either one?

14 A I think that he was -- in fact, I know that he --  
15 that, after the meeting, he said, "I will get back to  
16 you." And he said, "Let me know" -- and he let me know  
17 that he was going to go on vacation but that he would get  
18 back to me. And he had not gotten back to me, so that's  
19 why I prompted his response.

20 Q Okay. I don't think it's a major point here, but  
21 you testified that the conversation occurred the first  
22 week of October, but you know, just based off your  
23 representation here in this email, it says you spoke  
24 briefly last week, and the email is being sent on October  
25 31st.



1       A       Well, "last week" could have been Monday of the  
2       prior week, and this could have been on Friday. So it  
3       could have been two weeks earlier, but I -- I don't know.

4       Q       Okay. But, I mean, you would agree that, even at  
5       the longest extent, 14 days prior to October 31st would  
6       not be the first week of October; right?

7       A       Okay.

8               MR. TAMASITIS: Object to the form.

9       A       Yeah, I suppose I agree with that.

10      Q       Okay. And, again, I'm not trying to play "got you"  
11      here because it's not that big of a deal.

12      A       Sure.

13      Q       But just reviewing this email, can you recall  
14      whether it was the first week or sometime mid-October or  
15      sometime later in October when you met with Mr. Blust?

16               MR. TAMASITIS: Object to the form.

17      A       Yeah, I can't. That's four years ago. I can't  
18      remember exactly when it was.

19      Q       Okay. That's totally fine. That's fair.

20               Okay. So this third sentence here says, "You  
21      indicated you would contact me after your review and  
22      follow-up."

23               And the second sentence, "Again, my hope is to  
24      provide limited food preparation and bar service at the  
25      property requiring interior renovations."

1           So, again, you would agree that this email, you were  
2 not asking him to look into whether Carolina Pines can own  
3 the property, are you?

4       A       No.

5       Q       Okay. And you were not asking him to look into  
6 whether y'all can use the property generally? Again, this  
7 email is very specific as whether Carolina Pines can  
8 provide food preparation and bar service; is that right?

9           MR. TAMASITIS: Object to the form. You can answer.

10      A       That's correct.

11      Q       Okay. All right. So moving up on the next email in  
12 line here, this purports to be an email from Mr. Blust  
13 dated a few days later, November 5th, 2019, back to you.  
14 And he says as follows. You can read it to yourself  
15 there. Ultimately, he tells you, in that bottom  
16 paragraph, that the cabana house cannot be used for  
17 services such as food and beverage; right?

18      A       Correct.

19      Q       Okay. And he goes on to even specify that food and  
20 beverage cannot be sold or provided by someone else; is  
21 that right?

22      A       Yes.

23      Q       Do you believe that you or Carolina Pines was  
24 authorized to provide food and beverage service at the  
25 cabana house as long as it was not being sold?

1       A       No.

2       Q       Okay. Did you feel like, based off this email, that  
3       you or Carolina Pines could, as long as the food was, you  
4       know, quote/unquote, prepared off-site, that it could  
5       provide that food at the cabana house?

6       A       I do not believe that.

7       Q       Okay. So was it your belief that zero food and zero  
8       beverage could be provided by anybody employed with  
9       Carolina Pines at the cabana house?

10      A       That's true.

11      Q       Okay. All right. So then the final email at the  
12      top of this particular exhibit is from you, same day,  
13      November 5th, as when Mr. Blust had emailed you back.

14             Appears you -- excuse me. It appears you forward  
15      the email chain with Mr. Blust's message to Ms. Kirtley  
16      and Mr. Bittner; is that right?

17      A       Yes.

18      Q       Okay. And, just for the record, who is Ms. Kirtley,  
19      if we have not identified her yet?

20      A       She is the regional vice president.

21      Q       Okay. You don't recall Carolina Pines obtaining any  
22      business license or food and beverage license for the  
23      cabana house following these email exchanges that you had?

24      A       None that I'm aware of.

25      Q       Okay. And I believe you testified earlier that you

1 don't recall events specifically being held in 2020 at the  
2 cabana house?

3 MR. TAMASITIS: Object to form.

4 A I couldn't provide you with any dates, any clients,  
5 any details of any events, so no. I don't have any  
6 recollection of any events occurring there that I can  
7 review.

8 Q Okay. But you would have had to have coordinated  
9 with Mr. Martucci in 2020 for the provision or preparation  
10 of food and beverage for events that may have occurred at  
11 the cabana house in 2020; correct?

12 A Likely. He did the bulk of the ordering, as I  
13 recall, and I crossed the schedules, but I didn't do them  
14 for the kitchen, but I would have likely known about them.

15 Q Okay. If you knew any -- you knew that his position  
16 was to sell events and activities at the cabana house;  
17 right?

18 A Sure.

19 Q Did you ever tell him that, without a food and  
20 beverage license, that he couldn't provide a food and  
21 beverage service at the cabana house?

22 A I testified that my opinion of the situation was  
23 well known by everyone that you have discussed and that  
24 included Mr. Martucci.

25 Q Okay. And I just want to make sure it's clear for

1 the record. So you had a conversation with him where you  
2 told him that he should not be providing food and beverage  
3 service without a license at the cabana house?

4 MR. TAMASITIS: Object to the form. You can answer.

5 A I -- I don't think I ever said that with regard to  
6 an event, but I will -- I will testify that, yes, I told  
7 Mr. Martucci and anyone else who asked that we were not  
8 licensed to do -- to prepare and sell food at the cabana  
9 house.

10 Q Okay. Food and beverage?

11 A Correct.

12 Q Okay. How did you [sic] respond when you told him  
13 that?

14 A He probably -- he didn't -- he wasn't argumentative.  
15 He said, "Well, you know, okay." "Thanks for your  
16 opinion," in so many words. That's -- that's how he  
17 relayed my answer. It was not something that I dwelt on.  
18 I didn't repeat myself over and over again. I mean, once  
19 everybody knew what I felt, I didn't find the need to go  
20 to a hilltop and shout it out some more. It wasn't my  
21 concern. It wasn't part of my jurisdiction.

22 Q Okay. Did you express to Mr. Bittner your concern  
23 about being prohibited from providing food and beverage at  
24 the cabana house?

25 A Again, he was one of the people who knew that I had

1       communicated that we were not licensed to make those  
2       provisions there and that -- but I was -- so he knew how I  
3       felt as well.

4       Q       Okay. All right. We spoke earlier about the  
5       Christensen wedding in April of 2021. Do you remember  
6       that conversation earlier?

7       A       Yes. Yes, sir.

8       Q       All right. At that time, you knew that food and  
9       beverage could not be provided at the cabana house;  
10      correct?

11      A       Yes.

12      Q       Now, you testified that you were not there for the  
13      wedding itself but you did assist in that wedding;  
14      correct?

15      A       Yes.

16      Q       Okay. Explain to me why you did that when you knew  
17      that food and beverage could not be provided.

18              MR. TAMASITIS: Object to the form. You can answer.

19      A       I'm an employee. I do what I'm expected to do and  
20      then told to do, so...

21      Q       So, again, how long did you work at the Carolina  
22      Pines RV Resort?

23      A       From March of 2019 until my retirement in July of  
24      2021.

25              MR. RICARD: Bear with me one moment, Your Honor.

1 (Counsel confer off the record.)

2 MR. TAMASITIS: For the record, Your Honor, before  
3 we move on to the next piece, we move to strike the  
4 testimony as to the drinking without paying as improper  
5 character evidence and not relevant. This is page  
6 13/line 17 through page 15/line 17.

7 THE COURT: I understand.

8 MR. TAMASITIS: Thank you, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. TAMASITIS:

11 Q So, again, how long did you work at the Carolina  
12 Pines RV Resort?

13 A From March of 2019 until my retirement in July of  
14 2021.

15 Q What was your designated role at the resort?

16 A I reported to the general manager, and my role was  
17 to implement the construction and opening and operation of  
18 the food and beverage services, which included two kitchen  
19 facilities, two snack bars, a banquet room, a buffet,  
20 sit-down dining, and outdoor dining, pool services, and a  
21 bar.

22 Q How was the beach club connected to the Carolina  
23 Pines RV Resort?

24 A I believe it was simply owned by the company and  
25 then that's that only connection. There weren't any

1 shared licenses or anything. It was staffed by employees,  
2 but I think that's all I know about.

3 Q I believe you testified earlier that you classified  
4 it as an amenity to the resort?

5 A Yes. That was -- that's how it was marked and  
6 that's how it was referred to by the managers on staff,  
7 that it was something to market to guests who wanted to  
8 come and camp in the Myrtle Beach market. And there were  
9 some campgrounds that were fronted on the ocean, and  
10 without that ability, we would have been -- had the lesser  
11 position in terms of marketing to vacationers.

12 And so having the amenity of a private property with  
13 beach access, transportation, pool, air-conditioning, and  
14 so on, was something that even the other competition  
15 didn't offer.

16 MR. TAMASITIS: We'll pull up our Exhibit No. 7,  
17 which is Exhibit No. 9 in the deposition.

18 BY MR. TAMASITIS:

19 Q And I'm going to turn your attention to Exhibit  
20 No. 9, which we have up here on the screen. I know you  
21 already answered some questions about it, but I'm going to  
22 ask you a couple more.

23 The date on the email here is October 31st, 2019,  
24 and it's from you, Dennis Onken, to Paul Blust at the  
25 City; is that correct?



1       A       Correct.

2       Q       And, in the email, it discusses -- from you, it  
3       says, "Hi, Paul. We spoke briefly last week regarding our  
4       intended use of the Carolina Pines Beach Club at 1814  
5       NOB." Do you see that?

6       A       Yes.

7       Q       And the meeting -- the last week -- the meeting  
8       referred to in there, the last-week meeting, was that in  
9       person or over the phone?

10      A       That was in person.

11      Q       And where did you meet with Mr. Blust for that  
12      meeting?

13      A       In the conference room at the City offices in North  
14      Myrtle Beach.

15      Q       How was that meeting set up?

16      A       I approached the receptionist in the Zoning  
17      Department prior, and Mr. Blust was not -- either not on  
18      the property or not available, and she set up a time for  
19      me to return.

20      Q       And did you return?

21      A       Yes.

22      Q       Okay. And who else -- was there anyone else in the  
23      meeting with you and Mr. Blust?

24      A       No.

25      Q       Why were you planning to meet with Mr. Blust in

1 person?

2 A I wanted to find out if there were any specifics of  
3 the zoning ordinance that would prohibit us from  
4 renovating the property to provide food and beverage  
5 services.

6 Q And tell me generally what you two discussed.

7 A Well, we discussed the offerings of the resort that  
8 included the food and beverage that I just talked about  
9 and the 800 sites and the cabin rentals and the bus  
10 transportation to the beach and the paved sites and so on.  
11 And I let him know that he wanted -- that we wanted to do  
12 this food and beverage deal at the beach club, and we were  
13 [sic] going to be using anything prohibitive from our  
14 zoning that would cause us an issue.

15 Q Do you recall what you were wearing that day?

16 A My khaki shorts and a Carolina Pines golf shirt.

17 Q Did you hand anything to Mr. Blust to verify your  
18 identity when you met?

19 A I gave him my card.

20 Q That's your business card?

21 A That's correct.

22 Q Did the business card identify you as an employee of  
23 the Carolina Pines RV Resort?

24 A Yes.

25 Q What did Mr. Blust relay to you about the zoning

1 restrictions with respect to food and beverage during that  
2 conversation?

3 A He let me know that he thought it was a complicated  
4 ordinance; that there were a number of -- there were a  
5 number of properties like that along Ocean Boulevard and  
6 that they were becoming a bit more prevalent and that he  
7 could not approve any food and beverage without  
8 researching the specifics.

9 Q Did you make it clear at that meeting that you were  
10 representing the RV resort?

11 A Absolutely.

12 Q Okay. In your opinion, did Mr. Blust recognize that  
13 the beach club was intended to be used by guests of the RV  
14 resort based on your conversation?

15 MR. RICARD: Object to form.

16 A Certainly.

17 Q Why do you think that?

18 MR. RICARD: Object to form.

19 Q Why do you think that?

20 MR. RICARD: Same objection.

21 A I -- they -- I -- it was clear that I -- that we own  
22 the property, yes, I know that you own the property. And  
23 it's a beach house with a beach access and we are going to  
24 bring our people over there on buses. And I'm sure  
25 that -- I'm quite certain that he understood that. And we

1 didn't discuss any restrictions to our existing use. We  
2 only discussed -- talked about renovating it for food and  
3 beverage and licensing it through DHEC.

4 Q During your conversations with Mr. Blust, did you  
5 ever discuss whether or not the RV resort could use the  
6 beach club?

7 A Never. We didn't.

8 Q Did you ever discuss with Mr. Blust who owned the  
9 beach club?

10 A No, other than we.

11 Q By "we" --

12 A We being Sun Communities.

13 Q Did Mr. Blust ever explain to you that the ownership  
14 and use of the beach club was a violation of the zoning  
15 ordinance?

16 A No.

17 MR. TAMASITIS: Rhett, can you scroll up to the next  
18 email?

19 Q Mr. Blust -- that's a mistake -- you answered  
20 questions about this email before -- sorry.

21 Mr. Blust [sic], you answered questions about this  
22 email before, but this email is dated November 5th, 2019,  
23 and it's from Mr. Blust to you. Do you recall receiving  
24 this email?

25 A Yes.

1 Q And what was your understanding of Mr. Blust's  
2 guidance set forth in this email for the beach club based  
3 on the context of your previous meeting?

4 A It was essentially to let me know that the cabana  
5 house would not be used or that it doesn't state that it  
6 could be used for providing food and beverage and that  
7 guests that show up there can bring their own but we can't  
8 sell it or provide it. And in order to do that, we'd have  
9 to get an amendment or a variance.

10 Q And in that email, he appears to quote a section of  
11 the zoning ordinance. It says the definition in Section  
12 -- is Section 23-2 states -- and it goes on to speak about  
13 the definition of beach club. Do you see that?

14 A Yes, sir.

15 Q Mr. Blust never raised any concerns with you about  
16 the ownership and use of the beach club by Carolina Pines  
17 RV Resort?

18 A No, never.

19 Q Did you have any further communications with  
20 Mr. Blust after this email correspondence?

21 A No.

22 MR. RICARD: The only thing that we would add, Your  
23 Honor, is an objection just based off of some of the  
24 testimony you heard regarding Mr. Onken's thoughts as to  
25 what was going through Mr. Blust's head and what he was

1 aware of and that sort of thing. So the objection would  
2 be speculation. We just want to preserve that for the  
3 record.

4 THE COURT: Understood.

5 MR. RICARD: Thank you, Your Honor.

6 THE COURT: Do y'all want to take a short lunch  
7 break and come back at 2:00 or do you want to keep going?

8 MS. SHOUN: May I beg the Court's indulgence, Your  
9 Honor? I just want to check with the witness that we have  
10 remotely, who I think will be incredibly brief.

11 THE COURT: I'll do whatever you want to do.

12 MS. SHOUN: Okay. Thank you.

13 (Pause in the proceedings.)

14 MS. SHOUN: Maybe, Your Honor, just a short restroom  
15 break while we're waiting to get in touch with her, if  
16 that suits Your Honor and opposing counsel.

17 THE COURT: That sounds good. 15 minutes.

18 MS. SHOUN: Thank you.

19 (A recess was taken from 1:01 p.m. to 1:19 p.m.)

20 THE COURT: Call your next witness.

21 MS. SHOUN: Your Honor, in advance, we're going to  
22 have a little bit of feedback here, so I apologize. I  
23 also apologize; I'm told I have to sit down to do this,  
24 and I'm very uncomfortable doing that.

25 Your Honor, the plaintiff would call Emily Alshire

1 as the next witness. And we'd like to swear her in  
2 remotely. No? Okay.

3 COURT REPORTER: No. This feedback, I don't...

4 THE COURT: You can't understand it. That's hard.

5 MR. WILLIS: Let's call timeout for a second and see  
6 if we can get rid of the feedback.

7 (Pause in the proceedings for technical  
8 difficulties.)

9 MR. RICARD: Your Honor, I believe if she just goes  
10 ahead and swears her in, the microphone should pick her  
11 up.

12 THE COURT: All right. Go ahead and give it a try.

13 THE CLERK: Will you raise your right hand, please?

14 MR. WILLIS: Your Honor, I'm a notary. Can I swear  
15 the witness?

16 THE COURT: Go ahead.

17 MR. WILLIS: Thank you.

18 EMILY ALSHIRE,

19 after having been duly sworn, was examined and  
20 testified to as follows:

21 MR. WILLIS: Thank you. You may proceed.

22 DIRECT EXAMINATION

23 BY MS. SHOUN:

24 Q Thank you, Ms. Alshire. Thank you, too, for your  
25 patience while we get this set up. We appreciate that.

1     **A**     No problem.

2     **Q**     Can you state your full name for us, please.

3     **A**     Emily Dawn Alshire.

4     **Q**     And where are you located right now, Ms. Alshire?

5     **A**     In my home office.

6     **Q**     And that's where?

7     **A**     Ohio.

8     **Q**     Ohio. Okay. Thank you.

9             Are you familiar with the Sea Cloisters, a project  
10    in the North Myrtle Beach area?

11    **A**     I am.

12    **Q**     And can you tell us when and how you first became  
13    familiar with Sea Cloisters?

14    **A**     Yes. 2005, I think my husband and I started going  
15    there on vacation.

16    **Q**     And, in 2005, would you generally rent a unit at Sea  
17    Cloisters?

18    **A**     We would, yes.

19    **Q**     Okay. And how often would you go?

20    **A**     Every summer, with the exception of a few summers.

21    **Q**     Okay. And, generally speaking, how long would you  
22    stay on these visits?

23    **A**     A week.

24    **Q**     All right. And then can you tell us, was there one  
25    or more things that kept you going back to the North



1 Myrtle Beach area?

2 A Yes.

3 Q And what was that?

4 A Just the family feel of it, the quiet nature of it.  
5 Really felt safe. Easy access to the beach. It wasn't a  
6 high-rise, with only three floors. It was just very nice.

7 Q So the family feel, the residential feel of it, does  
8 that apply to the North Myrtle Beach and to the Sea  
9 Cloisters as well?

10 A Yes, both.

11 Q All right. Thank you.

12 Did you eventually come to own a unit at Sea  
13 Cloisters?

14 A We did. We purchased in October of 2020.

15 Q And after purchasing in 2020, did you immediately  
16 thereafter begin to use the Sea Cloisters unit?

17 A Yes. Much more frequently than just once a year.

18 Q And was it during 2020 that you started that use?

19 A Yes.

20 Q Throughout your years of going to North Myrtle Beach  
21 and specifically Sea Cloisters, are you familiar with the  
22 property that lies between the two Sea Cloisters I and Sea  
23 Cloisters II that's known as the cabana house?

24 A We are, yes.

25 Q And can you describe generally when and how you

1 became familiar with that property?

2 A I mean, we noticed it when we started going there  
3 each summer. It was -- there was never any kind of  
4 questionable behavior in the beginning.

5 Q Okay. Did that change?

6 A It did.

7 Q And can you tell us roughly when that began to  
8 change?

9 A Definitely started noticing it in 2021.

10 Q That was after you had purchased your unit and you  
11 were visiting more frequently?

12 A Correct.

13 Q Okay. Let me back up just briefly.

14 Before you purchased your unit, were you aware of  
15 the permitted uses or any restrictions, if you will, on  
16 the cabana house?

17 A Not in detail in depth, no. We just knew that a  
18 neighborhood used it pretty infrequently. I can't recall  
19 the neighborhood name, but there -- the owners in that  
20 neighborhood and their families were able to come and  
21 enjoy the property.

22 Q And then you were using it in 2020. That was the --  
23 part of that was the year of COVID. How frequently would  
24 you and your family visit during 2020?

25 A Well, we didn't own until October 30th of 2020. So

1 between November and December of that year, we came down  
2 just a few times. We were in the process of renovating it  
3 as well, so...

4 Q Happy ownership anniversary as of yesterday, I  
5 guess.

6 A Oh, thank you.

7 Q When you began to come more frequently as we move  
8 into 2021, you indicated there were some changes. Can you  
9 describe what those changes were that you observed?

10 A Yes. 2021, I believe, was when they installed some  
11 large speakers on the second floor level and were using  
12 those. There was some events that were happening on the  
13 property, which my understanding is that they weren't  
14 supposed to be doing that.

15 And then there was a wedding in April, and we  
16 were -- it was very loud, lots of people, very late. And  
17 it seemed like a lot of alcohol use.

18 They also installed very bright motion lights by the  
19 pool area, and I believe they upgraded them in maybe  
20 October of '22, and they are just very -- kind of a  
21 nuisance because they're motion detecting but they're very  
22 sensitive to any kind of motion. So when the wind blows,  
23 it seems, they come on and stay on for a long period of  
24 time.

25 There's -- it was just -- they were parking in our

1 lots when we were down there. I have seen people climb  
2 the fences. I can't say whether or not those are people  
3 that were using the property or if they were just, you  
4 know, people that were trying to trespass.

5 There was an assault that happened. I didn't  
6 witness but I know it was with somebody in our complex and  
7 somebody next door in the cabana -- somebody that was  
8 using it.

9 So a little bit of a safety issue, I feel, and we  
10 have children that I don't feel like we should let them  
11 out by themselves, let the dogs out, things like that.

12 Q You mentioned alcohol use. Are you aware whether  
13 there's a license allowing either the sale or the  
14 consumption of alcohol on the premises of the cabana  
15 house?

16 A I know they applied for one. I don't know where  
17 that landed.

18 Q Okay. And you mentioned people parking in your  
19 lots. Were you able to determine with any -- by any  
20 observation whether it appeared as though people parking  
21 in your lots may have been going to or from the cabana  
22 house?

23 A We did see a couple of people park in the lot and  
24 walk across where the bushes are into the parking lot.

25 Q And the people who would cross your property, again,

1 did you ever observe any of those individuals going to or  
2 from the cabana house?

3 A Yes.

4 Q Are you aware that, in January of 2022, there was a  
5 consent order that addressed the use of the cabana house  
6 by the new owner? And by "new," I mean the owner that  
7 took title to it in 2019. Are you aware of that order?

8 A Yes.

9 Q So beginning in January of 2022, did you observe any  
10 differences in the use of the cabana house?

11 A We definitely saw people in the pool.

12 Q Even after that order?

13 A Yes.

14 Q Did you see any events after January 2022?

15 A Organized events? No. I believe the wedding was in  
16 2021.

17 Q Okay. All right. Generally speaking, from your  
18 unit in Sea Cloisters, can you observe the pool area of  
19 the cabana house?

20 A Yes.

21 Q Okay. All right. And it's based on that that you  
22 indicated that people were definitely using the pool after  
23 January of 2022?

24 A Yes.

25 Q As the owner of a Sea Cloisters unit, do you feel

1 that the changes in use that you observed in, to some  
2 extent, 2020 and then again in 2021, do you feel like  
3 those particular changes, if they were allowed to resume,  
4 would affect the marketability of your property?

5 A Yes.

6 Q Do you believe that such use of the cabana house as  
7 you experienced it prior -- let me qualify that.

8 Do you feel like your observation of the uses of the  
9 cabana house between 2019 and January 2022, do you believe  
10 that those uses adjacent to the Sea Cloisters unit would  
11 detrimentally impact the property value of your property  
12 at Sea Cloisters?

13 A Yes, I do.

14 Q Okay. I don't think I have any further questions.  
15 Opposing counsel may or the Court may. I'm going to  
16 switch seats.

17 CROSS-EXAMINATION

18 BY MR. WILLIS:

19 Q Pronounce your name for me. I don't want to  
20 mispronounce it.

21 A Emily Alshire.

22 Q I get Emily. It's Alshire?

23 A Mm-hmm, yes.

24 Q My name is Dick Willis, Ms. Alshire. I represent  
25 Sun, the current owner of the cabana house, Sun

1 Communities.

2 When you bought your unit at Sea Cloisters, when was  
3 that?

4 A October 2020.

5 Q Thank you.

6 And it's Sea Cloisters I or II?

7 A One.

8 Q After you became an owner, did you ever rent the  
9 property out?

10 A We did not.

11 Q Did you ever loan it out to friends, rent it to  
12 friends on an informal basis?

13 A We did not.

14 Q So it was solely for the personal use of you and  
15 your family; is that fair to say?

16 A Yes. We intended to rent it but we haven't yet  
17 because we're not at that point.

18 Q That's fine. I just was curious of whether you have  
19 done that yet.

20 And so how much time out of the year do you spend  
21 down there currently?

22 A I would say ten weeks.

23 Q Primarily during the summer or do you space it out?

24 A No, we space it out.

25 Q Now, the Sea Cloisters developments, Sea Cloisters I

1     itself, it's kind of a silly question but it's not a  
2     single-family residence, is it?

3     A     I mean, I don't know. I don't know how many people  
4     live there full-time or not.

5     Q     And I'm not asking you that. I'm just saying it's  
6     not a single-family residence like your home in -- where  
7     do you live? In Ohio, I believe?

8     A     Mm-hmm.

9     Q     It's a multi-family condominium development;  
10    correct?

11    A     Yes, yes.

12    Q     And it's across the street from other large  
13    multi-family developments like the Tilghman Golf and Beach  
14    Club. Are you familiar with that?

15    A     I am.

16    Q     You said you're worried about letting your kids and  
17    your dogs go out. The Sea Cloisters is on a busy street;  
18    is it not?

19    A     It is.

20    Q     Yeah. Ocean Boulevard in North Myrtle Beach,  
21    probably the busiest street in North Myrtle Beach;  
22    correct?

23    A     I don't know.

24    Q     Well, it's a busy street; right?

25    A     It is a busy street.



1 Q You'd ordinarily be concerned about letting dogs out  
2 just because of the busyness of the street; correct?

3 A No, because they don't go out that far.

4 Q Well, I would, if it was my dog, but okay. I'll  
5 accept your answer.

6 You say you recall it being operated for a local  
7 development. You can't remember the name of it; correct?

8 A Correct.

9 Q Does Seabrook come to mind? Does that help you  
10 refresh your recollection?

11 A Yes, that sounds familiar.

12 Q Do you recall it changing from that to a private  
13 beach club in 2017 called the North Myrtle Beach Ocean  
14 Club?

15 A I don't recall.

16 Q Do you recall ever seeing any signs that said,  
17 "Ocean Club, Private Beach Club, Members Only"?

18 A Yes, I do recall seeing that sign.

19 Q You say you saw some people in the pool after  
20 January of 2022; correct?

21 A Correct.

22 Q Do you know whether these people were RV guests or  
23 members of the beach club?

24 A I do not know that.

25 Q Or trespassers, for that matter?

1 Do you know one way or the other?

2 A I do not know that.

3 Q And how many times did you see people in the pool?

4 A Well, there was at least -- there was people in  
5 every time we were down there, so...

6 I mean, if we went ten times then ten times.

7 Q Did you say anything about it to anybody?

8 A I mentioned it to our HOA president, yes.

9 Q That's all I have. Thank you, ma'am.

10 MS. SHOUN: I have one quick follow-up, Ms. Alshire.

11 REDIRECT EXAMINATION

12 BY MS. SHOUN:

13 Q Mr. Willis asked you if you noticed a change in  
14 signs in around 2017. Do you recall that question?

15 A I do.

16 Q Okay. After the change in that sign between  
17 whenever Mr. Willis represented that took place -- I have  
18 no reason to question that -- between that time in 2017  
19 and then the latter part of 2019, did you notice any  
20 use -- difference in the use of the cabana house just  
21 because the sign had changed?

22 A No, I did not.

23 MS. SHOUN: I don't have anything else.

24 MR. WILLIS: Thank you, ma'am.

25 MS. SHOUN: Thank you so much. We really appreciate

1 your patience.

2 THE WITNESS: No problem. Thank you. Bye.

3 MS. SHOUN: Bye.

4 (Pause in the proceedings.)

5 MR. RICARD: Your Honor, I suppose we wait for her  
6 to get back in, but now probably would be a good time for  
7 a lunch break.

8 THE COURT: Do y'all want to take a lunch break  
9 until 2:45?

10 MR. WILLIS: Your Honor, Ms. Shoun and I request  
11 that we try the entire case from back there.

12 [Courtroom laughter.]

13 THE COURT: All right. We'll start back at 2:45.

14 (A lunch recess was taken from 1:43 to 2:47 p.m.)

15 THE COURT: Call your next witness.

16 MS. SHOUN: If it please the Court, the plaintiff  
17 calls Christopher Martucci.

18 THE CLERK: Raise your right hand and place your  
19 left hand on the Bible.

20 CHRISTOPHER MARTUCCI,

21 after having been duly sworn, was examined and  
22 testified to as follows:

23 THE CLERK: You may be seated. If you will state  
24 your name for the Court, please.

25 THE WITNESS: Christopher Martucci, M-a-r-t-u-c-c-i.

## DIRECT EXAMINATION

BY MS. SHOUN:

Q Good afternoon, Mr. Martucci.

A Hi.

Q A little bit about your background. How are you currently employed?

A I own -- I buy and sell bagel stores. I just sold my last store. I'm working for a friend in a butcher shop, and I'm opening another store.

Q Before that, where were you employed?

A Before that, I was at Carolina Pines.

Q Okay. And you went to work for Carolina Pines in roughly 2018; is that correct?

A It's either 2018 or early 2019. I'm just not sure of the actual dates.

Q Okay.

A It's right around there.

Q All right. You were the food and beverage -- Assistant Manager of Food and Beverage for the beach club; is that right?

A Actually, I was Assistant Food and Beverage Manager for the park.

Q For the RV park?

A For the RV park.

Q Okay. And you were present in the courtroom when

1 Mr. Onken's testimony was presented; correct?

2 A Yes, I was.

3 Q Okay. And you left Carolina Pines in 2020; is that  
4 correct?

5 A Well, late 2020, early 2021.

6 Q In your brief stay at Carolina Pines, you were  
7 familiar with what we've referred to as the cabana house?

8 A Yes, ma'am.

9 Q And would you agree with me when I say the cabana  
10 house is the property that sits between Sea Cloisters I  
11 and Sea Cloisters II?

12 A Yes.

13 Q In North Myrtle Beach?

14 A Yes.

15 Q And you got your job at Carolina Pines through  
16 Dennis Onken; correct?

17 A I had known Dennis Onken, and he told me what they  
18 were doing and asked me to apply.

19 Q Okay. Is it fair to say that Dennis Onken was the  
20 reason you went to Carolina Pines and also the reason you  
21 left Carolina Pines?

22 A Pretty much, yes.

23 Q Okay. Sun did not own the cabana house at the time  
24 you originally started working there; correct?

25 A I think they did own the beach club or -- when I

1 started there. They already had the property.

2 Q Okay. Did you have any participation in that  
3 acquisition?

4 A No, not at all.

5 Q All right. Do you recall when Sun started using the  
6 cabana house?

7 A I believe as soon as the park opened.

8 Q You heard Mr. Onken's testimony that the first full  
9 season was 2020. Do you agree with that?

10 A The first full season? I guess that's when it  
11 happened. As soon as the park opened for people, the  
12 cabana house opened.

13 Q You were the Assistant Manager for Food and Bev- --  
14 of the resort but you ended up spending a significant  
15 amount of time at the cabana house; right?

16 A A couple of weeks after I was employed there, Troy  
17 Bittner asked me if I would oversee -- or he had projects  
18 or things to do at the beach club and if would do them if  
19 he asked me.

20 Q And when you said "beach club," we're talking about  
21 the same property as the cabana house?

22 A Yes, we are.

23 Q Okay. You were responsible for some on-site work at  
24 the cabana house such as the pool cleaning; right?

25 A Yes, ma'am.

1 Q Okay. And during your work there, you had occasion  
2 to talk with different folks at both Sea Cloisters I and  
3 II; correct?

4 A Yes.

5 Q And those people would include Mr. Shortle, whom you  
6 see in the courtroom today?

7 A Jim, yes.

8 Q Yeah, Jim.

9 And you had a number of occasions to speak with  
10 Mr. Shortle; correct?

11 A Yes, I have.

12 Q And you have even kept in contact with Mr. Shortle,  
13 either directly or indirectly, since you left Carolina  
14 Pines?

15 A Yes.

16 Q All right. Now, let's go back to the cabana house.  
17 Do you remember receiving an email from Dennis Onken under  
18 the cover of which he sent to you a proposed business plan  
19 for the beach house known as the cabana house?

20 A I don't.

21 Q Okay. We're going to show you a copy what's been  
22 marked as Plaintiff's Exhibit 38. You can look on the  
23 screen there. Do you recognize that email?

24 A I don't see the attachment.

25 Q Beg your indulgence one moment. We'll give you a

1 hard copy of it.

2 Actually, it should be in the notebook up there.

3 A Yes, I see it now.

4 Q Okay. You don't recognize that, Mr. Martucci?

5 A I don't really recognize it, but it's not to say  
6 that I didn't see it at one point when I first started.

7 Q Okay. When you were employed at Carolina Pines, was  
8 your email address CMartucci@SunCommunities.com?

9 A Yes.

10 Q Do you remember receiving a proposed business plan  
11 for Mr. Onken?

12 A I don't, but I could have.

13 Q You don't have any reason to doubt that you received  
14 this; correct?

15 A No, I don't.

16 Q Okay. Do you have any question that you conducted  
17 the business that you conducted at the cabana house  
18 pursuant to a business plan?

19 A I'm sorry; I don't follow.

20 Q Did you do any of the activities to implement a  
21 proposed business plan, such as the one attached to  
22 Exhibit 38, while you were at the cabana house?

23 A I ran events at the club.

24 Q Okay.

25 A I did events. I did catering. And I cleaned the



1 facility and managed, basically, the property itself of  
2 that. I don't see where all that's in there, so...

3 Q If you look on the lower right hand of the page,  
4 it's Sun\_03459.

5 A Yes, I see that. Okay.

6 Q You have no recollection of that?

7 A No.

8 Q Okay. Do you recall Mr. Onken talking about wanting  
9 to make the cabana house a profitable venture?

10 A Yes. I believe we talked about that.

11 Q Did you do what you could do to implement that goal?

12 A Yes, I did.

13 Q Do you recall Mr. Onken or anybody else to whom  
14 perhaps he reported discussing that -- if this was a  
15 revenue source?

16 A Yes.

17 Q "This" being the beach house or the cabana house.

18 A We talked about putting in an underground kitchen or  
19 bar or concession stand facility so it could make money  
20 eventually but also to give other things to the guests.

21 Q Okay. So events for food -- pursuant to which food  
22 and beverage would be sold and/or provided to guests;  
23 correct?

24 A Yes.

25 Q Back to this email, Mr. Martucci, did you correspond

1 with Mr. Onken and others frequently via email while you  
2 were employed by Carolina Pines?

3 A Yes.

4 Q Did you correspond with him frequently by text  
5 message while you were employed at Carolina Pines?

6 A You know, we had texted on certain occasions.

7 Q On occasion?

8 A On occasions. We texted back and forth.

9 Q Okay. Have you produced any emails pursuant to any  
10 requests in this case?

11 A I didn't have any after I left.

12 Q Were you asked to produce any?

13 A Yes.

14 Q By whom?

15 A Somebody subpoenaed me for any documentation I had,  
16 any emails or any texts.

17 Q Prior to that, did anybody from Sun ask you if you  
18 had any emails?

19 A Prior to that? After I left Sun?

20 Q Yes, sir.

21 A No.

22 Q Okay. What about text messages?

23 A No.

24 Q Nobody ever asked you for any text messages?

25 A No, they did not.

1 Q Okay. And after you left, you've had different  
2 conversations with people who were still with Sun;  
3 correct?

4 A Not on any kind of business level. Just as a  
5 friend. I still had one or two people I knew that worked  
6 there.

7 Q You've had discussions with Mindy Kirtley since you  
8 left; right?

9 A Mindy Kirtley called me about two weeks before I got  
10 notified of the lawsuit regarding -- we did a project for  
11 a parking lot redo at the beach club so the shuttles could  
12 enter, and she had asked me who I worked with at the beach  
13 club. And I tried to find out the person's name that I  
14 dealt it.

15 Q Did Ms. Kirtley ask you at that time to gather up  
16 any text messages that you had?

17 A No, she did not.

18 Q Would you agree that Ms. Kirtley was also pretty  
19 excited about this cabana house/beach club?

20 A Sure. I'd say so, yeah.

21 Q She really wanted to transform it into something  
22 profitable; correct?

23 A Yes.

24 Q Okay. If you'll go back to the business plan,  
25 Mr. Martucci, which starts at Sun\_03459. And you'll look

1 at page 3 of that.

2 A In the book or the screen?

3 Q Whatever is easier for you, sir.

4 A Okay.

5 Q And would you agree with me that this starts out by  
6 indicating, under the introduction, "The club enhances  
7 transient occupancy length of stay and the perception of  
8 value among our target markets"?

9 A I don't have that page.

10 Q Sun\_3460.

11 A Okay. Okay. I see it.

12 Q And you agree that was the goal of Sun?

13 A I believe it was, yes.

14 Q Okay. And then the next paragraph refers to a  
15 clubhouse lounge, does it not, in the first sentence?

16 A Yes.

17 Q Okay. And it also refers to eight parking spaces;  
18 is that correct?

19 A Yes.

20 Q Now, you mentioned earlier something about design a  
21 plan for the parking lot.

22 A Yes.

23 Q At the time you were there, even at the time you  
24 left, there were only eight parking spaces for the cabana  
25 house; correct?

1       A       That's correct.

2       Q       And the proposed designed -- I mean, these -- only  
3       eight vehicles could fit in there; right?

4       A       Correct.

5       Q       They couldn't get through the turn gate, could they?  
6       I mean, once it was full, it was full. Eight vehicles was  
7       all that parking lot was going to hold?

8       A       Correct.

9       Q       Okay. Do you know where the other people parked?

10      A       They didn't allow parking there.

11      Q       Where did they allow it?

12      A       They used the shuttles. They encouraged people to  
13      use beach access.

14      Q       What about the people who didn't use the shuttle?

15      A       They encouraged them to use beach access parking.  
16      Along Ocean Drive, there's beach access parking.

17      Q       Did Sun do anything to ensure that the people coming  
18      from the RV resort to the cabana house did not park on  
19      private property?

20      A       No, but they did instruct them where to park in a  
21      pamphlet.

22      Q       Okay. Back to the business plans, about two-thirds  
23      of the way down the page, let's look at projected sources  
24      of potential revenue. Do you see that?

25      A       Yes, I do.

1 Q Okay. And that starts with food, beverage, and  
2 alcohol sales; does it not?

3 A Yes, it does.

4 Q Okay. And then we also have rental fees for renting  
5 beach chairs, umbrellas, and water sport items; right?

6 A Yes.

7 Q And then more food, beverage, and alcohol associated  
8 with preplanned events through the resort activity  
9 department; correct?

10 A Correct.

11 Q Okay. Now, Mr. Martucci, was it your job to secure  
12 the requisite business license for the cabana house?

13 A No, it was not.

14 Q Did the cabana house have a business license to do  
15 all these commercial activities?

16 A That was not my job. They just asked me to run  
17 events and book them. They didn't ask me to get any  
18 permits or anything for them.

19 Q Yes, sir. Do you know if they had a business  
20 license?

21 A I assume they -- I don't know. I thought they did.

22 Q You buy and sell restaurants; correct?

23 A Yes, I do.

24 Q To have a business license, do you have to display  
25 it on the premises?

1     **A**     In certain states, yes.

2     **Q**     In South Carolina?

3     **A**     South Carolina, you have to display it.

4     **Q**     Was it ever displayed in the Cabana House?

5     **A**     I did not notice if it was.

6     **Q**     You were there five days a week; correct?

7     **A**     Yeah.

8     **Q**     Okay. What about alcohol license, Mr. Martucci?

9     **A**     Don't know. Again, I wasn't in charge of that.

10    **Q**     Do you have to have something displayed if you have  
11    an alcohol license?

12    **A**     I believe you do, yes.

13    **Q**     Did you see it at the cabana house?

14    **A**     I did not, no.

15    **Q**     Okay. Now, if you'll look over a couple of pages  
16    further in the business plan, would you agree with me that  
17    it was envisioned there would actually be a cook and a  
18    bartender on-site?

19    **A**     That's what Dennis had talked about, yes.

20    **Q**     Okay. And there was projections based on an average  
21    of at least 600 guests per week; correct?

22    **A**     Correct.

23    **Q**     Okay. And then, if you will, Mr. Martucci, look at  
24    the last page of the business plan, which I think you will  
25    agree with me says in the second sentence "without a

1 feasible beach component, the resort will face critical  
2 disadvantages and competition in market share among a  
3 large demographic of the tourist population." Do you see  
4 that?

5 A Yes.

6 Q Okay. And that, again, was the goal of Sun, wasn't  
7 it?

8 A Yes, it was.

9 Q It wanted an advantageous position as far as  
10 competition, didn't it?

11 A They wanted an amenity there also for the guests.

12 Q Yes, sir. My question: Did it want a fair -- what  
13 it felt was a competitive position as to beachfront?

14 A Sure.

15 Q Okay. Mr. Martucci, while you were there, were  
16 there vending machines on the property?

17 A Yes, there were.

18 Q Okay. Were those licensed?

19 A I don't know if you needed one, to have a vending  
20 machine.

21 Q Who authorized those there?

22 A Troy Bittner.

23 Q Did anybody with the City do that?

24 A Not that I'm aware of, no.

25 Q In the catering events that you referred to before,



1     you supervised those, didn't you?

2     A     Yes, I did.

3     Q     And Carolina Pines charged money for those events,  
4     didn't it?

5     A     Yes, they did.

6     Q     And that included the sale of food and alcoholic  
7     beverages?

8     A     Yes, it did.

9     Q     In fact, on its website, Carolina Pines advertised  
10    the cabana house as its base for, for instance,  
11    destination weddings?

12    A     Yes.

13    Q     And there were weddings indeed held there; were  
14    there not?

15    A     Yes, there were.

16    Q     And how many of those do you recall, Mr. Martucci?

17    A     I recall three of them while I was there.

18    Q     Okay. And in all three of those, would you say  
19    there were probably somewhere between 50 to 75 people in  
20    attendance?

21    A     Around 50ish, yeah.

22    Q     Still the same eight parking spots?

23    A     Yes, they were, but they were instructed not to park  
24    there.

25    Q     One of those events had a one-man band; is that

1 correct?

2 A Yes.

3 Q Another of the events had a DJ; correct?

4 A Yes.

5 Q And alcohol was served at those weddings; correct?

6 A Yes.

7 Q All three of them?

8 A I believe so, yes.

9 Q You were, in fact, instructed to, quote, "go after  
10 weddings," weren't you, Mr. Martucci?

11 A Yes.

12 Q And a part of the weddings, again, you were serving  
13 alcohol?

14 A Yes.

15 Q You are familiar with -- you have already testified  
16 you're familiar with the property, where it's located  
17 between the two Sea Cloisters projects; correct?

18 A Yes.

19 Q You're also aware there's a beach access very near  
20 the Sea Cloisters property; right?

21 A Yes.

22 Q It's a public access?

23 A Yes.

24 Q And there's a public parking lot there; correct?

25 A Yes.

1 Q During your tenure there, you, in fact, had a number  
2 of discussions with Mr. Shortle about people from the RV  
3 resort parking on Sea Cloisters property; right?

4 A Yes.

5 Q And during those discussions with Mr. Shortle, you  
6 had actually said to him that you knew that the cabana  
7 house wasn't allowed to have a snack bar, didn't you?

8 A I said at the time it wasn't one there probably, so  
9 I figured because they were going through the process.

10 Q Had they completed the process?

11 A I don't know. I'm not employed there anymore.

12 Q Was it completed by the time you left there?

13 A No.

14 Q And you also said to Mr. Shortle you knew that they  
15 weren't allowed to have a tiki bar there; correct too?

16 A Yeah, but they didn't haven't a tiki bar when I was  
17 there.

18 Q And you told Mr. Shortle before you left the employ  
19 of Carolina Pines that, with its expansions at the RV  
20 park, it had already outgrown any reasonable capacity for  
21 use at the cabana house, didn't you?

22 A I don't know if that's what I said, but it was  
23 growing fast. There were people coming.

24 Q Okay. Now, Mr. Martucci, you heard the testimony of  
25 Mr. Onken, and Mr. Onken said he was an employee, he

1 basically did what he was told; right?

2 A True.

3 Q And you, too, were an employee and basically did  
4 what you were told to do; correct?

5 A Yeah.

6 Q For the most part?

7 Now, and you were not asked to produce -- you were  
8 not asked if you had personal possession of any text  
9 messages by anybody from Carolina Pines; right?

10 A No, I don't believe nobody contacted me about any  
11 messages.

12 Q Or emails; right?

13 A Or emails.

14 Q Let me show you what's marked as Exhibit 51. Just  
15 let me know when it's on the screen and you see it,  
16 Mr. Martucci.

17 A Yes, I do.

18 Q And can you explain for us that that email was sent  
19 on what date?

20 A It was sent on the 12th, 2023. 1/12.

21 Q And it's sent from what email address?

22 A From mine.

23 Q From CMartucci at --

24 A Yes.

25 Q Okay. Did you send it?

1       A       I don't think I did.

2       Q       You weren't employed there; right?

3       A       I wasn't employed there.

4       Q       Okay. Thanks. That's all I have.

5               THE COURT: Cross?

6               MR. TAMASITIS: Briefly, Your Honor.

7                               CROSS-EXAMINATION

8       BY MR. TAMASITIS:

9       Q       Mr. Martucci, how are you?

10      A       Very good, sir. Thank you.

11      Q       I think you testified to this earlier, but when did  
12      the beach club start accepting guests from Carolina Pines?

13      A       When Carolina Pines opened.

14      Q       Do you know approximately when that was?

15      A       It was probably about three or four months after  
16      the -- I was employed there. So I guess summer of 2020.

17      Q       During that time from the RV resort opening until  
18      the end of your employment, did you have any interaction  
19      with the City officials regarding events at the beach  
20      club?

21      A       About events?

22      Q       Yeah.

23      A       No, nothing.

24      Q       Could you characterize your relationship during your  
25      employment with Carolina Pines, your relationship with

1 Mr. Shortle?

2 A Jim?

3 Q Yes.

4 A It was very good. We worked together very well. If  
5 it was a small issue or something from a guest or  
6 something like that, I tried to rectify it and handle any  
7 situation that had happened.

8 Q How often would you say you talked to Jim?

9 A Well, he was always on property by me, and I was  
10 always there in the morning. So a couple of times a week.

11 Q In fact, didn't Mr. Shortle help you -- the  
12 shuttles -- didn't Mr. Shortle help you out with making  
13 sure the shuttles got rerouted to be able to park in the  
14 Sea Cloisters parking lot for a period of time --

15 A Yes, he did.

16 Q -- while you were reconfiguring the parking lot at  
17 the Carolina Pines Beach Club?

18 A Yes, he did.

19 Q And how long was the parking of the shuttles  
20 happening at Sea Cloisters while the reconfiguration was  
21 going on?

22 A I'd say it was a good couple of weeks.

23 Q Are you familiar with how the beach club was being  
24 operated before Carolina Pines -- or before Sun purchased  
25 it?

1     A     I knew it was an amenity for Seabrook that allowed  
2     people who purchased homes from Seabrook to have a  
3     membership there, and then when Sun took it over, they  
4     allowed those people to stay. That's all I know.

5           MR. TAMASITIS: And if we could put up Plaintiff's  
6     No. 38 that was just referenced in the direct testimony.  
7     And just scroll to that first page, please.

8     BY MR. TAMASITIS:

9     Q     Mr. Martucci, are you familiar with this business  
10    plan?

11    A     Like I said, I don't remember seeing it. It doesn't  
12    mean I didn't, but I don't remember seeing it.

13    Q     Did you draft it?

14    A     No, I did not.

15           MR. TAMASITIS: If you'd go to the next page. Thank  
16    you.

17    BY MR. TAMASITIS:

18    Q     And Ms. Shoun was talking to you about there's six  
19    potential sources of potential revenue. Do you see that?

20    A     Yes, I do.

21    Q     And it says "potential revenue"; right?

22    A     Yes.

23    Q     "Food, beverage, and alcohol sales to existing  
24    members and transient resort guests." Do you see that?

25    A     Yes.

1 Q Was that occurring while you were there?

2 A No, it was not.

3 Q "Rental fees for beach chairs, umbrellas, and water  
4 sport items from attendees." Was that occurring while you  
5 were there?

6 A No, that was not.

7 Q You've already talked about the weddings and the  
8 preplanned events, but "property rental fees for private  
9 access events to members, resorts groups, and the public."  
10 Was that occurring while you were there?

11 A That was there.

12 Q "Transportation fees derived from the resort." Was  
13 that occurring?

14 A No, I don't believe so.

15 Q "Ancillary retail sales of goods." Was that  
16 occurring?

17 A There was nothing there, no.

18 Q Had the City issued you a warning or a citation  
19 regarding events at the beach club, what would you have  
20 done?

21 A I would have stopped everything and let my bosses  
22 know what was happening and not have anymore events there.

23 Q Did that ever happen? Did they ever issue a  
24 citation?

25 A No, they did not.



1 Q And you didn't know that the ownership and use by a  
2 project in North Myrtle Beach was an issue with the beach  
3 club until about July of 2021; is that right?

4 A Correct.

5 Q And when did your employment end?

6 A Prior to that.

7 Q No further questions.

8 A Thank you.

9 THE COURT: Any redirect?

10 MS. SHOUN: Beg the Court's indulgence. One moment,  
11 Your Honor.

12 REDIRECT EXAMINATION

13 BY MS. SHOUN:

14 Q That Exhibit No. 38, Mr. Martucci, let's go back to  
15 the email under which that was sent to you just briefly.  
16 And I think I asked you earlier on, that's your email  
17 address to which it was directed; correct?

18 A The email that was sent in 2023?

19 Q No, sir. The one on Exhibit 38 that has the  
20 business plan. We're going to get that back up for you.

21 A Sure.

22 Q Okay. There you go. Do you see that? August 21st,  
23 2019?

24 A Yes.

25 Q And that is your email address; correct?

1       A     Yes, with Sun.

2       Q     And that email was sent to you or purports to have  
3       been sent to you by whom, Mr. Martucci?

4       A     Dennis Onken.

5       Q     Okay. Thank you.

6           MS. SHOUN: Nothing else.

7           THE COURT: Anything further from the defense?

8           MR. TAMASITIS: No, Your Honor. Thank you.

9           THE COURT: Thank you.

10          If you'll call your next witness.

11          MR. RICARD: Thank you, Your Honor. We'd like to  
12       call Mr. Jim Shortle.

13          THE CLERK: Raise your right hand and place your  
14       left hand on the Bible.

15                       SEA CLOISTERS I,

16                       by its designee, JAMES SHORTLE,

17                       after having been duly sworn, was examined and  
18       testified to as follows:

19          THE CLERK: Thank you. You may be seated. Will you  
20       state your name for the Court, please.

21          THE WITNESS: James Shortle. S-h-o-r-t-l-e.

22                       DIRECT EXAMINATION

23       BY MR. RICARD:

24       Q     Good afternoon, sir. How are you?

25       A     Good.

1 Q Mr. Shortle, do you own a unit in Sea Cloisters?

2 A Yes, 304-C.

3 Q And is that Sea Cloisters I or II?

4 A Sea Cloisters I.

5 Q Can you describe the different building letters for  
6 Sea Cloisters I and where they're located?

7 A Sea Cloisters I is A, B, and C buildings. A  
8 building is at the south side along the 18th Avenue street  
9 and public parking. B building is across the front. And  
10 C building is down the side where the ocean club is.

11 Q Okay. So the long side of Building B faces the  
12 ocean?

13 A Yes.

14 Q And the long side of Building C faces the cabana  
15 house?

16 A Yes.

17 Q And Building C is where your unit is located?

18 A Yes.

19 Q When did you purchase your unit in Building C?

20 A August of 1998.

21 Q Did it serve as your primary residence?

22 A It did for awhile, yes.

23 Q What years did it serve as your primary residence?

24 A From 2015 until 2019. Early 2019.

25 Q After 2019, did you keep your unit there?

1       A       Yes. We own it today.

2       Q       Okay. How often are you there in spite of not being  
3 your primary residence anymore?

4       A       Well, I'm in there once, twice a week. Stay there  
5 several times a year.

6       Q       And why do you go there so frequently?

7       A       Well, I'm the president of the HOA, and I have a lot  
8 of business going on there.

9               MR. RICARD: I'd like to note too for the record  
10 that Mr. Shortle is being called as the representative of  
11 the designee for Sea Cloisters I.

12       BY MR. RICARD:

13       Q       And you're comfortable with testifying on their  
14 behalf, Mr. Shortle?

15       A       Yes, sir.

16       Q       So you described Sea Cloisters I. Sea Cloisters II  
17 is a fairly mirror image of Sea Cloisters I; is that  
18 correct?

19       A       Yes. And that would be D, E, and F building.

20       Q       How many units total are in each of the Sea  
21 Cloisters projects?

22       A       There's 15 units in each of the three buildings, so  
23 45 units in Sea Cloisters I and the same in Sea Cloisters  
24 II.

25       Q       And how many parking spaces are there total between

1 the two Sea Cloisters?

2 A Oh, between the two? Now I got to do math.

3 Q Well, you can start with just one.

4 A 115, 116. There's 57 or 58 in each one.

5 Q Okay.

6 A When the units were built, the requirement was one  
7 parking space per two-bedroom unit, and one and a half per  
8 three-bedroom unit, and we exceed that requirement.

9 Q How far is the distance between the C Building in  
10 Sea Cloisters I from the cabana house?

11 A About 15 feet.

12 Q And what about in Sea Cloisters II? Is that the D  
13 Building that faces --

14 A Yes, D Building. And that's about 20 feet.

15 Q Where is the nearest public beach access point on  
16 either side closest to Sea Cloisters? Public beach access  
17 point.

18 A Well, there's some construction going on right now  
19 for a sewer, but normally, it would be 18th Avenue right  
20 alongside of A Building, and Shore Haven beach access,  
21 which is right alongside of F Building.

22 Q So, essentially, both Sea Cloisters locations are  
23 flanked by public beach access?

24 A One at each side, yes.

25 Q Are there any public restrooms at either of those

1 public beach access points?

2 A At the Shore Haven there is permanent public  
3 restrooms.

4 Q And folks can change clothes in there as well?

5 A Yes.

6 Q Is there any public parking in the nearby vicinity  
7 of Sea Cloisters I or II?

8 A From Sea Cloisters I, A Building to the south, you  
9 have all the -- we call them the avenues. It's 18th  
10 Avenue is next to us, 17th, 16th, all the way down to  
11 Maine. And from 18th to 4th, at the end of each street is  
12 a public parking lot.

13 So we have a public parking lot which holds about 75  
14 cars right next to A Building. The bathrooms and change  
15 rooms occupy the ones next to F building, but across the  
16 street on Shore Haven drive, there is a public parking  
17 lot, paved.

18 Q Okay. Switching topics just a little bit, can you  
19 describe the culture of the Sea Cloisters community?

20 A I can tell you Sea Cloisters I more than II but II  
21 is not far behind; I know quite a few owners over there.  
22 It's more of a family than any sort of business  
23 relationship. We have a spring cleanup weekend when a lot  
24 of people come down.

25 Our HOA meeting in October, we have a very good

1 turnout, and it's a whole-day event. We have the meeting  
2 in the morning at the surf club and then potluck BYOB at  
3 the pool in the evening. It's a very comfortable  
4 community. We have some owners. We have some second  
5 generation owners. They have been there around for a long  
6 time.

7 Q And I suppose they either stay there, or if they  
8 reside out of town, they keep coming back to this  
9 community?

10 A We have a lot of -- with the real estate market  
11 that's been going on, we got a lot of new homeowners in  
12 the last two years, and they have cut down on the rental  
13 units. We're down to 15, 16 rental units out of 45 in Sea  
14 Cloisters I.

15 And there's a lot of renters that always come back  
16 to Sea Cloisters because that's where they have always  
17 gone. I did it before I bought a place there. We rented  
18 there every year for about 12 or 13 years.

19 Q Why did you keep coming back to Sea Cloisters?

20 A Because we enjoyed it. It's a nice place, got a  
21 nice beach. Quiet, family oriented.

22 Q What's the culture of the surrounding neighborhood?

23 A It's residential. Tilghman Lakes is a development  
24 across the street, and I don't know how many buildings  
25 they have, but there's four units in each building.

1 They're up on stilts. Very, very quiet.

2 From 18th Avenue to the south, for about a mile and  
3 a half, is private homes along the beach. And then that  
4 neighborhood extends back. It's called the Tilghman Beach  
5 neighborhood, and they're very -- it's a very nice  
6 neighborhood, very large homes. Wooded. It's beautiful.

7 And then you have Tilghman Lakes. Behind Tilghman  
8 Lakes is a surf, beach, and golf country club. And next  
9 door to Tilghman Lakes across from Sea Cloisters II is  
10 Tilghman Golf and Beach Resort, which is a 10-story  
11 high-rise. Went up in -- well, they finished it in 2008.

12 Q Had there been any issues with that high-rise?

13 A Actually, there has. Noise from the pool. They had  
14 events out on their pool, and we discussed it with the  
15 City, and Mr. -- their manager -- general manager over  
16 there and was taking care of it. And we haven't any  
17 problems since.

18 Q That was Mr. Mike Mahaney?

19 A I did speak to Mr. Mahaney about that, yes.

20 Q And, ultimately, that issue was resolved?

21 A Yes.

22 Q No issues since?

23 A No.

24 Q And you have kind of already indicated this, but  
25 both Sea Cloisters, they each had a respective homeowners



1 association; is that right?

2 A Yes.

3 Q And your position is what?

4 A I'm the president of Sea Cloisters I Homeowners  
5 Association.

6 Q How long have you served in that role?

7 A Ten years.

8 Q What are your roles and responsibilities for that  
9 position?

10 A Basically to run the -- run the HOA. There's a  
11 board, so I would be the head of the board. There's five  
12 members on the board, and we have to hire groundskeepers,  
13 a property manager who takes care of all of our accounting  
14 and building and what have you, and a CPO for the pool,  
15 and just make sure that the -- overall responsibility to  
16 make sure that the place is nice, place is kept up, and  
17 the place doesn't slide on into the ocean.

18 Q If residents were not complying with whatever the  
19 HOA rules are, the HOA has authority to regulate?

20 A Yes.

21 Q Had there ever been times where y'all have been  
22 contacted by the City about any issues whatsoever?

23 A Not that I recall.

24 Q Okay. If you had ever received a call from the City  
25 Manager, would you have returned it or not returned it?

1       A       Oh, I would have returned it definitely.

2       Q       If had you ever received an email from the City  
3       Manager, would you have returned it --

4       A       I would respond, yes.

5       Q       And can you just generally describe the Sea  
6       Cloisters HOA, specifically Sea Cloisters I, you know, its  
7       degree of care for the neighborhood and its landscaping,  
8       appearance, and that sort of thing?

9       A       That kind of makes -- it's some of the -- the  
10      difficulty in being president. We have a lot of long-term  
11      owners, and you can't let the place -- the place is 45  
12      years old on the ocean, and you can't let it slide  
13      downhill because they notice.

14             We don't have that much difficulty keeping the  
15      owners happy. Like I say, it's a -- more like a family.  
16      And they make a request; we do our best to respond as soon  
17      as possible.

18      Q       Okay. Mr. Shortle, just bear with me one moment.  
19      I'm going to try to display Plaintiff's Exhibit 68 here.

20             Are you familiar with this document, Mr. Shortle?

21      A       Yes, sir.

22             MR. WILLIS: Can I interrupt for a second, Your  
23      Honor?

24             THE COURT: Yes, sir.

25             MR. WILLIS: I just want to make it clear for the

1 record: We agree to the admissibility of this document;  
2 however it's -- it contains hearsay -- significant  
3 hearsay. Some statements in here are accurate.  
4 Mr. Shortle did a good job on the research here. Some are  
5 maybe not accurate.

6 So we don't object to the admissibility of this as  
7 not for the truth of the matter asserted but as notice --  
8 proof of notice to the City to whom it was sent as well as  
9 to Sun, who obtained a copy of it -- of the litany of the  
10 complaints that the HOA had. Thank you.

11 THE COURT: Thank you.

12 BY MR. RICARD:

13 Q Mr. Shortle, we're going to speak more to some of  
14 the issues that are identified in this document, but at  
15 the end of this document -- I'm going to scroll down on  
16 the screen so you can see -- you have some attachments.

17 A Yes.

18 Q Specifically, for the record, I'm on page 11 of  
19 Exhibit 68, which is Bates labeled Cloisters I Subpoena  
20 00523.

21 Do you recognize what this document is, Mr. Shortle?

22 A Yes. It's a restrictive covenant on the ocean  
23 club's property, the cabana house property.

24 Q What specifically does that restrictive covenant set  
25 forth?

1       A       A couple of things. One, a part of the  
2       consideration for the sales of the adjoining properties to  
3       Sea Cloisters is a restriction of use within the described  
4       property. So it actually had value. It states it adds  
5       value to our property.

6               The other thing, that property is to only be used  
7       for recreational purposes, and there's -- the only  
8       structure on it shall be a clubhouse.

9       Q       Okay. Can you provide the historical background to  
10      the development of Sea Cloisters and how this restrictive  
11      covenant came about?

12     A       To the best of my knowledge --

13              MR. WILLIS: Again, Your Honor, a lot of this is  
14      based on hearsay. I know Your Honor can discern what's  
15      persuasive and what's not. Thank you.

16     A       There was a company, Sea Cloisters Corporation. One  
17      of the partners in it was a woman named Gail Jordan. I  
18      can't remember the other partners in it, but they came and  
19      they built Sea Cloisters. And they bought the property  
20      from the Tilghman family. They built Sea Cloisters I and  
21      then Sea Cloisters II.

22              I don't know the exact story behind that 86-foot lot  
23      between them, but as part of that -- I know somebody who  
24      could tell you for sure, not hearsay; it was a secretary  
25      for Mr. Tilghman at the time. But Mr. Tilghman wanted to

1 maintain a density limit there at the beach, but he wanted  
2 some recreational facilities. He wanted a clubhouse there  
3 for -- I believe for where he was living, but I don't  
4 know.

5 So this was actually part of the property purchased.  
6 When Sea Cloisters Corporation bought that 200-by-300-foot  
7 lot to build Sea Cloisters I on, this was part of that.  
8 And at the same time, they had Sea Cloisters II. That  
9 came the next year.

10 Q And even setting aside what Mr. Tilghman may have  
11 wanted or not wanted, has this restrictive covenant been  
12 important to Sea Cloisters over the years?

13 A Extremely. In 2005, we were sued by a company  
14 called Pan, LLC. P-a-n, LLC. They wanted to put a  
15 10-story condominium building on that 86-foot-wide lot  
16 between us. So they sued us to have this deed restriction  
17 removed.

18 We fought very hard. His name scrolled by. Michael  
19 Barnett was our attorney. And in the end, the deed  
20 restriction was upheld and additional restrictions were  
21 placed on the property, which are the 2007 covenants. And  
22 they include building limit size, building height limit,  
23 size limit, setback limits, things like that.

24 So this is part of the story and that's the other  
25 part, but we view these as property. They have a value to

1 us.

2 Pan, LLC, was the same developers that were  
3 developing -- it was a different company, different LLC,  
4 but they were the same two people that were developing  
5 Seabrook Plantation. So once they lost this battle, they  
6 immediately started construction on the cabana house. And  
7 it was to be a cabana house for Seabrook Plantation, which  
8 was to be an upscale community there. Unfortunately, 2008  
9 took them down.

10 Q From, like, a 2008 time period forward, was the  
11 cabana house being used very much?

12 A From 2008 to 2014, there was nobody in there, and it  
13 was kind of run down. The pool was green. Sometime in  
14 there, there was a fire in the elevator, and the elevator  
15 was just boarded up.

16 But from 2007, when it was built, to 2014, there was  
17 virtually no use at all. It was overgrown.

18 Q And then immediately prior to Defendant's purchase  
19 of the property, that 2014 to 2019 time frame, can you  
20 describe your observations of how the cabana house was  
21 being used?

22 A It was being very lightly used. Every once in a  
23 while, you'd see a car or a couple of golf carts in there.  
24 And I talked to a couple of these guys, you know, "Hey,  
25 how you doing?" And they were residents of Seabrook

1 Plantation. They were given the option to buy into that.

2 And I don't know who was running the organization or  
3 whatever. The sign out front -- the big sign that you  
4 showed pictures of before remained -- big gilded letters:  
5 Seabrook Plantation Amenity Center. That stayed there  
6 until 2017 when Mace Watts and Ben Oates bought it, Ocean  
7 Club Partners.

8 Q From the 2017, then, to 2019 time frame, was there  
9 much difference in the use of the property?

10 A No. No, there was -- Ben Oates used the upstairs as  
11 an office. Mace is a home builder, and he was building  
12 some homes in Seabrook. By that time, the home building  
13 industry had turned around a little bit, but he was  
14 building some homes in Seabrook, and he was building some  
15 homes in Robber's Roost and some other places, and he was  
16 using memberships to that as sales tools.

17 But Ben sat up there most of the time. He was a  
18 landscape architect, I believe, and he was designing  
19 landscape architecture for the homes they were building in  
20 Seabrook Plantation.

21 And while he was there, he was selling memberships.  
22 That was their goal, was to sell memberships. I have no  
23 idea how many memberships, but it was \$5,000 to join and  
24 \$900 a year, very similar to a country club. So you'd buy  
25 in.

1           If I didn't have my place at Sea Cloisters, that  
2 might have sounded good.

3       Q     If we haven't covered it already, Seabrook  
4 Plantation, is that located inside the City of North  
5 Myrtle Beach?

6       A     Oh, yes.

7       Q     Okay. And what about Robber's Roost you mentioned?

8       A     Yes. They're adjoining.

9       Q     Okay. When Defendants purchased the property in the  
10 spring of 2019, can you describe the use that you observed  
11 kind of from that spring of 2019 onward and whether it  
12 changed at all?

13      A     Well, 2019, like Chris Martucci said, it was slow  
14 getting started. And the RV resort didn't open until  
15 October, and up on the beachfront, in October,  
16 everything's closing down. In fact, today, we closed down  
17 the pool at Sea Cloisters.

18           So there wasn't much traffic. Occasionally, we'd  
19 get people parking in there or coming through, but there  
20 really wasn't much traffic.

21           And 2020 was COVID. Well, in the spring, the City  
22 was shut down, and then it opened much slower. And there  
23 wasn't a lot of traffic.

24           And, in 2021, it just broke loose, and there was  
25 nothing -- starting in April with the sunrise wedding and