

**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

RECEIVED
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SC Court of Appeals

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 I

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	CA No. 2021-CP-26-07489
	)	
CITY OF NORTH MYRTLE BEACH,	)	
	)	
Plaintiff,	)	
	)	Consent Order Regarding
vs.	)	Use of Subject Property
	)	
SUN TRS OCEAN CLUB LLC and SUN	)	
TRS CAROLINA PINES LLC,	)	
	)	
Defendant.	)	
	)	
	)	

THIS ISSUE CAME BEFORE THE COURT on consent motion by the Plaintiff City of North Myrtle Beach ("NMB") and Defendants Sun TRS Ocean Club LLC ("Sun TRS OC") and SUN TRS Carolina Pines LLC ("Sun TRS CP") (collectively, the "Sun Defendants") under which these parties requested a Consent Order to the following limitations on the use of the property that is the subject of this dispute, known as "The Carolina Pines Beach Club," designated as Lot 1, Block 18-A, Tilghman Beach, located in the City of North Myrtle Beach (the "Property"), until such time as the Court rules on the substantive issues regarding the validity and enforceability of Section 23-22(4)(d) and Section 23-2 (definition of cabana house) of the Zoning Ordinance of the City of North Myrtle Beach ("Zoning Ordinance"):

1. Limitations: The Sun Defendants agree to limit the use of the Property only to beach access. [✱]

The Sun Defendants agree to close the pool; not to hold organized events or gatherings of any type on the Property and limit the use of the cabana house to bathing and change of clothing facilities; not allow any overnight stays; and to comply with the parking requirements for the "cabana house" use of the Property

** and only for members
as referenced in Paragraph 2;
1 ~~Finder of Members/ Membership,~~
~~of the Termination of Easement and~~
~~Access Agreement / Quit Claim, attached as Exhibit A.~~*

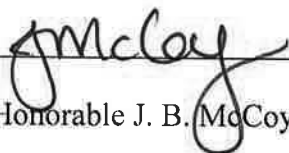
2. The Parties agree and stipulate that the purpose of this Consent Order is to ~~maintain the status quo during the pendency of this dispute, while permitting limited use of Defendants' property in a manner prescribed by the Zoning Ordinance, in order to~~ eliminate the need for temporary injunctive relief.

3. This Consent Order shall remain in full force and effect ~~throughout the duration of the proposed Scheduling Order,~~ until such time as the matter is resolved by settlement, or the

Court rules on the merits. *For the duration of this Consent Order, neither the Cabana House or the Property will be utilized by, for, or on behalf of Sun*FRS-EP or any entity acting on behalf or through Sun*FRS-EP.*

IT IS SO ORDERED.

**Defendants*


The Honorable J. B. McCoy

Circuit Court Judge

Date: 1/10/2022

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Horry
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP2607489

North Myrtle Beach City of
PLAINTIFF(S)

Sun TRS Ocean Club LLC et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

After careful and deliberate consideration, reviewing the memorandums, PowerPoint slides, hearing oral arguments from both sides, Judge Seals respectfully denies Defendant's Motion for Partial Summary Judgment. A formal Order to follow by Attorney Tamasitis.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/18/2022 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Horry Common Pleas

Case Caption: North Myrtle Beach City of VS Sun TRS Ocean Club LLC ,
defendant, et al

Case Number: 2021CP2607489

Type: Order/Electronic Form 4

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

Electronically signed on 2022-11-18 14:27:06 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	CA No. 2021-CP-26-07489
	)	
CITY OF NORTH MYRTLE BEACH,	)	
	)	
Plaintiff,	)	Order Denying Sun Defendants Motion
	)	for Partial Summary Judgment
vs.	)	
	)	
SUN TRS OCEAN CLUB LLC and SUN	)	
TRS CAROLINA PINES LLC,	)	
	)	
Defendants.	)	
	)	
_____	)	

This matter came before the Court on November 16, 2022, for a hearing on Defendants Sun TRS Ocean Club LLC's ("Sun TRS OC") and Sun TRS Carolina Pines LLC ("Sun TRS Carolina Pines," and collectively, the "Sun Defendants") Motion for Partial Summary Judgment as to their dormant Commerce Clause counterclaim. John G. Tamasitis and Richard H. Willis, Williams Mullen, appeared on behalf of the Sun Defendants. Rhett Richard, Nexsen Pruet, LLC, appeared on behalf of Plaintiff City of North Myrtle Beach (the "City"). For the reasons set forth herein, Sun Defendants' Motion for Partial Summary Judgment is denied.

On November 11, 2021, the City initiated this declaratory judgment action seeking a declaration from the Court that the Sun Defendants' ownership and use of the cabana house, located on the subject property, is in violation of the applicable sections of the City's Zoning Ordinance, and asked the Court to order the Sun Defendants' ownership and use of the property "immediately cease and desist." The sections of the City's Zoning Ordinance at issue, Sections 23-2 and 23-22, restrict the use of subject property approved by special exception for a cabana house to "projects" located in the City near the ocean, and prohibit ownership of a cabana house

by any persons or entity other than a “homeowners association with a maintenance agreement” for such projects located in the City.

In response, the Sun Defendants filed counterclaims for Declaratory Judgment/Injunctive Relief seeking an order from the Court declaring the relevant sections of the Zoning Ordinance unconstitutional under the Dormant Commerce Clause, the Fourteenth Amendment Due Process and Equal Protection Clauses, and for violation of 42 U.S.C. § 1983 for deprivation of the Defendants’ constitutional rights. Finally, Defendants asserted a counterclaim for Inverse Condemnation/Regulatory Taking of the Property based on the City’s claim for relief that the Sun Defendants’ ownership of the subject property “cease and desist.”

At the outset of the litigation, the City moved for a preliminary injunction seeking to enjoin the Sun Defendants from utilizing the subject property during the pendency of the action. After negotiations, the parties agreed to enter a “status quo” Consent Order regarding use of the subject property that limits use thereof and its facilities to only certain members of the Cabana House that are also members of the Seabrook Plantation Homeowners Association.¹

On August 1, 2022, the Sun Defendants moved for partial summary judgment as to their Dormant Commerce Clause counterclaim.

Summary judgment is appropriate only where “there is no genuine issue as to any material fact.” Rule 56(c), SCRPC. Summary judgment “should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.” *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). “In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the

¹ The Sun Defendants unsuccessfully moved the Court on June 3, 2022 to vacate the Consent Order due to change in circumstances and Sun Defendants decision to withdraw their consent. That motion was denied on July 21, 2022.

evidence in the light most favorable to the non-moving party.” *White v. J.M. Amusement Co., Inc.*, 360 S.C. 366, 370-71, 601 S.E.2d 342, 344 (2004) (internal citations omitted).

The moving parties have the burden of clearly establishing, with use of the record properly before the court, the absence of a triable issue of fact. *Standard Fire Ins. Co. v. Marine Contracting and Towing*, 301 S.C. 418, 392 S.E.2d 460 (S.C. 1990). All ambiguities, conclusions, and inferences arising from the evidence must be construed against the moving party. *Vermeer Carolina’s Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (1999). The non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 802-03 (2009).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000).

The City contends there are questions of fact that preclude summary judgment on Sun Defendants’ dormant Commerce Clause counterclaim, and discovery is not complete. Both sides agree this is an important case that involves significant questions and issues of federal constitutional law. Summary Judgment at this stage of the case is premature; discovery is ongoing, and a more comprehensive factual record is desirable to fairly determine the appropriate result. Accordingly, after careful consideration of the written motion, memoranda of law, presentation materials, and arguments of counsel, the Court **DENIES** the Sun Defendants’ Motion for Partial Summary Judgment.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that Sun Defendants' Motion for Partial Summary Judgment is denied for the reasons stated herein.

AND IT IS SO ORDERED.



Horry Common Pleas

Case Caption: North Myrtle Beach City of VS Sun TRS Ocean Club LLC ,
defendant, et al

Case Number: 2021CP2607489

Type: Order/Summary Judgment

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

Electronically signed on 2022-11-28 09:41:58 page 5 of 5

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	CA No. 2021-CP-26-07489
	)	
	)	
CITY OF NORTH MYRTLE BEACH,	)	
	)	
Plaintiff,	)	
	)	CONSENT ORDER REGARDING
vs.	)	MOTION TO BIFURCATE TRIAL
	)	
SUN TRS OCEAN CLUB, LLC, SUN TRS	)	
CAROLINA PINES, LLC, and SUN TRS	)	
CAROLINA PINES RV, LLC,	)	
	)	
Defendants.	)	
	)	

THIS ISSUE CAME BEFORE THE COURT on motion by Defendants Sun TRS Ocean Club, LLC, SUN TRS Carolina Pines, LLC, and Sun TRS Carolina Pines RV, LLC, (collectively, the “Sun Defendants”), pursuant to Rule 42(b), SCRCF, for separate trials on the following claims and in the following order, which motion was filed with the Court on May 18, 2023. Pursuant to an agreement reached by undersigned counsel for Sun Defendants and Plaintiff City of North Myrtle Beach (the “City”), the Motion is hereby GRANTED, so structuring the trials of these claims to avoid confusion, preserve resources, and further convenience, expedition, and economy.

The parties agree that the majority of the claims asserted in this case are non-jury matters. The only claims that require the impaneling of a jury are Sun Defendants’ claims for damages based on its 42 U.S.C. § 1983 counterclaim for alleged violation of their constitutional rights and any amount of just compensation to be paid to Sun Defendants if their non-jury inverse condemnation claim is successful.

Accordingly, pursuant to agreement between the parties, it is hereby ORDERED that the following shall be the structure for two separate trials in this action because such separate trials will be conducive to expedition and economy and in furtherance of convenience:

Trial 1 (Non-Jury): The Court shall first preside over the non-jury trial of:

- (1) The City's claim seeking a Declaratory Judgment that Sun Defendants divest their ownership and/or cease use of the subject property and the Cabana House situated thereon because such ownership and use violates Sections 23-2 and 23-22 of the City's Zoning Ordinance;
- (2) Sun Defendants' affirmative defenses to Plaintiff's Declaratory Judgment claim and their counterclaims seeking a Declaratory Judgment that Sections 23-2 and 23-22 of the Zoning Ordinance are unenforceable because they violate the Commerce Clause of the U.S. Constitution, the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and the Due Process Clause of the South Carolina Constitution, and/or the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and the Equal Protection Clause of the South Carolina Constitution; and
- (3) Sun Defendants' counterclaim that the City's enforcement of the applicable sections of the Zoning Ordinance amounts to an inverse condemnation and/or a regulatory taking of the subject real property.

Trial 2 (Jury): The Court shall then preside, if necessary, and unless otherwise waived by the City, over:

- (1) If the Court determines in Trial 1 that Sections 23-2 and 23-22 of the Zoning Ordinance violate the U.S. Constitution and/or the South Carolina Constitution, then the Court shall preside over a jury trial of Sun Defendants' claim for violation of their constitutional rights and associated damages and reasonable attorneys' fees and costs, pursuant to 42 U.S.C. §§ 1983 and 1988; or
- (2) If the Court determines in Trial 1 that (i) Sections 23-2 and 23-22 of the Zoning Ordinance does not violate the U.S. and South Carolina Constitutions, (ii) Sun Defendants ownership and use of the subject real property violates Sections 23-2 and 23-22 of the Zoning Ordinance, and (iii) the City's enforcement of the Zoning Ordinance amounts to an inverse condemnation and/or a regulatory taking of the subject real property, then the Court shall preside over a jury trial on the amount of just compensation for the City's regulatory taking of the subject property.¹

IT IS SO ORDERED.

¹ The parties expressly reserve the right to consent to waiver of any demand for trial by jury on any such issues, pursuant to Rule 39(a), SCRPC.

WE SO CONSENT: <u>s/John G. Tamasitis</u> Richard H. Willis (SC Bar No.: 6159) E-Mail: rwillis@williamsmullen.com Derek Tarver (SC Bar No.: 103289) E-Mail: dtarver@williamsmullen.com John G. Tamasitis (SC Bar No.: 101875) Email: jtamasitis@williamsmullen.com WILLIAMS MULLEN 1230 Main Street, Suite 330 Columbia, SC 29201 Tel. 803.567.4615 Fax: 803.567.4601 <i>Attorneys for Defendants Sun TRS Ocean Club, LLC, Sun TRS Carolina Pines, LLC, and Sun TRS Carolina Pines, LLC</i>	WE SO CONSENT: <u>s/Rhett D. Ricard</u> Cheryl D. Shoun, SC Bar No. 5092 cshoun@nexsenpruet.com Rhett D. Ricard, SC Bar No. 102353 rricard@nexsenpruet.com MAYNARD NEXSEN PC 205 King Street, Suite 400 (29401) P.O. Box 486 Charleston, SC 29402 Phone: 843.577.9440 Fax: 843.720.1777 <i>Attorneys for Plaintiff City of North Myrtle Beach</i>



Horry Common Pleas

Case Caption: North Myrtle Beach City of VS Sun TRS Ocean Club LLC ,
defendant, et al

Case Number: 2021CP2607489

Type: Order/Consent Order

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

Electronically signed on 2023-06-06 13:32:57 page 4 of 4

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Horry
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP2607489

North Myrtle Beach City of
PLAINTIFF(S)

Sun TRS Ocean Club LLC et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

The Court respectfully denies the Defendants' Renewed Motion for Partial Summary Judgment.
The Court hereby Orders that Plaintiff counsel comply with Rule 11, withdraw its Motion to Compel, confer with Defendants, and make a good faith effort to resolve the Rule 30(b)(6) deponents' depositions.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/10/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Horry Common Pleas

Case Caption: North Myrtle Beach City of VS Sun TRS Ocean Club LLC ,
defendant, et al

Case Number: 2021CP2607489

Type: Order/Electronic Form 4

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

Electronically signed on 2023-08-10 17:00:45 page 3 of 3

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,	)	
	)	FINAL ORDER
vs.	)	
	)	
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

Additionally, the Court finds that all other provisions of the City's Zoning Ordinance are constitutional and fully enforceable. The Court also acknowledges that Defendants have

knowingly violated the remaining portions of the City's Zoning Ordinance on numerous occasions as stated herein above.

However, this court lacks the time and resources to enforce the day-to-day disputes between a cabana house and neighboring homeowners' associations. These matters are better addressed by local authorities. Otherwise, cities across this state would be encouraged to turn to circuit courts to handle day-to-day issues, bypassing the local authorities and municipal courts and preventing them from doing the job they are better suited to perform. Otherwise, the responsibilities of cities to fund and equip local law enforcement with the capacity to enforce local ordinances would be passed on to the circuit courts. South Carolina Circuit Courts are occupied with substantial civil and criminal dockets. Circuit courts resources are better utilized and preserved for these dockets and enforcement of local ordinances, such as those mentioned in this case, are better left to the local authorities.

Furthermore, the Court would like to extend its appreciation of the professionalism, civility, and advocacy each attorney exhibited on behalf of their clients throughout this trial. While it sometimes appears that general respect and civility among lawyers is in decline, the same is not true in this case. It was a pleasure working with each of these attorneys as they set an example for all other attorneys to follow.

IT IS SO ORDERED.



Horry Common Pleas

Case Caption: North Myrtle Beach City of VS Sun TRS Ocean Club LLC ,
defendant, et al

Case Number: 2021CP2607489

Type: Order/Other

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

Electronically signed on 2023-11-19 13:20:42 page 27 of 27

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Horry
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP2607489

North Myrtle Beach City of
PLAINTIFF(S)

Sun TRS Ocean Club LLC et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

After very careful and deliberate consideration, Judge Seals is hereby denying the Plaintiff's Motion to Reconsider the Court's Final Order.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 01/03/2024 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Horry Common Pleas

Case Caption: North Myrtle Beach City of VS Sun TRS Ocean Club LLC ,
defendant, et al

Case Number: 2021CP2607489

Type: Order/Electronic Form 4

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

Electronically signed on 2024-01-03 13:15:59 page 3 of 3

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

CITY OF NORTH MYRTLE BEACH,

Case No.

Plaintiff,

SUMMONS

vs.

SUN TRS OCEAN CLUB LLC and SUN
TRS CAROLINA PINES LLC,

Defendant.

TO: Defendants Sun TRS Ocean Club LLC and Sun TRS Carolina Pines, LLC:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint, judgment by default will be rendered against you for the relief demanded in the Complaint.

s/Cheryl D. Shoun

Cheryl D. Shoun, SC Bar No. 5092
Rhett D. Ricard, SC Bar No. 102353
NEXSEN PRUET, LLC
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P.O. Box 486
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CShoun@nexsenpruet.com

Attorneys for Plaintiff

November 11, 2021

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

CITY OF NORTH MYRTLE BEACH,

Case No.

Plaintiff,

COMPLAINT

vs.

SUN TRS OCEAN CLUB LLC and SUN
TRS CAROLINA PINES LLC,

Defendant.

Plaintiff, the City of North Myrtle Beach ("NMB"), complaining of Defendants wherein, respectfully shows unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. The City of North Myrtle Beach ("NMB") is a political subdivision of the State of South Carolina, acting by and through its governing body, North Myrtle Beach City Council, and through its various employees, agents and representatives.

2. NMB is informed and believes Defendant Sun TRS Ocean Club LLC (Sun TRS") is a limited liability company organized and existing pursuant to the laws of the state of Michigan, that it is authorized to, and does business and owns real property in Horry County, South Carolina.

3. NMB is informed and believes Defendant Sun TRS Carolina Pines LLC ("Sun Carolina Pines") is a limited liability company organized and existing pursuant to the laws of the state of Michigan, that it is authorized to, and does business in Horry County, South Carolina.

4. NMB is informed and believes this Court has jurisdiction over the subject matter of this action, based upon its original jurisdiction and that this Court has personal jurisdiction over Defendants as they transact business and/or own property in South Carolina.

5. NMB is further informed and believes venue is proper in Horry County, as the acts or omissions giving rise to this action occurred, in whole or in substantial part, in Horry County, South Carolina.

6. There is a substantial, justiciable controversy between the parties, as more fully set forth herein, which warrants this action.

BACKGROUND AND ALLEGATIONS

7. 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 Zoning Ordinance of the City of North Myrtle Beach, South Carolina. ("Zoning Ordinance").

The Zoning Ordinance provides, in relevant part:

Cabana house: 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 parting 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. (Zoning Ordinance, Section 23-2).

8. The Property is generally subject to the Zoning Ordinance, the general purposes of which 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 with reasonable consideration for the specific purposes set forth in such Zoning Ordinance. Specifically, the Property is located within the R-4 Resort Residential District that provides for permitted uses, all of which are set forth in the Zoning Ordinance. (Zoning Ordinance, Sec. 23-22 (2)).

9. Section 23-22 sets forth certain special exceptions to the aforementioned permitted uses, which include, in pertinent part, cabana houses, as defined in Section 23-2 of the Zoning Ordinance, which are subject to the following:

1. That a homeowner's association shall have been established for the project and a maintenance agreement has been submitted to the planning department.
 2. That at least eight (8) parking spaces per zoning standards be established on site and that more spaces may be required by the board if there is no other means to limit the number of cars traveling to the property provided such as a shuttle service to and from the property to the project.
 3. That the use of the house be limited to bathing and change of clothing facilities, and occasional use as guest quarters and other similar uses.
 4. That the special exception will be in substantial harmony with the area in which it is to be located.
 5. That the special exception will not be injurious to the adjoining property.
 6. That the special exception will not discourage or negate the use of surrounding property for use(s) permitted by right.
 7. That in granting the special exception, the board of zoning appeals may impose such reasonable and additional stipulations, conditions or safeguards as, in its judgment, will enhance the siting of the proposed special exception.
10. In March 2005, the Property was conveyed to an entity known as Pan LLC ("Pan").
11. In or about May, 2007, Pan, by and through Ben Powell, submitted a request, designated as #SE4-07, seeking authorization to construct and operate a

Cabana house in and upon the Property, which request was granted, subject to certain findings of fact, said authorization and findings of fact more fully set forth in that certain letter from Paul Blust, Zoning Administrator, for NMB, dated June 18, 2007, a copy of which is attached hereto as Exhibit A.

12. On or about August 24, 2009, Pan conveyed the Property to NMB Oceanclub LLC.

13. On or about November 5, 2012, NMB Oceanclub LLC conveyed the Property to NMBOC Holding Company, LLC.

14. On or about May 10, 2019, NMB Ocean Club Partners LLC conveyed the Property, including an improvement thereto, formerly approved and constructed as a Cabana house, to Sun TRS Ocean Club LLC ("Sun TRS"), which, upon information and belief, is the owner of the Property at the time of this filing.

15. Upon information and belief, Sun TRS has been and continues to utilize the Property, including the Cabana house constructed thereon, in violation of the applicable Zoning Ordinance in, but not limited to, the following particulars:

- a. In the use of the Property by a project(s) that is not in North Myrtle Beach;
- b. In the ownership and maintenance of the Cabana House, as an entity that is not a homeowners' association;
- c. In failing to limit the use of the Cabana House to bathing and changes of clothing facilities, occasionally using as guest quarters and other similar uses;
- d. In failing to utilize the Cabana House in a manner that is in substantial harmony with the area in which it is located;
- e. In utilizing the Cabana House in a fashion that is, upon information and belief, injurious to the adjoining property.

16. Upon information and belief, ("Sun Carolina Pines") has been and continues to utilize the Property in violation of the applicable Zoning Ordinance in, but not limited to, the following particulars;

- a. In the use of the Cabana House by a project(s) that is not in North Myrtle Beach;
- b. In the use of the Cabana House as an entity that is not a homeowners' association;
- c. In failing to limit the use of the Cabana House to bathing and changes of clothing facilities, occasionally using as guest quarters and other similar uses;
- d. In utilizing the Cabana House in a fashion that is, upon information and belief, injurious to the adjoining property.

17. That NMB made contact with Sun TRS, and thus with any entities affiliated therewith or otherwise operating through or in association with Sun TRS, including Sun Carolina Pines, within a reasonable period of time upon learning of the unauthorized ownership and use of the Cabana House by Sun TRS and within a reasonable period of time upon learning of the unauthorized use of the Cabana House by Sun Carolina Pines, demanding that such ownership and use cease and desist.

18. Despite repeated demand therefor, Sun TRS has failed and refused to relinquish its unauthorized ownership and use of the Cabana House and Sun Carolina Pines has failed and refused to relinquish its unauthorized use of the Cabana House.

19. Section 23-7 of the Zoning Ordinance provides, in relative part, the nothing therein shall prevent the City of North Myrtle Beach from taking such lawful action as is necessary to prevent or remedy a violation.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

20. NMB realleges and revers the foregoing as fully as if restated verbatim.

21. NMB is informed and believes it is entitled to an Order of this Court finding and holding that the ownership and use of the Cabana House by Sun TRS is in violation of the applicable Zoning Ordinance and that such ownership and use must immediately cease.

22. NMB is informed and believes it is entitled to an Order of this Court finding and holding that the use of the Cabana House by Sun Carolina Pines is in violation of the applicable Zoning Ordinance and that such use must immediately cease.

WHEREFORE, the City of North Myrtle Beach, having made its Complaint as to Defendants, prays that this Honorable Court issue is Order, finding and holding that the ownership and use of the Cabana house, located upon the Property, as currently exercised by Defendants, is in violation of the applicable Zoning Ordinance and that such ownership and use must immediately cease and desist.

s/Cheryl D. Shoun

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November 11, 2021

Attorneys for Plaintiff

EXHIBIT A



June 18, 2007

Ben Powell
PO Box 750
North Myrtle Beach, SC 29597

Dear Mr. Powell,

The North Myrtle Beach Board of Zoning Appeals met on June 14, 2007 to hear and decide on two applications submitted by you for special exception #SE3-07 and #SE4-07. Special exception #SE3-07 was to create an amenity area for storage of RVs and boats for your new subdivision Seabrook Plantation and special exception #SE4-07 was for an oceanfront cabana house for Seabrook Plantation in the R-4 (Resort Residential) district to be located at 1814 North Ocean Boulevard.

This letter is notification to you that the Board voted to approve both of these requests for special exception. The specific finding of fact on the RV and boat storage area was that this property abuts commercially zoned property and it is very well screened from the proposed lots that will be platted upon recording of a final plat. The specific findings of fact for the oceanfront cabana was that the design of the building is similar to a single-family house, the use of the building will be according to the limitations contained in the Zoning Ordinance and the parking meets and exceeds the minimum requirement of the code.

If you have any questions on either of these two cases please call me at 280-5565.

Sincerely,

Paul Blust
Zoning Administrator

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	CA No. 2021-CP-26-07489
	)	
	)	
CITY OF NORTH MYRTLE BEACH,	)	
	)	
Plaintiff,	)	Defendants Sun TRS Ocean Club LLC and
	)	SUN TRS Carolina Pines LLC's Answer
vs.	)	and Affirmative Defenses
	)	
SUN TRS OCEAN CLUB LLC and SUN	)	
TRS CAROLINA PINES LLC,	)	
	)	
Defendant.	)	
	)	
_____	)	

Defendants Sun TRS Ocean Club, LLC ("Sun TRS OC") and SUN TRS Carolina Pines, LLC ("Sun TRS CP") (collectively, the "Sun Defendants") responds to Plaintiff's Complaint as follows:

PARTIES AND JURISDICTION

1. The Sun Defendants admit the allegations contained in Paragraph 1 of Plaintiff's Complaint.
2. The Sun Defendants admit the allegations contained in Paragraph 2 of Plaintiff's Complaint.
3. The Sun Defendants admit the allegations contained in Paragraph 3 of Plaintiff's Complaint.
4. At this time, the Sun Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 4 of Plaintiff's Complaint, and therefore deny same.

5. At this time, the Sun Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 5 of Plaintiff's Complaint, and therefore deny same.

6. The Sun Defendants deny the allegations contained in Paragraph 6 of Plaintiff's Complaint.

BACKGROUND AND ALLEGATIONS

7. The Sun Defendants admit that Plaintiff's claims allegedly center on certain property, which Plaintiff identifies as Lot 1, Block 18-A, Tilghman, located in the City of North Myrtle Beach. Based on Plaintiff's allegations, the Sun Defendants understand Plaintiff is referring to a property owned by Sun TRS OC, parcel number 35501040048 (the "Property"). The Sun Defendants admit that this property is located in North Myrtle Beach, South Carolina, and as such is subject to the Zoning Ordinance of North Myrtle Beach, South Carolina ("Zoning Ordinance"). The Sun Defendants further admit that Section 23-2 of the Zoning Ordinance has a definition of "Cabana house" set forth in Paragraph 7 of Plaintiff's Complaint, and alleges the Zoning Ordinance speaks for itself.

8. The allegations contained in Paragraph 8 of Plaintiff's Complaint contain a legal conclusion to which no response is required. To the extent a response is required, the Sun Defendants admit that the Property is located within the R-4 Resort Residential District, the uses for which are set forth in Section 23-22(2) of the Zoning Ordinance.

9. The allegations contained in Paragraph 9 of Plaintiff's Complaint contain a legal conclusion to which no response is required. To the extent a response is required, the Sun Defendants admit that Section 23-22 of the Zoning Ordinance sets forth certain special exceptions

to the uses of property in an R-4 zone, including cabana houses, as described in Paragraph 9 of Plaintiff's Complaint.

10. The Sun Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 10 of Plaintiff's Complaint, and therefore deny same.

11. The Sun Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11 of Plaintiff's Complaint, and therefore deny same.

12. The Sun Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 12 of Plaintiff's Complaint, and therefore deny same.

13. The Sun Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 13 of Plaintiff's Complaint, and therefore deny same.

14. The Sun Defendants admit that the Sun TRS OC purchased the Property from NMB Ocean Club Partners LLC on May 6, 2019, and that Sun TRS OC is the record owner of the property at this time.

15. The Sun Defendants deny the allegations contained in Paragraph 15 and subparts (a) through (e). The Sun Defendants deny that any conduct by Sun TRS OC or Sun TRS CP is or was in violation of the Zoning Ordinance.

16. The Sun Defendants deny the allegations contained in Paragraph 16 and subparts (a) through (d). The Sun Defendants deny that any conduct by Sun TRS OC or Sun TRS CP is or was in violation of the Zoning Ordinance.

17. The Sun Defendants deny the allegations contained in Paragraph 17. The Sun Defendants deny that any conduct by Sun TRS OC or Sun TRS CP is or was in violation of the Zoning Ordinance.

18. The Sun Defendants deny the allegations contained in Paragraph 18. The Sun Defendants deny that any conduct by Sun TRS OC or Sun TRS CP is or was in violation of the Zoning Ordinance.

19. The Sun Defendants admit the allegations contained in Paragraph 19, but deny that any conduct by Sun TRS OC or Sun TRS CP is or was in violation of the Zoning Ordinance.

20. Any allegation not expressly admitted herein is expressly denied.

FOR A FIRST DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION
(Declaratory Judgment)

21. The Sun Defendants incorporate by reference their responses to Paragraphs 1 – 20.

22. The Sun Defendants deny the allegations contained in Paragraph 22. The Sun Defendants deny that any conduct by Sun TRS OC or Sun TRS CP is or was in violation of the Zoning Ordinance.

23. The Sun Defendants deny the allegations contained in Paragraph 23. The Sun Defendants deny that any conduct by Sun TRS OC or Sun TRS CP is or was in violation of the Zoning Ordinance.

FOR A SECOND DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Failure to State a Claim)

24. Plaintiff has failed to state a claim for which relief may be granted, because the Plaintiff is not and cannot be damaged by an owner's lawful use of its property in the face of an unconstitutional ordinance.

FOR A THIRD DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Estoppel, Laches, Waiver, and Statute of Limitations)

25. Plaintiff's claim is barred by the doctrine of estoppel, laches, waiver, and is barred by the applicable statute of limitations. *See* Exh. A, Mar. 19, 2019 Zoning Letter from P. Blust regarding subject property.

FOR A FOURTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Lack of Jurisdiction)

26. There may be a lack of personal jurisdiction over one or both of the Defendants, or the Court may lack jurisdiction over the subject matter of this dispute.

FOR A FIFTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Vagueness)

27. The Sun Defendants will show that the Zoning Ordinance, or portions thereof, which Plaintiff seeks to enforce is not sufficiently clear as to be enforceable and/or valid under the U.S. Constitution and/or Constitution of South Carolina.

FOR A SIXTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Fifth Amendment Taking)

28. The Sun Defendants will show that enforcement of the Zoning Ordinance, or portions thereof, in accordance with Plaintiff's claim, amounts to a taking of property rights without just compensation, as contemplated by the Fifth Amendment of the U.S. Constitution and Article 1, section 13 of the Constitution of South Carolina.

FOR A SEVENTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Constitutionality)

29. The Sun Defendants will show that the Zoning Ordinance, or portions thereof, which limit use or ownership of private property to persons based on their locality, is a violation of the U.S. Constitution and/or Constitution of South Carolina.

FOR AN EIGHTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Reasonableness)

30. The Sun Defendants will show that the Zoning Ordinance, or portions thereof, which Plaintiff seeks to enforce, are not reasonable. *See, e.g., Byrd v. City of N. Augusta*, 261 S.C. 591, 201 S.E.2d 744 (1974).

FOR A NINTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Ultra Vires)

31. The Sun Defendants will show that the Zoning Ordinance is ultra vires.

FOR A TENTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Exhaustion of Administrative Remedies)

32. The Sun Defendants will show that Plaintiff has failed to exhaust its administrative remedies.

FOR AN ELEVENTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Arbitrary and Capricious)

33. The Sun Defendants will show that Plaintiff's efforts to enforce the Zoning Ordinance are arbitrary and capricious and an abuse of discretion, and that the Zoning Ordinance itself is arbitrary and capricious and does not reasonably effectuate its legitimate purpose, and is therefore invalid and unenforceable.

FOR A TWELFTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Equal Protection)

34. The Sun Defendants will show that Plaintiff's efforts to enforce the Zoning Ordinance against the Sun Defendants violate the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution and the Equal Protection clause of the Constitution of South Carolina. *See* Exh. A.

FOR AN THIRTEENTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Failure to State a Claim)

35. Plaintiff's request for Temporary Restraining Order and Preliminary Injunction are not in accordance with applicable South Carolina law, as Plaintiff has not suffered and is not at risk of suffering any irreparable harm or injury, there are adequate remedies at law available to Plaintiff, there has been no showing of likelihood of success on the merits, there has been no bond provided, and the equities weigh in favor of the Sun Defendants' right to use the property in a manner that does not harm or prejudice Plaintiff.

FOR A FOURTEENTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Reservation of Rights)

36. The Sun Defendants have not completed their investigation of Plaintiff's allegations. The Sun Defendants intend to act as best they can to inform themselves of the pertinent facts and circumstances surrounding the allegations contained in Plaintiff's Complaint. Thus, the Sun Defendants hereby give notice of their intent to assert any further affirmative defenses that they may learn to be supported by facts and law, including but not limited to, that this action is barred in whole or any part by any applicable statute, contract, release, covenant, or by the doctrine of laches. The Sun Defendants thus reserve the right to amend this Answer to assert any such defenses.

WHEREFORE, having fully answered Plaintiff's Complaint, the Sun Defendants pray that this Court issue an Order dismissing these claims with prejudice and that they be awarded attorney's fees and costs, and any such other relief as the Court deems just and proper.

(signature block on following page)

WILLIAMS MULLEN

By: s/ Richard H. Willis

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**COUNSEL FOR DEFENDANTS SUN TRS
OCEAN CLUB, LLC AND SUN TRS
CAROLINA PINES, LLC**

December 20, 2021

Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	CA No. 2021-CP-26-07489
	)	
	)	
CITY OF NORTH MYRTLE BEACH,	)	
	)	
Plaintiff,	)	Defendants Sun TRS Ocean Club LLC and
	)	Sun TRS Carolina Pines LLC's Amended
vs.	)	Answer, Affirmative Defenses and
	)	Counterclaims
SUN TRS OCEAN CLUB LLC and SUN	)	(Jury Demand)
TRS CAROLINA PINES LLC,	)	
	)	
Defendants.	)	
	)	
	)	

Defendants Sun TRS Ocean Club, LLC ("Sun TRS OC") and Sun TRS Carolina Pines, LLC ("Sun TRS CP") (collectively, the "Sun Defendants") hereby file their Amended Answer, Affirmative Defenses, and Counterclaims to Plaintiff's Complaint.

The Sun Defendants expressly deny each and every allegation in the Complaint, except those specifically admitted.

PARTIES AND JURISDICTION

1. The Sun Defendants admit the allegations contained in Paragraph 1 of Plaintiff's Complaint.
2. The Sun Defendants admit the allegations contained in Paragraph 2 of Plaintiff's Complaint.
3. The Sun Defendants admit the allegations contained in Paragraph 3 of Plaintiff's Complaint.

4. At this time, the Sun Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 4 of Plaintiff's Complaint, and therefore deny same.

5. At this time, the Sun Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 5 of Plaintiff's Complaint, and therefore deny same.

6. The Sun Defendants deny the allegations contained in Paragraph 6 of Plaintiff's Complaint.

BACKGROUND AND ALLEGATIONS

7. The Sun Defendants admit that Plaintiff's claims allegedly center on certain property, which Plaintiff identifies as Lot 1, Block 18-A, Tilghman, located in the City of North Myrtle Beach. Based on Plaintiff's allegations, the Sun Defendants understand Plaintiff is referring to a property owned by Sun TRS OC, parcel number 35501040048 (the "Property"). The Sun Defendants admit that this property is located in North Myrtle Beach, South Carolina, and as such is subject to the Zoning Ordinance of North Myrtle Beach, South Carolina ("Zoning Ordinance"). The Sun Defendants further admit that Section 23-2 of the Zoning Ordinance defines "Cabana house" as described in Paragraph 7 of Plaintiff's Complaint.

8. The allegations contained in Paragraph 8 of Plaintiff's Complaint contain a legal conclusion to which no response is required. To the extent a response is required, the Sun Defendants admit that the Property is located within the R-4 Resort Residential District, the uses for which are set forth in Section 23-22(2) of the Zoning Ordinance.

9. The allegations contained in Paragraph 9 of Plaintiff's Complaint contain a legal conclusion to which no response is required. To the extent a response is required, the Sun

Defendants admit that Section 23-22 of the Zoning Ordinance sets forth certain special exceptions to the uses of property in an R-4 zone, including cabana houses, as described in Paragraph 9 of Plaintiff's Complaint.

10. The Sun Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 10 of Plaintiff's Complaint, and therefore deny same.

11. The Sun Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11 of Plaintiff's Complaint, and therefore deny same.

12. The Sun Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 12 of Plaintiff's Complaint, and therefore deny same.

13. The Sun Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 13 of Plaintiff's Complaint, and therefore deny same.

14. The Sun Defendants admit that the Sun TRS OC purchased the Property from NMB Ocean Club Partners LLC on May 6, 2019, and that Sun TRS OC is the record owner of the property at this time.

15. The Sun Defendants deny the allegations contained in Paragraph 15 and subparts (a) through (e). The Sun Defendants deny that any conduct by Sun TRS OC or Sun TRS CP is or was in violation of the Zoning Ordinance.

16. The Sun Defendants deny the allegations contained in Paragraph 16 and subparts (a) through (d). The Sun Defendants deny that any conduct by Sun TRS OC or Sun TRS CP is or was in violation of the Zoning Ordinance.

17. The Sun Defendants deny the allegations contained in Paragraph 17. The Sun Defendants deny that any conduct by Sun TRS OC or Sun TRS CP is or was in violation of the Zoning Ordinance.

18. The Sun Defendants deny the allegations contained in Paragraph 18. The Sun Defendants deny that any conduct by Sun TRS OC or Sun TRS CP is or was in violation of the Zoning Ordinance.

19. The Sun Defendants admit the allegations contained in Paragraph 19 but deny that any conduct by Sun TRS OC or Sun TRS CP is or was in violation of the Zoning Ordinance.

FOR A FIRST DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION
(Declaratory Judgment)

20. The Sun Defendants incorporate by reference their prior responses to Paragraphs 1 – 19.

21. The Sun Defendants deny the allegations contained in Paragraph 21. The Sun Defendants deny that any conduct by Sun TRS OC or Sun TRS CP is or was in violation of the Zoning Ordinance.

22. The Sun Defendants deny the allegations contained in Paragraph 22. The Sun Defendants deny that any conduct by Sun TRS OC or Sun TRS CP is or was in violation of the Zoning Ordinance.

FOR A SECOND DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Failure to State a Claim)

23. Plaintiff has failed to state a claim for which relief may be granted.

FOR A THIRD DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Estoppel, Laches, & Waiver)

24. Plaintiff's claim is barred by the doctrine of estoppel, laches, and/or waiver.

FOR A FOURTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Lack of Jurisdiction)

25. There may be a lack of personal jurisdiction over one or both of the Defendants, or the Court may lack jurisdiction over the subject matter of this dispute.

FOR A FIFTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Vagueness Doctrine)

26. The Sun Defendants will show that the Zoning Ordinance, or portions thereof, which Plaintiff seeks to enforce is not sufficiently clear as to be enforceable and/or valid under the U.S. Constitution and/or Constitution of South Carolina.

FOR A SIXTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Fifth Amendment Taking)

27. The Sun Defendants will show that enforcement of the Zoning Ordinance, or portions thereof, in accordance with Plaintiff's claim, amounts to a taking of personal property rights without just compensation, as contemplated by the Fifth Amendment of the U.S. Constitution.

FOR A SEVENTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Constitutionality)

28. The Sun Defendants will show that the Zoning Ordinance, or portions thereof, which limit use or ownership of private property to persons based on their locality, is a violation of the U.S. Constitution and/or Constitution of South Carolina.

FOR AN EIGHTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Reasonableness)

29. The Sun Defendants will show that the Zoning Ordinance, or portions thereof, which Plaintiff seeks to enforce, are not reasonable. *See, e.g., Byrd v. City of N. Augusta*, 261 S.C. 591, 201 S.E.2d 744 (1974).

FOR A NINTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Ultra Vires)

30. The Sun Defendants will show that the Zoning Ordinance is ultra vires.

FOR A TENTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Exhaustion of Administrative Remedies)

31. The Sun Defendants will show that Plaintiff has failed to exhaust its administrative remedies.

FOR AN ELEVENTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Arbitrary and Capricious)

32. The Sun Defendants will show that Plaintiff's efforts to enforce the Zoning Ordinance are arbitrary and capricious.

FOR A TWELFTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Equal Protection)

33. The Sun Defendants will show that Plaintiff's efforts to enforce the Zoning Ordinance against the Sun Defendants violate the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution and the Equal Protection clause of the Constitution of South Carolina.

FOR AN THIRTEENTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
(Reservation of Rights)

34. The Sun Defendants have not completed their investigation of Plaintiff's allegations. The Sun Defendants intend to act as best they can to inform themselves of the pertinent

facts and circumstances surrounding the allegations contained in Plaintiff's Complaint. Thus, the Sun Defendants hereby give notice of their intent to assert any further affirmative defenses that they may learn to be supported by facts and law, including but not limited to, that this action is barred in whole or any part by any applicable statute, contract, release, covenant, or by the doctrine of laches. The Sun Defendants thus reserve the right to amend this Answer to assert any such defenses.

**FOR A FOURTEENTH DEFENSE TO PLAINTIFF'S CAUSE OF ACTION
AND BY WAY OF COUNTERCLAIM**

35. The Sun Defendants repeat and reallege their answers to the allegations of the Complaint incorporated herein by reference as if said answers were set forth herein verbatim.

PARTIES AND JURISDICTION

36. Plaintiff is a political subdivision of the State of South Carolina, acting by and through its governing body, North Myrtle Beach City Council, and through its various employees, agents, and representatives.

37. Sun TRS OC is a limited liability company organized and existing pursuant to the laws of the state of Michigan and is authorized to transact business and owns real property in Horry County, South Carolina.

38. Sun TRS CP is a limited liability company organized and existing pursuant to the laws of the state of Michigan and is authorized to transact business in Horry County, South Carolina. Sun TRS CP is an improperly named party in this action.

39. This action arises out of a zoning dispute regarding the ownership and use of certain real property located in Horry County, South Carolina, within the City of North Myrtle Beach.

40. This Court has jurisdiction over the parties and the subject matter of this action, and venue is proper in Horry County, South Carolina.

41. This action involves certain real property owned by Sun TRS OC, identified as Lot 1, Block 18-A, Tilghman, Parcel Number 35501040048 located at 1814 N Ocean Blvd in the City of North Myrtle Beach, Horry County, South Carolina (the “Property”).

FACTUAL BACKGROUND

42. On or around March 28, 2005, the Property was acquired by Pan, LLC. Upon information and belief, Pan, LLC was not a homeowners’ association.

43. Upon information and belief, sometime in May 2007, Pan, LLC submitted an application for a special exception to the North Myrtle Beach Board of Zoning Appeals to construct an oceanfront cabana house on the Property for the use of Seabrook Plantation, which exception was designated #SE4-07 (the “Special Exception Application”).

44. Upon information and belief, at the time the Special Exception Application was submitted to the North Myrtle Beach Board of Zoning Appeals, the Property was zoned in a R-4 (Resort Residential) district.

45. On June 18, 2007, Paul Blust, the Zoning Administrator for Plaintiff, informed Pan, LLC, via letter that the Special Exception Application was approved, and that the North Myrtle Beach Board of Zoning Appeals found that the design of the building to be placed upon the Property was similar to a single-family house, the proposed use of the building was according to the limitations set forth in Plaintiff’s zoning ordinances at the time and the parking at the Property met or exceed the requirements of Plaintiff’s zoning ordinances at the time (the “Approval Letter”). A copy of the Approval Letter is attached hereto as **Exhibit A**.

46. Upon information and belief, after Pan, LLC’s receipt of the Approval Letter, it caused to be constructed on the Property a physical structure with an inground pool, among other

internal and external improvements and fixtures. Pan, LLC, thereafter, referred to the Property as the “Ocean Club at Tilghman Beach.”

47. On August 24, 2009, Pan, LLC, conveyed the Property to NMB Oceanclub LLC. Upon information and belief, NMB Oceanclub LLC was not a homeowners’ association.

48. In June 2012, NMB Oceanclub, LLC, conveyed the Property to NMBOC Holding Co., LLC. Upon information and belief, NMBOC Holding Co., LLC, was not a homeowners’ association.

49. In May 2014, NMBOC Holding Co., LLC, granted an easement over the Property to Seabrook Plantation Property Owners’ Association, Inc., permitting property owners and guests of Seabrook Plantation to use the Property. Upon information and belief, the Seabrook Plantation Property Owners’ Association, Inc., was not located in North Myrtle Beach.

50. In May 2015, NMB Oceanclub, LLC, and the Seabrook Plantation Property Owners’ Association, Inc., amended the easement such that it served as an option for residents and property owners in Seabrook Plantation to purchase a membership to a private “beach club” located at the Property (the “Beach Club”). Upon information and belief, certain memberships in the Ocean Club at Tillman Beach were sold or provided to persons who were not residents of Seabrook Plantation and who did not reside in the City of North Myrtle Beach.

51. In April 2017, NMBOC Holding Co., LLC conveyed the Property to NMBOC Holding Co. II, LLC. Upon information and belief, NMBOC Holding Co. II, LLC, was not a homeowners’ association.

52. In August 2017, NMBOC Holding Co. II, LLC conveyed the Property to Sapphire, LLC, which immediately conveyed the Property to NMB Ocean Club Partners, LLC. Upon

information and belief, neither Sapphire, LLC, nor NMB Ocean Club Partners, LLC, were a homeowners' association.

53. On or about February 15, 2019, Sun TRS OC entered into a Real Estate Purchase and Sale Agreement with NMB Ocean Club Partners LLC (the "Purchase Agreement").

54. Pursuant to the Purchase Agreement, NMB Ocean Club Partners LLC warranted, *inter alia*, the following with respect to the Property:

To the best of Seller's Knowledge, the Assets and the operation of the Beach Club comply in all respects with all Permitted Exceptions and all applicable laws, ordinances, codes, rules and regulations, including those pertaining to zoning To the best of Seller's knowledge, there are no existing facts or conditions which may result in the issuance of, any violations of any building, zoning, safety, fire, environmental, health or other code, laws, ordinances, or regulations with respect to the Assets, the appurtenances thereto or the maintenance, repair or operation thereof. To the best of Seller's knowledge, Parking at the Real Estate complies with all requirements for the operation of the Beach Club.

55. In April 2019, NMB Ocean Club Partners, LLC, and the Seabrook Plantation Property Owners' Association terminated Seabrook Plantation Property Owners' Association's easement over the Property but continued to offer membership to the Beach Club to residents of Seabrook Plantation, Robbers' Roost, employees of local businesses, and other persons, without requiring that they reside in the City of North Myrtle Beach.

56. Prior to closing the sale of the Property and during the due diligence period, Sun TRS OC, through Sun Acq LLC, requested a zoning letter from Plaintiff, inquiring as to the zoning of the Property and whether the Property or the Beach Club was subject to any zoning ordinance violations. In response, on or about March 19, 2019, Paul Blust, Zoning Administrator for Plaintiff, informed Sun TRS OC in writing (the "No Violations Letter") 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.” The No Violations Letter is attached hereto as **Exhibit B**.

57. At the time of the purchase of the Property, the Sun TRS OC believed that Horry County, City of North Myrtle Beach, the local chamber of commerce, and other business leaders in the area knew of the Sun TRS OC’s intention to use the Property for guests and residents of its Recreational Vehicle Park in Horry County, and expressed no objections or reservations.

58. On May 3, 2019, the Property (along with the Beach Club) was conveyed to Sun TRS OC via General Warranty Deed, which deed was recorded in the Horry County Register of Deeds on May 10, 2019 in Deed Book 4206 at Page 2963.

59. Sun TRS OC is a wholly owned subsidiary of Sun Communities, Inc. (“Sun Communities”), a publicly traded real estate investment trust that, through its subsidiaries, invests in manufactured housing communities, recreation vehicle resorts, and marinas. As of June 30, 2021, Sun Communities and its subsidiaries owned interest in 569 such communities in the United States and Canada, consisting of over 153,300 developed sites.

60. Sun TRS OC has an agreement with another Sun Communities subsidiary, Sun Carolina Pines RV, LLC, whereby it permits Sun Carolina Pines RV, LLC, to use the Property (and the Beach Club) as a private beach club for guests staying at its RV Resort in Conway, South Carolina.

61. Sun TRS OC also honors memberships to the Beach Club held by certain residents of Seabrook Plantation and Robber’s Roost in North Myrtle Beach, South Carolina, in addition to other members not residing in the City of North Myrtle Beach.

62. Sun TRS CP does not own or use the Property (or the Beach Club) and is improperly named in this action.

63. Upon information and belief, between May 3, 2019 and September 2, 2021, Sun TRS OC operated the Property and the Beach Club on the Property without any complaint from Plaintiff despite the alleged zoning ordinance violations complained of in its Complaint.

64. On or about September 2, 2021, approximately 2 years and 4 months after Sun TRS OC purchased the Property, Plaintiff issued a cease and desist letter to Sun TRS OC and Sun TRS CP explaining that the use of the Property and related shuttle services to and from the Property were in violation of Plaintiff's zoning ordinance (the "Cease and Desist Letter").

65. Specially, the Cease and Desist Letter explained that Defendants were operating the Property in violation of Section 23-2 of Plaintiff's Zoning Ordinance, which 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, SC, Ordinances, Sec. 23-2.

66. Upon information and belief, the Cease and Desist Letter was prompted by a complaint filed by Sea Cloisters I Homeowners Assoc., Inc. ("Cloisters I") and Sea Cloisters II Homeowners Assoc., Inc. ("Cloisters II").

67. As set forth in the Complaint, Plaintiff now alleges that Defendants not only violated Section 23-2 of the Zoning Ordinance, but also Section 23-22 of the Zoning Ordinance which sets forth certain the permitted use requirements for the Property to meet the Special

Exception requirements to be lawfully considered a cabana house. Specifically, Plaintiff asserts that the Sun Defendants have violated the Zoning Ordinance in the following regards:

- a. In the use of the Property by a project(s) not in North Myrtle Beach;
- b. In the ownership of the Cabana House by an entity that is not a Homeowners' Association;
- c. In failing to limit the use of the Cabana House to bathing and changes of clothing facilities, occasionally using as a guest quarters and other similar uses;
- d. In failing to use the Cabana House in a manner that is in substantial harmony with the area in which it is located; and
- e. In utilizing the Cabana House in a fashion that is, upon information and belief, injurious to the adjoining property.

See Compl. ¶¶ 15, 16.

68. Upon information and belief, none of the prior owners of the Property were homeowners' associations.

69. Upon information and belief, the use of the Property prior to Sun TRS OC's ownership was not limited to persons or "projects" in North Myrtle Beach, and the Property was used in substantially the same manner as Sun TRS OC has used the Property.

70. Upon information and belief, no prior owners of the Property limited use of the Property to persons or "projects" in North Myrtle Beach, and at those times, the Property was used in substantially the same manner as Sun TRS OC has used the Property.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment/Injunctive Relief – Unconstitutionality of the Zoning Ordinance under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3)

71. The Sun Defendants repeat and reallege their answers to the allegations of the Complaint incorporated herein by reference as if said answers were set forth herein verbatim.

72. The Commerce Clause not only vests Congress with “Power . . . [t]o regulate Commerce with foreign Nations, and among the several States,” U.S. Const. art. I, § 8, cl. 3, but also prohibits states and municipalities from discriminating against interstate commerce.

73. The Zoning Ordinance discriminates on its face against interstate commerce by expressly limiting the use of the Property only to “projects” that exist in North Myrtle Beach not located near the ocean, and prohibiting ownership of the Property by any person or entity other than a homeowners’ associations.

74. Further, the Zoning Ordinance, as applied, has a discriminatory purpose and/or effect on interstate commerce by restricting the use of the Property only to “projects” that exist in North Myrtle Beach not located near the ocean, and prohibiting ownership of the Property by any person or entity other than a homeowners’ associations.

75. Plaintiff cannot show that this discrimination against and interference with interstate commerce is unrelated to economic protectionism for the benefit of Plaintiff. Further, there exists many nondiscriminatory alternatives adequate to preserve the local interests at stake.

76. Moreover, the Zoning Ordinance imposes a disproportionate burden on interstate commerce that is clearly excessive in relation to the putative local benefits it seeks to achieve by restricting the ownership and use of the Beach Club exclusively to homeowners’ associations and “projects” in the City of North Myrtle Beach.

77. By expressly setting forth geographic limitations on the classes of persons or entities that may own and use the Property, the Zoning Ordinance negatively impacts interstate commerce to a significantly greater degree than intrastate commerce in South Carolina.

78. Therefore, an actual controversy exists within the meaning of the South Carolina Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 *et seq.* regarding whether the Zoning Ordinance is in violation of Commerce Clause of the United States Constitution.

79. Accordingly, the Sun Defendants seek a declaratory judgment pursuant to Rule 57, SCRPC, and the South Carolina Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 *et seq.*, declaring that the Zoning Ordinance violates the Commerce Clause of the United States Constitution and, therefore, is unconstitutional.

80. Additionally, in light of the imminent risk of harm posed to Sun TRS OC and members of the Beach Club by enforcement of the Zoning Ordinance, such enforcement which would divest Sun TRS OC and members of the Beach Club of certain rights attached to the Property, the Sun Defendants request that the Court issue preliminary injunction and permanent injunctive relief preventing Plaintiff from enforcing the Zoning Ordinance as to ownership and who may use the Property.

FOR A SECOND CAUSE OF ACTION

(Declaratory Judgment/Injunctive Relief – Unconstitutionality of the Zoning Ordinance under the Fourteenth Amendment, U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 – Due Process)

81. The Sun Defendants repeat and reallege their answers to the allegations of the Complaint incorporated herein by reference as if said answers were set forth herein verbatim.

82. The Zoning Ordinance arbitrarily and capriciously deprives Sun TRS OC of its cognizable property interests by restricting use and ownership of the Property in violation of Sun TRS OC's due process rights under the United States and South Carolina Constitutions.

83. Plaintiff's actions in enacting and arbitrarily enforcing the Zoning Ordinance against Sun TRS OC has no foundation in reason and represents a mere arbitrary and irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare of Plaintiff's citizens in its proper sense and constitute a violation of the Sun TRS OC's due process rights under the United States and South Carolina Constitutions.

84. Therefore, an actual controversy exists within the meaning of the South Carolina Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 *et seq.* regarding whether the Zoning Ordinance is in violation of the Sun TRS OC's due process rights under the United States and South Carolina Constitutions, insofar as the Ordinance purports to restrict ownership of the Property to homeowners' association and use to "projects" in North Myrtle Beach.

85. Accordingly, the Sun Defendants seek a declaratory judgment pursuant to Rule 57, SCRCP, and the South Carolina Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 *et seq.*, declaring that the Zoning Ordinance violates the Sun Defendants' due process rights of the United States and South Carolina Constitutions and, therefore, is unconstitutional.

86. Additionally, in light of the imminent risk of harm posed to Sun TRS OC and members of the Beach Club by enforcement of the Zoning Ordinance, such enforcement which would divest Sun TRS OC and members of the Beach Club of certain rights attached to the Property, the Sun Defendants request that the Court issue preliminary and a permanent injunction preventing Plaintiff from enforcing the Zoning Ordinance in the manner described.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment/Injunctive Relief – Unconstitutionality of the Zoning Ordinance under the Fourteenth Amendment, U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 – Equal Protection)

87. The Sun Defendants repeat and reallege their answers to the allegations of the Complaint incorporated herein by reference as if said answers were set forth herein verbatim.

88. Sun TRS OC is similarly situated to owners of other property, including owners of other “cabana houses” and properties zoned R-4, in North Myrtle Beach.

89. Sun TRS OC, and its membership, are also similarly situated to other visitors to North Myrtle Beach who utilize public and/or private beach access and other recreational amenities located in North Myrtle Beach.

90. Plaintiff’s enactment and arbitrary enforcement of the Zoning Ordinance represents a vindictive action against Sun TRS OC and its membership, who do not permanently reside in North Myrtle Beach, and such action is undertaken with illegitimate animus and/or ill will against Sun TRS OC and residents and guests of their Recreational Vehicle Park in violation of the United States and South Carolina Constitutions’ guarantee to the right of equal protection under the laws.

91. Plaintiff’s intentional disparate treatment of Sun TRS OC’s property rights by its arbitrary enforcement of the Zoning Ordinance in the manner described has no rational basis and bears no rational relationship to a legitimate municipal purpose and, therefore, violate Sun TRS OC’s rights of equal protection.

92. Therefore, an actual controversy exists within the meaning of the South Carolina Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 *et seq.* regarding whether the Zoning Ordinance is in violation of Sun TRS OC’s equal protection rights guaranteed by the United States and South Carolina Constitutions.

93. Accordingly, the Sun Defendants seek a declaratory judgment pursuant to Rule 57, SCRPC, and the South Carolina Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 *et seq.*, declaring that the Zoning Ordinance violates Defendants' equal protection rights guaranteed by the United States and South Carolina Constitutions and, therefore, is unconstitutional.

94. Additionally, in light of the imminent risk of harm posed to Sun TRS OC and members of the Beach Club by enforcement of the Zoning Ordinance, such enforcement which would divest Sun TRS OC and members of the Beach Club of certain rights attached to the Property, the Sun Defendants request that the Court issue a preliminary and permanent injunction preventing Plaintiff from enforcing the Zoning Ordinance in the manner described.

FOR A FOURTH CAUSE OF ACTION

(Violation of 42 U.S.C. § 1983 – Commerce Clause, Due Process, and Equal Protection)

95. The Sun Defendants repeat and reallege their answers to the allegations of the Complaint incorporated herein by reference as if said answers were set forth herein verbatim.

96. By arbitrarily enforcing the Zoning Ordinance against Sun TRS OC, Plaintiff, acting under color of law, has violated and, unless enjoined by this Court, will continue to violate Sun TRS OC's rights to engage in interstate commerce free from unconstitutional discrimination in violation of the dormant Commerce Clause of the United States Constitution, as well as Sun TRS OC's rights to due process and equal protection of the laws under the Fourteenth Amendment of the United States Constitution.

97. Plaintiff's deprivation of Sun TRS OC's guaranteed rights in violation of 42 U.S.C. § 1983 and the Constitution of the United States are the result of Plaintiff's policy and/or custom against ownership and use of Property or "projects" by individuals or entities that do not reside in the City of North Myrtle Beach.

98. An actual “case or controversy” exists because Plaintiff’s attempts to enforce the Zoning Ordinance creates a genuine, credible, and immediate threat that Plaintiff – acting under color of state law – will violate Sun TRS OC’s constitutionally protected rights.

99. The Sun Defendants accordingly seek a judgment against Plaintiff for enactment and enforcement of the Zoning Ordinance in violation of Sun TRS OC’s constitutional rights in violation of the United States and South Carolina Constitutions, and 42 U.S.C. § 1983. Sun TRS OC also seeks actual damages in an amount to be determined at trial and reasonable attorneys’ fees and costs pursuant to 42 U.S.C § 1988.

FOR A FIFTH CAUSE OF ACTION
(Inverse Condemnation/Regulatory Taking)

100. The Sun Defendants repeat and reallege their answers to the allegations of the Complaint incorporated herein by reference as if said answers were set forth herein verbatim.

101. The Takings Clause of the Fifth Amendment of the United States Constitution provides, “nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V.

102. Article I, § 13 of the South Carolina Constitution provides, in pertinent part, that “private property shall not be taken . . . for public use without just compensation being first made therefor.”

103. Under both the United States and South Carolina Constitutions, a regulation that advances a legitimate state interest may nevertheless constitute a taking if it denies an owner of all economically beneficial or productive use of his or her land.

104. Moreover, a finding of no value must be considered under the Takings Clause by reference to the owner’s reasonable, investment-backed expectations, such as the uninterrupted use of a Beach Club for the benefit of its customers as is the case with the Property here.

105. The Zoning Ordinance enacted and arbitrarily enforced by Plaintiff as aforesaid has deprived Sun TRS OC of all economically viable use of all or part of the Property as Sun TRS OC will no longer be able to use the Property as it has been used by Sun TRS OC and its predecessors in title since 2007.

106. Sun TRS OC is entitled to recover in this civil action just compensation for the regulatory taking of the Property as set forth above, including prejudgment interest, expenses, and attorneys' fees, as well as costs incurred in reasonable reliance on the Plaintiff's representations that there were no zoning violations as of March 19, 2019, and that prior uses of the Cabana House had been legal, and judgment declaring the Zoning Ordinance invalid as applied to Sun TRS OC and the Property.

WHEREFORE, having fully answered Plaintiff's Complaint and asserted its Counterclaims, the Sun Defendants pray that this Court:

1. Issue an Order dismissing Plaintiff's claims with prejudice;
2. Award the Sun Defendants attorneys' fees and costs, and any such other relief as the Court deems just and proper, associated with defending this action;
3. Declare the Zoning Ordinance unconstitutional under the Commerce Clause of the United States Constitution and enjoin Plaintiff from enforcing the Zoning Ordinance against the Property;
4. Declare the Zoning Ordinance unconstitutional under the Fourteenth Amendment of the United States and South Carolina Constitutions for violations of the Sun Defendants due process and equal protection rights and enjoin Plaintiff from enforcing the Zoning Ordinance against the Property;

5. Enter judgment against Plaintiff under 42 U.S.C. § 1983 and order Plaintiff to pay all actual, incidental, and consequential damages in an amount to be determined at the trial of this case for Plaintiff's actions in violating the Sun Defendants' substantive and procedural due process rights, violation of its rights to equal protection under the law, and its right to participate in interstate commerce under the Commerce Clause of the United States Constitution;

6. Award the Sun Defendants' its reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and S.C. Code Ann. § 15-77-300, on the grounds that the arbitrary enforcement of the Zoning Ordinance was in violation of the Sun Defendants' civil rights and without justification, and constitutes improper state action where an award of attorney's fees would not be unjust; and

7. Award any and all such further relief as this Court may deem just and proper. The Sun Defendants hereby demand trial by jury on their Section 1983 claims.

[signature on following page]

WILLIAMS MULLEN

By: s/John G. Tamasitis
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**COUNSEL FOR DEFENDANTS SUN TRS
OCEAN CLUB, LLC AND SUN TRS
CAROLINA PINES, LLC**

March 14, 2022
Columbia, South Carolina



EXHIBIT A

ELECTRONICALLY FILED - 2022 Mar 14 2:24 PM - Horry - COMMON PLEAS - CASE#2021CP2607489

June 18, 2007

Ben Powell
PO Box 750
North Myrtle Beach, SC 29597

Dear Mr. Powell,

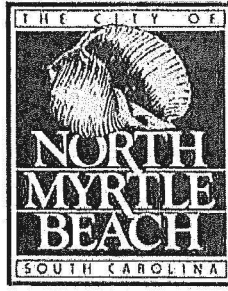
The North Myrtle Beach Board of Zoning Appeals met on June 14, 2007 to hear and decide on two applications submitted by you for special exception #SE3-07 and #SE4-07. Special exception #SE3-07 was to create an amenity area for storage of RVs and boats for your new subdivision Seabrook Plantation and special exception #SE4-07 was for an oceanfront cabana house for Seabrook Plantation in the R-4 (Resort Residential) district to be located at 1814 North Ocean Boulevard.

This letter is notification to you that the Board voted to approve both of these requests for special exception. The specific finding of fact on the RV and boat storage area was that this property abuts commercially zoned property and it is very well screened from the proposed lots that will be platted upon recording of a final plat. The specific findings of fact for the oceanfront cabana was that the design of the building is similar to a single-family house, the use of the building will be according to the limitations contained in the Zoning Ordinance and the parking meets and exceeds the minimum requirement of the code.

If you have any questions on either of these two cases please call me at 280-5565.

Sincerely,

Paul Blust
Zoning Administrator



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

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

CITY OF NORTH MYRTLE BEACH,

Plaintiff,

vs.

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

Defendants.

IN THE CIRCUIT COURT

Case No. 2021-CP-26-07489

**PLAINTIFF'S REPLY TO DEFENDANTS'
COUNTERCLAIMS**

Plaintiff, the City of North Myrtle Beach ("NMB"), answers in reply to the counterclaims of Defendants Sun TRS Ocean Club LLC and Sun TRS Carolina Pines, LLC (collectively, the "Defendants"), as follows. Any allegation that is not expressly admitted is to be deemed denied and strict proof thereof demanded.

DEFENDANTS' ANSWER

1. – 35. No response is required to any allegation in these paragraphs. To the extent a response is required, the allegations are denied.

PARTIES AND JURISDICTION

36. Plaintiff admits the allegations in Paragraph 36 of Defendants' Counterclaims.

37. Plaintiff admits, upon information and belief the allegations in Paragraph 37 of Defendants' Counterclaims.

38. Plaintiff admits, upon information and belief, the allegations in Paragraph 38 of Defendants' Counterclaims.

39. Plaintiff admits the allegations in Paragraph 39 of Defendants' Counterclaims.

40. Plaintiff admits the allegations in Paragraph 40 of Defendants' Counterclaims.

41. Plaintiff admits the allegations in Paragraph 41 of Defendants' Counterclaims.

FACTUAL BACKGROUND

42. Plaintiff admits, upon information and belief, the allegations in Paragraph 42 of Defendants' Counterclaims.

43. Plaintiff admits the allegations in Paragraph 43 of Defendants' Counterclaims.

44. Plaintiff admits the allegations in Paragraph 44 of Defendants' Counterclaims.

45. Plaintiff admits the allegations in Paragraph 45 of Defendants' Counterclaims.

46. Plaintiff admits, upon information and belief, the allegations in Paragraph 46 of Defendants' Counterclaims.

47. Plaintiff admits the allegations in Paragraph 47 of Defendants' Counterclaims insofar as Pan, LLC conveyed the Property to NMB Oceanclub LLC on or about August 24, 2009 and so much of Paragraph 47 as alleges or may be construed to allege that NMB was subsequently informed of said conveyance and that NMB Oceanclub LLC may not have operated as a homeowners' association.

48. Plaintiff admits the allegations in Paragraph 48 of Defendants' Counterclaims insofar as NMB Oceanclub LLC conveyed the Property to NMB Ocean Club Partners LLC in 2012, and so much of Paragraph 48 as alleges or may be construed to allege that NMB was subsequently informed of said conveyance and that NMB Oceanclub LLC may not have operated as a homeowners' association.

49. Plaintiff admits, upon information and belief, the allegations in Paragraph 49 of Defendants' Counterclaims.

50. Responding to Paragraph 50 of Defendants' Counterclaims, NMB craves reference to any amendment of the referenced easement, assuming such amendment

exists, for the terms and provisions thereof and denies any allegations of Paragraph 50 that are, or may be, inconsistent therewith.

51. Plaintiff admits, upon information and belief, so much of Paragraph 51 as alleges or may be construed to allege that in April 2017, NMBOC Holding Co., LLC conveyed the Property to NMBOC Holding Co. II, LLC. Further responding, NBM admits so much of Paragraph 51 as alleges or may be construed to allege that NMB was subsequently informed of said conveyance and that NMBOC Holding Co., II, LLC may not have operated as a homeowners' association.

52. Plaintiff admits, upon information and belief, so much of Paragraph 52 as alleges or may be construed to allege that in August 2017, NMBOC Holding Col II, LLC conveyed the Property to Sapphire, LLC, when then conveyed the Property to NMB Ocean Club Partners, LLC. Further responding, NMB admits so much of Paragraph 52 as alleges or may be construed to allege that NMB was subsequently information of said conveyance and that neither Sapphire, LLC nor NMB Ocean Club Partners, LLC may have operated as a homeowners' association

53. Plaintiff lacks sufficient information to admit or deny the allegations in Paragraph 53 of Defendants' Counterclaims, and accordingly denies them and demands strict proof thereof.

54. Plaintiff lacks sufficient information to admit or deny the allegations in Paragraph 54 of Defendants' Counterclaims, and accordingly denies them and demands strict proof thereof.

55. Plaintiff admits, upon information and belief, so much of Paragraph 55 as alleges or may be construed to allege that in or around April 2019, NMB Ocean Club Partners, LLC and Seabrook Plantation Property Owners' Association undertook certain action

relative to an easement previously granted unto Seabrook Plantation Property Owners' Association and craves reference to said document evidencing such action for the terms thereof, and denies any allegations of Paragraph 55 that are, or may be, inconsistent therewith. NMB lacks sufficient information or knowledge to admit or deny the remaining allegations in Paragraph 55 of Defendants' Counterclaims, and accordingly denies them and demands strict proof thereof.

56. Answering Paragraph 56 of Defendants' Counterclaims, Plaintiff admits so much thereof as alleges, or may be construed to allege, that Paul Blust signed a letter to Sun Acq LLC dated March 19, 2019. Defendants further reference the language in the letter, attached to Defendants' Counterclaims, which speaks for itself and denies any allegations of Paragraph 56 that are, or may be, inconsistent therewith, along with any remaining allegations of Paragraph 56.

57. Plaintiff lacks sufficient information to admit or deny the allegations in Paragraph 57 of Defendants' Counterclaims, and accordingly denies them and demands strict proof thereof.

58. Plaintiff admits, upon information and belief, the allegations in Paragraph 58 of Defendants' Counterclaims.

59. Plaintiff lacks sufficient information to admit or deny the allegations in Paragraph 59 of Defendants' Counterclaims, and accordingly denies them and demands strict proof thereof.

60. Plaintiff admits, upon information and belief, so much of Paragraph 60 as alleges or may be construed to allege that Sun Carolina Pines RV Resort located outside the limits of the City of North Myrtle Beach previously utilized the Property. NMB is without

sufficient information or knowledge to admit or deny the remaining allegations of Paragraph 60 and demands strict proof thereof.

61. Plaintiff lacks sufficient information to admit or deny the allegations in Paragraph 61 of Defendants' Counterclaims, and accordingly denies them and demands strict proof thereof.

62. Plaintiff lacks sufficient information to admit or deny the allegations in Paragraph 62 of Defendants' Counterclaims, and accordingly denies them and demands strict proof thereof.

63. Plaintiff admits so much of Paragraph 63 as alleges or may be construed to allege that, for a short period of time, NMB was unaware of the manner in which Sun TRS OC operated the Property and the Beach Club on the Property and denies any remaining allegations of Paragraph 63, demanding strict proof thereof.

64. Plaintiff admits the allegations in Paragraph 64 of Defendants' Counterclaims.

65. Answering Paragraph 65 of Defendants' Counterclaims, Plaintiff admits so much thereof as alleges, or may be construed to allege, that the Cease and Desist Letter alleged violations of the Zoning Ordinances. Defendants further reference the language in the letter, which speaks for itself.

66. Plaintiff admits the allegations in Paragraph 66 of Defendants' Counterclaims insofar as Plaintiff first became aware of Defendants' alleged violations via a letter received from Sea Cloisters I Homeowners Assoc., Inc. ("Cloisters I") and Sea Cloisters II Homeowners Assoc., Inc. ("Cloisters II"), but Plaintiff denies so much thereof as alleges, or may be construed to allege, that it did not conduct an independent evaluation to verify the existence of Defendants' violations and to determine how to respond to the existence of Defendants' violations, prior to the sending of the Cease and Desist Letter.

67. Answering Paragraph 67 of Defendants' Counterclaims, Plaintiff admits so much thereof as alleges, or may be construed to allege, that its Complaint alleges violations of the Zoning Ordinances. Defendants further reference the language in the letter, which speaks for itself.

68. Plaintiff admits, upon information and belief, the allegations of Paragraph 68. Further responding, Plaintiff adds that it was not become aware of these allegations until being notified of Defendants' violations.

69. Plaintiff denies the allegations in Paragraph 69 of Defendants' Counterclaims and demands strict proof thereof.

70. Plaintiff denies the allegations in Paragraph 70 of Defendants' Counterclaims and demands strict proof thereof.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment/Injunctive Relief – Unconstitutionality of the Zoning Ordinance under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3)

71. Answering Paragraph 71 of Defendants' Counterclaims, Plaintiff repeats and reiterates the paragraphs above, as if set forth verbatim herein.

72. The allegations contained in Paragraph 72 of Defendants' Counterclaims call for a legal conclusion to which Plaintiff is not required to respond.

73. Plaintiff denies the allegations in Paragraph 73 of Defendants' Counterclaims and demands strict proof thereof.

74. Plaintiff denies the allegations in Paragraph 74 of Defendants' Counterclaims and demands strict proof thereof.

75. Plaintiff denies so much of Paragraph 75 as alleges or may be construed to allege any discrimination against or interference with interstate commerce and demands strict proof thereof.

76. Plaintiff denies the allegations in Paragraph 76 of Defendants' Counterclaims and demands strict proof thereof.

77. Plaintiff denies the allegations in Paragraph 77 of Defendants' Counterclaims and demands strict proof thereof.

78. Plaintiff denies the allegations in Paragraph 78 of Defendants' Counterclaims and demands strict proof thereof.

79. Plaintiff denies the allegations in Paragraph 79 of Defendants' Counterclaims and demands strict proof thereof.

80. Responding to Paragraph 80, Plaintiff denies there is any imminent risk of harm to Sun TRS OC and members of the Beach Club by enforcement of the applicable Zoning Ordinances, denies that enforcement of the applicable Zoning Ordinances divest Sun TRS OC and members of the Beach Club of any rights validly attached to the Property and that the Sun Defendants are entitled to any preliminary injunction or permanent injunctive relief as to Plaintiff's enforcement of the applicable Zoning Ordinances or the Consent Order previously entered by the Court in this matter.

FOR A SECOND CAUSE OF ACTION

(Declaratory Judgment/Injunctive Relief – Unconstitutionality of the Zoning Ordinance under the Fourteenth Amendment, U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 – Due Process)

81. Answering Paragraph 81 of Defendants' Counterclaims, Plaintiff repeats and reiterates the paragraphs above, as if set forth verbatim herein.

82. Plaintiff denies the allegations in Paragraph 82 of Defendants' Counterclaims and demands strict proof thereof.

83. Plaintiff denies the allegations in Paragraph 83 of Defendants' Counterclaims and demands strict proof thereof.

84. Plaintiff denies the allegations in Paragraph 84 of Defendants' Counterclaims and demands strict proof thereof.

85. Plaintiff denies so much of Paragraph 85 as alleges or may be construed to allege the Sun Defendants are entitled to any relief, and demands strict proof thereof.

86. Responding to Paragraph 86, Plaintiff denies there is any imminent risk of harm to Sun TRS OC and members of the Beach Club by enforcement of the applicable Zoning Ordinances, denies that enforcement of the applicable Zoning Ordinances divest Sun TRS OC and members of the Beach Club of any rights validly attached to the Property and that the Sun Defendants are entitled to any preliminary injunction or permanent injunctive relief as to Plaintiff's enforcement of the applicable Zoning Ordinances or the Consent Order previously entered by the Court in this matter.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment/Injunctive Relief – Unconstitutionality of the Zoning Ordinance under the Fourteenth Amendment, U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 – Equal Protection)

87. Answering Paragraph 87 of Defendants' Counterclaims, Plaintiff repeats and reiterates the paragraphs above, as if set forth verbatim herein.

88. Plaintiff denies the allegations in Paragraph 88 of Defendants' Counterclaims and demands strict proof thereof.

89. Plaintiff denies the allegations in Paragraph 89 of Defendants' Counterclaims and demands strict proof thereof.

90. Plaintiff denies the allegations in Paragraph 90 of Defendants' Counterclaims and demands strict proof thereof.

91. Plaintiff denies the allegations in Paragraph 91 of Defendants' Counterclaims and demands strict proof thereof.

92. Plaintiff denies the allegations in Paragraph 92 of Defendants' Counterclaims and demands strict proof thereof.

93. Plaintiff denies the allegations in Paragraph 93 of Defendants' Counterclaims and demands strict proof thereof.

94. Responding to Paragraph 94, Plaintiff denies there is any imminent risk of harm to Sun TRS OC and members of the Beach Club by enforcement of the applicable Zoning Ordinances, denies that enforcement of the applicable Zoning Ordinances divest Sun TRS OC and members of the Beach Club of any rights validly attached to the Property and that the Sun Defendants are entitled to any preliminary injunction or permanent injunctive relief as to Plaintiff's enforcement of the applicable Zoning Ordinances or the Consent Order previously entered by the Court in this matter.

FOR A FOURTH CAUSE OF ACTION
(Violation of 42 U.S.C. § 1983 – Commerce Clause, Due Process, and Equal Protection)

95. Answering Paragraph 95 of Defendants' Counterclaims, Plaintiff repeats and reiterates the paragraphs above, as if set forth verbatim herein.

96. Plaintiff denies the allegations in Paragraph 96 of Defendants' Counterclaims and demands strict proof thereof.

97. Plaintiff denies the allegations in Paragraph 97 of Defendants' Counterclaims and demands strict proof thereof.

98. Plaintiff denies the allegations in Paragraph 98 of Defendants' Counterclaims and demands strict proof thereof.

99. Plaintiff denies the allegations in Paragraph 99 of Defendants' Counterclaims and demands strict proof thereof.

FOR A FIFTH CAUSE OF ACTION

(Inverse Condemnation/Regulatory Taking)

100. Answering Paragraph 100 of Defendants' Counterclaims, Plaintiff repeats and reiterates the paragraphs above, as if set forth verbatim herein.

101. The allegations contained in Paragraph 101 of Defendants' Counterclaims call for a legal conclusion to which Plaintiff is not required to respond.

102. The allegations contained in Paragraph 102 of Defendants' Counterclaims call for a legal conclusion to which Plaintiff is not required to respond.

103. The allegations contained in Paragraph 103 of Defendants' Counterclaims call for a legal conclusion to which Plaintiff is not required to respond.

104. The allegations contained in Paragraph 104 of Defendants' Counterclaims call for a legal conclusion to which Plaintiff is not required to respond.

105. Plaintiff denies the allegations in Paragraph 105 of Defendants' Counterclaims and demands strict proof thereof.

106. Plaintiff denies the allegations in Paragraph 106 of Defendants' Counterclaims and demands strict proof thereof.

WHEREFORE, having fully replied to Defendants' Counterclaims, Plaintiff requests that they be dismissed with prejudice and that this Court award Plaintiff its costs and attorneys' fees, grant it the relief sought in its Complaint, and for such further relief as this Court deems just and proper.

Respectfully submitted,

s/Cheryl D. Shoun

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Attorneys for Plaintiff
CITY OF NORTH MYRTLE BEACH

April 20, 2022
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
CITY OF NORTH MYRTLE BEACH,

Plaintiff,

vs.

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

Defendants.

IN THE CIRCUIT COURT

Case No. 2021-CP-26-07489

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COUNTERCLAIMS**

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70. Plaintiff denies the allegations in Paragraph 70 of Defendants' Counterclaims and demands strict proof thereof.

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(Declaratory Judgment/Injunctive Relief – Unconstitutionality of the Zoning Ordinance under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3)

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FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment/Injunctive Relief – Unconstitutionality of the Zoning Ordinance under the Fourteenth Amendment, U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 – Due Process)

81. Answering Paragraph 81 of Defendants' Counterclaims, Plaintiff repeats and reiterates the paragraphs above, as if set forth verbatim herein.

82. Plaintiff denies the allegations in Paragraph 82 of Defendants' Counterclaims and demands strict proof thereof.

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FOR A THIRD CAUSE OF ACTION

(Declaratory Judgment/Injunctive Relief – Unconstitutionality of the Zoning Ordinance under the Fourteenth Amendment, U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 – Equal Protection)

87. Answering Paragraph 87 of Defendants' Counterclaims, Plaintiff repeats and reiterates the paragraphs above, as if set forth verbatim herein.

88. Plaintiff denies the allegations in Paragraph 88 of Defendants' Counterclaims and demands strict proof thereof.

89. Plaintiff denies the allegations in Paragraph 89 of Defendants' Counterclaims and demands strict proof thereof.

90. Plaintiff denies the allegations in Paragraph 90 of Defendants' Counterclaims and demands strict proof thereof.

91. Plaintiff denies the allegations in Paragraph 91 of Defendants' Counterclaims and demands strict proof thereof.

92. Plaintiff denies the allegations in Paragraph 92 of Defendants' Counterclaims and demands strict proof thereof.

93. Plaintiff denies the allegations in Paragraph 93 of Defendants' Counterclaims and demands strict proof thereof.

94. Responding to Paragraph 94, Plaintiff denies there is any imminent risk of harm to Sun TRS OC and members of the Beach Club by enforcement of the applicable Zoning Ordinances, denies that enforcement of the applicable Zoning Ordinances divest Sun TRS OC and members of the Beach Club of any rights validly attached to the Property and that the Sun Defendants are entitled to any preliminary injunction or permanent injunctive relief as to Plaintiff's enforcement of the applicable Zoning Ordinances or the Consent Order previously entered by the Court in this matter.

FOR A FOURTH CAUSE OF ACTION
(Violation of 42 U.S.C. § 1983 – Commerce Clause, Due Process, and Equal Protection)

95. Answering Paragraph 95 of Defendants' Counterclaims, Plaintiff repeats and reiterates the paragraphs above, as if set forth verbatim herein.

96. Plaintiff denies the allegations in Paragraph 96 of Defendants' Counterclaims and demands strict proof thereof.

97. Plaintiff denies the allegations in Paragraph 97 of Defendants' Counterclaims and demands strict proof thereof.

98. Plaintiff denies the allegations in Paragraph 98 of Defendants' Counterclaims and demands strict proof thereof.

99. Plaintiff denies the allegations in Paragraph 99 of Defendants' Counterclaims and demands strict proof thereof.

FOR A FIFTH CAUSE OF ACTION
(Inverse Condemnation/Regulatory Taking)

100. Answering Paragraph 100 of Defendants' Counterclaims, Plaintiff repeats and reiterates the paragraphs above, as if set forth verbatim herein.

101. The allegations contained in Paragraph 101 of Defendants' Counterclaims call for a legal conclusion to which Plaintiff is not required to respond.

102. The allegations contained in Paragraph 102 of Defendants' Counterclaims call for a legal conclusion to which Plaintiff is not required to respond.

103. The allegations contained in Paragraph 103 of Defendants' Counterclaims call for a legal conclusion to which Plaintiff is not required to respond.

104. The allegations contained in Paragraph 104 of Defendants' Counterclaims call for a legal conclusion to which Plaintiff is not required to respond.

105. Plaintiff denies the allegations in Paragraph 105 of Defendants' Counterclaims and demands strict proof thereof.

106. Plaintiff denies the allegations in Paragraph 106 of Defendants' Counterclaims and demands strict proof thereof.

FOR A FIRST DEFENSE TO DEFENDANTS' COUNTERCLAIMS
(Failure to State a Claim)

107. Defendants' Counterclaims fail to state facts sufficient to constitute any claim upon which relief can be granted, and, therefore, should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SECOND DEFENSE TO DEFENDANTS' COUNTERCLAIMS
(Section 29 of Title 6 of the South Carolina Code)

108. Defendants' Counterclaims fail as a matter of law based upon Section 29 of Title 6 of the South Carolina Code.

FOR A THIRD DEFENSE TO DEFENDANTS' COUNTERCLAIMS
(Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926))

109. Defendants' Counterclaims fail as a matter of law based upon *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

FOR A THIRD DEFENSE TO DEFENDANTS' COUNTERCLAIMS
(Reservation of Right to Make Other Assertions)

110. Plaintiff reserves the right to assert, via amended pleadings, any and all additional and/or further defenses as may be revealed by additional information or documentation produced or acquired through discovery or otherwise herein.

WHEREFORE, having fully replied to Defendants' Counterclaims, Plaintiff requests that they be dismissed with prejudice and that this Court award Plaintiff its costs and attorneys' fees, grant it the relief sought in its Complaint, and for such further relief as this Court deems just and proper.

Respectfully submitted,

s/Cheryl D. Shoun

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Attorneys for Plaintiff
 CITY OF NORTH MYRTLE BEACH

May 20, 2022
 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

**STIPULATION OF DISMISSAL
AS TO SUN DEFENDANTS' EQUAL
PROTECTION COUNTERCLAIM ONLY**

Defendants Sun TRS Ocean Club, LLC, Sun TRS Carolina Pines, LLC, and Sun TRS Carolina Pines RV, LLC (collectively, the “Sun Defendants”) and Plaintiff City of North Myrtle Beach (the “City”) consent and stipulate, pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure, to the dismissal of Sun Defendants’ Third Cause of Action for Declaratory Judgment/Injunctive Relief – Unconstitutionality of the Zoning Ordinance under the Fourteenth Amendment, U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 – Equal Protection (the “Equal Protection Counterclaim”) as set forth in their Amended Answer, Affirmative Defenses and Counterclaim **only**.

This Stipulation does not end the case and only relates to the Equal Protection Counterclaim. All of Sun Defendants’ other causes of action and affirmative defenses set forth in their Amended Answer, Affirmative Defenses and Counterclaim remain. Each party shall bear its own attorneys’ fees and costs with respect to this Stipulation.

[signatures on following page]

WE SO CONSENT AND STIPULATE: <u>s/John G. Tamasitis</u> Richard H. Willis (SC Bar No.: 6159) E-Mail: rwillis@williamsmullen.com Derek Tarver (SC Bar No.: 103289) E-Mail: dtarver@williamsmullen.com John G. Tamasitis (SC Bar No.: 101875) Email: jtamasitis@williamsmullen.com WILLIAMS MULLEN 1230 Main Street, Suite 330 Columbia, SC 29201 Tel. 803.567.4615 Fax: 803.567.4601 <i>Attorneys for Sun Defendants</i>	WE SO CONSENT AND STIPULATE: <u>s/Rhett D. Ricard</u> Cheryl D. Shoun, SC Bar No. 5092 cshoun@maynardnexsen.com Rhett D. Ricard, SC Bar No. 102353 rricard@maynardnexsen.com MAYNARD NEXSEN PC 205 King Street, Suite 400 (29401) P.O. Box 486 Charleston, SC 29402 Phone: 843.577.9440 Fax: 843.720.1777 <i>Attorneys for Plaintiff City of North Myrtle Beach</i>

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	CA No. 2021-CP-26-07489
	)	
CITY OF NORTH MYRTLE BEACH,	)	
	)	
Plaintiff,	)	DEFENDANTS' MOTION FOR
	)	PARTIAL SUMMARY JUDGMENT
vs.	)	
	)	
SUN TRS OCEAN CLUB LLC and SUN	)	
TRS CAROLINA PINES LLC,	)	
	)	
Defendants.	)	
	)	

PLEASE TAKE NOTICE THAT Defendants Sun TRS Ocean Club LLC (“Sun TRS OC”) and Sun TRS Carolina Pines LLC (“Sun TRS Carolina,” and collectively with Sun TRS OC, the “Sun Defendants”), by and through their undersigned counsel, hereby move, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure (“SCRCP”), for partial Summary Judgment in the Sun Defendants’ favor as to their counterclaim for Declaratory Judgment/Injunctive Relief – Unconstitutionality of the Zoning Ordinance under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. The grounds for this Motion are as follows:

1. Plaintiff City of North Myrtle Beach (the “City”) brought this declaratory judgment action seeking a declaration from the Court that the Sun Defendants’ ownership and use of the Cabana House, located on the subject Property, is in violation of the applicable sections of the City’s Zoning Ordinance, and asks the Court to order the Sun Defendants’ ownership and use of the subject Property “immediately cease and desist.” The Sun Defendants filed their counterclaim alleging, *inter alia*, that the relevant sections of the City’s Zoning Ordinance violates the Dormant Commerce Clause of the United States Constitution.

2. The Commerce Clause not only vests Congress with “Power . . . [t]o regulate Commerce with foreign Nations, and among the Several States,” U.S. Const. art. I, § 8, cl. 3, but also prohibits states and municipalities from discriminating against interstate commerce – commonly known as the Dormant Commerce Clause. The sections of the City’s Zoning Ordinance at issue, Sections 23-2 and 23-22, facially discriminate against interstate commerce by expressly limiting the use of the subject Property only to “projects” that exist in North Myrtle Beach not located near the ocean, and by prohibiting ownership of the subject Property by any persons or entity other than a “homeowners’ association” for such projects located in North Myrtle Beach. *McBurney v. Young*, 569 U.S. 221, 235 (quoting *New Energy Co. of Ind. V. Limbach*, 486 U.S. 269, 273-74 (1988)) (explaining that the Dormant Commerce Clause jurisprudence “is driven by a concern about ‘economic protectionism—that is, regulatory measures designed to benefit in-state economic interest by burdening out-of-state competitors.’”

3. Accordingly, the sections of the Zoning Ordinance at issue are *per se* invalid and the City thus bears the burden of demonstrating that the sections’ discriminatory provisions “advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008). The City cannot meet this high burden and, therefore, Sections 23-2 and 23-22 of the Zoning Ordinance should be declared unconstitutional as a matter of law.¹

¹ The Sun Defendants are keenly aware that the canon of constitutional avoidance requires the Court to interpret a statute or ordinance in such a manner so as not to raise constitutional concerns, if possible. *Boumediene v. Bush*, 553 U.S. 723, 787 (2008) (holding the Supreme Court has an obligation to construe a statute to avoid constitutional problems “if it is fairly possible to do so”). Accordingly, the only possible interpretation of the sections of Zoning Ordinance at issue that saves them from their constitutional infirmities would be to recognize that the Cabana House, itself, constitutes a “project” located in North Myrtle Beach for the purposes of interpreting that requirement, and any property interest held in the Property, such as an easement right granted to a homeowners’ association, would satisfy this requirement of the Zoning Ordinance.

4. In all material respects regarding the daily operations of the Cabana House located on the subject Property, Sun Defendants are in compliance with all aspects of the Zoning Ordinance at issue not specifically challenged as unconstitutional. To the extent the City maintains that Sun Defendants are in violation of other provisions of the Zoning Ordinance not challenged on constitutional grounds, adequate remedies exist to the City short of injunctive relief depriving the Sun Defendants of use and ownership of the Cabana House, which the City has chosen not to pursue. *See* Section 23-7 of the City's Zoning Ordinances; S.C. Code Ann § 6-29-800 et seq.

5. For the reasons set forth above, and as will be more fully described in any Affidavit or Memorandum of Law filed in support of this Motion, there is no genuine issue as to any material fact and the Sun Defendants are entitled to judgment as a matter of law on Sun Defendants' counterclaim for judgment declaring that the sections of the Zoning Ordinance at issue are unconstitutional under the Commerce Clause of the United States Constitution. This Motion is based upon the pleadings in this action, the South Carolina Rules of Civil Procedure, all applicable statutory and common law, any affidavit that may be provided in support of this Motion, and upon any Memorandum of Law to be filed in connection herewith and additional arguments as may be submitted to the Court in support hereof.

[Signature block on the following page.]

WILLIAMS MULLEN

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*Attorneys for Defendants Sun TRS Ocean Club, LLC
and Sun TRS Carolina Pines, LLC*

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	CA No. 2021-CP-26-07489
	)	
CITY OF NORTH MYRTLE BEACH,	)	
	)	
Plaintiff,	)	DEFENDANTS' MEMORANDUM IN
	)	SUPPORT OF MOTION FOR
vs.	)	PARTIAL SUMMARY JUDGMENT
	)	
SUN TRS OCEAN CLUB LLC and SUN	)	
TRS CAROLINA PINES LLC,	)	
	)	
Defendants.	)	
	)	
	)	

Defendants Sun TRS Ocean Club LLC (“Sun TRS OC”) and Sun TRS Carolina Pines LLC (“Sun TRS Carolina Pines,” and collectively, the “Sun Defendants”), by and through their undersigned counsel, submit this Memorandum in Support of their Motion for Partial Summary Judgment, which was filed with the Court on August 1, 2022.

INTRODUCTION

The Zoning Ordinance for the City of North Myrtle Beach (the “City”) authorizes property owners in the R-4 (Resort Residential) district to apply for a special exception permit to build a cabana house (also known as a beach club or a club house) on certain beachfront property for the use of “projects” not located near the ocean.¹ These cabana houses are utilized almost exclusively by resorts located in the City. Specifically, Barefoot Resort & Golf, Beachwalk Villas, The Links Golf and Racquet Club, and Tidewater Planation all own cabana houses on the City’s beachfront.

The cabana house at issue here is owned by Sun TRS OC for the use of guests at the Carolina Pines RV Resort in Conway, South Carolina – and therein lies the issue. Because

¹ See Sections 23-2 and 23-22 of the City’s Zoning Ordinance, discussed in more detail *infra*.

Carolina Pines RV Resort is located outside the City limits, the Zoning Ordinance (as interpreted by the City) forbids Sun TRS OC from owning a cabana house in the City. This geographical restriction is unconstitutional under the Constitution of the United States' dormant Commerce Clause.

On February 15, 2019, Sun TRS OC purchased its beachfront property with an already established cabana house in North Myrtle Beach for approximately \$2.5 million. The goal of the purchase was to utilize the cabana house for members and guests of the Carolina Pines RV Resort. After owning and operating the cabana house for more than two (2) years without incident, the City initiated this declaratory judgment action, in response to complaints from the property's adjacent homeowners associations, the residents of Sea Cloisters I & II condominium towers.

The City's chief justification for the lawsuit is based on two sections of the City's Zoning Ordinance. These sections require that a cabana house located in the City must be owned and operated by a homeowners association affiliated with a "project" located in North Myrtle Beach. Therefore, Sun TRS OC's ownership of the property and cabana house is, according to the City, illegal. As a result, the City asserts in its Complaint that it is entitled to an order from this Court "that the use of the Cabana House by Sun Carolina Pines is in violation of the applicable Zoning Ordinance and that such use must immediately cease," thereby divesting Sun TRS OC of its ownership of the beachfront property and the cabana house located thereon.

These specific provisions of the Zoning Ordinance that restrict ownership and use of a cabana house located in the City to homeowners associations affiliated with "projects" located in the City are unconstitutional as a violation of the dormant Commerce Clause. The United States Supreme Court has explained that discrimination against interstate commerce in favor of local investment is per se invalid, save for a narrow set of cases where the City can demonstrate, under

the strictest scrutiny, that it has no other means to advance a legitimate local interest. Under the exceedingly high standard articulated by the Supreme Court, the City's rationale for these restrictions cannot pass constitutional muster, especially when the Carolina Pines RV Resort is located less than 15 miles from City Hall, and the remaining provisions of the applicable sections of the Zoning Ordinance more than aptly cover the City's concerns.

Accordingly, the Court should grant the Sun Defendants' motion for partial summary judgment declaring Sections 23-2 and 23-22 of the City's Zoning Ordinance unconstitutional and unenforceable.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

I. Procedural History

On November 11, 2021, the City initiated this declaratory judgment action seeking a declaration from the Court that the Sun Defendants' ownership² and use of the Cabana House, located on the Property, is in violation of the applicable sections of the City's Zoning Ordinance, and asked the Court to order the Sun Defendants' ownership and use of the Property "immediately cease and desist." As discussed in more detail throughout, the sections of the City's Zoning Ordinance at issue, Sections 23-2 and 23-22, limit the use of Property approved by special exception for a cabana house to "projects" located in the City near the ocean, and prohibit ownership of a cabana house by any persons or entity other than a "homeowners association with a maintenance agreement" for such projects located in the City.

In response, the Sun Defendants filed counterclaims for Declaratory Judgment/Injunctive Relief seeking an order from the Court declaring the relevant sections of the Zoning Ordinance

² Sun TRS OC is the only defendant entity with an ownership interest in the Property. Sun Carolina Pines is improperly named in this litigation, a fact that has been made clear to the City since the Sun Defendants' submitted their initial Answer.

unconstitutional under the Dormant Commerce Clause, the Fourteenth Amendment Due Process and Equal Protection Clauses, and for violation of 42 U.S.C. § 1983 for deprivation of the Defendants' constitutional rights. Finally, Defendants asserted a counterclaim for Inverse Condemnation/Regulatory Taking of the Property based on the City's claim for relief.

At the outset of the litigation, the City moved for a preliminary injunction seeking to enjoin the Sun Defendants from utilizing the Property during the pendency of the action. After negotiations, the parties agreed to enter a "status quo" Consent Order regarding use of the Property that limits use of the Property and its facilities to only certain members of the Cabana House that are also members of the Seabrook Plantation Homeowners Association.³

On August 1, 2022, the Sun Defendants moved for partial summary judgment as to their Dormant Commerce Clause counterclaim. That Motion is now before the Court for its consideration.

II. History of the Property

The above-captioned action involves certain beachfront property owned by Sun TRS OC, identified as Lot 1, Block 18-A, Tilghman, Parcel Number 35501040048 located at 1814 N Ocean Blvd. in the City of North Myrtle Beach, Horry County, South Carolina (the "Property").⁴ On or around March 28, 2005, the Property was acquired by Pan, LLC. Sometime in May 2007, Pan, LLC applied for a special exception permit to the North Myrtle Beach Board of Zoning Appeals to construct an oceanfront cabana house on the Property for the use of Seabrook Planation, which special exception application was designated #SE4-07 (the "Special Exception Application"). At the time the Special Exception Application was submitted to the City's Board of Zoning Appeals,

³ The Defendants unsuccessfully moved the Court on June 3, 2022 to vacate the Consent Order due to change in circumstances and Defendants decision to withdraw their consent. That motion was denied on July 21, 2022.

⁴ An aerial photograph of the Property is attached hereto as **Exhibit A**.

the Property was zoned in a R-4 (Resort Residential) district. Upon information and belief, the cabana house special exception was created by the City Council in response to an inquiry from the owner of Tidewater Plantation to allow residential developments to build beach clubs for their residents' exclusive use. (Blust Dep. Tr. at 22:6-16; 25:6-21).⁵

On June 18, 2007, Paul Blust, the Zoning Administrator for the City at the time, informed Pan, LLC via letter that the Special Exception Application was approved, and that the Board of Zoning Appeals found the design of the building to be placed upon the Property was similar to a single-family house, the proposed use of the building was consistent with to the limitations set forth in the City's Zoning Ordinance at the time, and the parking at the Property met or exceeded the requirements of the City's Zoning Ordinance at the time (the "Approval Letter").⁶

After receipt of the Approval Letter, Pan, LLC's caused to be constructed on the Property a physical structure with an inground pool, among other internal and external improvements and fixtures (the "Cabana House"). Pan, LLC, thereafter, referred to the Property as the "Ocean Club at Tilghman Beach." At the time of construction, Pan, LLC did not create a homeowners association to own the Cabana House or the Property, nor was it asked to do so by the City in order to comply with Sections 23-2 and 23-22 of the Zoning Ordinance.

Following the construction of the Cabana House, the Property was conveyed several times. First, on August 24, 2009, Pan, LLC conveyed the Property to NMB Oceanclub, LLC. In June 2012, NMB Oceanclub, LLC conveyed the Property to NMBOC Holding Co., LLC. In April 2017, NMBOC Holding Co., LLC conveyed the Property to NMBOC Holding Co. II, LLC. Finally, in August 2017, NMBOC Holding Co. II, LLC conveyed the Property to Sapphire, LLC,

⁵ A copy of the relevant portions of Paul Blust's deposition transcript is attached hereto as **Exhibit B.**

⁶ A copy of the Approval Letter is attached hereto as **Exhibit C.**

which immediately conveyed the Property to NMB Ocean Club Partners, LLC. Upon information and belief, none of the aforementioned owners of the Property and the Cabana House were homeowners associations.

In May 2014, while NMBOC Holding Co., LLC owned the Property, an easement over the Property was granted to Seabrook Plantation Property Owners' Association, Inc., permitting property owners and guests of Seabrook Planation to use the Property. At the time, the Seabrook Planation Property Owners' Association, Inc. was not located in the City. In May 2015, the easement was amended such that it served as an option for residents and property owners in Seabrook Planation to purchase a membership to a private "beach club" located at the Property. Accordingly, certain memberships in the beach club were sold or provided to persons who were not residents of Seabrook Planation and who did not reside in the City.⁷

III. Property Sold to Sun TRS OC

On or about February 15, 2019, Sun TRS OC entered into a Real Estate Purchase and Sale Agreement with NMB Ocean Club Partners LLC (the "Purchase Agreement"). Pursuant to the Purchase Agreement, NMB Ocean Club LLC warranted, *inter alia*, the following with respect to the Property:

To the best of Seller's Knowledge, the Assets and the operation of the Beach Club comply in all respects with all Permitted Exceptions and all applicable laws, ordinances, codes, rules and regulations, including those pertaining to zoning . . . To the best of Seller's knowledge, there are no existing facts or conditions which may result in the issuance of, any violations of any building, zoning, safety, fire, environmental, health or other code, laws, ordinances, or regulations with respect to the Assets, the appurtenances thereto or the maintenance, repair or operation thereof. To the best of Seller's knowledge, Parking at the Real Estate complies with all requirements for the operation of the Beach Club.

⁷ In April 2019, NMB Ocean Club Partners, LLC and the Seabrook Plantation Owners' Association terminated the easement over the Property but continued to offer membership to the beach club to residents of Seabrook Plantation, Robbers' Roost, employees of local businesses, and other persons, without requiring that they reside in the City.

Prior to closing the sale of the Property and during its due diligence period, Sun TRS OC, through Sun Acq LLC, requested a zoning letter from the City, inquiring as to the zoning of the Property and whether the Property or the Cabana House was subject to any violations of the City's Zoning Ordinance.⁸ In response, on March 19, 2019, Mr. Blust, then-Zoning Administrator for the City, informed Sun TRS OC in writing (the "Zoning Letter") that the Cabana House 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."⁹ Mr. Blust admitted in his deposition that, after receipt of the Zoning Letter, he did not check to see if the Cabana House was owned by a homeowners association nor whether the Cabana House was being used by a "project" located in the City. (Blust Dep. Tr. at 47:5 – 13). Instead, Mr. Blust testified that when he visited the Property to conduct his investigation for the Zoning Letter, he visually inspected the Property, noticed it was not in use, and "since it was not being used at all, whoever owned it didn't really matter to me as far as whether it was a zoning violation or not." (*Id.* at 47:14-21).

At the time of the purchase of the Property, Sun TRS OC believed that Horry County, the City, the local chamber of commerce, and other business leaders in the area knew of Sun TRS OC's intention to use the Property for guests and residents of the Carolina Pines RV Resort located in Conway, South Carolina; however, none of them ever expressed any reservations or issue with the purchase. Accordingly, on May 3, 2019, the Property (along with the Cabana House) was conveyed to Sun TRS OC via General Warranty Deed, which deed was recorded in the Horry County Register of Deeds on May 10, 2019 in Deed Book 4206 at Page 2963.

⁸ A zoning letter, as explained by the City's current Zoning Administrator, Benjamin Caldwell, is a letter requested by a property owner (or prospective purchaser) stating what the property in question is zoned, and if the current use of the property is a use that is permitted. (Caldwell Dep. Tr. 16:19 – 17:6). A copy of the relevant portions of Mr. Caldwell's deposition transcript is attached hereto as **Exhibit D**.

⁹ A copy of the Zoning Letter is attached hereto as **Exhibit E**.

IV. Sun Communities

Sun TRS OC is a wholly owned subsidiary of Sun Communities, Inc. (“Sun Communities”), a publicly traded real estate investment trust that, through its subsidiaries, invests in manufactured housing communities, recreation vehicle resorts, and marinas. As of June 30, 2021, Sun Communities and its subsidiaries own interest in 569 such communities in the United States and Canada, consisting of over 153,300 developed sites.

Sun TRS OC has an agreement with another Sun Communities’ subsidiary, Sun Carolina Pines RV, LLC, whereby it permits Sun Carolina Pines RV, LLC¹⁰ to use the Property (and the Cabana House) as a private beach club for guests staying at the Carolina Pines RV Resort in Conway. Sun TRS OC also honors memberships to the Cabana House held by certain residents of Seabrook Planation and Robber’s Roost in the City, in addition to other members not residing in the City.

V. Sun TRS OC’s Ownership of the Property and the City’s Selective and Politically Coerced Enforcement of the Zoning Ordinance

Between May 3, 2019 and September 2, 2021, Sun TRS OC operated the Property and the Cabana House without any complaint from the City, despite the alleged violations of the Zoning Ordinance complained of in the City’s Complaint. However, on September 2, 2021, approximately two years and four months after Sun TRS OC purchased the Property, the City issued a cease-and-desist letter to Sun TRS OC explaining that the use of the Property and related shuttle services to and from the Property were in violation of the City’s Zoning Ordinance (the “Cease and Desist Letter”). The Cease and Desist Letter (along with this lawsuit) was prompted by a “formal

¹⁰ Sun Carolina Pines RV, LLC is not a named party in this action.

complaint” filed by Sea Cloisters I Homeowners Assoc., Inc. (“Cloisters I”) and Sea Cloisters II Homeowners Assoc., Inc. (“Cloisters II”).¹¹

Specifically, the Cease and Desist Letter explained that the Sun Defendants were operating the Property in violation of Section 23-2 of the City’s Zoning Ordinance, which defines “cabana house” as:

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, SC, Ordinances, Sec. 23-2.¹²

The City also alleged in its Complaint that the Sun Defendants violated the sister-section to Section 23-2, Section 23-22(4)(d) of the Zoning Ordinance¹³ which sets forth the permitted uses for a Cabana House subject to the special exception requirements. Specially, the City alleges that the Sun Defendants have violated this particular section of the Zoning Ordinance in the following regards:

- a. **In the use of the Property by a project(s) not in North Myrtle Beach;**
- b. **In the ownership of the Cabana House by an entity that is not a Homeowners Association;**¹⁴

¹¹ The individual responsible for spearheading the formal complaint and placing subsequent pressure on the City to file this lawsuit is Jim Shortle, president of Sea Cloisters I. Mr. Shortle’s continued dogged persistence to force Sun TRS OC to relinquish its ownership of the Property has continued unabated since the filing of this civil action and has resulted in questionable conduct on the part of Mr. Shortle with the full knowledge of the City and its attorneys.

¹² A copy of Section 23-2 of the City’s Zoning Ordinance is attached hereto as **Exhibit F**.

¹³ A copy of Section 23-22 of the City’s Zoning Ordinance is attached hereto as **Exhibit G**.

¹⁴ As stated previously, none of the prior owners of the Property were homeowners associations.

- c. In failing to limit the use of the Cabana House to bathing and changes of clothing facilities, occasionally using as a guest quarters and other similar uses;
- d. In failing to use the Cabana House in a manner that is in substantial harmony with the area in which it is located; and
- e. In utilizing the Cabana House in a fashion that is, upon information and belief, injurious to the adjoining property.

(See Compl. ¶¶ 15, 16 (emphasis added)). However, when questioned about what is truly important to the City in this lawsuit, the City Manager, Mike Mahaney, testified that the ownership of the Property is not the real concern, but rather the “late night activities, parking in the street, buses backing out, parking on the sidewalk, all those sorts of quality of life issues.” (Mahaney Dep. Tr. at 51:21 – 52:8).¹⁵

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRCP. Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, “this initial responsibility may be discharged by ‘showing’—that is, pointing out to the trial court—that there is an absence of evidence to support the nonmoving party’s case.” *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once the moving party makes this demonstration, the opposing party “must, under Rule 56(e), do more than simply show some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a *genuine issue for trial*.” *Id.* (emphasis in original); *Midland Mutual Life Ins. Co. v. Darrell*, 331 S.C. 394, 397, 503 S.E.2d

¹⁵ A copy of the relevant portions of Mr. Mahaney’s deposition transcript is attached hereto as **Exhibit H**.

189, 190 (Ct. App. 1998). The nonmoving party must specifically set forth such facts showing that a fact issue exists. *See* Rule 56(e), SCRCP.

As it pertains to the relief requested in this Motion, none of the material facts are in dispute—the United States Constitution and the City’s Zoning Ordinance say what they say, and the City’s representatives have confirmed the rationale (or lack thereof) for the unconstitutional restrictions on ownership and use of a cabana house in the Zoning Ordinance. The Motion before the Court is purely a legal question about whether the restrictions on ownership found in Sections 23-2 and 23-22 of the City’s Zoning Ordinance are facially discriminatory and, thus, per se unconstitutional. The City cannot show any evidence or facts that would undermine the arguments set forth herein and, thus, these specific matters are ripe for summary judgment.

ARGUMENT

What is at issue in this Motion are two specific restrictions set forth in Sections 23-2 and 23-22 of the City’s Zoning Ordinance:

- a. The Cabana House must be owned and maintained by a homeowners association; and**
- b. The Cabana House must be used by a “project” in the City.**

These two requirements are inextricably linked and require that any cabana house approved by the City as a special exception must be owned by a homeowners association¹⁶ created for a “project” located within the City. *Compare* Sec. 23-2 (defining Cabana House as “[a] structure . . . to be used by projects in North Myrtle Beach not located near ocean.”) with Sec. 23-22 (requiring

¹⁶ Under South Carolina’s Horizontal Property Regime Act, a homeowners association that owns property in South Carolina must record the master deed or lease that creates and establishes the association in the Register of Deeds in the county where the association is located. S.C. Code Ann. § 27-31-100. Thus, pursuant to the applicable sections of the Zoning Ordinance governing cabana houses, the homeowners association established for the project in the City must be located and registered in Horry County.

“[t]hat a homeowners association shall have been established for the project”). Accordingly, the owner of any other “project,” such as the Carolina Pines RV Resort in Conway, Horry County, South Carolina, is not allowed to purchase real property in the City and seek a special exception for the development of a cabana house even if the property owner complies with all of the other requirements set forth in Sections 23-2 and 23-22 of the Zoning Ordinance.¹⁷ This geographical limitation on ownership of real property in the City is the crux of the Motion.

The Constitution vests in Congress the “Power” to “regulate Commerce . . . among the several States.” 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*, 139 S.Ct. 2449, 2459 (2019); *see also Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control*, 424 S.C. 80, 88, 817 S.E.2d 633, 637 (Ct. App. 2018). Applying that principle, the Supreme Court has consistently “struck down [state] statute[s]” that “discriminate[] against interstate commerce.” *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

“The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38, (2008) (internal quotations and citations omitted); *see also Amisub of South Carolina, Inc.*, 424 S.C. at 88, 817 S.E.2d at 637. “The common thread among those cases in which the [United States Supreme] Court has found a dormant Commerce Clause violation is that

¹⁷ Both the City’s immediate past and present Zoning Administrators agreed that a resort RV Park, like the Carolina RV Resort, would constitute a “project” under the Zoning Ordinance, even though the term is undefined. *See* (Blust Dep. Tr. 21:21 – 22:5; Caldwell Dep. Tr. 26:25 – 27:10).

the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.”” *Amisub of South Carolina, Inc.*, 424 S.C. at 88, 817 S.E.2d at 637 (quoting *McBurney v. Young*, 569 U.S. 221, 235 (2013)).

Determining whether a state action violates the dormant Commerce Clause normally involves a two-tiered analysis. *Brown-Forman Distillers Corp.*, 476 U.S. at 578. However, as is the case here, when a statute directly “regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interest over out-of-state interest,” the Supreme Court has “generally struck down the statute without further inquiry.” *Id.* at 279; *Brown v. Hovatter*, 561 F.3d 357, 363 (4th Cir. 2009); *see also Davis*, 553 U.S. at 338 (noting a “discriminatory” law is one enacted for the “forbidden purpose”). Unless it is “demonstrably justified by a factor unrelated to economic protectionism, a ‘discriminatory law is virtually per se invalid.’” *Brown*, 561 F.3d at 363 (quoting *Davis*, 553 U.S. at 338); *see also Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005) (“[W]hen the state statute amounts to simple economic protectionism, a virtually per se rule of invalidity has applied.”) (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992)); *Env'tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996) (explaining that when a state law discriminates on its face or has a discriminatory effect or purpose, the law must be “demonstrably justified by a valid factor unrelated to economic protectionism,” and there must be an absence of “nondiscriminatory alternatives adequate to preserve the local interests at stake.”). When determining if a state action is “discriminatory” and thus subject to a rule of virtual per se invalidity, *see Davis*, 553 U.S. at 338, “[c]ourts are afforded some latitude to determine for themselves the practical impact of a state law, but in doing so they must not cripple the States’ ‘authority under their general police powers to regulate matters of legitimate local concern.’” *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 152 (4th Cir.

2016).

This prohibition applies equally to local and municipal laws that discriminate in favor of local commerce. “[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 the subdivisions of the State rather than through the State itself.” *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural 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. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994); accord *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (“In thus erecting an economic barrier protecting a major local industry against competition from without the State, [the City of] Madison plainly discriminates against interstate commerce.”)

In *Dean Milk*, the City of Madison, Wisconsin passed an ordinance requiring that all milk sold in Madison be pasteurized, processed, and bottled at a City-approved plant within five miles of Madison. 340 U.S. at 350. Only three milk processors that sold milk wholesale and retail in Madison were located within that five-mile radius. *Id.* at 352. Plaintiff Dean Milk bought milk from hundreds of farms in Illinois and Wisconsin, pasteurized the milk in Illinois, more than five miles from Madison, and distributed the milk in both states. *Id.* Pursuant to the ordinance, Madison denied a milk-selling license to Dean Milk solely because Dean Milk pasteurized milk at plants more than five miles, 65 and 85 miles respectively, from Madison. *Id.*¹⁸ Dean Milk sued, claiming Madison’s ordinance violated the dormant Commerce Clause. *Id.* at 350. The Supreme Court agreed and struck down the ordinance. *Id.* at 353.

¹⁸ Carolina Pines RV Resort is located approximately 15 miles from the Property.

The Supreme Court concluded that Madison's ordinance discriminated against interstate commerce because the ordinance "in practical effect excludes distribution in Madison wholesome milk produced and pasteurized in Illinois." *Id.* at 354. The Supreme Court concluded that Madison had "erect[ed] an economic barrier protecting a **major local industry** against competition from without the state," and therefore Madison's ordinance "plainly discriminates against interstate commerce." *Id.* at 354 (emphasis added). The fact that Madison's ordinance applied equally to in-state milk distributors did not change the Supreme Court's analysis, for "[i]t is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." *Id.* at 354 n. 4.

The Dean Milk Court recognized Madison's interest in the safety and health of its citizens and their milk supply. *Id.* at 353. However, the Supreme Court determined that "reasonable and adequate alternatives" to the ordinance were available. *Id.* at 354. For example, Madison could (1) charge out-of-town milk processors for the cost of inspecting milk brought to Madison from other areas, or (2) adopt quality standards based on milk ratings established by the jurisdiction in which the milk is processed. Because the discriminatory measure was not "essential for the protection of local health interest," the Supreme Court invalidated the ordinance. *Id.*

"*Dean Milk* shows that local ordinances that isolate local markets from outsiders are discriminatory even when those ordinances apply equally to in-staters and out-of-staters." *Florida Transp. Svs., Inc. v. Miami-Dade County*, 703 F.3d 1230, 1249 (11th Cir. 2012). Indeed, *Dean Milk* is the example of a law that can be discriminatory without explicitly distinguishing between in-staters and out-of-staters. *Id.* Such is the case with the City's Zoning Ordinance in the case *sub judice*.

As stated above, "[s]tate laws discriminating against interstate commerce on their face are

virtually per se invalid.” *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997) (quotation omitted). “A state or local law discriminates by **restricting market participation** or curtailing the movement of articles of interstate commerce based on whether a market participant or article of commerce is in-state versus out-of-state, **or local versus non-local.**” *Amisub of South Carolina, Inc.*, 424 S.C. at 89, 817 S.E.2d at 638 (emphasis added) (quoting *Florida Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230, 1244 (11th Cir. 2012)). That is precisely what Sections 23-2 and 23-22 of the Zoning Ordinance are designed to accomplish. By their explicit terms, these sections impose unconstitutional burdens on interstate commerce without any justification. 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).

Like the ordinance in *Dean Milk*, the sections of the Zoning Ordinance at issue, in practical effect, exclude ownership of cabana houses in North Myrtle Beach from persons located anywhere outside of the City’s limits, including locations in nearby North Carolina.¹⁹ 340 U.S. at 354. The fact that the applicable sections of the Zoning Ordinance apply equally to in-state “projects,” like the Carolina Pines RV Resort, or in-state owners like Sun TRS OC, 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.” *Id.* at 354 n. 4.

Moreover, as testified to by the City Manager, the economic bloodline of the City is tourism. (Mahaney Dep. Tr. pp. 13:19 – 14:2) (“First of all, we’re in a tourism environment in North Myrtle. There is 20 million visitors to the Grand Strand in the course of a year.”).

¹⁹ The town of Calabash, North Carolina is located less than 10 miles from City Hall.

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.” *Id.* at 354 (emphasis added). Through Sections 23-2 and 23-22 of the Zoning Ordinance, the City ensures that only local residents can benefit economically from ownership and use of a cabana house on the City’s coastline.

The City’s employees most responsible for zoning enforcement have never even tried to offer any justification for its treatment of “projects” outside of the City.²⁰ However, the City did respond to an Interrogatory²¹ propounded by the Sun Defendants regarding the purpose behind the restriction:

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.

(emphasis added). This admission concedes the Sun Defendants’ case. Whether such a market has materialized yet is beside the point; incentivizing local commerce at the expense of interstate

²⁰ Mr. Blust was the Zoning Administrator at the time these sections of the Zoning Ordinance were enacted and helped in the passage of these sections related to the Cabana House. He testified that he could not recall the County Council’s reason for the geographical location. (Blust Dep. Tr. at 22:6-19).

²¹ A copy of the City’s Responses to the Sun Defendants’ First Set of Interrogatories is attached hereto as **Exhibit I**.

commerce is one of the chief evils the Commerce Clause seeks to prevent, and renders the challenged portions of the Zoning Ordinance unconstitutional. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 339-40 (2009).

The City Manager tried to rationalize the need for the City’s geographic restriction as a “responsiveness” issue. (Mahaney Dep. Tr. pp. 8:3 – 9:1) (“Well, when it’s an HOA that is inside the city, they are generally more responsive.”). However, the Supreme Court has explained that “[d]iscrimination against interstate commerce in favor of local business or investment is per se invalid, save in a **narrow class of cases** in which the municipality can demonstrate, under **rigorous scrutiny**, that it has no other means to advance a legitimate local interest.” *Clarkstown*, 504 U.S. at 392-93 (emphasis added). This high standard of the strictest scrutiny is not met by the purported “responsiveness” rationale, especially when the Carolina Pines RV Resort is located less than 15 miles from City Hall and the remaining provisions of Section 23-22 adequately protect the City’s local interests.²²

The discriminatory geographical restriction is not “essential for the protection of local health interest,” a that reality has been all but admitted by the City Manager. (Mahaney Dep. Tr. at 51:21 – 52:8). The City’s stated concerns about public safety and “quality of life issues” for the Cabana House’s neighbors are more than aptly covered by the remaining provisions in Section 23-22 governing the conduct of an approved cabana house, rather than by a geographical restriction on those eligible to seek a cabana house via the special exception process. For example, Section 23-22(4)(d)(4) requires that use of a cabana house must be “in substantial harmony with the area

²² If the City believes that Sun TRS OC is operating the Cabana House in a manner that violates the applicable sections of the Zoning Ordinance pertaining to use and operation (for example, the issues cited by the City Manager as the “real problem”), the City has ample means to enforce these restrictions, through citations, fines, and even criminal sanctions as discussed in more detail *infra*.

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.” *Id.* at (4)(d)(5) – (6).

These provisions are reinforced by the Zoning Ordinance’s penalty provision found in Section 23-7, which the City chose not to follow by bringing this action first in the Court of Common Pleas. Section 23-7 provides that violations of the conditions and safeguards establish in connection with special exceptions, like the Cabana House, shall constitute a misdemeanor, and any person who violates the Zoning Ordinance or fails to comply with its requirements “shall upon conviction thereof be fined as provided in section 1-6 [which calls for a fine not exceeding \$500.00, imprisonment for a period not exceeding 30 days, or both].”²³ Each day such violation continues shall be considered a separate offense. Through these other provisions, the City has all but affirmatively shown that constitutionally valid measures exist to advance its legitimate local interest regarding the use of cabana houses without resorting to discriminating against interstate commerce in violation of the Commerce Clause.

CONCLUSION

Based on the foregoing, the geographical restrictions imposed on ownership of cabana houses in the City of North Myrtle Beach by Sections 23-2 and 23-22 of the Zoning Ordinance facially discriminates against interstate commerce and constitutes a per se violation of the dormant Commerce Clause. The remaining provisions of Section 23-22 of the Zoning Ordinance are clear evidence that non-discriminatory alternatives exist to advance the City’s legitimate local interest related to “quality of life” issues and safety without needing to resort to the discriminatory restrictions that currently exist. Therefore, there are no genuine issues of material fact and Sections

²³ A copy of Section 23-7 of the Zoning Ordinance is attached hereto as **Exhibit J**.

23-2 and 23-22 of the City's Zoning Ordinance are unconstitutional as a matter of law, and this Court should grant the Sun Defendants' Motion.

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November 2, 2022
Columbia, South Carolina

Exhibit A



FILED 2022 Nov 02 3:42 PM JORDAN COMMON PLEAS - CASE#2021CP2607489

In the Matter of:

CITY OF NORTH MYRTLE BEACH

VS.

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

Paul Blust

April 26, 2022



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1 going to talk about some certain sections of it.

2 First, it says here "a structure utilizing
3 single-family design and development standards."

4 Can you put in your own words what that
5 means, a single-family design? What does that mean?

6 **A. The appearance was to be similar to any other**
7 **single-family house in the city, the outward appearance**
8 **of the house -- or, excuse me, of the structure, and the**
9 **development standards would be similar.**

10 They would have to meet our setbacks, the
11 same as for other single-family houses within the
12 district in which the cabana house is located.

13 Q. And why was that important to have that as part
14 of the definition?

15 **A. The cabana houses, as it says, were to be in**
16 **close proximity to the ocean, and all of that is**
17 **residential area. It's -- well, we do have a couple**
18 **commercial areas, but the majority of this was to be in**
19 **the R-4 district, which is a residential area, and we**
20 **wanted to make sure that the integrity of the**
21 **residential area was maintained by this use.**

22 Q. So is it fair to say that what you essentially
23 wanted is the houses to look the same? You wanted it to
24 look residential in nature?

25 **A. You wanted the appearance to be residential, yes,**

1 **sir.**

2 Q. The second piece of this definition in the first
3 sentence is "in close proximity to the oceanfront."

4 What proximity are they talking about here?

5 **A. First or second row would be the thought there.**

6 **If somebody wanted to go a bit further, I mean, it could**
7 **be an interpretation. This is not obviously -- you**
8 **could have some interpretation, but mainly first or**
9 **second row from the ocean on Ocean Boulevard.**

10 Q. And then the next piece is "to be used by
11 projects in North Myrtle Beach not located near the
12 ocean", is that correct? That is what it says right
13 there?

14 **A. Yes.**

15 Q. What are projects?

16 **A. Subdivisions, planned unit developments. In this**
17 **particular case, the reason for the original drafting of**
18 **the ordinance was for a planned unit development that**
19 **was, at the time, about 580 acres, and it was a good**
20 **mile by the roads from the oceanfront.**

21 Q. Does it have to be a planned residential
22 development for it to be considered a project?

23 MR. RICARD: Objection to speculation. You
24 can answer.

25 **A. No, a large subdivision could be.**

1 Q. (BY MR. TAMASITIS): How about an RV park located
2 in the city of North Myrtle Beach?

3 MR. RICARD: Objection, speculation. You
4 may answer.

5 A. An RV park would be a project, yes, sir.

6 Q. (BY MR. TAMASITIS): Why was the projects, or
7 what we are supposed to be using, cabana houses,
8 geographically limited to being in the city of North
9 Myrtle Beach?

10 A. I don't recall the reason for that, but, you
11 know, City Council is always looking out for the good of
12 the citizens, the citizens of North Myrtle Beach, and I
13 would assume since the Tidewater project -- again, the
14 reason we wrote this was for Tidewater. It was within
15 the city of North Myrtle Beach. And I guess it was
16 to -- well, I don't know.

17 Q. Do you recall having any discussions with members
18 of City Council about this geographical --

19 A. No, I don't remember that. No, I don't.

20 Q. And then in the third sentence, this is talking
21 about the use of the cabana house, it says,
22 "Additionally, it can be used as an occasional guest
23 quarters and similar residential uses. "

24 What would you consider similar residential
25 uses?

1 A. I would think it would be like maybe a cookout or
2 something happening that may happen at your normal -- at
3 your house in some regular neighborhood, people coming
4 over and gathering, have a beer or something, and having
5 a cookout.

6 I can't think of all of them, but I would
7 think that if somebody was doing something that -- and
8 the question came up, we would have to make an
9 interpretation on that when it happened. I don't know
10 what all it would be. Most of the uses that you would
11 have at your house, let's say, or my house.

12 Q. So I know in modern day a lot of other counties
13 are dealing with the situation where you have a
14 farmhouse and people are using it for like wedding
15 receptions and stuff like that.

16 Would that be considered a similar
17 residential use, or could it be based on how it's set
18 up?

19 MR. RICARD: Object to form, speculation.
20 You may answer.

21 A. I would think that if you had somebody from the
22 development that was getting married that there wouldn't
23 be a problem to have a wedding reception there.

24 I'm just trying to think because there is
25 different -- I guess different things could fall under

1 the similar uses, and I'm trying to think of it in that
2 aspect. But just a wedding reception for a couple that
3 may live in the development, I would say that would be
4 all right.

5 Q. What if they didn't live in the development?

6 A. Well, if they are relatives, I guess you wouldn't
7 have to if they are relatives, like say an older couple
8 and their son is getting married and they want to have
9 it there, I guess that would be all right, too.

10 Q. Going back to the geographical limitation we were
11 just talking about earlier, that the project has to be
12 inside the city of North Myrtle Beach, I will represent
13 to you that the purpose of the zoning ordinance as it's
14 defined is, "To guide development in accordance with
15 existing and future needs and to promote the public
16 health, safety, morals, convenience, order, appearance,
17 prosperity and general welfare of the community."

18 Does restricting a cabana house to only
19 projects in the city of North Myrtle Beach satisfy that
20 purpose for the zoning ordinance?

21 A. I don't know.

22 Q. Does the limitation, a geographical limitation
23 that it has to be serving a project inside North Myrtle
24 Beach, serve any purpose other than economic protection
25 for the City?

1 **A. I don't know that either.**

2 Q. All right. The final sentence here, "A cabana
3 house shall be owned and maintained by a homeowner's
4 association with a maintenance agreement submitted and
5 approved by the planning department."

6 So this is two parts. It says here, "Shall
7 be owned and maintained by a homeowner's association."

8 Why does the property, cabana house, need to
9 be owned and maintained by a homeowners association?

10 **A. I don't really know that one either. That was**
11 **something that City Council wanted.**

12 And the homeowners association, again, I go
13 back to Tidewater, because at the time we wrote this,
14 that's what we were responding to. Tidewater's
15 homeowners association had asked us for that. A lot of
16 times on these definitions -- not definitions, but on a
17 lot of things that somebody else has asked Council to
18 make an ordinance for to help them out, it's always been
19 to try to make it as narrow as possible toward what they
20 are asking so that it doesn't open things just wide open
21 to everything.

22 Again, I don't know if I'm explaining that
23 correctly. But the homeowners association had to ask us
24 to allow them to build a cabana house, and so the
25 ordinance was kind of tied to the homeowners

1 **association.**

2 Q. You can see the issue here, that if it's not a
3 homeowners association then an individual person can't
4 have a cabana house in the city of North Myrtle Beach,
5 correct? That's the way the ordinance reads?

6 **A. Yes.**

7 Q. And what is a maintenance agreement?

8 **A. I guess it's an agreement between the owners and**
9 **the City as to who will maintain the property.**

10 Q. Are you aware of any other ownership restrictions
11 in the city of North Myrtle Beach that limits who can
12 own certain property?

13 **A. I'm not aware of any off the top of my head. If**
14 **there are any, I just don't know.**

15 Q. Let me ask you, have you ever been involved in an
16 enforcement situation or any other kind of zoning
17 situation as the zoning administrator for the City of
18 North Myrtle Beach where you were dealing with a
19 restriction in the ownership of property in the city?

20 **A. No, sir, I don't remember that.**

21 Q. And, again, just for my recollection, you're
22 aware of the fact that in this litigation one of the
23 issues is that SUN TRS Ocean Club owns the cabana house,
24 yet is not a homeowners association and is not for a
25 project located in North Myrtle Beach, correct?

1 A. It might help just to tell you what normally
2 happens with a zoning letter.

3 Q. Please do.

4 A. I will get a call from somebody, whether it's a
5 banker, somebody that's interested in buying the
6 property, an insurance company. There is all sorts of
7 different people. A lot of times it's the lawyer's
8 office that is working with somebody.

9 And they will say, can we get a zoning
10 letter? And I will tell them, please send me an email,
11 give them my email address, and send me in that email
12 address why do you want this letter, what do you want
13 answered in the letter, and send to me the name of who
14 to address it to, who to send it to, and all the
15 different information so that I can get the letter to
16 the right people. And then they would send me an email
17 and I would answer their question.

18 As I said, there are a lot of times that
19 there are different questions that they ask, and there
20 were so many that it got to the point where I would say,
21 you tell me what you want and we'll look at that and
22 answer that question.

23 Q. So is it safe to say that this letter is an
24 answer to a question that you were posed about the
25 property?

1 **A. Yes.**

2 Q. And it says here, "As of the date of this letter,
3 there are no known zoning violations on the property."

4 **A. Correct.**

5 Q. Do you recall, when answering the question that
6 was posed by whoever asked for this letter to be
7 drafted, whether you checked to see if the cabana house
8 on the property was owned by a homeowners association?

9 **A. No, sir.**

10 Q. Do you recall whether or not you checked to see
11 if the cabana house was being used by a project located
12 in North Myrtle Beach?

13 **A. No, sir.**

14 Q. So then how did you know there were no zoning
15 violations on the property?

16 **A. Well, I went out and looked at the property and**
17 **it wasn't being used at all. And since it as not being**
18 **used at all, whoever owned it didn't really matter to me**
19 **as far as whether it was a zoning violation or not.**
20 **There is nothing happening here, and so I see no zoning**
21 **violations.**

22 Q. Go with me on this. This is a hypothetical.

23 If after getting the question posed to you
24 about this letter, and you went on the -- into the
25 property records and found that this property was owned

1 by an LLC and not a homeowners association, would that
2 have changed your response in this letter?

3 MR. RICARD: Object to form, speculation.
4 You may answer.

5 A. I don't know, and I say that because the property
6 was not being used. If it were being used at the time
7 and we were interested in who owned it, then, yes, sir,
8 it would change that.

9 But at the time the property was not being
10 used at all, and I don't know at the time -- well, I
11 have to say I did not look into ownership of the
12 property.

13 Q. (BY MR. TAMASITIS): There was some testimony
14 when we were talking to Mr. Caldwell about special
15 exceptions for cabana houses in particular.

16 And when a property that has a cabana house
17 on it, via a special exception, is transferred from one
18 party to another, is there a requirement for that new
19 property owner, the grantee of the property, to seek
20 another special exception for the cabana house on the
21 property?

22 A. No.

23 MR. RICARD: Objection to form. You may
24 answer.

25 Q. (BY MR. TAMASITIS): The answer is no?

Exhibit C



June 18, 2007

Ben Powell
PO Box 750
North Myrtle Beach, SC 29597

Dear Mr. Powell,

The North Myrtle Beach Board of Zoning Appeals met on June 14, 2007 to hear and decide on two applications submitted by you for special exception #SE3-07 and #SE4-07. Special exception #SE3-07 was to create an amenity area for storage of RVs and boats for your new subdivision Seabrook Plantation and special exception #SE4-07 was for an oceanfront cabana house for Seabrook Plantation in the R-4 (Resort Residential) district to be located at 1814 North Ocean Boulevard.

This letter is notification to you that the Board voted to approve both of these requests for special exception. The specific finding of fact on the RV and boat storage area was that this property abuts commercially zoned property and it is very well screened from the proposed lots that will be platted upon recording of a final plat. The specific findings of fact for the oceanfront cabana was that the design of the building is similar to a single-family house, the use of the building will be according to the limitations contained in the Zoning Ordinance and the parking meets and exceeds the minimum requirement of the code.

If you have any questions on either of these two cases please call me at 280-5565.

Sincerely,

Paul Blust
Zoning Administrator

In the Matter of:

CITY OF NORTH MYRTLE BEACH

VS.

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

Benjamin Caldwell

April 26, 2022



www.spectrumcourtreporting.com

P.O. Box 1296

Mt. Pleasant, SC 29465

843-849-0133

Spectrumaaa@gmail.com

1 MR. RICARD: Objection, form.

2 A. Partially, because I do have a supervisor, and
3 from time to time I go to him and try to feel out if I'm
4 thinking that the zoning ordinance is -- what is a
5 better way to say it -- if I'm having a difficult time
6 interpreting a certain zoning ordinance, I will go to my
7 supervisor and say, hey, what do you think about this,
8 or from time to time I will go to the City attorney and
9 say, hey, what do you think, do you think I'm looking at
10 this the right way, and then I would give that advice
11 out to whoever is asking the question.

12 Q. (BY MR. TAMASITIS): Who is your supervisor?

13 A. Jim Wood.

14 Q. What is his position?

15 A. He's the director of planning and development.

16 Q. So how does it work? So you're the zoning
17 administrator, and then there is Jim Wood, and who is
18 above him?

19 A. The City manager.

20 Q. Do you make preliminary zoning decisions on
21 behalf of the City?

22 A. Yes.

23 Q. And how does that process work?

24 A. It can work in many different ways. Would you
25 like an example of one?

1 A. Sure.

2 A. If someone calls and says, hey, I want to put a
3 new sign on my building, how big can it be? Well, I
4 will see what zoning district that building is located
5 in. I will review the zoning ordinance many times
6 because I don't want to give a false answer.

7 I will then say -- you know, get the
8 information I need from them to make the determination
9 on what the size of that sign can be and then relay that
10 information to them.

11 Q. What if someone is purchasing a property and they
12 want to know if there are any zoning issues on the
13 property? Would they contact you?

14 A. Yes, in many cases.

15 Q. How would that typically work?

16 A. Typically, I would get an email from someone
17 saying, hey, I need a zoning verification letter for
18 this property.

19 Q. What is a zoning letter?

20 A. A zoning letter usually is what the property is
21 zoned, and then if the current use is a use that is
22 permitted by right.

23 Q. What do you mean usually?

24 A. Well, the zoning letter requests come in from all
25 different people, and a lot of times they have different

1 wording.

2 So usually what I do is I will respond and
3 say, well, can you give me exact -- can you give me back
4 a form letter stating what you need to know, and then I
5 will plug in the relevant information and send it back
6 to them.

7 Q. Does the City rely on your zoning decisions when
8 it's making its own decisions?

9 MR. RICARD: Objection, form, speculative.

10 A. I believe so.

11 Q. (BY MR. TAMASITIS): Do citizens rely on your
12 zoning decisions?

13 MR. RICARD: Objection, form, speculation.

14 A. I believe so.

15 Q. (BY MR. TAMASITIS): When you're making a zoning
16 decision, how are those issued?

17 A. It could be a phone call. It could be in person.
18 It could be a letter. It could be a text message -- not
19 a text message. It could be email.

20 Q. Are there ways to appeal your decision?

21 A. Yes.

22 Q. And how is that done?

23 A. Through the Board of Zoning Appeals, an appeal
24 form.

25 Q. If you make a decision -- say you issue a zoning

1 letter and it's not appealed, what is the effect of that
2 decision?

3 **A. I have not had a zoning letter appealed.**

4 **Could you maybe ask me a different question?**

5 Q. If you make any zoning decision, then what is the
6 effect of that decision? Is that the City stands on the
7 zoning issue?

8 MR. RICARD: Objection to form, speculation.

9 **A. Yes.**

10 Q. (BY MR. TAMASITIS): How about if someone calls
11 the City and has a question about the Zoning Board's
12 interpretation? Does that go to you?

13 **A. It probably would go to me. It could go to Elton
14 Farmer, who is our zoning technician.**

15 Q. What does a zoning technician do?

16 **A. He reviews new construction permits for
17 residential, and he reviews trees for tree permits, and
18 he fields a lot of questions at the front desk, and also
19 on the phone.**

20 Q. So what is, I guess, the dividing line of
21 responsibility between your making decisions of the
22 zoning interpretation and the zoning technician's?

23 MR. RICARD: Objection, form.

24 **A. I think if it's a more simple question that we
25 get more regularly, like how tall can a single-family**

1 The first part here says, "A structure
2 utilizing a single-family design and development
3 standards", is that correct?

4 **A. Yes.**

5 Q. What does that mean to you?

6 **A. To me, that means that the building would appear**
7 **to be somewhat like a single-family home. And the**
8 **development standards, I take that to mean that when**
9 **we're going to the permitting process we would review it**
10 **to make sure it meets all the minimum standards of**
11 **single-family construction within the R-4 district.**

12 Q. "And in close proximity to the oceanfront", what
13 does that mean to you?

14 **A. That would mean, to me, probably first or second**
15 **row, either oceanfront or across Ocean Boulevard from**
16 **the oceanfront.**

17 Q. So we are talking within the first two streets of
18 the ocean?

19 **A. Yes.**

20 Q. And then "to be used by projects in North Myrtle
21 Beach not located near the ocean", what does that mean?

22 **A. From my understanding -- and, again, I think Paul**
23 **could better answer the question -- but I believe it was**
24 **Tidewater Plantation, which is a large multi-use planned**
25 **development district within the city that is off of**

1 Little River Neck Road, which is a few miles, I would
2 assume, from the beach.

3 They wanted a place where their residents
4 could use an amenity on the oceanfront, and I believe at
5 that time they approached the City about if they could
6 do that or not.

7 And then, through those discussions, I
8 believe this ordinance was created defining cabana
9 houses and placing them as a special exception use
10 within the R-4 district.

11 Q. When it says "projects", what does that mean?

12 A. To me, that means a residential development.

13 Q. So a development is a project. So that's all it
14 can be, is a development?

15 MR. RICARD: Objection, speculation.

16 A. I hate to say ever or always, because there could
17 be maybe a different type of project that had a
18 residential component to it and they wanted the amenity
19 on the oceanfront. And if they weren't located near the
20 ocean, I think we could probably go through the process
21 of special exception to see if it could work.

22 But as far as never or always, I don't like
23 to use those terms because I don't know exactly what
24 could happen in the future.

25 Q. (BY MR. TAMASITIS): Hypothetically, as the

1 zoning administrator, if you were presented with an RV
2 park located within the city of North Myrtle Beach,
3 would that be considered a project?

4 MR. RICARD: Objection, speculation.

5 A. I believe so, yes.

6 Q. (BY MR. TAMASITIS): You do believe that would be
7 considered a project?

8 A. I do, yes.

9 Q. And would be covered by this ordinance?

10 A. Yes.

11 Q. The other question I have about this specific
12 piece, "to be used by projects in North Myrtle Beach not
13 located near the ocean", why the geographic limitation
14 to be -- it has to be within North Myrtle Beach?

15 MR. RICARD: Objection to form, speculation.

16 A. I don't know. I wasn't the author of the
17 ordinance. I don't know.

18 Q. (BY MR. TAMASITIS): What is your opinion?

19 A. Why --

20 MR. RICARD: Objection to form, relevance.

21 A. Why it was limited to projects in North Myrtle
22 Beach?

23 Q. (BY MR. TAMASITIS): Yes.

24 A. I don't know.

25 Q. I will represent to you that it says the purpose

1 of the zoning ordinance in another section of the code
2 is, quote, "To guide the development in accordance with
3 existing and future needs and to promote the public
4 health, safety, morals, convenience, order, appearance,
5 prosperity and general welfare of the community."

6 Does this definition satisfy that
7 requirement?

8 **A. I think so.**

9 Q. Does this definition requiring the project to be
10 in North Myrtle Beach, in your view as the zoning
11 administrator, discriminate against projects outside of
12 North Myrtle Beach that may want to use a cabana house
13 in the city?

14 MR. RICARD: Objection to form.

15 **A. I don't know.**

16 Q. (BY MR. TAMASITIS): How does the geographic
17 limitation in North Myrtle Beach serve the purpose of
18 the public health, safety, morals, order, appearance or
19 prosperity of North Myrtle Beach?

20 MR. RICARD: Objection, form.

21 **A. Could you say that again? I'm sorry.**

22 Q. (BY MR. TAMASITIS): Sure. How does the
23 geographic limitation that the project has to be in
24 North Myrtle Beach serve any purpose related to the
25 public health, safety, morals, order, appearance or

Exhibit E



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

Sec. 23-2. Definitions.

Generally. For the purpose of this chapter, certain words and terms are herein defined. Words used in the present tense shall include the future; words in the singular number include the plural number, and words in the plural number include the singular number; the word "lot" includes the word "plot"; the word "building" includes the word "structure"; the word "shall" is mandatory and not directory. Any words not herein defined shall carry their customary dictionary definition.

Accessory building: A subordinate building, the use of which is incidental to and customary in connection with the principal building or use, and which is located on the same lot with such principal building or use.

Accessory use: A subordinate use which is incidental to and customary in connection with the principal building or use and which is located on the same lot with such principal building or use.

Alley: A public or private way, at the rear or side of property, permanently reserved as a means of providing secondary or service vehicular access to abutting property, less in size than a street, and which is not designed for general vehicular traffic.

Boatyard: A facility for the construction or major repair of watercraft, including overhaul of hull, engines and other major components.

Body piercing: Any method of piercing of the human skin of one (1) person by another person with the intention of inserting any object including, but not limited to jewelry. For the purposes of this zoning ordinance, the term body piercing shall also include any process of marking or disfiguring the skin or other tissue of any person by branding or scarification but shall not include the piercing of the fatty lobe of the ear by an ear-piercing gun designed solely for the purpose, or physician-authorized surgical procedures. This definition of body piercing includes that process commonly referred to as implantation.

Building: Any structure having a roof supported by columns or walls for the shelter or enclosure of persons or property.

Building height: The highest vertical distance measured from the finished grade at ground level at the building line to the midpoint between the eave and the highest point of the roof.

For the purpose of calculating side setbacks in R-2A, R-4, HC and RC, the height of the roof section (if not devoted to living or storage space) shall not be considered in determining the height of the structure.

Building, principal: A building in which is conducted the main or principal use of the lot on which the building is located.

Cabana house: 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.

Caliper: The diameter of a tree measured three (3) feet above the base of the tree. The two (2) largest diameters of multiple trunk trees shall be added to obtain the caliper.

Camp, youth day or educational: A camp providing facilities for groups with nonpermanent accommodations, not to include recreational vehicles or mobile homes, used for related youth recreational or educational purposes. This can also include adult educational and training activities.

Club: Buildings and facilities owned or operated by a corporation, association, person or persons for a social, educational or recreational purpose, but not primarily for profit and not primarily to render a service which is customarily carried on as a business.

Commercial center: Two (2) or more retail stores, service establishments, professional offices, and/or mixed-use, or any other businesses serving a community or neighborhood, not necessarily owned by one (1) party nor by a single land ownership, which occupy a common and/or adjacent building(s) on premises and also utilize common parking area(s).

Commercial craft: Any boat that is used for excursions such as dinner cruises, sightseeing cruises (excluding smaller sightseeing boats with no more than forty (40) seats and a maximum authorized capacity of forty (40) passengers), overnight cruises and similar trips, commercial fishing and shrimping (excluding smaller charter fishing), industrial uses such as tug boats, tankers, barges, and military craft. Gaming/gambling boats are commercial craft, which are further defined elsewhere.

Compact automobile space: Designated parking space which allows parking for only compact automobiles. The overall dimensions of the same space are fifteen (15) feet by eight (8) feet.

Conditional use: A zoning ordinance provision that imposes conditions, special provisions, or limitations on a use that are in addition to those applicable to other uses permitted by right in the same zoning district. S.C. State Law requires that the list of conditions must be set forth in the text of the Zoning Ordinance, and then; when all are met, the "conditional use" may be permitted by the zoning administrator without review of the board of appeals.

Condominium: A condominium is an ownership arrangement, not a land use. It is individual ownership of a unit in a multi-unit structure.

Condotel: A condominium set up like a hotel in which each room is individually owned and in which some or all rooms are available to transients for rent.

Convenience store: A one-story, retail store containing less than three thousand (3,000) square feet of gross floor area that is designed and stocked to sell primarily food, beverages, and other household supplies to customers who purchase only a relatively few items. It is designed to attract and depends upon a large volume of stop-and-go traffic.

Court: An open space which may or may not have direct street access and around which is arranged a single building or group of related buildings.

Day care facilities, including:

- (1) *Family day care home:* A family day care home is one in which care is given in a family only during the day for one (1) but not more than seven (7) children, including the day care parents' own children.
- (2) *Child care center:* A child care center shall mean or include any home, center, agency or place, however styled, where children not related to the operator are received for custodial care, apart from their parents whether for compensation, reward, or otherwise, during part or all of the day or night and upon any number of successive days or nights.

Density: The number of dwelling units per acre of "developable land" within the boundaries of a residential project.

Developable land: The term developable land or land which is suitable for development is defined to mean all lands within a project's boundaries, including lands or parcels designated for support of the development; that is, all areas for lots, parking areas, drives, roads, drainage and utility easements or rights-of-way, sign easements, entrance structure easements, and lands designated for private recreation. Off-site parking, marsh and wetlands shall not be included as developable land for purposes of calculating density, except that marsh and wetlands held in fee simple may be applied to the open space requirements of this chapter.

Developments of regional significance: Retail and/or office uses in which the gross floor area of combined buildings within a development equals or exceeds seventy-five thousand (75,000) square feet.

Dwelling: A structure or portion thereof which is used exclusively for human habitation.

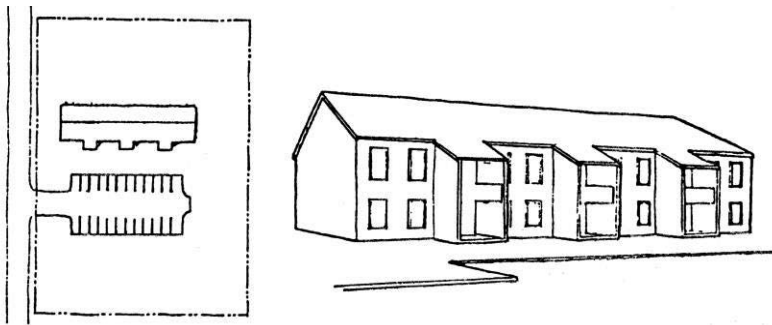
Dwelling, attached: A dwelling unit attached to two (2) or more dwelling units by common vertical walls.

Dwelling, boarding house: A detached residential structure similar in style to a single-family structure where lodging is provided for periods in excess of two (2) weeks, for compensation or other consideration, for three (3) or more individual boarders. This definition excludes the use of boarding houses in single-family, duplex, multifamily, and other residential uses separately defined. Houses parties, groups of golfers, shaggers, bikers, and other tourist-related groups with a commonality and prearranged purpose are not included in this definition.

Dwelling, detached: A dwelling which is not attached to any other dwelling by any means.

Dwelling, duplex: A structure on a single lot containing two (2) dwelling units, each of which is totally separated from the other by an unpierced wall extending from ground to roof or an unpierced ceiling and floor extending from exterior wall to exterior wall, except for a common stairwell exterior to both dwelling units.

Dwelling, garden apartment: A multifamily dwelling up to three (3) stories in height.

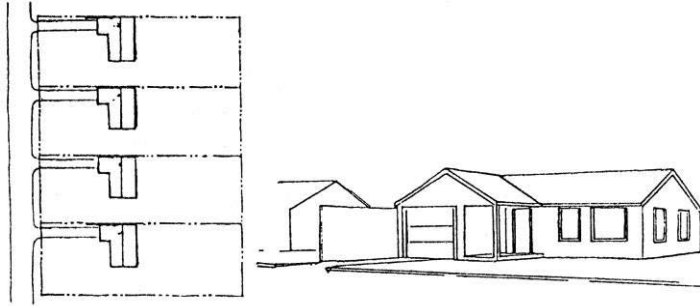


Dwelling, Garden Apartment

Dwelling, mobile/manufactured home: A structure transportable in one (1) or more sections, which in the traveling mode, is eight (8) body feet or more in width, or forty (40) body feet or more in length or when erected on site is three hundred twenty (320) or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein. The term mobile/manufactured home shall not include the term modular building or structure as herein separately defined, or the term recreational vehicle or camping trailer.

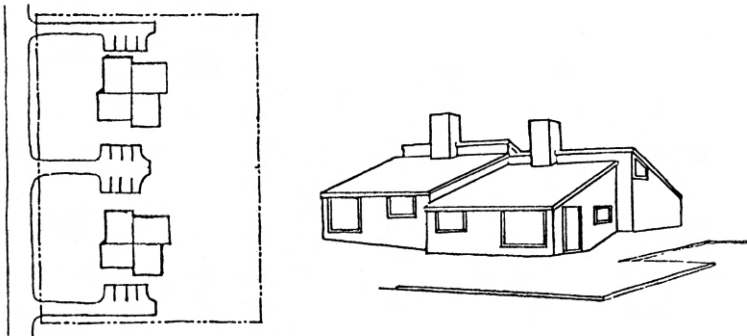
Dwelling, multifamily: A structure containing more than two (2) dwelling units, not including triplexes or quadrplexes, separately defined by this chapter.

Dwelling, patio home: A single-family dwelling on a separate lot with open space setbacks usually on three (3) sides. The term is usually synonymous with zero lot line dwellings.



Dwelling, Patio Home

Dwelling, quadruplex: A multiplex containing four (4) attached dwellings in one (1) structure. Each unit has two (2) open space exposures and shares one (1) or two (2) walls with adjoining unit or units.



Dwelling, Quadruplex

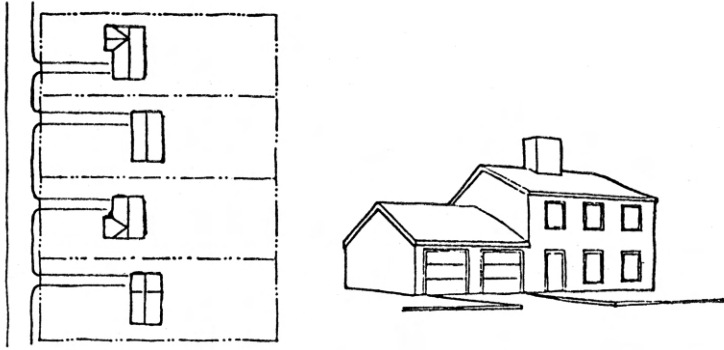
Dwelling, semidetached: A dwelling attached to one (1) other dwelling by a common vertical wall, and each dwelling located on a separate lot.



Dwelling, Semidetached

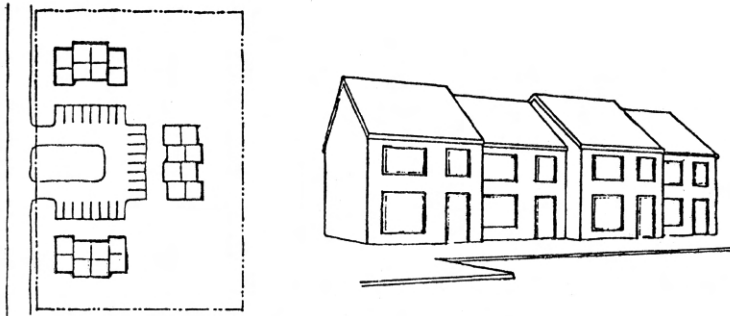
Dwelling, single-family: A building containing one (1) dwelling unit.

Dwelling, single-family detached: A dwelling which is designed for and occupied by not more than one (1) family and surrounded by open space or yards and which is not attached to any other dwelling by any means.



Dwelling, Single-Family Detached

Dwelling, townhouse: A single-family dwelling in a row of at least three (3) such units in which each unit has its own front and rear access to the outside, no unit is located over another unit, each unit is separated from any other unit by one (1) or more common fire-resistant walls, and each unit is serviced by separate utilities.



Dwelling, Townhouse

Dwelling, triplex: A multiplex dwelling containing three (3) dwelling units, each of which has direct access to the outside or to a common hall.

Dwelling unit: One (1) or more rooms designed, occupied, or intended for occupancy as separate living quarters, with cooking, sleeping and sanitary facilities provided within the dwelling unit for the exclusive use of a single-family maintaining a household.

Family: One (1) or more persons occupying premises and living together as a single housekeeping unit.

Flood hazard area: Any area of the city so designated on FEMA Flood Hazard Boundary Maps.

Floor area: The square feet of floor space within the surrounding exterior walls of a building or portion thereof, exclusive of vent shafts and courts. It does not include porticos, garages, or space in a basement or cellar when the basement or cellar space is used for storage or incidental uses.

Floor area ratio: The total floor area of a building excluding porches, decks and attic space but including garages and other enclosed storage areas divided by the square footage of the lot.

Frontage: The side of a lot abutting on a street, the front lot line.

Gaming/gambling boats: Any boat or other floating structure or craft on which any game of chance is played. This includes all electronic video game machines that are available to play or simulate the play of games utilizing a

video display and microprocessors in which the player may receive free games or credits that can be redeemed for cash and all dice, card, roulette, and lottery type games in which money is staked or a wager made.

Gazebo: A freestanding, wood-constructed, roofed structure, open on all sides, no larger than one hundred forty-four (144) square feet, intended as a shady rest area, but shall not be utilized for any commercial activity. An unenclosed shower and lighting are permissible as accessories.

Gross trailer area: Gross trailer area is the total living area of a recreation vehicle measured to the maximum horizontal projection of exterior walls when in the setup mode.

Home occupation: Any occupation within a dwelling and clearly incidental thereto, carried on by a member of the family residing on the premises, provided that no person not a resident of the premises is employed, no stock in trade is kept or commodities sold, no mechanical equipment is used except such that is normally used for family, domestic or household purposes, and there is no exterior indication that the building is being used for any purpose other than a dwelling. When within the above requirements, a home occupation includes but is not limited to the following: (a) art studio; (b) dressmaking; (c) salesman, real estate agent, insurance agent, or other similar occupation; (d) teaching, with musical instruction limited to one (1) or two (2) pupils at a time.

Hotel: A building in which lodging or boarding and lodging are provided and offered to the public for compensation and in which ingress and egress to and from all rooms is made through an inside lobby or office supervised by a person in charge at all times. As such, it is open to the public in contradistinction to a multifamily structure which is herein separately defined.

Impervious surface: Impervious surfaces are those that do not absorb rain. All buildings, parking areas, driveways, roads, sidewalks, and any areas in concrete and asphalt shall be considered impervious surfaces within this definition. In addition, other areas determined by the zoning administrator to be impervious within the meaning of this definition will also be classed as impervious surfaces.

Impervious surface ratio: The impervious surface ratio is a measure of the intensity of land use. It is determined by dividing the total area of all impervious surfaces within the site by the total site area.

Institution: A nonprofit establishment for public use.

Interior court: An open space other than required yards or setbacks which does not have direct street access and around which is arranged on three (3) sides a group of related buildings.

Junk yard: A junk yard is defined as a place where two (2) or more wrecked or disabled vehicles, without current license tags, and/or otherwise inoperable are placed or stored in an open area, including parts thereof, scrap building material, scrap contractor's equipment, tanks, cases, cans, barrels, boxes, drums, piping, bottles, glass, old iron, machinery, rags, paper, excelsior, mattresses, beds, or bedding, or any kind of scrap or waste material.

Landscaped area: An area that is permanently devoted to and maintained for the growing of shrubbery, grass and other plant material.

Lot: A parcel of land which fronts on and has access to a street and which is occupied or intended to be occupied by a building or buildings with customary accessories and open space.

Lot, corner: A lot abutting upon two (2) or more streets at their intersection.

Lot, depth: The mean horizontal distance between the front and rear lot lines.

Lot, double frontage: A lot having a frontage on two (2) nonintersecting roads, as distinguished from a corner lot.

Lot, interior: A lot other than a corner lot.

Lot, width: The width of a lot at the front building line.

Lot of record: A lot or parcel of land the plat or deed of which has been legally recorded.

Marina: There are four (4) types of marinas, defined as follows:

- (1) *Marina, noncommercial multiple docking facility:* A basin or marine terminal that provides space, docks, moorings for five (5) or more boats on a private or noncommercial basis. This includes multiple docking facilities such as for condominiums or other residential uses or subdivisions, and includes nonprofit "yacht clubs." It does not include service generally associated with commercial marinas, such as fuel, overnight docking, ship's store, etc. Dry storage and/or dry stack facilities are prohibited.
- (2) *Marina, commercial:* A basin or marine terminal that provides space, docks, moorings, and related facilities and services for five (5) or more pleasure boats. This includes the sale and minor in-water repair of recreational marine craft and the sale of fuel, food, beverages, supplies, hardware and other accessory uses. The overhaul of hulls and the painting, finishing and building of boats are prohibited. Commercial craft are prohibited from docking, mooring or being repaired. Dry storage and/or dry stack is permitted as a special exception if approved by the zoning board of appeals.
- (3) *Marina, boatyard:* A basin or marine terminal that provides space, docks, moorings, and related facilities and services for five (5) or more boats, including pleasure and commercial craft. This includes the sale, repair, painting, finishing, and building of boats, dry storage, and/or dry stack, fueling operations, and other uses permitted by commercial marina definition.
- (4) *Marina, dry stack:* A facility for storing and keeping boats out of water. This is principally a land operation, where boats are dry stored or "stacked" in a common structure until such time as they are transferred to the water for use.

Massage parlor: An establishment or business which provides the services of massage and body manipulation, including exercises, heat and light treatments of the body, and all forms and methods of physiotherapy, unless operated by a medical practitioner or professional physical therapist licensed by the state.

Mini-warehouse: A structure comprised of individually rented units for the purpose of storage, separated by permanent walls with individual exterior doors. Each unit generally not exceeding three hundred (300) square feet in floor area.

Mini-warehouse, climate controlled: A building where individually rented units for the purpose of storage are contained within the wall of the building, and no unit opens directly to the exterior of the building, but rather to an interior hall with security, controlled through an interior office area. Climate control shall be by central heat and air only.

Mini-warehouse facility: A warehouse facility complex designed with numerous component storage units, each for lease to clients for storage.

Mixed use building/site: A single building that contains a residential dwelling unit or units and commercial uses or a site that has multiple uses in multiple, separate buildings located upon it.

Mobile/manufactured home park: A parcel of land under single ownership, with required improvements and utilities for the long-term parking and occupancy of mobile/manufactured homes where mobile/manufactured home sites are available for rent or lease and which may include services and common facilities for the residents.

Mobile/manufactured home site: A parcel of land (space) within a mobile/manufactured home park for the placement of a mobile/manufactured home and its accessory buildings and structures and containing approved sewer and water connections.

Mobile/manufactured home subdivision: A subdivision designed and intended for residential use, where residence is primarily in mobile/manufactured homes.

Modular building or structure: A structure or building including the necessary electrical, plumbing, heating, ventilating, and other service systems, manufactured off-site and transported to the point of use for installation or

erection, with or without other specified components, as a finished building, and not designed for ready removal to another site. The term is applicable to all buildings or structures, including residential, commercial, industrial, institutional, etc. When meeting the requirements of the Modular Building's Construction Act (23-43 of the South Carolina Code of Laws), said building or structure may be located in any of the city's several zoning districts.

Motel: A building or buildings in which lodging, with or without meals, is provided and offered through an on-site office to the public for compensation, which is open to transient or permanent guests.

Neighborhood convenience store: A convenience store limited to three thousand (3,000) square feet of gross floor space including storage and providing convenience items and services to the general public but excluding sale of motor fuels. Such establishments are limited to the following uses: drug and food stores, flower shops, beverage stores, confectioneries, delicatessens, and bakeries whose products are sold exclusively at retail and on premises.

Overlay zone: A zone imposed over a primary zoning district which imposes a set of requirements or relaxes a set of requirements imposed by the underlying primary zoning district when there is a special public interest in a particular geographical area that does not coincide with the underlying district boundaries.

Park and sports complex. A tract of publicly owned land one hundred (100) acres or more in size, with athletic fields, active and/or passive recreation facilities and regional attractions such as, but not limited to, zip lines and water parks and associated facilities and activities, dog parks, biking/hiking trails, water activities, and entertainment/gathering venues. Such facilities may also have accessory on-site sales and consumption of food, legal beverages, gifts, clothing, ticket sales, equipment rental and similar activities.

Primary zoning district: Geographic sections of the city delineated on the official zoning map and designated in the zoning ordinance text in which requirements for the use of land and building and development standards are prescribed.

Protected tree: Any tree regulated by the tree protection regulation article of this chapter excluding pine trees.

Public buildings: Any nonrecreational state, county, or municipal building used for public purposes.

Public park and recreation facilities: Any noncommercial park, playground, or other recreation facility, and/or open space officially designated as a public park or recreation facility including community centers, passive and active outdoor uses and indoor uses, and all structures associated with such uses.

Recreational vehicle: A vehicular type unit primarily designed to provide seasonal or temporary living quarters which has its own motive power or is towed by another vehicle and may be connected to utilities necessary for operation of installed fixtures and appliances and with a gross trailer area not exceeding four hundred (400) square feet when in the setup mode. The basic entities are: travel trailer, folding camping trailer, park trailer, truck camper, motor home and multi-use vehicle.

Resort accommodations: A building in which lodging or boarding and lodging are provided and offered to the public for compensation in which ingress and egress to and from all rooms can be made through an inside lobby or office supervised by a person in charge at all times and which may have individual units owner occupied as dwelling units within the same building.

Retail, "big box": A single retail establishment that exceeds fifty thousand (50,000) square feet in gross sales floor area either as a single use on a property or within a commercial center.

Retail, convenience: Convenience retail establishments are those providing convenience items and services to the general public, such as drug, beverage, grocery stores, hardware, etc.

Retail, primary: Primary retail establishments are those selling commodities in small quantities to the consumer, usually low bulk comparison items which are normally found in large regional shopping centers, including department stores and stores selling general merchandise, variety merchandise, shoes, millinery, clothing, jewelry, etc.

Retail, secondary: Secondary retail establishments are those selling primarily one-stop items usually high bulk and very often more expensive items than those found in the primary retail establishments, including stores selling appliances, radios, televisions, floor coverings, furniture, etc.

Short term rental: Any residential unit offered for lease for a period of ninety (90) days or less.

Sleeping area: As it relates to *short term rentals*, a sleeping area is any room (including bedrooms) that is not one of the following: A kitchen, a hallway not exceeding seven (7) feet in width, a mechanical room designed primarily for containing HVAC equipment or hot water heaters or electrical panels or similar, a bathroom, a closet not exceeding seventy (70) square feet in size, or an elevator or stairwell.

Story: That portion of a building included between the surface of any floor and the surface of the floor next above it; or if there is no floor above it, then the space between such floor and the ceiling next above it. If the finished floor level directly above a basement or cellar is more than six (6) feet above grade, such basement or cellar shall be considered a story.

Structure: Anything constructed, erected or established, including but without limiting the generality of the following: swimming pools, buildings, signs, trailers, fences, screened enclosures, patio walls, backstops and sun decks or similar activities.

Structural alteration: Any change except those required by law or ordinance, which would prolong the life of the supporting members of a building or structure, such as bearing walls, columns, beams or girders, not including openings in bearing walls as permitted by other ordinances.

Tavern: For the purpose of regulating adult uses and amusements, a tavern is any establishment which sells or is authorized to sell alcoholic beverages to patrons by the individual drink for consumption on the premises. A tavern or bar is an establishment used primarily for the serving of alcohol for on-premises consumption to the general public, and where food is served only as accessory to the primary use.

Town center: A large contiguous (including streets) commercial area which contains at least twenty (20) acres and a minimal commercial area of at least fifty thousand (50,000) square feet within a Planned Development District (PDD) and not covering more than fifty (50) percent of the total land area of the entire PDD.

Video gaming establishment: Any building (under one (1) roof) in which more than five (5) video gaming machines or stations are located.

Video gaming machine: An electronic video game machine that, upon insertion of cash, is available to play or simulate the play of games as authorized by the South Carolina Tax Commission utilizing a video display and microprocessors in which the player may receive free games or credits that can be redeemed for cash.

Yard: A required open space other than a court occupied and unobstructed by a structure or portion of a structure from twelve (12) inches above the general ground level of the graded lot upward; however, fences, walls, poles, posts, permitted signs, and other customary yard accessories, ornaments and furniture may be permitted in any yard subject to height limitations and requirements limiting obstruction of visibility.

- (1) *Yard, front:* A yard extending between side lot lines across the front of a lot adjoining a street or the twelve and one-half feet (12.5) easement on twenty-five feet (25) private rights-of-way. In one (1) required front yard, no fence or wall shall be permitted which materially impedes vision across that yard above the height of thirty (30) inches, and no hedge nor vegetation shall be permitted which materially impedes vision across such yard between the heights of thirty (30) inches and ten (10) feet.
- (2) *Yard, side:* A yard extending along the side lot line from the front yard to the rear yard.
- (3) *Yard, rear:* A yard extending between side lot lines across the rear of the lot.

(Ord. No. 88-35, 11-1-88; Ord. No. 90-3, §§ 1, 2, 2-20-90; Ord. No. 90-35, § 1, 8-28-90; Ord. No. 91-8, §§ 2, 3, 2-4-91; Ord. No. 93-36, §§ 1, 2, 10-4-93; Ord. No. 94-1, § 1, 1-3-94; Ord. No. 95-4, § 1, 2-6-95; Ord. No. 95-49, § 1, 10-16-95; Ord. No. 96-02, § 1, 2-5-96; Ord. No. 97-31, § 1, 8-18-97; Ord. No. 98-37, § 1, 12-7-98; Ord. No. 99-46, § 1,

11-15-99; Ord. No. 00-15, § 1, 3-6-00; Ord. No. 00-45, § 1, 10-16-00; Ord. No. 01-12, § 1, 2-19-01; Ord. No. 01-51, §§ 1, 2, 11-19-01; Ord. No. 02-03, § 2, 2-4-02; Ord. No. 03-13, § 1, 4-21-03; Ord. No. 03-34, § 1, 8-18-03; Ord. No. 06-46, § 1, 7-17-06; Ord. No. 07-09, § 1, 2-19-07; Ord. No. 07-21, § 1, 6-18-07; Ord. No. 09-17, § 1, 3-2-09; Ord. No. 09-21, § 1, 6-1-09; Ord. No. 09-36, § 1, 11-16-09; Ord. No. 11-28, § 1, 10-17-11; Ord. No. 11-30, § 1, 11-21-11; Ord. No. 12-16, § 1, 9-17-12; Ord. No. 15-18, § 1, 5-18-15; Ord. No. 17-12, § 1, 6-5-17; Ord. No. 18-19, § 1, 10-15-18)

Exhibit G

Sec. 23-22. R-4 Resort Residential District.

- (1) *Purpose.* The purpose of this 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.
- (2) *Permitted uses:* Within the R-4 District, a building or lot shall be used only for the following purposes:
- (a) Dwellings, including:
 - Single-family detached.
 - Semidetached.
 - Patio homes.
 - Two-family (duplex).
 - Multiplex (triplex and quadruplex).
 - Townhouse developments.
 - Multifamily, including garden.
 - Mid-and high-rise apartments.
 - Zero lot line single-family detached developments, as provided in section 23-119.
 - Boarding house.
 - Resort accommodation.
 - (b) Hotels, motels, inns, [and] lodges.
 - (c) Accessory uses customarily incidental to dwellings.
 - (d) Accessory uses customarily included in hotels, motels, inns, lodges and resort accommodations: provided such uses are located within the principal building and are accessible only from an interior court, lobby corridor or pool deck except for poolside activities as regulated under section 23-118: Further that such uses shall be limited to the following: restaurants, newsstands, snack bars, florists, gift shops, confectionery stores, beach and convenience retail shops, automobile rental agencies, drug and sundry shops, nightclub and radio broadcasting studios, health clubs, barber and beauty shops.
 - (e) Parking lots.
 - (f) Signs permitted by and in accord with all applicable provisions of Article III.
- (3) *Development standards for uses in R-4 District:*

	Hotels, Motels, Inns, Lodges Resort Accommodation ⁷	Nonresi- dential Uses	Single- family Detached	Semi- detached	Duplex	Multi- plex Boarding house	Town- house	Multi- family ⁷	Restaurant

Minimum site area (square feet)	15,000	NA	5,000	7,000	7,000	10,000	16,000	15,000	10,000
Minimum lot area* (square feet)	NA	NA	5,000	3,500	3,500	2,000	2,000	NA	NA
Minimum lot width	100 feet	NA	50 feet	35 feet	55 feet	75 feet	14 feet ⁸	100 feet	70 feet
Minimum yards:									
Front	15 feet	15 feet	15 feet	15 feet	15 feet	15 feet	15 feet	15 feet	10 feet
Side	³	5 feet	5 feet	5 feet	5 feet	7.5 feet	²	³	10 feet
Rear	15 feet	15 feet	15 feet	15 feet	15 feet	15 feet	⁴	15 feet	15 feet
Maximum impervious surface ratio	90%	60%	60%	60%	60%	60%	60%	80%	90%
Common open space	10%	NA	NA	NA	NA	15%	25%	20%	NA
Maximum height of buildings	90 feet ⁵	90 feet	90 feet	90 feet	90 feet	90 feet	90 feet	90 feet ⁵	35 feet
Maximum height of signs	30 feet					10 feet	10 feet	10 feet	8 feet
Minimum distance between buildings	Where more than one (1) principal building is located on a lot, minimum distance between buildings shall be twenty (20) feet with one (1) additional foot for each six (6) feet in height over thirty-five (35) feet, using the highest building.								

*Per dwelling unit

Notes:

¹ A five-foot setback shall be applied to the ends of the structure and the exterior property lines, and zero (0) setback shall be allowed for the common interior property line.

² Zero (0) between units; ten (10) feet between end structures and side property line; no more than six (6) units shall be attached in one (1) building.

³ Ten (10) feet for first thirty-five (35) feet in height and fifteen (15) feet for buildings in excess of thirty-five (35) feet in height.

⁴ Rear yard shall be ten (10) feet except where contiguous to the project site property line, then a twenty-foot setback shall be required, and shall remain unoccupied by any accessory building or structure.

⁵ Hotel/motel, resort accommodation and multifamily uses may exceed the ninety-foot height limitation by one (1) floor of units for each full level of above grade parking deck construction below the principal building not to exceed four (4) additional floors of units.

[⁶ Reserved.]

⁷ The use may be constructed in the airspace above a noncontiguous parking lot of the same use subject to the requirements of section 23-41 and an agreement between the owners sharing the off-site lot and the city; and/or an easement protecting access and required off-site parking; and deed restriction of off-site spaces; and compensation for any lost required interior landscaping.

⁸ Minimum lot width and/or unit width.

- (4) *Special exceptions:* Owing to their potential negative impact on the community and surrounding areas, the following uses may be approved as special exceptions by the board of zoning appeals:
- (a) Noncommercial marinas, subject to the siting standards of section 23-120.
 - (b) Fishing piers, provided that the uses permitted on such piers are limited to restaurants, bait and tackle shops, and marine accessories. Refer to section 23-124 for separation requirements.
 - (c) Lighted tennis courts, subject to the following:
 - 1. That the proposed lighted tennis court not be located closer than fifty (50) feet to any residential structure.
 - 2. That the lighting be a minimum to sufficiently illuminate the playing surface utilizing sharp cut-off lights with adjustable glare shields.
 - 3. When in close proximity to a residential structure or lot, the board may require a vegetative screen as described in section 23-58(2)(d) on the side(s) of the court or other method to minimize noise levels.
 - 4. In granting the special exception, the board of zoning appeals may impose such reasonable and additional stipulations, conditions or safeguards as, in its judgement will enhance the siting of the proposed special exception.
 - (d) Cabana houses subject to the following:
 - 1. That a homeowner's association shall have been established for the project and a maintenance agreement has been submitted to the planning department.
 - 2. That at least eight (8) parking spaces per zoning standards be established on site and that more spaces may be required by the board if there is no other means to limit the number of cars traveling to the property provided such as a shuttle service to and from the property to the project.
 - 3. That the use of the house be limited to bathing and change of clothing facilities, and occasional use as guest quarters and other similar uses.
 - 4. That the special exception will be in substantial harmony with the area in which it is to be located.
 - 5. That the special exception will not be injurious to the adjoining property.
 - 6. That the special exception will not discourage or negate the use of surrounding property for use(s) permitted by right.

7. That in granting the special exception, the board of zoning appeals may impose such reasonable and additional stipulations, conditions or safeguards as, in its judgment, will enhance the siting of the proposed special exception.
- (5) *Conditional uses:* Due to the manner of operations, conditional uses must meet certain conditions stated in this section, as well as the restrictions and/or limitations applicable to all land uses in the R-4 District and all applicable supplemental regulations for the use contained throughout the zoning ordinance (See Article I, section 23-2 of this chapter entitled "Definitions"). If the conditions or standards are met, the zoning administrator may permit the use without review by the board of [zoning] appeals. (S.C. Code 6-29-720 of the S.C. Comprehensive Planning Act of 1994).
- (a) *Restaurants.*
1. That the use complies with all applicable development standards in the R-4 district and/or an R-4 site also designated in an "Activity Center Overlay" area.
 2. That the use will be an enhancement to the character and sense of place of the area in which it is to be located, increasing pedestrian accessibility to eating establishments and reducing traffic congestion. Towards this goal, auto oriented drive through pickup restaurants are not eligible for this conditional use.
 3. That parking requirements/incentives be met as follows:
 - a. Any proposed R-4 restaurant site also located in a designated activity center overlay will be eligible for the fifty (50) percentage parking requirement reduction, as well as the ability to satisfy parking requirements off site within five hundred (500) feet and located on land owned or leased by the restaurant owner.
 - b. Any proposed R-4 restaurant site that does not fall in an activity center overlay designated area will also qualify for the fifty (50) percent parking reduction and the ability to locate the other fifty (50) percent of the parking off site (on owned or leased within five hundred (500) feet and not necessarily adjacent); with one major exception that the offsite parking be improved to full city parking lot standards including lighting, landscaping, surfacing, and drainage).
 - c. In cases where there is a change of use in an existing building from some other use to restaurant, the zoning administrator shall evaluate the site on a case-by-case basis to determine if there is room to provide on-site parking. If there is he/she may require any number and combination of vehicular, bicycle, and golf cart parking stalls to be provided as a condition for issuance of the permit. For purposes of this section, a bicycle stall shall mean a space in a standard bicycle rack specifically designed for the temporary parking and securing of bicycles. A golf cart space shall have a dimension not less than six (6) feet wide by ten (10) feet deep, and shall be identified as "golf cart parking only" via small informational signage.

NOTE: Restaurants allowed as accessory uses to the permitted use of resort accommodations in R-4 (see Article II Sec. 22-23(d) of this section) will not require parking in addition to that calculated for the hotel/permitted principal use. Also see Article IV of this chapter, off street parking)
 4. That the use has taken measures to not be injurious to adjoining property including, but not limited to:
 - i. Controlling and shielding all lighting so as not to cast undue glare onto adjoining residential uses. In addition, landscape buffers and/or fencing must be added if the R-4 adjoins an R-1

District parcel. These requirements will be based on buffering of R-1 from adjacent commercial uses in other commercial districts in this chapter.

- ii. Signage will be limited to wall signage as permitted this use if it were locating in The RC District. However there will be no freestanding signage allowed, other than pedestrian oriented (sandwich/menu boards) per RC District standards.
 - iii. Controlling all elements that produce noise, such as interior/exterior music and table availability announcements for waiting customers so as not to create a nuisance for neighboring properties.
5. That the use is limited to restaurant and not bar/nightclub. (For purposes of this section, a bar/nightclub shall be defined as any establishment licensed by the State of South Carolina to serve alcoholic beverages, and whose sale of such beverages constitutes forty (40) percent or more of its gross revenues. For those applicants who wish to claim that their sales of such beverages constitute less than forty (40) percent of gross revenues, the burden of proof shall rest with the applicant to so demonstrate.)
 6. That the use will contribute to the economic vitality and promote the general welfare of the community.
 7. That the use will not discourage or negate the use of surrounding property for use(s) permitted by right in the district.
- (6) *Off-street parking:* Off-street parking [requirements] for the various uses permitted herein are set forth in Article IV.
- (Ord. No. 88-35, 11-1-88; Ord. No. 89-16, § 1, 4-18-89; Ord. No. 95-10, § 7, 3-20-95; Ord. No. 95-16, § 2, 4-3-95; Ord. No. 95-40, § 1, 7-3-95; Ord. No. 95-45, § 1, 7-17-95; Ord. No. 96-02, § 2, 2-5-96; Ord. No. 98-10, § 3, 4-20-98; Ord. No. 98-11, §§ 1, 2, 4-20-98; Ord. No. 98-13, § 3, 5-4-98; Ord. No. 98-35, § 3, 11-2-98; Ord. No. 99-35, § 2, 9-20-99; Ord. No. 02-14, § 1, 4-15-02; Ord. No. 03-13, § 2, 4-21-03; Ord. No. 04-51, § 1, 10-4-04; Ord. No. 06-10, §§ 1—4, 2-20-06; Ord. No. 12-13, § 1, 7-2-12; Ord. No. 21-02, § 2, 3-1-21)

Exhibit H

In the Matter of:

CITY OF NORTH MYRTLE BEACH

VS.

**SUN TRS OCEAN CLUB, LLC and SUN TRS
CAROLINA PINES, LLC**

Michael G. Mahaney

June 15, 2022



www.spectrumcourtreporting.com

P.O. Box 1296

Mt. Pleasant, SC 29465

843-849-0133

Spectrumaaa@gmail.com

1 **A. No.**

2 **Q.** What did you do to prepare for today's
3 deposition?

4 **A.** **There was a video conference yesterday with the**
5 **two attorneys sitting here where we went over**
6 **some of the documents.**

7 **Q.** What documents do you recall going over?

8 **A.** **Zoning appeals, the resort residential district,**
9 **some definitions, some e-mails, the Plaintiff's**
10 **Answers. I believe this might be Ben Caldwell.**
11 **Some Amended Notices, Application for Special**
12 **Exception, formal complaint. That's from Jim**
13 **Shortle, I think. Consent Order of Dismissal,**
14 **North Myrtle Beach Zoning Appeals. I think**
15 **that's pretty much the entire list.**

16 **Q.** Those are all documents that you brought with you
17 today?

18 **A.** **Yes.**

19 **Q.** Any other documents that you brought with you
20 today related to this lawsuit?

21 **A.** **No.**

22 **Q.** Who else did you talk to other than your
23 attorneys?

24 **A.** **Jim Wood was in the meeting, the planning**
25 **director.**

1 Q. Anybody else?

2 A. No.

3 Q. In your own words, can you please explain to me
4 what your understanding is of this lawsuit?

5 A. Well, basically the lawsuit, from my perspective,
6 is about issues at the beach cabana that Carolina
7 Pines owns. And, of course, they're quite a
8 distance from the city. And, from my
9 perspective, it has to do a lot with the quality
10 of life issues that are generated in harmony with
11 the adjacent neighbors and the problems that it
12 causes.

13 Q. What do you mean by "quality of life issues"?

14 A. I'm talking about like when they have late night
15 parties that are disturbing people that live next
16 door that may have to get up and go to work at
17 6 a.m. the next morning.

18 Q. They're quite a distance from the city, you said
19 that, why is that a concern?

20 A. Well, when it's an HOA that is inside the city,
21 they are generally more responsive. When I call
22 an HOA president or e-mail an HOA president,
23 they're pretty responsive in calling back fairly
24 quickly. In the case of Carolina Pines, I both
25 called the cell phone number of the manager and

1 e-mailed and never got a response.

2 Q. In your opinion, that's because they're just
3 located quite a ways from the city?

4 A. I have no opinion on why he didn't call back.

5 There are some other legal difficulties going on
6 with him as I understand from the paper. But
7 that's not normal for me. When I call, when the
8 city manager's office calls someone on a public
9 safety line, it's very rare that nobody calls
10 back.

11 Q. And that's when they're calling someone inside
12 the city, correct?

13 A. Well, it doesn't matter. It doesn't matter. If
14 I call Cleveland, Ohio on the public safety line,
15 somebody usually answers.

16 Q. And who did you call from Carolina Pines?

17 A. I don't remember his name. I could probably find
18 it. It's whoever the manager is. I just don't
19 recall.

20 Q. If you could slide those to the side and we'll go
21 through the documents that I have brought today.

22 MR. TAMASITIS: Let's mark this as
23 Exhibit No. 1.

24 (AMENDED NOTICE OF DEPOSITION OF MIKE MAHANEY

25 MARKED FOR IDENTIFICATION AS DEFENDANT'S EXHIBIT

1 NO. 1.)

2 BY MR. TAMASITIS:

3 Q. Mr. Mahaney, do you recognize the document that's
4 been handed to you?

5 A. Yes.

6 Q. What is it?

7 A. **It's an Amended Notice of Deposition that you**
8 **want to take my deposition.**

9 Q. So, it's for your deposition here today, correct?

10 A. Yes.

11 Q. What's your full name for the record?

12 A. **Michael Greg Mahaney.**

13 Q. Do you go by any aliases or nicknames?

14 A. No.

15 Q. What's your date of birth?

16 A. **February 8, 1950.**

17 Q. What is the last four of your Social Security
18 number?

19 A. **7174.**

20 Q. What is your current address?

21 A. **1215 Trisail Lane in North Myrtle Beach.**

22 Q. And that's in Horry County?

23 A. Yes.

24 Q. How long have you resided at that address?

25 A. **Since 2010.**

1 Q. Where does he live?

2 A. **He lives with us.**

3 Q. And that's in Horry County?

4 A. **Yes.**

5 Q. Do you have any other relatives by blood or
6 marriage in Horry County?

7 A. **No.**

8 Q. The reason we ask that is if we have to pull a
9 jury for this case, we want to know if there is
10 anyone related to you.

11 Let's start with your education starting
12 from high school. Where did you graduate from?

13 A. **I graduated from Covington High School in
14 Covington, Virginia.**

15 Q. Where did you go to college?

16 A. **My engineering degree is from Virginia Tech.**

17 Q. Any graduate school?

18 A. **I did graduate work at Virginia Tech, University
19 of Virginia and James Madison University where I
20 finished and got a master's in business
21 administration from James Madison University.**

22 Q. Any other degrees?

23 A. **No.**

24 Q. Are you involved in any civic organizations?

25 A. **I have been over the years.**

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 **have time to get down in the weeds on a lot of**
2 **these issues.**

3 **So, not every e-mail I get is returned,**
4 **and not every call to the city manager's office**
5 **is returned. But someone returns them and**
6 **someone responds to the e-mail.**

7 **Q.** That's a good lead into my next question. What's
8 your day-to-day involvement with the zoning
9 administrator and the Planning & Development
10 Department?

11 **A.** Well, again, there are 650 employees. I don't
12 have a lot of involvement with the zoning
13 administrator. What involvement I have generally
14 over there is going to be with Jim Wood or code
15 enforcement issues, those kind of things. Not a
16 whole lot of zoning involvement by me.

17 **Q.** And through taking these depositions in the
18 course of this case, it's my understanding that
19 the reporting channel goes from zoning
20 administrator, so Caldwell to Mr. Wood, and then
21 from Mr. Wood to you?

22 **A.** **That's correct.**

23 **Q.** And then you to counsel?

24 **A.** **That's correct.**

25 **Q.** So, would you consider yourself well versed in

1 cabana house that's the subject of this case were
2 homeowner's associations?

3 **A. Well, and again, I may not, recall may not be**
4 **total on this, but whatever the homeowner's**
5 **association is behind the car wash off of 17,**
6 **they at one time operated that as an HOA beach**
7 **cabana, I'm pretty sure. I can't remember the**
8 **name.**

9 **Q. Seabrook?**

10 **A. Yes. Seabrook at one time I think utilized that**
11 **as a beach cabana for the HOA.**

12 **Q. If you could turn to Interrogatory number 18 on**
13 **Exhibit No. 11, please.**

14 **A. What page is it?**

15 **Q. Ten.**

16 **A. All right.**

17 **Q. I'm going to read the question to you and you**
18 **could read the answer to yourself.**

19 **A. Okay.**

20 **Q. It says, "Please explain how the zoning**
21 **ordinances' limitation of the use of properties**
22 **zoned as 'cabana houses' exclusively to 'projects**
23 **in North Myrtle Beach' furthers 'the general**
24 **purpose of guiding development in accordance with**
25 **existing and future needs and promoting the**

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.)

11 - - - - -

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Exhibit I

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

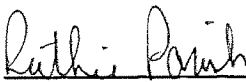

Nexsen Pruet, LLC
205 King Street, Suite 400
Charleston, SC 29401
(843) 577-9440

Exhibit J

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 AND SUN
TRS CAROLINA PINES, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2021-CP-26-07489

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

Plaintiff, City of North Myrtle Beach (the “**City**”), by and through its undersigned counsel, respectfully submits this Memorandum in Opposition to the Motion for Partial Summary Judgment (“**Motion**”) filed by Defendants Sun TRS Ocean Club, LLC, and Sun TRS Carolina Pines, LLC (collectively, “**Defendants**”). For the reasons set forth below, this Court should deny Defendants’ Motion.

I. RELEVANT 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.

As background, the City employs a zoning scheme, much like virtually every other municipality or similar-tiered governmental entity across the United States. The purpose of the zoning scheme 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 primary 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 Nov. 6, 2022).¹ The stated purposes of the Coastal Protection Overlay Zone are

¹ 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.

“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 Resort Residential 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).² Section 23-22 covers the types of uses allowed within the R-4 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.” (Hereinafter referred to as the “**Project Ordinance.**”)

2008) (collecting cases indicating that postings on government websites are inherently authentic or self-authenticating).

² Notably, for planning purposes, the City also categorizes certain land use classes within each of 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 Nov. 6, 2022).

- “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.”
- (Hereinafter referred to as the “**HOA Ordinance.**”)

North Myrtle Beach, S.C., Code of Ordinances ch. 23, art. II, § 23-2 (1984) (emphasis added) (attached hereto as **Exhibit A**).

Five cabana houses have been approved 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 City. The notable exception is the Cabana House at issue in this case. The Cabana House is located between Sea Cloisters I and Sea Cloisters II (collectively, “**Sea Cloisters**”), which are condominiums governed by separate homeowners’ associations. The condominiums are generally owned and occupied by families as permanent or extended-stay second homes, although some units are used as short-term vacation rental spaces. Each of the Sea Cloisters complexes has forty-five (45) residential units, for a total of ninety (90) units; further, each of the complexes include sixty (60) parking spots, for a total of one hundred and twenty (120) parking spots. In contrast, the Cabana House at issue has approximately a dozen (12) parking spots.

On or about May 10, 2019, Defendant Sun TRS Ocean Club, LLC, became the owner of the Property, and uses it in conjunction with Defendant Sun TRS Carolina Pines, LLC, which is affiliated with a recreational vehicle (“**RV**”) resort located in or near Conway, South Carolina. This RV resort contains over eight-hundred and twenty (820) sites, rentals, and residences. (**Exhibit B**, Site Map.) Further, the RV resort operates and maintains over twenty (20) on-site

amenities. (**Exhibit B**, Site Map.) 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 they already provided on-site. (Defs. Memo. Supp. Mot. for Partial Summ. J., p. 7.) Prior to the entering of the consent order, Defendants shuttled their guests and residents to the Cabana House, but, upon information and belief, did not charge for transportation to or access of the Cabana House amenity. The City was *not* aware of Defendants’ intention to use the Property in this way at the time of the purchase of the Property, nor did it become aware Defendants were in fact using the Property in this manner until it received a complaint signed and submitted by both Sea Cloisters homeowners’ associations on or about July 12, 2021. Importantly, neither of the Defendants operate as a homeowners’ association and the project for which the Defendants use the Cabana House is the RV resort located in Conway, South Carolina. Thus, Defendants’ ownership and use violate this definitional condition for cabana houses as provided in the City’s Code of Ordinances.

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*.³

³ The Use Ordinances are *not* at issue within Defendants’ Motion.

North Myrtle Beach, S.C., Code of Ordinances ch. 23, art. II, § 23-22(4)(d) (1984) (emphasis added). Defendants operated the Cabana House without a maintenance agreement on file for the duration of their ownership through the initiation of this litigation.⁴ Further, Defendants not only marketed the Cabana House for weddings and special events, but they also held at least two weddings there. Lastly, Defendants' use has not been in substantial harmony with the surrounding area, and it has been injurious to the adjoining 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 violent confrontations 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 these use conditions, in addition to Defendants' improper ownership.

As mentioned, the City became aware of these violations on or about July 12, 2021. In August 2021, 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.

⁴ 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.

(**Exhibit C**, 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. The following day, 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. Between January 11, 2022, and the present, the parties have engaged in discovery, which remains ongoing. On August 1, 2022, Defendants submitted the pending Motion, which is now before the Court for its consideration.

II. LEGAL 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.*

III. ARGUMENT

This Court should deny Defendants’ Motion, because the Project Ordinance does not

violate the Dormant Commerce Clause. First, there are a number of policy considerations that favor the City and will frame the Court's analysis. Second, the ownership and use of an amenity, as compared to the exchange of goods or the use of transportation networks, does not implicate interstate commerce. Third, even under the Dormant Commerce Clause analysis, any discriminatory effect by the Project Ordinance is indirect and incidental, which is outweighed by the underlying legitimate municipal interests and local benefits derived from the Project Ordinance. Fourth and finally, to the extent this Court is concerned Defendants have failed to meet their burden due to a genuine issue of material fact, the Court must find in favor of the City or allow further discovery and/or trial to commence to develop sufficient facts. Therefore, this Court should deny Defendants' Motion.

A. Policy Considerations Favor the City's Position.

As a preliminary matter, 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 have limited their Motion and Memorandum in Support to asserting only a facial discrimination challenge to the ordinances. (Defs. Mot. for Partial Summ. J., p. 2; Defs. Memo. Supp. Mot. for Partial Summ. J., pp. 11, 19.) 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. All of these policy considerations favor the City, and these considerations, in conjunction with the substantive reasons set forth herein, warrant denial of Defendants’ Motion.

B. The Project Ordinance Does Not Implicate the Commerce Clause, Rendering the Dormant Commerce Clause Challenge Inapplicable.

Defendants’ entire Motion is based on a fatal flaw: i.e., the unanalyzed premise the Project Ordinance conditioning the ownership and use of cabana house amenities in the City implicate the Commerce Clause. Defendants assume such is the case without any factual or legal support. This assumption is flawed.

There are two broad categories of activity that may implicate the Commerce Clause:

(1) channels and instrumentalities of interstate commerce, which concern transportation and communications networks; and (2) activities that “substantially affect interstate commerce.” *See United States v. Lopez*, 514 U.S. 549, 556–60 (1995). The first category can quickly be disposed of, because the Project Ordinance does not prohibit Defendants’ guests from traveling to and from their Conway resort nor from the City. After all, the City allows anyone to park at its public parking locations, patronize its business establishments, and travel through its public access points to the beach. In fact, Defendants acknowledge they can utilize these transportation networks for the benefit of their guests, because it has been offering complementary shuttle service to the City’s public beaches in lieu of shuttling its guests to the Cabana House during the pendency of the consent order. *Carolina Pines RV Resort*, Sun Outdoors, <https://www.sunoutdoors.com/south-carolina/carolina-pines-rv-resort> (last visited Nov. 6, 2022) (screenshot attached hereto as **Exhibit D**). Thus, the only way in which the Project Ordinance implicates the Commerce Clause is if they substantially affect 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 a case cited by Defendants—*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.*

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. Even Defendants, prior to the consent order, provided access to the Cabana House free-of-charge. The regulation of an amenity is vastly different from regulations impacting the selling and consumption of goods, like wheat and milk. The question becomes whether the existence and/or unavailability of this one amenity—out of over twenty (20) that Defendants operate on-site—substantially effects the number of reservations and/or length of reservations at Defendants' RV resort. These material facts are not yet known to the City, nor to this Court, but discovery is ongoing. Regardless, common sense dictates there can be little, if any, effect on their reservations, because reasonable alternatives to this amenity still exist. These alternatives ***are already employed by Defendants*** through their complementary shuttle service to and from the City's public access points to its beaches.

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 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 Nov. 6, 2022). Therefore, Defendants can shuttle their RV resort guests to these particular access points if these facilities are of value to their guests. Defendants suggest "only local residents can benefit" from the City's coastline. (Defs. Memo. Supp. Mot. for Partial Summ. J., p. 17.) However, this suggestion is without merit, because the City welcomes all visitors

to its shores, made evident by the numerous public access points to the beach where public parking and public restroom/shower facilities are provided as amenities. Ultimately, Defendants are not excluded from the market, like the plaintiff in *Dean Milk*, and Defendants have not demonstrated any impact on their RV resort reservations, like the wheat price impact evident in *Wickard*.

Based on the foregoing, it cannot be said the Project Ordinance implicates interstate commerce. Because interstate commerce is not substantially effected, the strictures of the Commerce Clause and the Dormant Commerce Clause do not apply. Therefore, Defendants' argument fails before getting off the ground.

C. Contrary to Defendants' Assertions, the Project Ordinance Is Not Directly Discriminatory Against Out-of-State Interests.

Assuming *arguendo* the Project Ordinance at issue implicate interstate commerce, the analysis then turns to a two-tiered test. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578–79 (1986) (“This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause.”). The first-tier approach will be analyzed here, which constitutes the only ground upon which Defendants rely. This approach states when “a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests,” a statute will generally be struck down. *Id.* at 579. In this case, the Project Ordinance is not directly discriminatory and does not directly favor economic interests within the City over interests outside of the City. At most, there is only an indirect or incidental effect on interstate commerce, which triggers the second-tier approach. *See id.* Therefore, Defendants' argument on this ground are without merit and its Motion should be denied.

Defendants have the burden to demonstrate discrimination. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (“The burden to show discrimination rests on the party challenging the validity of

the statute . . .”). Further, Defendants must provide evidence of a discriminatory effect on commerce that is “significantly probative, not merely colorable.” *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040–41 (10th Cir. 2009) (quoting *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 40 (1st Cir. 2005)). Defendant must also show “both how local economic actors are favored by the legislation, **and** how out-of-state-actors are burdened.” *Id.* at 1041 (emphasis added) (quoting *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 432 (6th Cir. 2008) (internal quotation marks omitted)). “Not every benefit or burden will suffice-only one that ‘alters the competitive balance between in-state and out-of-state firms.’” *Id.* (quoting *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 36 (1st Cir. 2007)). Defendants have **not** met their burden, because they merely rely on a facial challenge, which as courts have acknowledged, is inherent within any zoning scheme.

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). Several courts have recognized the inherently discriminatory nature of zoning regulations. *See, e.g., Studen 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. 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. Further, the City also employs a zoning district called RC, for Resort Commercial, and which covers four stretches of oceanfront property. 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 establishment within the RC zoning district. Therefore, Defendants have not shown how local economic actors are favored in R-4 and Defendants, as actors outside of the City are burdened, when the RC zoning district is available to Defendants. *See Kleinsmith*, 571 F.3d at 1041; *see also Lilly*, 553 F.3d at 432. As previously discussed, Defendants can still shuttle its guests to one or more of the multiple public access points with restroom/shower amenities within the City, which further demonstrates Defendants have not been burdened.

Further, even though there may be a facial distinction between projects within the City and those outside the City, the Project Ordinance treats in-state projects outside of the City and out-of-state projects outside of the City equally. "[L]aws that impose the same burden on in-state and out-

of-state business interest usually do not violate the Commerce Clause.”⁵ *Georgia Manufactured Hous. Ass’n, Inc. v. Spalding Cnty., Ga.*, 148 F.3d 1304, 1308 (11th Cir. 1998) (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (holding the burden posed on interstate commerce by a Minnesota statute was not clearly excessive, and focusing on the fact that both in-state and out-of-state firms would be burdened equally: “there is no reason to suspect that the gainers will be Minnesota firms, or the losers out-of-state firms.”); *see also Oregon Waste Sys., Inc. v. Dep’t of Env’t Quality of State of Or.*, 511 U.S. 93, 99 (1994) (“As we use the term here, “discrimination” simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”). Therefore, there is no facial discrimination sufficient to justify the use of the first-tiered approach in this case.

As a summation of the issues analyzed above, an examination of a case arising out of the Southern District of Texas is especially persuasive. In *Texas Manufactured Housing Association, Inc. v. City of La Porte*, 974 F. Supp. 602 (S.D. Tex. 1996), the municipality’s motion for summary judgment was granted, because the court found an ordinance’s exclusion of manufactured homes from “R–1” districts was an evenhanded regulation and did not directly discriminate against interstate commerce. *Id.* at 608–14. Defendants suggest the exclusion of project owners outside the City owning and operating cabana houses in the R-4 district is facially discriminatory, but such

⁵ Defendants cite to *Florida Transportation Systems, Inc. v. Miami-Dade County*, 703 F.3d 1230, 1249 (11th Cir. 2012), for the proposition that “*Dean Milk* shows that local ordinances that isolate local markets from outsiders are discriminatory even when those ordinances apply equally to in-staters and out-of-staters.” (Def. Memo. Supp. Mot. for Partial Summ. J., p. 15.) However, controlling case law from the Supreme Court of the United States appears to curtail this alleged reach of the *Dean Milk* decision from 1951. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978) (“While the refiners will no longer enjoy their same status in the Maryland market, ***in-state independent dealers will have no competitive advantage over out-of-state dealers.*** The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.” (emphasis added)).

an assertion is belied by the *Texas Manufactured Housing Association* decision. Because Defendants' Motion exclusively rests on this first-tier approach, and because its arguments are without merit, Defendants' Motion should be denied.⁶

D. The Project Ordinance is Motivated by Legitimate Municipal Interests and the Local Benefits Clearly Exceed Any Indirect or Incidental Burden on Interstate Commerce.

Although Defendants do not assert or analyze the second-tier approach, the City will briefly do so here. The rule here is when an ordinance “has only indirect effects on interstate commerce and regulates evenhandedly,” the court must examine “whether the [municipal] interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.” *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). This approach is often called the *Pike* balancing test. *See, e.g., Sandlands C & D LLC v. Cnty. of Horry*, 737 F.3d 45, 52 (4th Cir. 2013).

The case of *McBurney v. Young*, 667 F.3d 454 (4th Cir. 2012), *aff'd*, 569 U.S. 221 (2013), is instructive. It 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, 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.*

⁶ Assuming *arguendo* this Court finds direct discrimination sufficient to trigger the first-tiered approach, an ordinance can nevertheless 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)). For the reasons set forth in the second-tiered analysis, the Project Ordinance at issue in Defendants’ Motion should survive under either approach.

at 469. Likewise, in the case at bar, interstate commerce is not implicated for all the reasons set forth above. Just because the Project Ordinance prevents Defendants from their “chosen way of doing business”—i.e. owning and operating a cabana house in the R-4 district—the ordinance does not prevent Defendants or their guests from accessing the City, patronizing its beaches, or using its public facilities.

Ultimately, there are multiple 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. (**Exhibit E**, Tr. of Mike Mahaney 8:3–9:1.) Further, these entities 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 potentially hundreds of RV resort guests from outside the City to a fairly small cabana house sitting between two condominium complexes. Mr. Mahaney identified several, including traffic congestion, shuttle buses backing out and/or conducting drop-off and pick-up on the side of a four-lane highway, noise from the pool deck, and late night activities. (**Exhibit E**, Tr. of Mike Mahaney 33:3–5, 39:5–13, 51:24–52:2.)

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). After all, the City has legitimate concerns in potentially 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 access.

Third, and in finishing the analysis of *Texas Manufactured Housing Association*, the Southern District of Texas found the "preservation of property values" as a legitimate local interest sufficient to pass the *Pike* balancing test. 974 F. Supp. at 612. Notably, three City employees testified to the depreciation of property value being a concern of theirs relative to the ordinances at issue in this case. (**Exhibit E**, Tr. of Mike Mahaney 30:9–23; **Exhibit F**, Tr. of James Wood 50:22–25; **Exhibit G**, Tr. of Ben Caldwell 46:10–19.) Fourth, and finally, because Defendants have not demonstrated it is excluded from owning and operating an amenity property within the Resort Commercial District, which the City has zoned to incentivize business and commercial development, there is no Dormant Commerce Clause issue created by the City providing for a limited number of cabana houses to projects within the City. These rationales are not exhaustive either. Further discovery and a trial in this matter may elicit further legitimate municipal interests. Based on the foregoing, the City's interests are legitimate and the local benefits exceed any indirect or incidental burden on interstate commerce. Therefore, Defendants' Dormant Commerce Clause claim fails the *Pike* balancing test.

E. To the Extent this Court Does Not Have Sufficient Information to Make a Decision, It Should Deny Defendants' Motion Without Prejudice and Allow for Further Discovery and/or Trial to Identify and Develop Sufficient Facts.

It is true Rule 56(b) of the South Carolina Rules of Civil Procedures allows for "a defending

party [to] move for summary judgment at any time.” *Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 660 (Ct. App. 1994) (citing *McDonnell v. Consol. Sch. Dist. of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994)). However, summary judgment can be premature if the parties have “not been provided a full and fair opportunity to conduct discovery” and “why further discovery would uncover relevant evidence and create a genuine issue of material fact.” *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54–55, 677 S.E.2d 32, 36 (Ct. App. 2009). In the present case, Defendants have presented no evidence the RV Resort has been harmed through an inability to use the Cabana House amenity. Therefore, in the alternative and to the extent discovery on this issue would be helpful, this Court should deny Defendants’ Motion without prejudice and allow for further discovery and/or a trial to identify and develop sufficient facts.

III. CONCLUSION

Based on the foregoing, this Court should deny Defendants’ Motion. First, the ownership and use of special-exception cabana houses in the R-4 district do not substantially effect 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. Because the local benefits and legitimate purposes underlying the Project Ordinance outweigh any alleged (and to date unproven) burden on interstate commerce, Defendants’ arguments are without merit. Therefore, the City respectfully requests this Court deny Defendants’ Motion and grant such further relief as this Court deems just and proper.

Respectfully submitted,

[SIGNATURE BLOCK FOLLOWS]

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CITY OF NORTH MYRTLE BEACH

November 7, 2022
Charleston, South Carolina

City of North Myrtle Beach v. Sun TRS Ocean Club, LLC and Sun TRS Carolina Pines, LLC
Case No. 2021-CP-26-07489
PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

EXHIBIT A

PERTINENT ORDINANCES

Sec. 23-1. - Title and objectives.

This chapter shall be known and may be cited as the "Zoning Ordinance of the City of North Myrtle Beach, South Carolina."

As authorized in Title 6, Chapter 29 of the Code of Laws of South Carolina, the 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 with reasonable consideration for the following specific purposes, where applicable:

- (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, agriculture, forestry, conservation, airports and approaches thereto, 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.

As presented in the comprehensive plan, the city's economy is dependent on the retail and service industries supported by tourism. As such, it is a further objective of the city 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.

(Ord. No. 88-35, 11-1-88; Ord. No. 95-10, §§ 3, 4, 3-20-95)

Sec. 23-2. - Definitions.

Generally. For the purpose of this chapter, certain words and terms are herein defined. Words used in the present tense shall include the future; words in the singular number include the plural number, and words in the plural number include the singular number; the word "lot" includes the word "plot"; the word "building" includes the word "structure"; the word "shall" is mandatory and not directory. Any words not herein defined shall carry their customary dictionary definition.

Accessory building: A subordinate building, the use of which is incidental to and customary in connection with the principal building or use, and which is located on the same lot with such principal building or use.

Accessory use: A subordinate use which is incidental to and customary in connection with the principal building or use and which is located on the same lot with such principal building or use.

Alley: A public or private way, at the rear or side of property, permanently reserved as a means of providing secondary or service vehicular access to abutting property, less in size than a street, and which is not designed for general vehicular traffic.

Boatyard: A facility for the construction or major repair of watercraft, including overhaul of hull, engines and other major components.

Body piercing: Any method of piercing of the human skin of one (1) person by another person with the intention of inserting any object including, but not limited to jewelry. For the purposes of this zoning ordinance, the term body piercing shall also include any process of marking or disfiguring the skin or other tissue of any person by branding or scarification but shall not include the piercing of the fatty lobe of the ear by an ear-piercing gun designed solely for the purpose, or physician-authorized surgical procedures. This definition of body piercing includes that process commonly referred to as implantation.

Building: Any structure having a roof supported by columns or walls for the shelter or enclosure of persons or property.

Building height: The highest vertical distance measured from the finished grade at ground level at the building line to the midpoint between the eave and the highest point of the roof.

For the purpose of calculating side setbacks in R-2A, R-4, HC and RC, the height of the roof section (if not devoted to living or storage space) shall not be considered in determining the height of the structure.

Building, principal: A building in which is conducted the main or principal use of the lot on which the building is located.

Cabana house: 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.

Caliper: The diameter of a tree measured three (3) feet above the base of the tree. The two (2) largest diameters of multiple trunk trees shall be added to obtain the caliper.

Camp, youth day or educational: A camp providing facilities for groups with nonpermanent accommodations, not to include recreational vehicles or mobile homes, used for related youth recreational or educational purposes. This can also include adult educational and training activities.

Club: Buildings and facilities owned or operated by a corporation, association, person or persons for a social, educational or recreational purpose, but not primarily for profit and not primarily to render a service which is customarily carried on as a business.

Commercial center: Two (2) or more retail stores, service establishments, professional offices, and/or mixed-use, or any other businesses serving a community or neighborhood, not necessarily owned by one (1) party nor by a single land ownership, which occupy a common and/or adjacent building(s) on premises and also utilize common parking area(s).

Commercial craft: Any boat that is used for excursions such as dinner cruises, sightseeing cruises (excluding smaller sightseeing boats with no more than forty (40) seats and a maximum authorized capacity of forty (40) passengers), overnight cruises and similar trips, commercial fishing and shrimping (excluding smaller charter fishing), industrial uses such as tug boats, tankers, barges, and military craft. Gaming/gambling boats are commercial craft, which are further defined elsewhere.

Compact automobile space: Designated parking space which allows parking for only compact automobiles. The overall dimensions of the same space are fifteen (15) feet by eight (8) feet.

Conditional use: A zoning ordinance provision that imposes conditions, special provisions, or limitations on a use that are in addition to those applicable to other uses permitted by right in the same zoning district. S.C. State Law requires that the list of conditions must be set forth in the text of the Zoning Ordinance, and then; when all are met, the "conditional use" may be permitted by the zoning administrator without review of the board of appeals.

Condominium: A condominium is an ownership arrangement, not a land use. It is individual ownership of a unit in a multi-unit structure.

Condotel: A condominium set up like a hotel in which each room is individually owned and in which some or all rooms are available to transients for rent.

Sec. 23-16. - Zoning districts.

(1) *Establishment of districts:* The city is hereby divided into the following zoning districts:

(a) *Primary zoning districts.* The following primary zoning districts are hereby established:

CP	Conservation Preservation
R-1	Single-Family Residential, Low Density
R-1A	Single-Family Residential, Low-Medium Density
R-1B	Single-Family Residential, Low-Medium Density
R-2	Medium Density Residential
R-2A	Mid-Rise Multifamily Residential
R-2B	Single-Family Medium Density
R-3	Mobile Home Residential
R-4	Resort Residential
R-4I	Inland Multifamily Residential
NC	Neighborhood Commercial
OC	Office Commercial
BC	Business Commercial

HC	Highway Commercial
GC	General Commercial
RC	Resort Commercial
LI	Limited Industrial
PDD	Planned Development District
W-1	Waterfront-Pleasure
IZD	Interim Zoning District

(b) *Overlay zones*. The following overlay zones are hereby established:

CPO	Coastal Protection Overlay Zone
ZLL	Zero Lot Line Overlay Zone
OPO	Off-Premise[s] Sign Overlay Zone
OFO	Oceanfront Overlay Zone
PI-ACO	Priority Investment - Activity Center Overlay Zone
TND	Traditional Neighborhood Development Overlay Zone for Single-Family Residential

CBNO	Crescent Beach Neighborhood (17 th Avenue South) Overlay Zone

- (2) *Official zoning map:* The above zoning districts are presented on the official zoning map which, together with all explanatory matter thereon, is hereby adopted by reference and identified by the signature of the mayor, attested by the city clerk, and bearing the seal of the city under the following words: "Official Zoning Map, North Myrtle Beach, S.C." adopted November 4, 1991. If, in accordance with the provisions of this chapter, changes are made in district boundaries or district designations portrayed on the official zoning map, such changes shall be made on the official zoning map after the amendment has been approved by the city council and attested by the city clerk. Regardless of the existence of purported copies of the official zoning map which may from time to time be made or published, the official zoning map shall be located in the office of the zoning administrator.
- (3) *Interpretation of zoning district boundaries:* Where uncertainty exists as to the boundaries of districts shown on the official zoning map, the following rules shall apply:
- (a) Boundaries indicated as approximately following the centerlines of streets, highways, railroads, utility easements, or alleys shall be construed to follow such centerlines.
 - (b) Boundaries indicated as approximately following platted lot lines and city limit lines shall be construed as following such lines.
 - (c) Boundaries indicated as approximately following the centerlines of streams, rivers, canals, lakes or other bodies of water shall be construed to follow such centerlines.
 - (d) Boundaries indicated as parallel to or extensions of features indicated in the above subsections shall be so construed.
 - (e) Distances not specifically indicated on the official zoning map shall be determined by the zoning administrator.
 - (f) The use of streets as district boundaries shall not be construed to make public streets subject to this chapter.
- (4) *Lots divided by zoning district boundaries:* Whenever a single lot is located within two (2) or more zoning districts, each portion of the lot shall be subject to all the regulations applicable to the zoning district in which it is located.

It shall be unlawful to utilize a portion of a lot in a zoning district for a use not permitted in that zoning district, including utilization for the purpose of meeting dimensional and/or density requirements for the use not permitted.

Sec. 23-22. - R-4 Resort Residential District.

- (1) *Purpose.* The purpose of this 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.
- (2) *Permitted uses:* Within the R-4 District, a building or lot shall be used only for the following purposes:
 - (a) Dwellings, including:
 - Single-family detached.
 - Semidetached.
 - Patio homes.
 - Two-family (duplex).
 - Multiplex (triplex and quadruplex).
 - Townhouse developments.
 - Multifamily, including garden.
 - Mid-and high-rise apartments.
 - Zero lot line single-family detached developments, as provided in section 23-119.
 - Boarding house.
 - Resort accommodation.
 - (b) Hotels, motels, inns, [and] lodges.
 - (c) Accessory uses customarily incidental to dwellings.
 - (d) Accessory uses customarily included in hotels, motels, inns, lodges and resort accommodations: provided such uses are located within the principal building and are accessible only from an interior court, lobby corridor or pool deck except for poolside activities as regulated under section 23-118: Further that such uses shall be limited to the following: restaurants, newsstands, snack bars, florists, gift shops, confectionery stores, beach and convenience retail shops, automobile rental agencies, drug and sundry shops, nightclub and radio broadcasting studios, health clubs, barber and beauty shops.
 - (e) Parking lots.
 - (f) Signs permitted by and in accord with all applicable provisions of Article III.

(3) *Development standards for uses in R-4 District:*

	Hotels, Motels, Inns, Lodges Resort Accommodation	Nonresi- dential Uses	Single- family Detached	Semi- detached	Duplex	Multi- plex Boarding house	Town- house	Multi- family ⁷	Restaurant
Minimum site area (square feet)	15,000	NA	5,000	7,000	7,000	10,000	16,000	15,000	10,000
Minimum lot area* (square feet)	NA	NA	5,000	3,500	3,500	2,000	2,000	NA	NA
Minimum lot width	100 feet	NA	50 feet	35 feet	55 feet	75 feet	14 feet ⁸	100 feet	70 feet
Minimum yards:									
Front	15 feet	15 feet	15 feet	15 feet	15 feet	15 feet	15 feet	15 feet	10 feet
Side		5 feet	5 feet	5 feet	5 feet	7.5 feet			10 feet
Rear	15 feet	15 feet	15 feet	15 feet	15 feet	15 feet		15 feet	15 feet
Maximum impervious surface ratio	90%	60%	60%	60%	60%	60%	60%	80%	90%
Common open space	10%	NA	NA	NA	NA	15%	25%	20%	NA
Maximum height of buildings	90 feet ⁵	90 feet	90 feet	90 feet	90 feet	90 feet	90 feet	90 feet ⁵	35 feet
Maximum height of signs	30 feet					10 feet	10 feet	10 feet	8 feet
Minimum distance between buildings	Where more than one (1) principal building is located on a lot, minimum distance between buildings shall be twenty (20) feet with one (1) additional foot for each six (6) feet in height over thirty-five (35) feet, using the highest building.								

*Per dwelling unit

Notes:

¹ A five-foot setback shall be applied to the ends of the structure and the exterior property lines, and zero (0) setback shall be allowed for the common interior property line.

² Zero (0) between units; ten (10) feet between end structures and side property line; no more than six (6) units shall be attached in one (1) building.

³ Ten (10) feet for first thirty-five (35) feet in height and fifteen (15) feet for buildings in excess of thirty-five (35) feet in height.

⁴ Rear yard shall be ten (10) feet except where contiguous to the project site property line, then a twenty-foot setback shall be required, and shall remain unoccupied by any accessory building or structure.

⁵ Hotel/motel, resort accommodation and multifamily uses may exceed the ninety-foot height limitation by one (1) floor of units for each full level of above grade parking deck construction below the principal building not to exceed four (4) additional floors of units.

[⁶ *Reserved.*]

⁷ The use may be constructed in the airspace above a noncontiguous parking lot of the same use subject to the requirements of section 23-41 and an agreement between the owners sharing the off-site lot and the city; and/or an easement protecting access and required off-site parking; and deed restriction of off-site spaces; and compensation for any lost required interior landscaping.

⁸ Minimum lot width and/or unit width.

- (4) *Special exceptions:* Owing to their potential negative impact on the community and surrounding areas, the following uses may be approved as special exceptions by the board of zoning appeals:
- (a) Noncommercial marinas, subject to the siting standards of section 23-120.
 - (b) Fishing piers, provided that the uses permitted on such piers are limited to restaurants, bait and tackle shops, and marine accessories. Refer to section 23-124 for separation requirements.
 - (c) Lighted tennis courts, subject to the following:
 - 1. That the proposed lighted tennis court not be located closer than fifty (50) feet to any residential structure.
 - 2. That the lighting be a minimum to sufficiently illuminate the playing surface utilizing sharp cut-off lights with adjustable glare shields.
 - 3. When in close proximity to a residential structure or lot, the board may require a vegetative screen as described in section 23-58(2)(d) on the side(s) of the court or other method to minimize noise levels.
 - 4. In granting the special exception, the board of zoning appeals may impose such reasonable and additional stipulations, conditions or safeguards as, in its judgement will enhance the siting of the proposed special exception.
 - (d) Cabana houses subject to the following:
 - 1. That a homeowner's association shall have been established for the project and a maintenance agreement has been submitted to the planning department.
 - 2. That at least eight (8) parking spaces per zoning standards be established on site and that more spaces may be required by the board if there is no other means to limit the number of cars traveling to the property provided such as a shuttle service to and from the property to the project.
 - 3. That the use of the house be limited to bathing and change of clothing facilities, and occasional use as guest quarters and other similar uses.
 - 4. That the special exception will be in substantial harmony with the area in which it is to be located.

5. That the special exception will not be injurious to the adjoining property.
6. That the special exception will not discourage or negate the use of surrounding property for use(s) permitted by right.
7. That in granting the special exception, the board of zoning appeals may impose such reasonable and additional stipulations, conditions or safeguards as, in its judgment, will enhance the siting of the proposed special exception.

(5) *Conditional uses:* Due to the manner of operations, conditional uses must meet certain conditions stated in this section, as well as the restrictions and/or limitations applicable to all land uses in the R-4 District and all applicable supplemental regulations for the use contained throughout the zoning ordinance (See Article I, section 23-2 of this chapter entitled "Definitions"). If the conditions or standards are met, the zoning administrator may permit the use without review by the board of [zoning] appeals. (S.C. Code 6-29-720 of the S.C. Comprehensive Planning Act of 1994).

(a) *Restaurants.*

1. That the use complies with all applicable development standards in the R-4 district and/or an R-4 site also designated in an "Activity Center Overlay" area.
2. That the use will be an enhancement to the character and sense of place of the area in which it is to be located, increasing pedestrian accessibility to eating establishments and reducing traffic congestion. Towards this goal, auto oriented drive through pickup restaurants are not eligible for this conditional use.
3. That parking requirements/incentives be met as follows:
 - a. Any proposed R-4 restaurant site also located in a designated activity center overlay will be eligible for the fifty (50) percentage parking requirement reduction, as well as the ability to satisfy parking requirements off site within five hundred (500) feet and located on land owned or leased by the restaurant owner.
 - b. Any proposed R-4 restaurant site that does not fall in an activity center overlay designated area will also qualify for the fifty (50) percent parking reduction and the ability to locate the other fifty (50) percent of the parking off site (on owned or leased within five hundred (500) feet and not necessarily adjacent); with one major exception that the offsite parking be improved to full city parking lot standards including lighting, landscaping, surfacing, and drainage).
 - c. In cases where there is a change of use in an existing building from some other use to restaurant, the zoning administrator shall evaluate the site on a case-by-case basis to determine if there is room to provide on-site parking. If there is he/she may require any number and combination of vehicular, bicycle, and golf cart parking stalls to be provided as a condition for issuance of the permit. For purposes of this section, a bicycle stall shall mean a space in a standard bicycle rack specifically designed for the temporary parking and securing of bicycles. A golf cart space shall have a dimension not less than six (6) feet wide by ten (10) feet deep, and shall be identified as "golf cart parking only" via small informational signage.
NOTE: Restaurants allowed as accessory uses to the permitted use of resort accommodations in R-4 (see Article II Sec. 22-23(d) of this section) will not require parking in addition to that calculated for the hotel/permitted principal use. Also see Article IV of this chapter, off street parking)
4. That the use has taken measures to not be injurious to adjoining property including, but not limited to:

- i. Controlling and shielding all lighting so as not to cast undue glare onto adjoining residential uses. In addition, landscape buffers and/or fencing must adjoins an R-1 District parcel. These requirements will be based on buffering of R-1 from adjacent commercial uses in other commercial districts in
 - ii. Signage will be limited to wall signage as permitted this use if it were locating in The RC District. However there will be no freestanding signage allowed, other than pedestrian oriented (sandwich/menu boards) per RC District standards.
 - iii. Controlling all elements that produce noise, such as interior/exterior music and table availability announcements for waiting customers so as not to create a nuisance for neighboring properties.
5. That the use is limited to restaurant and not bar/nightclub. (For purposes of this section, a bar/nightclub shall be defined as any establishment licensed by the State of South Carolina to serve alcoholic beverages, and whose sale of such beverages constitutes forty (40) percent or more of its gross revenues. For those applicants who wish to claim that their sales of such beverages constitute less than forty (40) percent of gross revenues, the burden of proof shall rest with the applicant to so demonstrate.)
 6. That the use will contribute to the economic vitality and promote the general welfare of the community.
 7. That the use will not discourage or negate the use of surrounding property for use(s) permitted by right in the district.

(6) *Off-street parking*: Off-street parking [requirements] for the various uses permitted herein are set forth in Article IV.

(Ord. No. 88-35, 11-1-88; Ord. No. 89-16, § 1, 4-18-89; Ord. No. 95-10, § 7, 3-20-95; Ord. No. 95-16, § 2, 4-3-95; Ord. No. 95-40, § 1, 7-3-95; Ord. No. 95-45, § 1, 7-17-95; Ord. No. 96-02, § 2, 2-5-96; Ord. No. 98-10, § 3, 4-20-98; Ord. No. 98-11, §§ 1, 2, 4-20-98; Ord. No. 98-13, § 3, 5-4-98; Ord. No. 98-35, § 3, 11-2-98; Ord. No. 99-35, § 2, 9-20-99; Ord. No. 02-14, § 1, 4-15-02; Ord. No. 03-13, § 2, 4-21-03; Ord. No. 04-51, § 1, 10-4-04; Ord. No. 06-10, §§ 1—4, 2-20-06; Ord. No. 12-13, § 1, 7-2-12; Ord. No. 21-02, § 2, 3-1-21)

Sec. 23-27. - RC Resort Commercial District.

- (1) *Purpose:* The purpose of this district is to define certain areas of the community where commercial uses may be established, and tourist and visitor attraction enhanced. To strengthen the drawing power of this district, it should remain relatively small and tightly developed for maximizing cumulative attraction, and minimizing the adversities of such uses on nearby residential developments.
- (2) *Permitted uses:* Within the RC District, a building or lot shall be used only for the following purposes:
 - (a) Motels, hotels, resort accommodations, lodges and inns.
 - (b) Multifamily dwellings, including garden and high-rise apartments and boarding houses.
 - (c) Personal service establishments such as barber and beauty shops, laundromats, laundry pick-up, tailor, dressmaker, shoe shops, photo studios, libraries, child care centers, restaurants, and similar personal service establishments, but not massage parlors.
 - (d) Commercial recreation establishments, including theaters, pool and video gamerooms, bowling alleys and skating rinks, miniature golf, water slides and arcades, but not amusement parks with rides.
 - (e) Rental of sport and recreation equipment, including rental of motorized equipment and vehicles, including golf cart rental.
 - (f) Primary and convenience retail shops, but not adult bookstores.
 - (g) Professional offices, such as real estate, business, financial, medical and governmental offices.
 - (h) Accessory uses customarily incidental to dwellings, including an accessory dwelling unit provided the following requirements are met:
 1. The accessory dwelling unit does not exceed six hundred (600) square feet of gross floor area, excluding storage and parking areas;
 2. The accessory dwelling unit is separated from the principal structure by a minimum of fifteen (15) feet;
 3. One (1) additional parking space is provided for the accessory dwelling unit;
 4. The principal structure must be owner-occupied.
 5. The accessory dwelling unit must use compatible exterior materials and be architecturally similar to the principal structure. Applications for accessory structures shall contain sufficient details for this requirement to be reviewed.
 6. The accessory dwelling unit must be located only in the rear yard, and must meet all applicable setback, impervious surface, and other requirements for the district as if it were a principal structure.
 - (i) Single family dwellings, duplex dwellings, and multiplex dwellings.
 - (j) Semi-detached dwellings.
 - (k) Townhouse developments.
 - (l) Mixed-use buildings.
 - (m) Accessory uses customarily incidental to hotels, motels, resort accommodations, inns and lodges; provided such uses are located within the principal

building and are accessible only from an interior court, lobby corridor or pool deck except for poolside activities as regulated under section 23-118 and off-site parking decks for hotels/motels; further provided that such uses shall be limited to the following: restaurants, newsstands, snack bars, florists, gift shops, confectionery stores, beach and convenience retail shops, automobile rental agencies, drug and sundry shops, nightclubs and radio broadcasting studios, health clubs, beauty and barber shops.

Accessory retail may be located on the first floor of off-site parking decks in association with hotel/motel uses and be accessible from the street.

- (n) Other accessory uses.
- (o) Signs permitted by and in accord with all applicable regulations of Article III.
- (p) Off-street parking lots and structures.

(3) *Development standards:*

	Hotels, Motels, Resort Accommodations, Lodges, Inns ⁵	Single-Family Detached	Multifamily Dwellings ⁵	Mixed-Use ⁶	All Other Uses
Minimum lot area (square feet)	15,000	5,000	15,000	N/A	N/A
Minimum lot width (feet)	100	35	100	N/A	N/A
Minimum yards:					
Front (feet)	15 ³	15	15	25	15 ¹
Side (feet)	10 ³	5	Note ²	20 ⁵	10 ¹
Rear (feet)	15 ³	15	15	30	10
Maximum impervious surface ratio	90%	50	80%	70%	95%
Common open space	10%	N/A	20%	N/A	N/A
Maximum height of structures (feet)	165	35	165	45	50
Maximum height of signs (feet)	30	N/A	10	N/A	30
Distance between structures (feet)	20	N/A	20	N/A	10

Notes:

¹ Zero lot line overlay zone per [sub]section 23-31(2).

² Ten (10) feet for the first thirty-five (35) feet in height and fifteen (15) feet for buildings in excess of thirty-five (35) feet in height.

³ Off-site parking decks for hotels/motels shall have a six-foot front yard, zero (0) side yard and zero (0) rear yard setback.

[⁴ *Reserved.*]

⁵ The use may be constructed in the airspace above a noncontiguous parking lot of the same use subject to the requirements of section 23-41 and an agreement between the owners sharing the off-site lot and the city; and/or an easement protecting access and required off-site parking; and deed restriction of off-site spaces; and compensation for any lost required interior landscaping.

⁶ No parking, parking lots or parking garages are permitted in front of the front building line of the building.

- (4) *Special exceptions.* Due to their potential negative impact on the community and incompatibility with residential neighborhoods the following uses may be approved as special exceptions by the board of zoning appeals:
- (a) Fishing piers, provided that the uses permitted on such piers are limited to restaurants, bait and tackle shops, and marine accessories. Refer to section 23-124 for separation requirements.
 - (b) Business establishments, excluding accessory uses to hotels and motels with access exclusively from an interior lobby, serving or permitting on premise consumption of alcoholic beverages, beer and/or wine, subject to the following conditions:
 - (1) That the special exception shall not be located closer than two hundred (200) feet from an R-1, R-2, R-2A, or R-3 District line or residential neighborhood, except in unusual circumstances where mitigating conditions can be imposed to minimize adverse effects to residential uses.
 - (2) That the special exception complies with all applicable development standards, including off-street parking, and dimensional requirements.
 - (3) That the special exception will be in substantial harmony with the area in which it is to be located.
 - (4) That the special exception will not be injurious to adjoining property.
 - (5) That the special exception will contribute to the economic vitality and promote the general welfare of the community.
 - (6) That the special exception will not discourage or negate the use of surrounding property for use(s) permitted by right.
 - (7) That in granting a special exception, the Board of Zoning Appeals may impose such reasonable and additional stipulations, conditions or safeguards as, in its judgement, will enhance the proposed special exception.
- (5) *Conditional uses.* Certain uses that assist in enhancing the character and sense of place of the community for residents and visitors, and which are compatible to the purpose of this district, may be allowed in the Resort Commercial (RC) district. However, due to the manner of operations, conditional uses must meet certain conditions stated in this section, as well as the restrictions and/or limitations applicable to all land uses in the RC district. (See Article I, section 23-2 of this ordinance entitled "Definitions"). If the conditions or standards are met, the zoning administrator may permit the use without review by the board of zoning appeals. (S.C. Code 6-29-720 of the S.C. Comprehensive Planning Act of 1994).
- (a) Public farmers' markets, subject to the same conditions and review procedures as set forth for this use in subsection 23-26(5)(a) public farmers' markets, in the Highway Commercial (HC) District.
 - (b) Amusement parks and rides, including traditional accessory uses, subject to the following conditions:
 - (1) That the use complies with all applicable development standards of the RC district, including parking requirements.
 - (2) That the use will be an enhancement to the character and sense of place of the area in which it is to be located.

- (3) That the use has taken measures to not be injurious to adjoining property, including, but not limited to:
- i. Limiting the hours of amusement ride operation to between 11:00 a.m. and 11:00 p.m. (All other uses associated with the amusement park are not restricted as to hours of operation.)
 - ii. Limiting the heights of amusement ride structures to one-hundred and sixty (160) feet or less. All other structures must meet the normal height limitations of the district.
 - iii. Controlling and shielding of all lighting so as not to cast undue glare onto adjoining residentially zoned or used properties.
 - iv. Controlling of all elements that produce noise, so as not to create nuisance conditions off-site.
- (4) That the use will contribute to the economic vitality and promote the general welfare of the community.
- (5) That the use will not discourage or negate the use of surrounding property for use(s) permitted by right.

(6) *Off-street parking.* Off-street parking requirements for the various uses permitted herein are set forth in article IV and in the Priority Investment Activity Center Overlay zone of section 23-31, Overlay Zones.

(Ord. No. 88-35, 11-1-18; Ord. No. 89-15, § 2, 4-4-89; Ord. No. 89-16, § 1, 4-18-89; Ord. No. 90-35, § 9, 8-28-90; Ord. No. 91-20, § 1, 5-20-91; Ord. No. 91-39, § 1, 11-11-91; Ord. No. 92-7, § 1, 1-20-92; Ord. No. 92-35, § 1, 7-20-92; Ord. No. 94-21, §§ 1—3, 7-18-94; Ord. No. 94-23, § 1, 7-18-94; Ord. No. 94-24, § 1, 7-18-94; Ord. No. 95-4, §§ 2—4, 2-6-95; Ord. No. 95-10, § 7, 3-20-95; Ord. No. 95-40, § 2, 7-3-95; Ord. No. 95-45, § 2, 7-17-95; Ord. No. 95-49, § 5, 10-16-95; Ord. No. 97-03, § 3, 2-3-97; Ord. No. 97-09, §§ 1, 2, 3-17-97; Ord. No. 97-31, § 4, 8-18-97; Ord. No. 98-12, §§ 1, 2, 4-20-98; Ord. No. 98-10, § 4, 4-20-98; Ord. No. 99-35, § 2, 9-20-99; Ord. No. 01-29, § 1, 6-4-01; Ord. No. 02-14, § 2, 4-15-02; Ord. No. 03-13, § 4, 4-21-03; Ord. No. 04-51, § 3, 10-4-04; Ord. No. 08-16, § 1, 8-18-08; Ord. No. 09-21, § 2, 6-1-09; Ord. No. 10-5, § 2, 5-3-10; Ord. No. 10-17, § 2, 10-4-10; Ord. No. 11-22, § 1, 8-15-11; Ord. No. 17-09, § 1, 5-1-17)

City of North Myrtle Beach v. Sun TRS Ocean Club, LLC and Sun TRS Carolina Pines, LLC
Case No. 2021-CP-26-07489
PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

EXHIBIT B

SITE MAP



City of North Myrtle Beach v. Sun TRS Ocean Club, LLC and Sun TRS Carolina Pines, LLC
Case No. 2021-CP-26-07489
PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

EXHIBIT C

CEASE AND DESIST LETTER

Cheryl D. Shoun
Special Counsel
Admitted in SC

September 2, 2021

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Sun Communities, Inc.
27777 Franklin Road, Suite 200
Southfield, MI 48034

Carolina Pines RV Resort
5800 Highway 90
Conway, SC 29526

Re: Carolina Pines Beach Club at Tilghman Beach, 1814 North Ocean
Boulevard, North Myrtle Beach, SC – Zoning Violation

Austin

Dear Sir or Madam:

Charleston

Charlotte

Columbia

Greensboro

Greenville

Bluffton / Hilton Head

Myrtle Beach

Raleigh

This firm has been retained to represent the City of North Myrtle Beach, South Carolina ("NMB") relative to the use of the property commonly identified as Carolina Pines Beach Club at Tilghman Beach ("Beach Club"), located at 1814 North Ocean Boulevard, North Myrtle Beach, SC. Specifically, we have been engaged relative to Carolina Pines RV Resort's ("Pines") use of the Beach Club for its guests, and the related shuttle services to and from the rv resort and the Beach Club all of which is in violation of NMB's zoning ordinance.

Efforts were made by the City Manager for NMB to reach you by telephone. Having received no response from you, an email was sent to Mr. Bittner on August 16, 2021. Again, there was no response. Being unable to reach you otherwise, by this letter, we are demanding, on behalf of NMB, that Pines, its owners, agents, guests, invitees and employees, and anyone else associated with it, immediately cease and desist using the Beach Club in any matter not permitted by the zoning ordinance.

The Beach Club is zoned as special exception #SE4-07 as a cabana house in the R-4 (Resort Residential) district. The Beach Club was approved as a Cabana House special exception as an oceanfront cabana house for Seabrook

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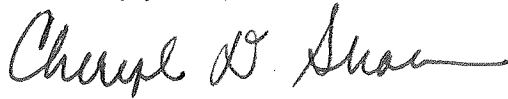
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Plantation, with the condition that the use of the building would be according to the limitations contained in the zoning ordinance.

Pursuant to Section 23-2 of the zoning ordinance, a "cabana house" is 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.**"

Pines' operation of the Beach Club is in violation of the applicable ordinance and such operation must immediately cease. If this use does not cease within ten days from the date hereof, NMB is prepared to pursue all available legal action seeking enforcement of the zoning ordinance.

Very truly yours,



Cheryl D. Shoun
CDS/rp

cc: Troy Bittner, General Manager
Carolina Pines RV Resort
tbittner@suncommunities.com

City of North Myrtle Beach v. Sun TRS Ocean Club, LLC and Sun TRS Carolina Pines, LLC
Case No. 2021-CP-26-07489
PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

EXHIBIT D

SCREENSHOT OF DEFENDANTS' WEBSITE



Get ready before you arrive

SUN'S TRAVEL TIPS

When do your pools close for the season?



Is the Beach Club closed?



Unfortunately, the Beach Club is currently closed for the 2022 season. We apologize for any inconvenience. Please follow our Facebook page for any updates about when we can reopen this amenity. We do offer complementary shuttle service to other public beaches.

Do you have breed restrictions for dogs?



Are we allowed to bring our own golf cart?



What is the earliest I can check in?



What amenities does Carolina Pines RV Resort offer?



City of North Myrtle Beach v. Sun TRS Ocean Club, LLC and Sun TRS Carolina Pines, LLC
Case No. 2021-CP-26-07489
PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

EXHIBIT E

TRANSCRIPT OF CITY MANAGER MIKE MAHANEY DEPOSITION

In the Matter of:

CITY OF NORTH MYRTLE BEACH

VS.

**SUN TRS OCEAN CLUB, LLC and SUN TRS
CAROLINA PINES, LLC**

Michael G. Mahaney

June 15, 2022



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Mt. Pleasant, SC 29465

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Spectrumaaa@gmail.com

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STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS COUNTY OF HORRY 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 APPEARANCES: 2 Rhett Ricard, Esq. 3 Nexsen, Pruet, LLC. 4 205 King Street, Suite 400 5 Charleston, South Carolina 29401 6 Rricard@nexsenpruet.com 7 -and- 8 Christopher Noury, Esq. 9 General Counsel, City of North Myrtle Beach 10 1018 Second Avenue South 11 North Myrtle Beach, South Carolina 29582 12 13 On behalf of Plaintiff 14 15 John G. Tamasitis, Esq. 16 Williams, Mullen, Esqs. 17 1230 Main Street, Suite 330 (29201) 18 P.O. Box 8116 (29202) 19 Columbia, South Carolina 20 Jtamasitis@williamsnullen.com 21 22 On behalf of Defendants 23 24 ALSO ATTENDING: (None) 25 STIPULATIONS: The within deposition was taken pursuant to the South Carolina Rules of Civil Procedure. WAIVER: Examination and reading of the deposition are not waived by the witness and by the parties.
Page 3	Page 4
1 INDEX 2 PAGE 3 Examination by Mr. Tamasitis 05 4 Certificate 53 5 Errata sheet 54 6 Exhibits: 7 DEFENDANT'S EXHIBITS MARKED FOR IDENTIFICATION: 8 1. Amended Notice of Deposition of Mike Mahaney 09 9 2. Section 23-2, Definitions, of city of North 10 Myrtle Beach Code of Ordinances 19 11 3. Section 23-22, R-4 Resort Residential 12 District, of city of North Myrtle Beach Code of 13 Ordinances 25 14 4. Affidavit in Support of Plaintiff's Motion 15 For a Temporary Restraining Order and/or 16 Preliminary Injunction 31 17 5. Section 23-7, Penalties For Violation, of 18 city of North Myrtle Beach Code of Ordinances ... 34 19 6. Letter from Paul Blust to Sun Acq, LLC., 20 dated March 19, 2019 36 21 7. Formal complaint filed by Sea Cloisters I 22 and II Homeowner's Association against Sun TRS 23 Ocean Club, LLC. 37 24 8. E-mail from Mr. Mahaney to Mr. Noury, et al, 25 dated August 16, 2021 41	1 DEFENDANT'S EXHIBITS MARKED FOR IDENTIFICATION: 2 9. Letter from Nexsen, Pruet to Sun Communities, 3 Inc and Carolina Pines RV Resort, dated September 4 2, 2021. 43 5 10. E-mail chain between Mr. Shortle and Mr. 6 Mahaney 44 7 11. Plaintiff's Answers to Defendant's Sun TRS 8 Ocean Club, LLC and Sun TRS Carolina Pines, LLC's 9 First Set of Interrogatories to the City of North 10 Myrtle Beach 47 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25

1 (Pages 1 to 4)

Page 5 1 MICHAEL G. MAHANEY, being duly sworn, testified as 2 follows: 3 EXAMINATION BY MR. TAMASITIS: 4 Q. Mr. Mahaney, my name is John Tamasitis. I 5 represent Sun TRS Ocean Club, LLC and Sun TRS 6 Carolina Pines, LLC in the lawsuit brought 7 against them by the city of North Myrtle Beach. 8 I'm here to take your deposition today. 9 Have you ever had your deposition taken before? 10 A. Many times. 11 Q. So you know the rules of the game. I'm going to 12 go through them though, as the court requires me 13 to do. 14 I would like you to do a couple of things 15 for me today. First, please answer with a yes or 16 no when appropriate, or I don't know if you don't 17 know, other than nodding your head or saying 18 uh-huh or uh-uh. The Court Reporter is trying to 19 take down the record here and we want to make 20 sure she gets everything accurate, okay? 21 A. Yes. 22 Q. Also, I want you to understand that none of the 23 questions I ask are intended to trick or confuse 24 you, but sometimes I do ask poor questions. If I 25 ask a question that confuses you or you don't	Page 6 1 understand, please ask me to repeat or rephrase 2 the question, okay? 3 A. I will do that. 4 Q. If you need any clarifications, definitions or 5 explanations of any of my words, questions or 6 documents presented during the course of this 7 deposition, please ask me rather than your 8 attorney, okay? 9 A. Yes. 10 Q. If you answer a question, I'll assume you 11 understand it. Is that fair? 12 A. Yes. 13 Q. And, finally, if you need to take a break at any 14 time, just let me know. This is not an 15 interrogation. However, if we take any breaks, 16 please do not engage in any private 17 off-the-record conferences with your attorney 18 regarding the substance of your testimony except 19 for the purposes of deciding whether to assert a 20 privilege or make an objection. If you do, I am 21 allowed to ask you about the substance of that 22 conversation, okay? 23 A. I understand. 24 Q. Are you under the disability of alcohol, drugs or 25 any medication today?
Page 7 1 A. No. 2 Q. What did you do to prepare for today's 3 deposition? 4 A. There was a video conference yesterday with the 5 two attorneys sitting here where we went over 6 some of the documents. 7 Q. What documents do you recall going over? 8 A. Zoning appeals, the resort residential district, 9 some definitions, some e-mails, the Plaintiff's 10 Answers. I believe this might be Ben Caldwell. 11 Some Amended Notices, Application for Special 12 Exception, formal complaint. That's from Jim 13 Shortle, I think. Consent Order of Dismissal, 14 North Myrtle Beach Zoning Appeals. I think 15 that's pretty much the entire list. 16 Q. Those are all documents that you brought with you 17 today? 18 A. Yes. 19 Q. Any other documents that you brought with you 20 today related to this lawsuit? 21 A. No. 22 Q. Who else did you talk to other than your 23 attorneys? 24 A. Jim Wood was in the meeting, the planning 25 director.	Page 8 1 Q. Anybody else? 2 A. No. 3 Q. In your own words, can you please explain to me 4 what your understanding is of this lawsuit? 5 A. Well, basically the lawsuit, from my perspective, 6 is about issues at the beach cabana that Carolina 7 Pines owns. And, of course, they're quite a 8 distance from the city. And, from my 9 perspective, it has to do a lot with the quality 10 of life issues that are generated in harmony with 11 the adjacent neighbors and the problems that it 12 causes. 13 Q. What do you mean by "quality of life issues"? 14 A. I'm talking about like when they have late night 15 parties that are disturbing people that live next 16 door that may have to get up and go to work at 17 6 a.m. the next morning. 18 Q. They're quite a distance from the city, you said 19 that, why is that a concern? 20 A. Well, when it's an HOA that is inside the city, 21 they are generally more responsive. When I call 22 an HOA president or e-mail an HOA president, 23 they're pretty responsive in calling back fairly 24 quickly. In the case of Carolina Pines, I both 25 called the cell phone number of the manager and

2 (Pages 5 to 8)

Page 9 1 e-mailed and never got a response. 2 Q. In your opinion, that's because they're just 3 located quite a ways from the city? 4 A. I have no opinion on why he didn't call back. 5 There are some other legal difficulties going on 6 with him as I understand from the paper. But 7 that's not normal for me. When I call, when the 8 city manager's office calls someone on a public 9 safety line, it's very rare that nobody calls 10 back. 11 Q. And that's when they're calling someone inside 12 the city, correct? 13 A. Well, it doesn't matter. It doesn't matter. If 14 I call Cleveland, Ohio on the public safety line, 15 somebody usually answers. 16 Q. And who did you call from Carolina Pines? 17 A. I don't remember his name. I could probably find 18 it. It's whoever the manager is. I just don't 19 recall. 20 Q. If you could slide those to the side and we'll go 21 through the documents that I have brought today. 22 MR. TAMASITIS: Let's mark this as 23 Exhibit No. 1. 24 (AMENDED NOTICE OF DEPOSITION OF MIKE MAHANEY 25 MARKED FOR IDENTIFICATION AS DEFENDANT'S EXHIBIT	Page 10 1 NO. 1.) 2 BY MR. TAMASITIS: 3 Q. Mr. Mahaney, do you recognize the document that's 4 been handed to you? 5 A. Yes. 6 Q. What is it? 7 A. It's an Amended Notice of Deposition that you 8 want to take my deposition. 9 Q. So, it's for your deposition here today, correct? 10 A. Yes. 11 Q. What's your full name for the record? 12 A. Michael Greg Mahaney. 13 Q. Do you go by any aliases or nicknames? 14 A. No. 15 Q. What's your date of birth? 16 A. February 8, 1950. 17 Q. What is the last four of your Social Security 18 number? 19 A. 7174. 20 Q. What is your current address? 21 A. 1215 Trisail Lane in North Myrtle Beach. 22 Q. And that's in Horry County? 23 A. Yes. 24 Q. How long have you resided at that address? 25 A. Since 2010.
Page 11 1 Q. Where were you born? 2 A. Clifton Forge, Virginia. 3 Q. How did you end up in North Myrtle Beach? 4 A. The job. 5 Q. Did you have the same job up in Virginia? 6 A. I have been the city manager in a number of 7 states. 8 Q. What other states? 9 A. Florida, Georgia, North Carolina, Pennsylvania, 10 assistant city manager in Ohio, et cetera. 11 Q. Where in Pennsylvania? 12 A. Somerset, Pennsylvania. Exit 10 on the Pike. 13 Q. I'm originally from outside of Philadelphia. 14 What's your current marital status? 15 A. Married. 16 Q. And your wife's name? 17 A. Patricia. 18 Q. Same last name, I assume? 19 A. Mahaney, yes. 20 Q. And what's her occupation? 21 A. She's a licensed clinical social worker. 22 Q. Do you have any children? 23 A. One stepson. 24 Q. How old is he? 25 A. 52.	Page 12 1 Q. Where does he live? 2 A. He lives with us. 3 Q. And that's in Horry County? 4 A. Yes. 5 Q. Do you have any other relatives by blood or 6 marriage in Horry County? 7 A. No. 8 Q. The reason we ask that is if we have to pull a 9 jury for this case, we want to know if there is 10 anyone related to you. 11 Let's start with your education starting 12 from high school. Where did you graduate from? 13 A. I graduated from Covington High School in 14 Covington, Virginia. 15 Q. Where did you go to college? 16 A. My engineering degree is from Virginia Tech. 17 Q. Any graduate school? 18 A. I did graduate work at Virginia Tech, University 19 of Virginia and James Madison University where I 20 finished and got a master's in business 21 administration from James Madison University. 22 Q. Any other degrees? 23 A. No. 24 Q. Are you involved in any civic organizations? 25 A. I have been over the years.

3 (Pages 9 to 12)

Page 13	Page 14
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
Page 15	Page 16
1 have time to get down in the weeds on a lot of 2 these issues. 3 So, not every e-mail I get is returned, 4 and not every call to the city manager's office 5 is returned. But someone returns them and 6 someone responds to the e-mail. 7 Q. That's a good lead into my next question. What's 8 your day-to-day involvement with the zoning 9 administrator and the Planning & Development 10 Department? 11 A. Well, again, there are 650 employees. I don't 12 have a lot of involvement with the zoning 13 administrator. What involvement I have generally 14 over there is going to be with Jim Wood or code 15 enforcement issues, those kind of things. Not a 16 whole lot of zoning involvement by me. 17 Q. And through taking these depositions in the 18 course of this case, it's my understanding that 19 the reporting channel goes from zoning 20 administrator, so Caldwell to Mr. Wood, and then 21 from Mr. Wood to you? 22 A. That's correct. 23 Q. And then you to counsel? 24 A. That's correct. 25 Q. So, would you consider yourself well versed in	1 the zoning ordinances for the city? 2 A. No. 3 Q. What would you classify as the role of the zoning 4 administrator for the city? 5 A. To enforce the zoning ordinance. 6 Q. Do they speak on behalf of the city for the 7 zoning ordinance? 8 MR. RICARD: Object to form. 9 Q. When he objects to the form you still answer the 10 question. 11 A. Could you repeat it, please. 12 Q. Does the zoning administrator speak on behalf of 13 the city with respect to the zoning ordinance and 14 the interpretation thereof? 15 A. Generally speaking, yes. 16 Q. What do you mean by "generally speaking"? 17 A. Well, I mean, if there is a gray area, he will 18 consult with Chris Noury, the city attorney. And 19 sometimes Chris may consult with outside legal 20 counsel. That's what I mean by "generally 21 speaking." 22 Q. Would it be fair to say that the zoning 23 administrator makes the preliminary zoning 24 decisions on behalf of the city? 25 A. Yes.

4 (Pages 13 to 16)

Page 17 1 Q. And then if the zoning administrator is 2 communicating that decision out, then folks from 3 the city can rely upon that decision from the 4 zoning administrator? 5 MR. RICARD: Object to form. 6 A. Generally, yes. 7 Q. Do you know how decisions are made on the zoning 8 administrator's level? 9 A. No. 10 Q. What about appeals from his decision, do you know 11 how that works? 12 A. Well, there is a Board of Appeals that forms can 13 be filed and it goes to the Board. 14 Q. Does that normally encompass disagreements with 15 the zoning administrator's interpretations? 16 A. Yes. 17 Q. Have you been involved in any other litigation 18 regarding zoning disputes while the city manager 19 here in North Myrtle Beach? 20 A. I need to think on that for a minute because 21 we're going back to 2010. Not that I can recall. 22 Q. Is your direct report to City Council and the 23 mayor? 24 A. I'm hired by seven elected officials, each of 25 which have one vote. So, I'm hired at their	Page 18 1 pleasure and let go at their pleasure. 2 Q. Do you know if the City Council and the mayor is 3 aware of this litigation? 4 A. Yes. 5 Q. What role has the mayor played in any of this? 6 A. No more than the other six elected officials. 7 The mayor is, you know, a ceremonial head as far 8 as cutting ribbons and running council meetings, 9 et cetera. I'm not aware of her having any more 10 involvement in this issue than any other elected 11 official. 12 Q. Do you know what a zoning letter is? 13 A. Not really. 14 Q. So, you don't have any involvement in the 15 issuance of zoning letters by the zoning 16 administrator? 17 A. No. 18 Q. We're going to use some definitions for the rest 19 of this deposition. When I say "property," I 20 mean Lot 1, Block 18A, Tilghman, that parcel of 21 property which is located in the city and part of 22 this litigation. 23 When I say "cabana house," I'm referring 24 to the structure on the property, okay? 25 A. Yes.
Page 19 1 Q. Are you aware of the zoning ordinances at issue 2 in this case? 3 A. Well, generally speaking. 4 Q. Do you know how the cabana house special 5 exception came into being through the city's 6 zoning process? 7 A. No. 8 MR. TAMASITIS: This is going to be 9 Exhibit No. 2. 10 (SECTION 23-2, DEFINITIONS, OF CITY OF NORTH 11 MYRTLE BEACH CODE OF ORDINANCES MARKED FOR 12 IDENTIFICATION AS DEFENDANT'S EXHIBIT NO. 2.) 13 BY MR. TAMASITIS: 14 Q. Sir, do you recognize Exhibit No. 2, that zoning 15 ordinance? 16 A. Yes. 17 Q. Section 23-2? 18 A. Yes. I saw it for the first time yesterday. 19 Q. So, three-quarters of the way down the page there 20 is the definition for cabana house. Can you read 21 that for me? 22 A. Sure. "A structure utilizing single-family 23 design and development standards in close 24 proximity to the oceanfront to be used by 25 projects in North Myrtle Beach not located near	Page 20 1 the ocean. The use of the cabana house shall be 2 limited to drop off and parking area, bathing, 3 changing clothes and similar uses." 4 "Additionally, it can be used as an 5 occasional guest quarters and similar residential 6 uses." 7 "A cabana house shall be owned and 8 maintained by homeowner's association with a 9 maintenance agreement submitted and approved by 10 the Planning Department." 11 Q. And you agree with me that that section, this 12 definition, is one of the sections at issue in 13 this case, correct? 14 A. That's my understanding. 15 Q. I want to break down this ordinance and I'm going 16 to talk to you about some of its provisions. And 17 I want you to tell me, as the city manager, how 18 you interpret this zoning ordinance. 19 It says here, you read, "A structure 20 utilizing single-family design and development 21 standards." What does that mean to you? 22 A. A beach house. 23 Q. It can't be anything else? 24 A. Well, I guess it could be but that's what it 25 means to me.

5 (Pages 17 to 20)

Page 21	Page 22
1 Q. Then it says, quote, "In close proximity to the 2 oceanfront." What does that mean? 3 A. Well, generally speaking, that's going to mean 4 the ocean side of Ocean Boulevard. 5 Q. How far back would it go? 6 A. They can go quite a ways. But it kind of defeats 7 the purpose unless you're going to use a golf 8 cart to get there. 9 Q. And then it says, quote, "to be used by projects 10 in North Myrtle Beach not located near the 11 ocean." What is a project? 12 A. Well, that would be like some of the other ones 13 that have beach cabanas; Barefoot Resort, 14 Tidewater, The Links, those type of projects. 15 Q. Would an RV park be considered a project? 16 A. Could be. 17 Q. Why is there a geographical limitation to require 18 the project to be in North Myrtle Beach? 19 A. Is this somewhere in the definition that 20 you're -- 21 Q. It says, "A structure utilizing single-family 22 design and development standards in close 23 proximity to the oceanfront to be used by 24 projects in North Myrtle Beach not located near 25 the ocean."	1 Why does the project have to be in North 2 Myrtle Beach? 3 MR. RICARD: Object to form. 4 A. I have no idea why that's in there. 5 Q. It says in here that the purpose of the zoning 6 ordinance is to, and I'm representing that this 7 is one of the purposes of the zoning ordinance, 8 is to guide development in accordance with 9 existing and future needs, and to promote the 10 public health, safety, morals, convenience, 11 order, appearance, prosperity and general welfare 12 of the community. 13 In your opinion, how does limiting the 14 ownership of a cabana house for projects only 15 located in North Myrtle Beach satisfy that 16 purpose of the zoning ordinance? 17 A. That's way too much. I'm more visual than 18 listening. If you want -- do I have that? If I 19 could read that rather than you reading it to me 20 and then asking a question. It's way too long. 21 Q. I think the simple question is, why can you not 22 have a cabana house for a project located outside 23 of North Myrtle Beach? 24 A. Why can you not have a cabana house located 25 outside of --
Page 23	Page 24
1 Q. No, you have a cabana house in North Myrtle 2 Beach, like the cabana house at issue here, for a 3 project like the RV park, which is located 4 outside of North Myrtle Beach. Why is that an 5 issue? 6 MR. RICARD: Object to form. 7 A. So, you're asking my opinion? 8 Q. Uh-huh. 9 A. Well, I think the reason it's probably stated 10 that way is because when the project is not in 11 North Myrtle Beach, it's not subject to the same 12 pressures that the projects are that are located 13 in North Myrtle Beach. 14 Q. What do you mean by "pressures"? 15 A. Pressures when there is quality of life issues. 16 Pressures when there is a rowdy wedding at 17 midnight, you know, they're not as responsive as 18 projects that are inside the city, in my opinion. 19 Q. The next part of this definition says, 20 "Additionally, it can be used as an occasional 21 guest quarters and similar residential uses." 22 Again, we're talking about cabana houses here. 23 What, in your opinion, are "similar 24 residential uses"? 25 A. Maybe you want to have lunch in there for your	1 bridge club or something like that. 2 Q. Have a barbecue, right? 3 A. It depends. If the barbecue is catered, yes. If 4 you're setting up a 12-foot long smoker that is 5 sending a lot of smoke over into the adjacent 6 residential unit, that would be problematic as 7 far as a quality of life issue. 8 Q. You can also legally rent homes in North Myrtle 9 Beach, right? 10 A. Absolutely. 11 Q. And there are residential properties in North 12 Myrtle Beach that are owned by LLCs, correct? 13 A. Many. 14 Q. And those LLCs can rent those properties that 15 they own, right? 16 A. Yes. 17 Q. And then one of the other parts of this 18 definition of cabana house, it says, "shall be 19 owned and maintained by a homeowner's 20 association." 21 I know we talked about this briefly, but 22 why, in your opinion, is the ownership of a 23 cabana house restricted to only being allowed to 24 be owned by a homeowner's association? 25 MR. RICARD: Object to form.

6 (Pages 21 to 24)

Page 25 1 A. I don't really have a clue why that's in there. 2 What year was this passed? You don't know? 3 Okay. I don't know. 4 Q. Can you guess as to what purpose that it serves? 5 MR. RICARD: Object to form. 6 A. It probably had to do with concern about issues 7 that were not being maintained properly. Whether 8 it may be fences, roofs, windows, grass, parking, 9 those kind of things. 10 MR. TAMASITIS: This will be Exhibit 11 No. 3. 12 (SECTION 23-22, R-4 RESORT RESIDENTIAL DISTRICT, 13 OF CITY OF NORTH MYRTLE BEACH CODE OF ORDINANCES 14 MARKED FOR IDENTIFICATION AS DEFENDANT'S EXHIBIT 15 NO. 3.) 16 BY MR. TAMASITIS: 17 Q. I have handed you another zoning ordinance which 18 is now marked as Exhibit No. 3. This is Section 19 23-22 of the city of North Myrtle Beach's 20 Municipality Code, titled R-4 Resort Residential 21 District. Have you seen this ordinance before? 22 A. I saw it for the first time yesterday. 23 Q. If you want to go ahead, in subsection 1 of the 24 ordinance, it starts with "Purpose." Can you 25 read that out loud for me.	Page 26 1 A. "The purpose of this district is to provide for 2 the orderly development of certain areas within 3 the community where both year-round and seasonal 4 or resort housing may be developed and where, 5 because of proximity to the ocean, such 'mixed 6 development' would promote year-round use of 7 public facilities, and permit housing choices in 8 response to market demands, but not at the 9 expense of ocean visibility and access by the 10 community." 11 Q. Can you put into your own words for me what the 12 R-4 resort residential district is there for? 13 MR. RICARD: Object to form. 14 A. Well, it's basically saying, in my opinion, that, 15 you know, we're a tourist community and they want 16 them to coexist in harmony but not totally 17 restrict access to seeing the ocean or accessing 18 the beach. 19 Q. Do you know if there are properties in North 20 Myrtle Beach that are zoned in the R-4 district 21 that are owned by people who do not reside in 22 North Myrtle Beach? 23 A. I'm sure there are. 24 Q. Probably like investment properties or something 25 like that?
Page 27 1 A. Sure. 2 Q. If you go to subsection 4 of that same ordinance 3 in Exhibit 3 entitled "Special Exceptions." 4 A. Okay. 5 Q. What is a special exception? 6 A. Well, a special exception would be some exception 7 to, in this case, R-4. 8 Q. Do you know how that process works? 9 A. Not in detail, no. 10 Q. But a cabana house that we're discussing today, 11 is that a special exception in an R-4 district? 12 A. It is according to 4(d). 13 Q. And then it goes through and there are seven 14 requirements for cabana houses for the city of 15 North Myrtle Beach in this ordinance, correct? 16 A. Yes. 17 Q. And first one says, "That a homeowner's 18 association shall have been established for the 19 project and a maintenance agreement has been 20 submitted to the Planning Development." 21 That's number one, right? 22 A. Yes. 23 Q. That doesn't discuss the ownership of a cabana 24 house has to be a homeowner's association, does 25 it?	Page 28 1 A. Say that again now. 2 Q. It doesn't say that the cabana house has to be 3 owned by a homeowner's association, it just says 4 that a homeowner's association has to be 5 established, correct? 6 A. Yes, but it infers that it's going to be owned by 7 the HOA. 8 Q. And it also talks about a maintenance agreement. 9 Do you know what a maintenance agreement is? 10 A. Well, that would be the same sort of things that 11 we were talking about earlier. Generally the 12 maintenance agreement is going to say, you know, 13 you have got to take care of the parking lot, you 14 have got to take care of the fence and the 15 windows, you've got to cut the grass. There may 16 be something in there about the number of parking 17 spaces, that kind of thing. 18 Q. Are those maintenance agreements submitted to the 19 city? 20 A. Yes. 21 Q. Have you ever seen one? 22 A. I saw the first one yesterday. 23 Q. What was that for? 24 A. It was for the Barefoot beach cabana. 25 Q. Have you seen any maintenance agreements for any

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Page 29 1 of the other cabana houses? 2 A. No. I think all of them existed before this 3 passed, would be my guess. 4 Q. Then it says, the second one, "at least eight 5 parking spaces per zoning standards be 6 established on site and that more spaces may be 7 required by the Board if there is no other means 8 to limit the number of cars traveling to the 9 property provided such as a shuttle service to 10 and from the property to the project." 11 Can you explain to me what the importance 12 of that provision is, in your opinion? 13 A. In my opinion, the reason that's there is because 14 if they're parking on the street and they're 15 restricting the roadway and a public safety call 16 occurs such as a fire, and the fire truck can't 17 get through because there are cars parked, you 18 know, in the public right-of-way, that's probably 19 the basis for that, in my opinion. 20 Q. Jumping on down, it says in number 4, "That the 21 special exception will be in substantial harmony 22 with the area in which it is to be located." 23 What does "substantial harmony" mean to 24 you? 25 A. That's, as I mentioned before, if you're having a	Page 30 1 wedding on the pool deck at midnight and the 2 noise level is loud, that's not in substantial 3 harmony with the adjacent properties. That's why 4 we have a quiet hours ordinance from 11:00 to 5 7:00. There are certain decibels that are not to 6 be exceeded. 7 Q. Number 5, "That the special exception will not be 8 injurious to the adjoining property." 9 Would you consider the devaluation of 10 property values in the area around the cabana 11 house to be injurious? 12 A. It depends. 13 Q. Depends on what? 14 A. If it's happening night after night or, you know, 15 where adjacent owners are saying, look, I can't 16 take this, I have got to move, and the word 17 spreads, I mean, it's a small city. You may have 18 20 million visitors but there is only 18,000 19 permanent residents and people talk. 20 So, you know, I'm sure that it could 21 affect, you know, sales price if there has been 22 problems after problems after problems in an 23 adjacent property. 24 Q. Are you aware of any other ordinances in the city 25 of North Myrtle Beach's codes that restricts the
Page 31 1 ownership of certain property? 2 A. No. 3 Q. So, this is the only one? 4 A. The only one I'm aware of. 5 Q. Again, in your opinion, why is this such a unique 6 property that it has these restrictions? 7 MR. RICARD: Object to form. 8 A. I think it goes back to the quality of life 9 issues. I think that's why they did it to begin 10 with. 11 Q. You think it's also geared towards protecting the 12 economy of the city of North Myrtle Beach as 13 well? 14 A. I don't see it having a lot of affect generally 15 on the economy because we're tourist oriented. 16 So, I don't see it having a lot of affect on the 17 economy. 18 Q. Turning now to the litigation that's at issue 19 here today. 20 MR. TAMASITIS: Let's mark this one as 21 No. 4. 22 (AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR A 23 TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY 24 INJUNCTION MARKED FOR IDENTIFICATION AS 25 DEFENDANT'S EXHIBIT NO. 4.)	Page 32 1 BY MR. TAMASITIS: 2 Q. What has been your involvement in this lawsuit? 3 A. Minimal. I mean, I was aware that it had been 4 filed. I was made aware when the temporary 5 restraining order was denied. That's pretty much 6 it. 7 Q. Did you have to sign off or check off on the 8 initiation of the lawsuit? 9 A. No. 10 Q. Exhibit No. 4 that I've just handed to you is an 11 affidavit that was submitted in this lawsuit in 12 support of the Plaintiff's motion for a temporary 13 restraining order and/or a preliminary 14 injunction. Have you seen this document before? 15 A. I saw it for the first time yesterday. 16 Q. Have you had a chance to read it? 17 A. I briefly read it. I didn't pour over every line 18 but I briefly read it. 19 Q. Did you have a hand in drafting this document? 20 A. No. 21 Q. Do you know what the purpose of this document is 22 for? 23 A. Well, I know what I thought the purpose was, to 24 try to get a temporary restraining order to shut 25 it down.

8 (Pages 29 to 32)

Page 33 1 Q. Shut it down as in? 2 A. Shut it down as far as the things that were going 3 on. The weddings, the traffic congestion, the 4 buses on the sidewalk, the parking lot 5 overflowing, those kind of things. 6 Q. How about the ownership, shutting down the 7 ownership? 8 A. I don't really understand the nuance here. 9 Q. Okay, we'll try to figure it out. If you go to 10 Paragraph 9 through 12, starting on Page 3 there 11 is like a partial sentence. If you could read 12 paragraphs 9 through 12 for me, please, and just 13 let me know when you're done. 14 A. Out loud you mean? 15 Q. No, to yourself. 16 A. Okay. 17 Q. Do you agree with the conclusions stated in 18 paragraphs 9 through 12? 19 A. Yes. 20 Q. Paragraph 13 of Exhibit 4 states, and this is the 21 last sentence, "Despite repeated demand therefor, 22 Sun TRS has failed and refused to relinquish its 23 unauthorized ownership and use of the cabana 24 house and Sun Carolina Pines has failed and 25 refused to relinquish its unauthorized ownership	Page 34 1 and/or use of the cabana house." 2 Did I read that correctly? 3 A. Yes. 4 Q. Is that the appropriate penalty for a zoning 5 violation in the city of North Myrtle Beach? 6 A. As far as I know it is. 7 MR. TAMASITIS: Let's mark this as 8 Exhibit No. 5. 9 (SECTION 23-7, PENALTIES FOR VIOLATION, OF 10 CITY OF NORTH MYRTLE BEACH CODE OF ORDINANCES 11 MARKED FOR IDENTIFICATION AS DEFENDANT'S EXHIBIT 12 NO. 5.) 13 BY MR. TAMASITIS: 14 Q. Mr. Mahaney, have you ever been involved in the 15 zoning code enforcement that required a property 16 owner to cease and desist from ownership of a 17 property? 18 A. No. 19 Q. Why is it called for here? 20 MR. RICARD: Object to form. 21 A. Are you going back to this document? 22 Q. Yes, I'm going being back to Exhibit No. 4. 23 A. And you're going back to this last paragraph? 24 Q. Paragraph number 13. 25 A. Where is the -- it's not in the last sentence.
Page 35 1 Q. "Despite repeated demand" -- are you on the same 2 page? 3 A. "Despite repeated demand, therefor" -- 4 Q. "Therefor, Sun TRS" -- 5 A. "Has failed and refused." Okay, so what's your 6 question again? 7 Q. Why are they asking Sun TRS or why is the city 8 asking Sun TRS to relinquish its unauthorized 9 ownership and use of the cabana house? 10 MR. RICARD: Object to form. 11 A. Because the attorneys wanted it to stop. 12 Everybody wants it to stop. 13 Q. Turn to Exhibit No. 5. And that's Section 23-7, 14 Penalties For Violation. Are you familiar with 15 this ordinance? 16 A. No. 17 Q. I'll represent to you that this ordinance sets 18 forth the penalties for a violation of the zoning 19 code by the city, which calls for a fine as set 20 forth in Section 1-6 of the zoning ordinance. 21 A. Okay. 22 Q. Why did the city not seek to follow this 23 provision for penalties for a violation of the 24 zoning ordinance and instead filed a lawsuit 25 seeking relinquishment of ownership of the	Page 36 1 property? 2 A. I think you will have to ask the attorneys that. 3 Q. Well, you're the city manager. 4 A. Yeah, I'm the city manager but I wasn't consulted 5 on going down this road versus this. I can't 6 answer that question. I'm sorry, I don't think 7 it's a reasonable question. If you want to 8 restate it, I'll give it my best shot. 9 Q. Do you think the city has the authority to demand 10 that a property owner relinquish ownership of a 11 property because of a zoning violation? 12 A. I think they do based on the advice of our 13 attorneys. 14 MR. TAMASITIS: This will be No. 6. 15 (LETTER FROM PAUL BLUST TO SUN ACQ. LLC., 16 DATED MARCH 19, 2019 MARKED FOR IDENTIFICATION AS 17 DEFENDANT'S EXHIBIT NO. 6.) 18 BY MR. TAMASITIS: 19 Q. Exhibit No. 6 that I just handed to you, Mr. 20 Mahaney, do you recognize that document? 21 A. I don't recall ever seeing this one. 22 Q. Do you know what it is? 23 A. Well, it looks like it's a letter by Paul Blust. 24 Okay, so we're going back. 25 Q. And this letter is dated March 19, 2019, correct?

Page 37	Page 38
1 A. Yes. 2 Q. And it's addressed to Sun Acq, LLC., is that 3 right? 4 A. Yes. 5 Q. Does this appear to be a zoning letter that was 6 issued to Sun Acq on March 19, 2019? 7 A. Yes. 8 Q. It starts at the last sentence here, "As of the 9 date of this letter, there are no known zoning 10 violations on the property," is that correct? 11 A. Yes. 12 Q. And were you aware of this letter when it went 13 out? 14 A. No. 15 (FORMAL COMPLAINT FILED BY SEA CLOISTERS I 16 AND II HOMEOWNER'S ASSOCIATION AGAINST SUN TRS 17 OCEAN CLUB, LLC. MARKED FOR IDENTIFICATION AS 18 DEFENDANT'S EXHIBIT NO. 7.) 19 BY MR. TAMASITIS: 20 Q. I have just handed you what we have marked as 21 Exhibit No. 7 (handing). Are you familiar with 22 this document? 23 A. Yes, I have seen it before. 24 Q. What is it? 25 A. It's, as I remember, it's basically a letter from	1 Sea Cloisters detailing his analysis of issues 2 with the cabana house owned by Carolina Pines. 3 Q. Do you recall when you first saw this letter? 4 A. No, not really. 5 Q. Was it the first time you saw it yesterday? 6 A. No. 7 Q. Have you ever visited the property that's at 8 issue here? 9 A. Yes. 10 Q. When? 11 A. I can't give you the exact date but I visited it 12 because he had called, Jim Shortle had call the 13 city manager's office. 14 Q. Who is Jim Shortle? 15 A. He's president, in my words, of the HOA. 16 Q. For Sea Cloisters? 17 A. Yes. 18 Q. Have you had previous engagements with Mr. 19 Shortle prior to this? 20 A. Yes. 21 Q. What were those in regards to? 22 A. Quality of life issues having to do with noise 23 from the pool deck of Tilghman Beach & Racket, 24 which is across the street from him. 25 Q. So, now we're not talking about the cabana house,
Page 39	Page 40
1 we're talking about something across the street? 2 A. Yes. 3 Q. What was the I guess background behind those 4 complaints? 5 A. The background of that is, again, the residents 6 were complaining about the activities going on on 7 the pool deck, which is directly across Ocean 8 Boulevard from Sea Cloisters. The activities 9 that were going on, particularly the noise issues 10 and the speakers and the music, that was 11 disturbing the quality of life and the harmony 12 and the peace and quiet of the residents of Sea 13 Cloisters. 14 Q. When, approximately, were these complaints made? 15 A. I don't know. I mean, you could do a computer 16 harvest and find out. If I had to guess, it was 17 probably a couple of years before this, the 18 issues with Carolina Pines. 19 Q. What was the end result? 20 A. The end result is they changed their procedures 21 to prohibit the type of activities that were 22 going on on the pool deck. 23 Q. Were they ever cited for any violations? 24 A. Not that I'm aware. That was before City Council 25 passed some of the quality of life issues, quiet	1 hours, decibel readings, those kind of things. 2 Q. Any other involvement with Mr. Shortle? 3 A. No. Well, I take that back. He called a couple 4 of times when we were doing federal beach 5 renourishment about what he perceived to be 6 access issues from his complex to the beach while 7 sand drenching and pumping was going on. 8 Q. After the city received this complaint, what 9 happened next, do you know? 10 A. The city attorney had multiple conversations with 11 Jim Shortle and had moved forward to where we are 12 today. 13 Q. Did you have a hand in how the investigation was 14 conducted? 15 A. No, I had no involvement with, you know, Chris 16 was communicating with him. Again, it's 17 management by exception. They were handling it. 18 I didn't get involved. 19 Q. Did you have any one-on-one conversations with 20 Mr. Shortle about his complaint? 21 A. Not that I can recall. 22 MR. RICARD: Can we take a recess? 23 MR. TAMASITIS: Sure. 24 ----- 25 (Thereupon, at 11:13 a.m., a

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Page 41 1 five-minute recess was had.) 2 ----- 3 MR. TAMASITIS: We are going to mark 4 this as Exhibit No. 8. 5 (E-MAIL FROM MR. MAHANEY TO MR. NOURY, ET AL, 6 DATED AUGUST 16, 2021 MARKED FOR IDENTIFICATION 7 AS DEFENDANT'S EXHIBIT NO. 8.) 8 BY MR. TAMASITIS: 9 Q. Mr. Mahaney, Exhibit No. 8 is an e-mail sent from 10 you to Mr. Noury, Troy Bittner at Sun 11 Communities, Ms. Clayton, Mr. Caldwell, Mr. Wood 12 and Mr. Dowling, dated August 16, 2021. 13 It says, "Chris," which I believe you're 14 referring to Mr. Noury, "please prepare letter to 15 Troy Bittner, Carolina Pines RV Resort, on the 16 issues on the above as I have been unable to 17 reach him by phone. Thanks." 18 Do you recall sending this e-mail in 19 August? 20 A. Not really but I'm sure I did. 21 Q. And it talks about preparing a letter. Do you 22 recall what letter you wanted prepared? 23 A. I just wanted him to send something, you know, 24 because I couldn't get him on the phone and the 25 issue was heating up.	Page 42 1 Q. So, I think this is what we talked about earlier, 2 you were trying to reach out to the manager of 3 Sun Communities or Carolina Pines Resort and 4 couldn't get ahold of anybody, correct? 5 A. Right. I had his personal cell telephone number. 6 Q. What were you trying to get ahold of him about? 7 A. I was trying to get ahold of him to tell him you 8 need to knock off what you're doing and you need 9 to quit putting gasoline on the fire. And that's 10 exactly what he was doing. 11 Q. And we're talking about the complaint? 12 A. No, I'm talking about in the middle of all this 13 they applied for an alcohol permit with the 14 Department of Revenue to sell alcohol at the 15 beach cabana, and that was just like throwing 16 gasoline on the fire that was already existing 17 with the neighborhood. 18 I mean, no other beach cabana, to my 19 knowledge, has ever applied to sell alcohol. So, 20 you know, that was part of this. I wanted to 21 talk to him about it. What are you doing? 22 What's the game plan here? And, of course, I was 23 unsuccessful in reaching him by phone or him 24 responding to e-mail. 25 Q. Did you ever end up getting ahold of anybody?
Page 43 1 A. No. 2 MR. TAMASITIS: This will be Exhibit 3 No. 9. 4 (LETTER FROM NEXSEN, PRUET TO SUN COMMUNITIES, 5 INC. AND CAROLINA PINES RV RESORT, DATED 6 SEPTEMBER 2, 2021 MARKED FOR IDENTIFICATION AS 7 DEFENDANT'S EXHIBIT NO. 9.) 8 MR. TAMASITIS: 9 Q. Have you seen this document before? 10 A. Not that I can recall. I mean, it may have 11 crossed my desk. 12 Q. This is a letter from Nexsen, Pruet dated 13 September 2, 2021 to Sun Communities, Inc and 14 Carolina Pines RV Resort. In the regards line 15 it's talking about the zoning violation for the 16 Tilghman Beach Club. 17 A. Okay. 18 Q. If you want to go ahead and review this letter 19 real quick and let me know when you're done. 20 A. Okay. 21 Q. Is this the letter that you wanted drafted and 22 sent to Sun Communities as indicated in your 23 previous e-mail in Exhibit No. 8? 24 A. Look, I set the broad goal. I didn't get 25 involved in, well, you know, Chris, Nexsen,	Page 44 1 Pruet, I didn't want you to go this far. I set 2 the broad goal. You need to get ahold of 3 somebody out there and get this calmed down. 4 Again, it's too far down in the weeds for 5 me. This is a legal decision of going this way. 6 That's not in my wheelhouse. 7 Q. So, you didn't review this letter before it went 8 out? 9 A. Absolutely not. 10 MR. TAMASITIS: This is Exhibit No. 10. 11 (E-MAIL CHAIN BETWEEN MR. SHORTLE AND MR. 12 MAHANEY MARKED FOR IDENTIFICATION AS 13 DEFENDANT'S EXHIBIT NO. 10.) 14 BY MR. TAMASITIS: 15 Q. This is a long e-mail chain basically between you 16 and Mr. Shortle between September 2nd and 17 September 3rd. I draw your attention to the 18 e-mail that you sent to Mr. Shortle in the middle 19 there. 20 It says, "After my calls and e-mails to 21 Carolina Pines were ignored, significant time was 22 spent in legal research on the best way to 23 proceed. That resulted in a cease and desist 24 letter that has been sent to them. 25 Chris/Franklin, I need a copy of that letter.

11 (Pages 41 to 44)

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1 Thanks." 2 Do you recall sending that e-mail in 3 September? 4 A. No, but I'm sure I did. 5 Q. Again, it's dated Friday, September 3rd. And if 6 we look back on Exhibit No. 9, the letter, that's 7 dated September 2nd. I'm assuming the letter 8 you're referring to there, the cease and desist 9 letter, is this letter that is Exhibit No. 9? 10 A. I'm sure it is because Chris probably said, hey, 11 we did send them a certified lettered to cease 12 and desist. 13 Q. And the e-mail below it from Mr. Shortle to you 14 on September 2, 2021, did he send you additional 15 e-mails regarding what's the status here? 16 A. I'm sure there probably is but it's probably 17 e-mails I was copied on that he was sending to 18 Chris. But, again, you would have to do a 19 computer harvest. I don't have a clue if there 20 is any other e-mails in there. But I generally 21 did not communicate with him. I let Chris 22 communicate with him. 23 Q. Does City Council have any direct input into the 24 responses to the complaint and what actions are 25 to be taken after that?	1 A. No. I mean, they set policy. They're not 2 involved in the administrative end of things. 3 Q. So that's delegated down from you to -- 4 A. Well, the City Counsel appoints three people. 5 That's the judge, the city attorney and me. I 6 appoint, hire/fire, discipline whatever, the 7 other currently 650 employees. So that's kind of 8 the separation of duties. 9 Q. I know we discussed this briefly but I just want 10 to kind of close the loop here. Were you 11 involved in the decision to file the lawsuit? 12 A. No. 13 Q. Did you have any input into what claims you were 14 going to make or what strategy you were going to 15 implore? 16 A. No. 17 Q. What is the standard protocol for someone who 18 violates a zoning ordinance in the city? 19 A. Well, I mean, the ultimate thing is correction of 20 the behavior. And that may result, generally 21 speaking, in citations and court dates, and 22 depending on which way they go, jury trials and 23 appeals, all the way up to the Supreme Court of 24 South Carolina. I mean, that's just kind of the 25 way it generally goes.
Page 47	Page 48
1 Q. Why, if you know, did this process in this case 2 jump the citation process and go straight to the 3 court asking for the court to get involved? 4 MR. RICARD: Object to form. 5 A. You will have to ask the attorneys that. I don't 6 know. 7 Q. And you weren't consulted on that at all? 8 A. No. 9 Q. Are you aware of any other cabana houses located 10 in North Myrtle Beach? 11 A. Yes. 12 Q. How many do you know of? 13 A. Four. 14 MR. TAMASITIS: This is 11. 15 (PLAINTIFF'S ANSWERS TO DEFENDANT'S SUN TRS 16 OCEAN CLUB, LLC AND SUN TRS CAROLINA PINES, LLC'S 17 FIRST SET OF INTERROGATORIES TO THE CITY OF NORTH 18 MYRTLE BEACH MARKED FOR IDENTIFICATION AS 19 DEFENDANT'S EXHIBIT NO. 11.) 20 BY MR. TAMASITIS: 21 Q. Have you seen this document before? 22 A. Hold on a second. Probably briefly. I haven't 23 read it in detail. 24 Q. I'll represent to you that these are the city's 25 responses to the Defendant's Sun TRS Ocean Club	1 and Sun TRS Carolina Pines's First Set of 2 Interrogatories that were issued in this case. 3 A. Okay. 4 Q. Did you have any input in the responses to these 5 Interrogatories? 6 A. No. 7 Q. If you could turn to Interrogatory number 9 on 8 Page 6. Interrogatory number 9 asks, "List every 9 'cabana house' in North Myrtle Beach, identify 10 the owner of each such 'cabana house,' and the 11 'project in North Myrtle Beach' used by the 12 'cabana house,' and specify if the owner of the 13 cabana house is a homeowners' association." 14 Do you see that? 15 A. Yes. 16 Q. The answers go, A, Barefoot Resort cabana house; 17 B, Beachwalk cabana house; C, Links cabana house; 18 and D, Tidewater cabana house. 19 A. Yes. 20 Q. Are those the four cabana houses that you're 21 aware of? 22 A. Yes, those are the only four that I'm aware of. 23 Q. So, you're not aware of any others? 24 A. No. 25 Q. Other than the one that's the subject of this

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Page 49	Page 50
1 lawsuit? 2 A. Right. 3 Q. Are you aware of whether or not all of these 4 cabana houses are owned by homeowner's 5 associations? 6 A. I think they are. 7 Q. Have they always been owned by homeowner's 8 associations? 9 A. As far as I know. 10 Q. Have they always been used for projects located 11 in North Myrtle Beach? 12 A. As far as I know. 13 Q. Have you ever done any investigation to figure 14 out if those two questions I've just asked you 15 are true? 16 A. No. 17 Q. Have you been involved in any zoning enforcement 18 activity related to any of these four cabana 19 houses? 20 A. No. 21 Q. Have you had communications with any of the prior 22 owners of this cabana house that's the subject of 23 this case? 24 A. No. 25 Q. Do you know whether the prior owners of the	1 cabana house that's the subject of this case were 2 homeowner's associations? 3 A. Well, and again, I may not, recall may not be 4 total on this, but whatever the homeowner's 5 association is behind the car wash off of 17, 6 they at one time operated that as an HOA beach 7 cabana, I'm pretty sure. I can't remember the 8 name. 9 Q. Seabrook? 10 A. Yes. Seabrook at one time I think utilized that 11 as a beach cabana for the HOA. 12 Q. If you could turn to Interrogatory number 18 on 13 Exhibit No. 11, please. 14 A. What page is it? 15 Q. Ten. 16 A. All right. 17 Q. I'm going to read the question to you and you 18 could read the answer to yourself. 19 A. Okay. 20 Q. It says, "Please explain how the zoning 21 ordinances' limitation of the use of properties 22 zoned as 'cabana houses' exclusively to 'projects 23 in North Myrtle Beach' furthers 'the general 24 purpose of guiding development in accordance with 25 existing and future needs and promoting the
Page 51	Page 52
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.) 11 ----- 12 13 14 15 16 17 18 19 20 21 22 23 24 25

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1 C E R T I F I C A T E 2 3 I, the undersigned, Rita Rodriguez, Notary Public 4 in and for the State of South Carolina, do hereby 5 certify that the foregoing statement under oath was 6 taken on the aforementioned date; 7 That the within deponent was sworn to tell the 8 truth, and that the foregoing is an accurate 9 transcription of the testimony taken under oath; 10 That all exhibits entered herein are attached 11 hereto (if requested by counsel) and made a part of 12 this statement under oath. 13 I further certify that I am neither counsel nor 14 solicitor to any of the parties in said suit, nor 15 interested in the event of the cause. 16 In witness whereof, I have hereunto set my hand 17 and seal on July 21, 2022. 18 19 20 21 _____ 22 Rita Rodriguez 23 Notary Public for South Carolina 24 25 My Commission Expires: 07/8/2025	1 E R R A T A S H E E T 2 In Re: CITY OF NMB V SUN TRS OCEAN CLUB, LLC. 3 PAGE LINE CORRECTION REASON 4 _____ 5 _____ 6 _____ 7 _____ 8 _____ 9 _____ 10 11 _____ 12 13 14 15 _____ 16 I, the undersigned, MICHAEL G. MAHANEY, do hereby 17 certify that I have read the foregoing deposition and 18 that to the best of my knowledge said deposition is 19 true and accurate, with the exception of the 20 corrections listed above. 21 Date: _____ Signature: _____ 22 23 Subscribed and sworn to before me 24 this day of , 2022. 25 _____ 25 NOTARY PUBLIC

City of North Myrtle Beach v. Sun TRS Ocean Club, LLC and Sun TRS Carolina Pines, LLC
Case No. 2021-CP-26-07489
PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

EXHIBIT F

TRANSCRIPT OF DIRECTOR OF PLANNING & DEVELOPMENT JIM WOOD DEPOSITION

In the Matter of:

CITY OF NORTH MYRTLE BEACH

VS.

**SUN TRS OCEAN CLUB, LLC and SUN TRS
CAROLINA PINES, LLC**

James William Wood

June 15, 2022



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Page 1

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY 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

Page 2

1 APPEARANCES:

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19 On behalf of Defendants

20 ALSO ATTENDING: (None)

21 STIPULATIONS: The within deposition was taken pursuant
22 to the South Carolina Rules of Civil Procedure.

23 WAIVER: Examination and reading of the deposition are
24 not waived by the witness and by the parties.
25

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1 JAMES WILLIAM WOOD, JR., being duly sworn, testified as 2 follows: 3 EXAMINATION BY MR. TAMASITIS: 4 Q. Good morning, Mr. Wood. My name is John 5 Tamasitis. I represent Sun TRS Ocean Club, LLC., 6 and Sun TRS Carolina Pines, LLC in this lawsuit 7 that's been brought against them by the city of 8 North Myrtle Beach, which is why we're taking 9 your deposition here today. 10 Have you ever taken a deposition before? 11 A. Yes, approximately 15 years ago. 12 Q. What type of case was that? 13 A. I think it was an appeal to a BCA case. 14 Q. So it was part of your employment with the city? 15 A. Yes. 16 Q. Were you in the same position as you are now for 17 that deposition? 18 A. No, it was in a different job. 19 Q. What was the job? 20 A. I think it was -- I'm trying to think back. I 21 think I was with the city of Georgetown at the 22 time. 23 Q. Any other depositions that you have taken before? 24 A. No. 25 Q. Since it's been a little bit, we're going to go	1 over some ground rules. I'll go through them and 2 if you don't understand anything just ask me. 3 A. Okay. 4 Q. There is a couple of things I need you to do for 5 me today. First, please answer questions yes or 6 no when they're appropriate. I know in a lot of 7 conversations we do uh-uhs and uh-huhs. We want 8 to keep a clean record today and we want the 9 Court Reporter to be able to accurately identify 10 what you're saying, so, if you could do yeses and 11 noes, I'd appreciate that. Does that make sense? 12 A. Yes. 13 Q. I also want you to understand that none of my 14 questions are intended to trick you. I sometimes 15 do ask poor questions though. If I ask you a 16 question that confuses you or you don't 17 understand, please ask me to repeat or rephrase 18 the question, okay? 19 A. Yes. 20 Q. If you need any clarification, definitions or 21 explanations in any of my words, questions or 22 documents presented during the course of this 23 deposition, please ask me rather than your 24 attorney, all right? 25 A. Yes, sir.
Page 7	Page 8
1 Q. If you answer a question, I'm going to assume you 2 understood it. Is that fair? 3 A. Yes. 4 Q. And, finally, if we need to take a break at any 5 time, this is not an interrogation, we're not 6 going to keep you here for too long. If we do 7 take any breaks, though, please do not engage in 8 any private off-the-record conversations with 9 your attorney regarding the substance of your 10 testimony, except for the purposes of deciding 11 whether to assert a privilege or make an 12 objection. If you do, I am allowed to ask you 13 about the content of those discussions, okay? 14 A. Understood. 15 Q. Are you under the disability of any alcohol, 16 drugs or any medications today? 17 A. No. 18 Q. What did you do to prepare for the deposition? 19 A. I had a meeting yesterday via telephone with this 20 attorney here. I'm sorry, I forgot your name. 21 Q. With Rhett? 22 A. Rhett, yes. 23 Q. Rhett Ricard, the attorney for the city? 24 A. Yes. 25 Q. Anyone else on that phone call?	1 A. Mr. Mahaney, Michael Mahaney, the city manager, 2 and Chris Noury, the city attorney. 3 Q. Did you review any documents or look at anything 4 before coming here today? 5 A. No. 6 Q. In your own words, can you please explain to me 7 what your understanding is of the issues and the 8 allegations in this lawsuit? 9 A. From what I understand, the RV park on Highway 10 90, was it called Sun Communities or something 11 like that? 12 Q. Okay. 13 A. The RV park took possession of a cabana house on 14 Ocean Boulevard in North Myrtle Beach and was 15 operating it as an ocean cabana for their 16 visitors and guests in violation of the city of 17 North Myrtle Beach's zoning ordinance. 18 And we received a complaint from a 19 neighboring property owner about that and we did 20 an investigation and determined that there was 21 indeed a violation of our zoning ordinance. 22 Q. What were the violations? 23 A. The violation, as I understand it, is that in 24 order to qualify for a cabana house, the 25 owner/operator of the cabana house has to be

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Page 9 1 represented by an HOA and it has to be a project 2 located within the city limits of North Myrtle 3 Beach, and there cannot be any activities that 4 are contraindicated for a cabana house as those 5 activities are set forth in the zoning ordinance. 6 Q. We'll discuss this in more detail as we go along 7 here, but the first two reasons you said was the 8 owner has to be represented by an HOA, is that 9 what you said? 10 A. Yes. In the ordinance it says that there has to 11 be an HOA sort of owning and managing, operating 12 the facility. 13 Q. Do you know of any ordinance in the North Myrtle 14 Beach Municipality Code that has that same 15 requirement? 16 A. I'm not aware of any. 17 Q. And then the second piece you talked about was 18 that it had to be used for a project that's 19 located in North Myrtle Beach, is that correct? 20 A. Yes. 21 Q. Are you aware of any other ordinances in the city 22 of North Myrtle Beach's Municipality Code that 23 has that requirement? 24 A. Not specifically called out like that. I guess, 25 just as a general principle, our laws only apply	Page 10 1 to projects within the city. So, I guess that's 2 what I would say to that. 3 Q. I'm going to hand you what we're going to mark as 4 Exhibit No. 1 for today's deposition. 5 (AMENDED NOTICE OF DEPOSITION OF JAMES WOOD 6 MARKED FOR IDENTIFICATION AS DEFENDANT'S EXHIBIT 7 NO. 1.) 8 BY MR. TAMASITIS: 9 Q. Mr. Wood, I have handed you Exhibit No. 1. Do 10 you recognize that document? 11 A. Yes. 12 Q. Is this document the Notice of your deposition 13 for today? 14 A. It is. 15 Q. Can you please state your full name for the 16 record? 17 A. James William Wood, Junior. 18 Q. Do you have any aliases or nicknames you go by? 19 A. No. 20 Q. What is your date of birth? 21 A. September 23, 1964. 22 Q. And the last four of your Social? 23 A. 9284. 24 Q. What is your current address? 25 A. 703 41st Avenue South in North Myrtle Beach.
Page 11 1 Q. And that's in Horry County? 2 A. Yes. 3 Q. How long have you resided at that address? 4 A. Since December. 5 Q. Where did you reside at before? 6 A. 607 19th Avenue South in North Myrtle Beach. 7 Q. And that's still in Horry County? 8 A. Yes. 9 Q. Where were you born? 10 A. Quincy, California. 11 Q. How did you end up in North Myrtle Beach? 12 A. That's a long story. My parents moved us to 13 Montana when I was young and then West Virginia. 14 And then because I used to vacation here, I 15 decided to move here after college. 16 Q. And what's your current marital status? 17 A. I'm married. 18 Q. What's your wife's name? 19 A. Sara. 20 Q. Same last name? 21 A. Yes. 22 Q. And her occupation? 23 A. She is the business license and revenue manager 24 for the city of North Myrtle Beach. 25 Q. Do you have any children?	Page 12 1 A. Yes, I have three daughters, and she has a son 2 and a daughter. 3 Q. What are the ages of your three daughters? 4 A. They are 14, 16 and 18. 5 Q. What are the ages of her children? 6 A. Eight and 11. 7 Q. Where do they all live? 8 A. My daughters reside primarily with their mother 9 in Conway. And my wife's children are split 10 50/50 custody. 11 Q. And for the, I believe you said one of the 12 daughters was 18. Does she reside in Horry 13 County? 14 A. She does. 15 Q. Same last name as yours? 16 A. Yes. 17 Q. Do you have any relatives by blood or marriage in 18 Horry County? 19 A. I guess my wife's parents or my in-laws. 20 Q. What are their last names? 21 A. Anderson. 22 Q. The reason why we ask that is if this does go to 23 trial and we have to pick a jury, we want to make 24 sure we're not picking family members of 25 witnesses.

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1 A. Understood. 2 Q. Let's talk about your education. Where did you 3 go to high school? 4 A. Parkersburg High School in West Virginia. 5 Q. How about college? 6 A. I went to West Virginia University for a 7 bachelor's degree, College of Charleston for a 8 master's, and back to West Virginia for a Ph.D., 9 where I completed everything except the 10 dissertation. 11 Q. For your master's degree, what did you get your 12 master's degree in? 13 A. Public administration. 14 Q. And then when you went back to West Virginia for 15 your doctorate, what did you have your doctorate 16 studies in? 17 A. Geography and urban planning. 18 Q. It says online and in some of the other 19 biographical information I found that you're 20 identified as an AICP. What does that mean? 21 A. American Institute of Certified Planners. It's a 22 certification similar to an accountant getting a 23 CPA certification. 24 Q. Are there tests required to be taken for that? 25 A. There are.	1 Q. When did you receive that designation? 2 A. Two thousand -- wait a minute. No, that's not 3 correct. I believe 1999. 4 Q. Do you have to do like ongoing education to keep 5 that up? 6 A. Yes. 7 Q. How often is that? 8 A. You have to have approximately 32 continuing 9 education credits every two years. 10 Q. Are you a member of any civic organizations? 11 A. No. 12 Q. How about any church affiliations? 13 A. I don't attend. My wife goes to First Baptist 14 Church in Myrtle Beach. 15 Q. How about military service, any? 16 A. No. 17 Q. Have you ever been arrested? 18 A. No. 19 Q. Let's talk about your employment history. What's 20 your employment status and history been for the 21 last ten years? So, let's go ten years back and 22 bring it current to today. 23 A. For the last 14 I have been in this current 24 position with the city of North Myrtle Beach. 25 Q. What is that current position?
Page 15	Page 16
1 A. Director of Planning & Development. 2 Q. What are your duties as the Director of Planning 3 & Development? 4 A. My duties include managing the Planning & 5 Development Department, which comprises planning, 6 zoning and building inspections. 7 Q. Who is your direct supervisor? 8 A. Michael Mahaney, the city manager. 9 Q. Give me some examples of some of your 10 responsibilities on a day-to-day basis? 11 A. Well, I have to prepare the department budget. I 12 have to oversee the building division and look at 13 our permitting systems. I attend technical 14 review committee meetings for new projects such 15 as subdivisions, site plan reviews. And I attend 16 department head meetings. 17 Q. Prior to -- I know we said we were going to go 18 ten years back. Let's go a little further back. 19 What was the position you had before you became 20 the Director of Planning & Development? 21 A. For a brief period, about a year, I was in 22 private consulting. And then prior to that I was 23 also in government service. 24 Q. Doing what? 25 A. Same type of thing.	1 Q. For who? 2 A. There was a stint in the city of Damascus, 3 Oregon. And prior to that, five years with the 4 city of Morgantown, West Virginia. 5 Q. Were those responsibilities you had in those 6 similar positions comparable to what you do 7 today? 8 A. Comparable in function but this is a much larger 9 department. So, previously I did not supervise 10 as many people. 11 Q. You talked about the fact that one of your duties 12 is supervision of the Zoning Department. What is 13 your day-to-day involvement with the Zoning 14 Department? 15 A. Well, the Zoning Division handles all 16 interpretations of the zoning ordinance. They 17 handle site plan reviews to determine compliance 18 with the zoning ordinance. They get a lot of 19 day-to-day service calls for, you know, come look 20 at our tree to see if we can get a permit, come 21 look at our house to make sure we put it in the 22 right place on the lot. 23 Ben Caldwell is the zoning administrator. 24 He is the division head of the Zoning Division 25 but he reports to me. So, my involvement usually

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Page 17 1 happens when Ben has a question or an issue that 2 he needs my guidance on. 3 Q. If Ben doesn't have any questions that he needs 4 guidance on, is it fair to say that he runs the 5 Zoning Division on his own as independent with 6 just your guidance? 7 MR. RICARD: Object to form. 8 A. Yes. 9 Q. He's going to object throughout the questioning. 10 Please answer unless he objects to 11 attorney/client privilege or instructs you not to 12 answer, okay? 13 A. Yes. 14 Q. What would you classify or characterize your 15 relationship with Ben Caldwell as currently? 16 A. Very collegial. He's quite good at coming to me 17 when he has an issue that he feels that he needs 18 my guidance. The communication is good between 19 us. 20 Q. Would you consider Ben pretty good at his job? 21 A. Yes. 22 Q. Did you have a lot of interactions with Paul 23 Blust when he was the zoning administrator? 24 A. Yes. 25 Q. Same thing, Paul Blust was pretty knowledge about	Page 18 1 his job? 2 A. Yes, he was quite knowledgeable. He had been 3 with the city 20 years when I got here. 4 Q. How well versed are you in the zoning ordinances 5 for the city? 6 A. Not as good as Ben but I have a decent working 7 knowledge of them. 8 Q. What would you classify as the role of the zoning 9 administrator? 10 MR. RICARD: Object to form. 11 A. He's the person who is in charge of interpreting 12 the zoning ordinance. So, anything that requires 13 a review for compliance with the zoning ordinance 14 he would interpret whether that situation is 15 compliant. 16 Q. Is that for citizens of North Myrtle Beach who 17 have questions about the zoning issues? 18 A. Yes, questions and also, you know, when somebody 19 submits a plan for approval. It's not just 20 questions. When somebody submits a plan for 21 approval he makes the interpretation whether that 22 plan complies with the ordinance. 23 Q. Does he then communicate that to the citizens 24 about, you know, what's the interpretation? 25 MR. RICARD: Object to form.
Page 19 1 A. Yes. 2 Q. Does he check with you for all interpretations of 3 the zoning ordinance? 4 MR. RICARD: Object to form. 5 A. No. 6 Q. Would it be fair to say that his discussions with 7 the citizenry or the city of North Myrtle Beach 8 when he's talking about zoning interpretations, 9 that's him speaking for the city? 10 MR. RICARD: Object to form. 11 A. Yes. 12 Q. Does the city rely on the zoning administrator's 13 interpretations? 14 MR. RICARD: Object to form. 15 MR. TAMASITIS: Can I ask what you're 16 objecting to on that? Just so I know so I can 17 clarify the questions and make sure I'm getting 18 it clear. 19 MR. RICARD: I'd rather just keep it as 20 object to form. 21 MR. TAMASITIS: No, I'm asking. 22 MR. RICARD: And I'm giving you my 23 response. 24 BY MR. TAMASITIS: 25 Q. Does the city rely on the zoning administrator's	Page 20 1 decisions when making zoning interpretations? 2 A. May I ask what you mean by "rely" upon? 3 Q. If he doesn't ask you for guidance, he just goes 4 ahead and tells the citizens this is my 5 interpretation, and does the city back that up 6 and say, yes, that works? 7 A. Yes. I mean, we presume that his interpretation 8 is correct. 9 Q. And, in your opinion, do the citizens rely on 10 those zoning interpretations and decisions? 11 MR. RICARD: Object to the form. 12 A. Not all of them. I mean, sometimes they don't 13 agree and then we have a process in our zoning 14 ordinance where somebody can appeal Ben's 15 decision to the Board of Zoning Appeals if they 16 disagree. 17 Q. What's that process? 18 A. It's called an administrative appeal. And it's 19 somebody alleging that Ben made a 20 misinterpretation of the ordinance. It's an 21 avenue for which they can make that allegation 22 and then the Board of Zoning Appeals hears both 23 sides and determines whose interpretation is 24 correct. 25 Q. If the Board of Zoning Appeals makes that

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Page 21	Page 22
1 determination and they side with the zoning 2 administrator, then that's the city's position? 3 MR. RICARD: Object to form. 4 A. It is. Then the applicant can also appeal that 5 further to the Court of Appeals if they choose 6 to. 7 Q. But if that decision by the zoning administrator 8 is not appealed to the Board of Zoning Appeals or 9 further up, then that decision made by the zoning 10 administrator is the stance of the city, correct? 11 MR. RICARD: Object to form. 12 A. Yes. 13 Q. Have you been involved in any other types of 14 litigation like this involving zoning disputes? 15 A. Yes. 16 Q. When? 17 A. You mean cases that went to court? 18 Q. Uh-huh. 19 A. I believe the last one, if I'm not mistaken, was 20 when I was with the city of Morgantown, West 21 Virginia, and the city actually sued its own 22 Board of Zoning Appeals over decisions made. 23 Q. Have you been involved in any litigation for the 24 city of North Myrtle Beach on zoning issues? 25 A. I don't recall being involved in any.	1 Q. Do you know what a zoning letter is? 2 A. Yes. 3 Q. What is it? 4 A. Sometimes an individual will seek a letter asking 5 if their site or property or project is currently 6 in compliance with the zoning ordinance. Usual 7 that's done when people are seeking financing for 8 something and the finance companies wants to know 9 that they're not going to have some cloud on the 10 title. 11 Q. So, would it be fair to say that's to inform 12 citizens whether such uses are not consistent 13 with the zoning ordinance? 14 MR. RICARD: Object to form. 15 A. Yes. 16 Q. And a citizen can, and lenders, for that matter, 17 can rely on the zoning administrator's 18 determination in those zoning letters? 19 MR. RICARD: Object to form. 20 A. I guess to the extent that those interpretations 21 are correct. 22 Q. Do you have any involvement in the zoning letters 23 that go out? 24 A. Almost never. I think maybe one or two in the 25 14 years I have been here.
Page 23	Page 24
1 Q. The ones that you have been involved in, what was 2 your role? 3 A. It was usually like if the zoning administrator 4 was on vacation and somebody was in a hurry for a 5 letter, then sometimes I would step in and help. 6 Q. But under your garden variety everyday zoning 7 letter, do you get involved? 8 A. No. 9 Q. So, do you, in those garden variety situations, 10 do you rely on the zoning administrator and his 11 staff to make that determination to send out 12 those zoning letters? 13 A. I do. 14 Q. We're going to go through this case in 15 particular, and I'm going to use some definitions 16 today. So, when I use this word, this is what it 17 means. When I say property, we're going to be 18 talking about Lot 1, Block 18A, Tilghman, which 19 is located in the city of North Myrtle Beach. 20 That's the property that is the subject of this 21 civil litigation. It's the property. 22 When I say cabana house, it's going to 23 mean the building that's located on the property. 24 Okay? 25 A. Okay.	1 MR. TAMASITIS: We're going to mark 2 this as Exhibit No. 2. 3 (SECTION 23-2, DEFINITIONS, OF CITY OF NORTH 4 MYRTLE BEACH CODE OF ORDINANCES MARKED FOR 5 IDENTIFICATION AS DEFENDANT'S EXHIBIT NO. 2.) 6 BY MR. TAMASITIS: 7 Q. Just to get some background out of the way, 8 Chapter 23 of the Code of Ordinances for the city 9 of North Myrtle Beach is the zoning ordinances, 10 correct? 11 A. Yes. 12 Q. Do you recognize the ordinance that I have just 13 provided to you as Exhibit No. 2? 14 A. I do. 15 Q. And that's Section 23-2 of the Code of 16 Ordinances, correct? 17 A. Yes. 18 Q. If you go three-quarters of the way down the 19 page, it provides the definition of cabana house, 20 correct? 21 A. Correct. 22 Q. Can you read that definition for me, please? 23 A. "Cabana house: A structure utilizing 24 single-family design and development standards in 25 close proximity to the oceanfront to be used by

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1 projects in North Myrtle Beach not located near 2 the ocean. The use of the cabana house shall be 3 limited to drop-off and parking areas, bathing, 4 changing clothes and similar uses." 5 "Additionally, it can be used as an 6 occasional guest quarters and similar residential 7 uses. A cabana house shall be owned and 8 maintained by a homeowner's association with a 9 maintenance agreement submitted and approved by 10 the Planning Department." 11 Q. Is that the correct ordinance for the definition 12 of a cabana house? 13 A. It is. 14 Q. And you would agree with me that that's one of 15 the sections at issue in this case, correct? 16 A. Yes. 17 Q. Do you know about the history of this ordinance 18 and why it was enacted? 19 A. My understanding is that it was enacted sometime 20 around 1996, which was approximately 12 years 21 before I became employed with the city. And from 22 conversations with Paul Blust, he indicated that 23 counsel was looking for a way to accommodate a 24 request by the Tidewater community for such a 25 facility. So, they amended the ordinance to	1 accommodate that request. And they wrote it in a 2 narrow fashion so that it would accommodate 3 Tidewater and the ones that were already in 4 existence without opening it up to the entire 5 city. 6 Q. What do you mean by "opening it up to the entire 7 city"? 8 A. Without having a large proliferation of those 9 facilities all over the oceanfront. 10 Q. Was that conversation you had with Paul Blust 11 about the history of this ordinance predicated on 12 this lawsuit? 13 A. It was. 14 Q. Let's go ahead and break this definition down. 15 And I want your interpretation of this definition 16 as we break it down as the Planning & Development 17 director. 18 It says here, the first part I wanted to 19 discuss, it says, "structure utilizing 20 single-family design and development standards." 21 What does that mean to you? 22 A. My interpretation is that it needs to sort of 23 look similar to a single-family house so that 24 it's not esthetically incompatible with 25 surrounding uses, and be designed in a similar
Page 27	Page 28
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	1 anywhere in the Code of Ordinances? 2 A. I don't believe it is. 3 Q. I'll represent to you that the purpose of the 4 zoning ordinance per its terms is, quote, "to 5 guide development in accordance with existing and 6 future needs, and to promote the public health, 7 safety, morals, convenience, order, appearance, 8 prosperity and general welfare of the community." 9 Is it your testimony the projects in North 10 Myrtle Beach are morally superior than those 11 outside of North Myrtle Beach? 12 MR. RICARD: Object to form. 13 A. Morally superior? 14 Q. Uh-huh. 15 A. I would not take that interpretation. 16 Q. Are they safer? 17 MR. RICARD: Object to form. 18 A. I don't have data that I could use to answer that 19 intelligently. 20 Q. How about health, what does that mean to you? 21 MR. RICARD: Object to form. 22 A. Those are sort of broadly used terms that are 23 common in any zoning ordinance adopted since the 24 1920s. And they sort of generically mean that -- 25 the history of zoning is such that zoning

7 (Pages 25 to 28)

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1 ordinances were adopted in response to slum 2 projects in New York, for example. And those 3 were unhealthy because they didn't have adequate 4 light and air and they were not sanitary. 5 So, pretty much when zoning was invented, 6 and I'm sorry for putting on my professor hat 7 here. 8 Q. Please do. 9 A. When zoning was invented, that catchphrase of 10 healthy, safe, attractive community, those were 11 sort of adopted as general call outs in every 12 zoning ordinance ever adopted. 13 So, to me, healthy means a project that's 14 got adequate light and air, it has good 15 sanitation, it's kept up well, it doesn't harm 16 the residents that live there. 17 Q. For lack of a better term, it's to keep the 18 riffraff out? 19 MR. RICARD: Object to form. 20 A. No, I don't agree with that. 21 Q. Why not? 22 A. Because that's a pejorative term and I don't know 23 what "riffraff" means. A healthy community is 24 not, you know, making something healthy and safe 25 is not designed to exclude people.	1 Q. What about appearance? 2 A. Again, that's a subjective thing. So, you know, 3 the general principle in zoning is that 4 appearances should be compatible with surrounding 5 land uses so as not to harm value of surrounding 6 land uses. 7 Q. What about prosperity? 8 A. The presumption, again, there is well designed, 9 attractive communities foster prosperity within 10 the community. 11 Q. So, in this limitation for projects to be used in 12 North Myrtle Beach not located near the ocean, 13 how does that limitation serve the purposes that 14 we have just discussed? 15 A. I was not here when council passed that, so, I 16 wasn't privy to those discussions. But my belief 17 is their intent in limiting it to projects within 18 the city is that, you know, you have hundreds if 19 not thousands of other communities in the 20 projects, so to speak, that are located outside 21 of city limits. And council wanted to adopt 22 something narrow so that they did not have a 23 large proliferation of oceanfront properties that 24 were being taken up and used by projects that are 25 not in the city.
Page 31	Page 32
1 And they wanted to, you know, there is a 2 certain, I guess attractiveness of being in the 3 city, so council said, well, we'll reserve cabana 4 houses for projects within the city as an 5 enticement for developers to come and do economic 6 development within the city instead of outside 7 the city. 8 Q. So, it is exclusionary in its focus, in your 9 opinion? 10 MR. RICARD: Object to form. 11 A. May I ask what you mean by "exclusionary"? 12 Q. No. 13 A. Well, I mean, on its face it's clearly stated 14 that it excludes projects that are not within the 15 city. So, I think that's self-evident. 16 Q. And you mentioned the economic development piece. 17 So, a large part of this is to protect the 18 economic interests of the city of North Myrtle 19 Beach? 20 A. Yes. 21 Q. I mean, essentially it's on its face, is it not? 22 A. I would agree with that. 23 Q. The next one says, "Additionally, it could be 24 used as an occasional guest quarters and similar 25 residential uses."	1 What are "similar residential uses"? 2 A. I confess I don't have a full understanding of 3 what they mean by that or why that was put in the 4 ordinance at the time. I'm not sure what the 5 intent was for allowing it to be used as a guest 6 quarters. Had I been here at the time, I 7 probably would have written it differently. 8 Q. But when we're looking at the term, not "guest 9 quarters" but "similar residential uses," would 10 that, in your opinion, your interpretation be 11 barbecues, small parties, things like that? 12 MR. RICARD: Object to form. 13 A. Well, residential use, I guess if you think of 14 things that are sort of typical activities within 15 a single-family residence, then I think that's 16 the intent of what they were getting at. 17 Q. Would you also consider similar residential uses 18 is renting for third parties? I mean, I could 19 rent my house out as an Airbnb, right? 20 MR. RICARD: Object to form. 21 A. I would not interpret it that way for a cabana 22 house because then you're operating it more or 23 less as a commercial accommodations, transient 24 accommodations, and I don't think that was the 25 intent.

8 (Pages 29 to 32)

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1 Q. So, even if I didn't advertise that ability, 2 you're saying that the cabana house would be 3 treated different than a typical residence? 4 A. In what respect? 5 Q. In the respect that I can't rent it out. 6 A. I'm not certain about that because when they put 7 the term "guest quarters" in there, they did not 8 specify whether that was pro bono or for a fee. 9 So, I don't know what the intent was. 10 Q. The next part of this definition I want to talk 11 about, it says, quote, "shall be owned and 12 maintained by a homeowner's association." 13 What does that mean to you? 14 A. Well, a homeowner's association is a legal entity 15 that has to be established according to the laws 16 of South Carolina, and that differs from a 17 commercial entity or a corporation. It's set up 18 under different sections of the state code. 19 So, to me, it would be an organization 20 that was promulgated according to the laws for 21 their formation by the state of South Carolina. 22 Q. So, you're saying for a cabana house in the city 23 of North Myrtle Beach it can't be owned by a 24 company? 25 A. That is my interpretation because the code	1 specifically calls out it has to be owned by a 2 homeowner's association. 3 Q. What if a company created a homeowner's 4 association, could it then be owned by that 5 company through the homeowner's association? 6 MR. RICARD: Object to form. 7 Q. I mean, that's essentially what Barefoot and the 8 rest of them are doing, is it not? 9 MR. RICARD: Object to form. 10 A. I don't know that Barefoot is a corporation 11 though. My understanding is they are only a 12 homeowner's association. 13 Q. Why is this ownership restricted in this way, do 14 you think? 15 A. My belief is that a homeowner's association is an 16 organization that is accountable, more 17 accountable than a corporation, they're easier to 18 contact. And probably, I think the intent was, 19 if there is an issue or concern that a 20 homeowner's association would be more able and 21 willing to address those concerns than perhaps 22 some corporation located in California or 23 whatever. 24 Q. And you're saying "corporation," you also mean 25 LLC., is that right, corporate entity?
Page 35	Page 36
1 A. Yes. 2 Q. What does that purpose that you're talking about, 3 what does that serve? 4 A. Well, the homeowner's association will typically 5 pass dues along to its members. And to further 6 the intent of the ordinance that these facilities 7 be well maintained, a homeowner's association is 8 in a position to pass assessments and other dues 9 to have the funds necessary to maintain them. 10 Q. So, if it's owned by a company, it would have 11 less of a chance of being well maintained? 12 A. No, I don't believe it would be less of a chance. 13 But I think the intent of having a homeowner's 14 association is to have an entity that would be in 15 a financial position to maintain and pass rules 16 and effectively manage the property to prevent 17 incompatibilities with its neighboring 18 properties. 19 My personal belief is that homeowner's 20 associations are more responsive and accountable 21 than a depersonalized corporate entity. And it 22 would be easier for the city to get problems 23 resolved by working with a homeowner's 24 association than a corporation. 25 Q. Accountable to whom?	1 A. Accountable to compliance with the ordinance. 2 Q. So accountable to the city? 3 A. Yes. 4 Q. So, you think that there would be a concern if it 5 was a company that they wouldn't be as 6 accountable to the city? 7 A. That's my belief. 8 Q. How does limiting the ownership to an HOA promote 9 public health? 10 A. I suppose that HOAs, as part of their 11 responsibilities and duties, they take their role 12 very seriously in maintaining properties. And a 13 well maintained property is a healthier property. 14 Q. How about safety, same sort of answer? 15 A. Yes. 16 Q. What about convenience? I don't know if 17 convenience would work there, would it? You 18 would have to have all the homeowners voting as 19 opposed to one corporate entity, right? 20 A. I don't know if I would agree that convenience is 21 all that relevant in this situation. 22 Q. What about welfare of the community, the 23 difference between a homeowner's association and 24 a company? 25 A. Again, it's my belief that it's easier to get

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1 compliance with property maintenance behaviors 2 that are incompatible with surrounding land uses, 3 activities, making sure that rules are followed, 4 I believe it's easier with a homeowner's 5 association managing than a corporation. 6 Q. So, would this situation in this case be resolved 7 if Sun TRS Ocean Club, LLC just developed an HOA 8 and transferred ownership of the property to the 9 HOA? 10 MR. RICARD: Object to form. 11 A. I don't believe so because it would not satisfy 12 the other requirement that the project be located 13 within the city limits of North Myrtle Beach. 14 Q. What if they could get a project within the city 15 of North Myrtle Beach and the only thing we were 16 talking about is the ownership under an HOA? 17 MR. RICARD: Object to form. 18 A. If an HOA, if the project were located in the 19 city, and that project formed an HOA and that HOA 20 owned and maintained the facility, then, in my 21 view, they would be compliant with the ordinance. 22 Q. So, in our current situation, if the HOA doesn't 23 own the cabana house, then the remedy for the 24 city is to just take the property back? 25 MR. RICARD: Object to form.	1 Q. Really just take ownership of the property? 2 A. No, we don't seize properties. We simply seek 3 compliance with the zoning ordinance. It is our 4 allegation or our contention that the RV 5 community, what is it called again? 6 Q. We can call it Sun Communities. 7 A. It is our contention that Sun Communities is not 8 a qualified entity to own a cabana house within 9 the city. 10 Q. So they need to sell it? 11 MR. RICARD: Object to form. 12 A. That would be one possibility. 13 Q. Isn't that the government then compelling the 14 sale, so it's a taking? 15 MR. RICARD: Object to form. 16 A. No, I don't agree with that. 17 Q. Why not? 18 A. My understanding of taking is that when you adopt 19 a regulation that is so onerous that the owner of 20 the property has no reasonable use of that 21 property. And most of the cases where it reaches 22 litigation kind of hinges around what the 23 definition of reasonable use is. The Lucas case, 24 for example, in South Carolina. 25 But, you know, that's me giving you
Page 39	Page 40
1 understanding of land use law as a Director of 2 Planning not an attorney or somebody qualified to 3 give legal advice. 4 Q. But, to answer my question, why does that not 5 constitute taking? 6 A. Because I don't believe that prohibition against 7 its use as a cabana house, I don't believe that 8 that qualifies as removing all reasonable use of 9 a property. 10 Q. You just said they had to sell it? 11 A. No, I did not. 12 Q. Well, that's the only way they could -- I mean, 13 they can't keep the property as is, correct? 14 MR. RICARD: Object to form. 15 A. They can keep the property. They just cannot 16 continue to use it as a cabana house. 17 Q. So, if they were just to keep it and leave it 18 sitting there, would that serve the moral and 19 welfare of the community by having an abandoned 20 property? 21 MR. RICARD: Object to form. 22 A. There would be no requirement or expectation that 23 they would abandon the property. 24 Q. Isn't there penalties in place for violations of 25 the zoning ordinance?	1 A. Yes. 2 Q. Do you know what those penalties are? 3 A. Typically if a citation is issued, it's for 4 violation of a zoning ordinance, and it carries 5 up to a \$500 fine plus reasonable court costs per 6 violation. And each separate day of violation 7 can be considered a new violation of the 8 ordinance. It rarely escalates to that point but 9 it can. 10 Q. Let me ask you this. Are you involved routinely 11 in enforcement of the zoning code? 12 A. Sometimes those cases get kicked up to me. We 13 just had a very recent case where there was a 14 property encroachment. 15 Q. Have you ever had it where it's kicked up to you 16 to the point where the city has decided that it's 17 just going to compel them to get rid of the 18 property? 19 A. No, I have not experienced that. 20 Q. Are you aware of any other ordinances, and I 21 think I have asked this before but I'll ask it 22 again, any other ordinances that restrict the 23 ownership in use of the property like the cabana 24 house ordinance does? 25 A. In the sense that the ordinance requires the

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1 property to be owned and maintained by an HOA and 2 to be used by a project within the city, no, I'm 3 not aware of any other use where there is that 4 restriction. 5 MR. TAMASITIS: Let's mark this as 6 Exhibit No. 3. 7 (SECTION 23-22, R-4 RESORT RESIDENTIAL DISTRICT, 8 OF CITY OF NORTH MYRTLE BEACH CODE OF ORDINANCES 9 MARKED FOR IDENTIFICATION AS DEFENDANT'S EXHIBIT 10 NO. 3.) 11 BY MR. TAMASITIS: 12 Q. Do you recognize that ordinance that I handed to 13 you (handing)? 14 A. Yes. 15 Q. And that's Section 23-22 of the city of North 16 Myrtle Beach's zoning ordinances titled R-4 17 Resort Residential District, correct? 18 A. Yes. 19 Q. Can you read the purpose for me in subsection 1. 20 A. "Purpose. The purpose of this district is to 21 provide for the orderly development of certain 22 areas within the community where both year-round 23 and seasonal or resort housing may be developed 24 and where, because of proximity to the ocean, 25 such 'mixed development' would promote year-round	1 use of public facilities, and permit housing 2 choices in response to market demands, but not at 3 the expense of ocean visibility and access by the 4 community." 5 Q. Can you put that in your own words for me? 6 A. This is a district somewhat similar to the resort 7 commercial district where it was intended for 8 properties located on or very near the ocean 9 where you could have resort style development 10 including single-family and multifamily and 11 resort accommodations. 12 Q. Are there properties in North Myrtle Beach that 13 are zoned to be R-4 district that are owned by 14 people who do not reside in North Myrtle Beach? 15 A. Yes. 16 Q. Those are like investment properties, right? 17 A. Second homes, investment properties, short-term 18 rentals, things like that. 19 Q. You just answered my question. They do get 20 rented out sometimes? 21 A. Yes. 22 Q. Let's go to subsection four, which is the special 23 exceptions for this ordinance 23-22. What is 24 your understanding of how the special exception 25 process works for the city?
Page 43	Page 44
1 A. My understanding is that a special exception has 2 a type of use or a category of use that requires 3 a little bit more scrutiny than just a staff 4 review because of its potential to negatively 5 impact surrounding property owners. So, it was 6 judged that the public interest is served by 7 having a review process that's open and 8 transparent to the public via the Board of Zoning 9 Appeals so that folks could hear about the use 10 and object if they felt compelled to. 11 Q. Under this subsection four, these are all the 12 different special exceptions that you could apply 13 for in the R-4 district, right? 14 A. Yes. 15 Q. So, let's go to D, which is the cabana house. 16 And in D it talks about, it's subsection D. So, 17 subsection four, subsection D, number one, it 18 says, "That a homeowner's association shall have 19 been established for the project and a 20 maintenance agreement has been submitted to the 21 Planning Department." 22 Did I read that correctly? 23 A. Yes. 24 Q. It does not talk anything about ownership, does 25 it?	1 MR. RICARD: Object to form. 2 A. The word "ownership" is not used in that 3 sentence. 4 Q. Do you know what a maintenance agreement is? 5 A. Yes. 6 Q. Have you ever seen one? 7 A. I have. 8 Q. In what capacity? 9 A. In the Barefoot Resort cabana house. 10 Approximately a year and a half, maybe two years 11 ago, they applied to demolish that facility and 12 rebuild it. And during that review process, a 13 surrounding property owner said, hey, there was a 14 court case about this when the first one was 15 built. A special exception was granted. The 16 neighboring entity appealed and it went to court. 17 In that court case there was reference to 18 a maintenance agreement and rules for the 19 facility's use, and I found that document. So, 20 when the Barefoot cabana was being rebuilt, I 21 informed the owners and the architect there are 22 certain design standards that have to be met, 23 you're subject to this court order, you have to 24 follow it to the letter. And we reviewed their 25 plans through that lens. And part of that

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1 document included a maintenance agreement. 2 Q. Do all the other cabana houses have maintenance 3 agreements on file with the Planning Department? 4 A. Not that I'm aware of. 5 Q. What is a maintenance agreement, just your 6 explanation? 7 A. It's typically a document that sets forth how the 8 property is going to be maintained, how often the 9 landscaping is done, how often the building is 10 cleaned, how often it's repaired, what's the 11 process if somebody has a broken window, that 12 would be typical elements of a maintenance 13 agreement. 14 Q. And if you don't have a maintenance agreement, 15 you're in violation of this ordinance, correct? 16 A. Yeah. 17 Q. What's the rationale for a maintenance agreement? 18 MR. RICARD: Object to form. 19 Q. In your opinion. 20 A. Well, I guess because it is a special exception, 21 that alone tells you that, as a matter of policy, 22 the city thinks that there is a risk of it being 23 incompatible with surrounding land uses. And to 24 mitigate that risk, you have the maintenance 25 agreement that helps ensure continued compliance	1 with the terms of the special exception. 2 Q. Number two in this subsection says, "That at 3 least eight parking spaces per zoning standards 4 be established on site and that more spaces may 5 be required by the Board if there is no other 6 means to limit the number of cars traveling to 7 the property provided such as a shuttle service 8 to and from the property to the project." 9 Did I read that correctly? 10 A. You did. 11 Q. Can you explain the importance of this provision? 12 A. Cabana houses for projects of almost any size are 13 going to usually be very intensively used, 14 especially during the summer season. For 15 example, the Barefoot cabana house has its own 16 satellite parking lot across the street from the 17 cabana house, and that parking lot sometimes has 18 25, 30 cars in it or more. 19 So, the purpose of that was to be sure 20 that there was adequate parking required. And 21 because it's a special exception, the Board can 22 require more than eight, but eight is the 23 absolute minimum. But if the Board says -- this 24 project is 50 homeowners, so eight is probably 25 sufficient. But if a project is 500 homeowners,
Page 47	Page 48
1 the Board would say eight is not sufficient, you 2 need more parking or some kind of demonstrated 3 shuttle service or something to that effect. 4 And, again, the intent is for them not to 5 take up public parking or park illegally causing 6 danger and chaos from illegal parking. 7 Q. And what you were talking about with the Board 8 having that leeway, that's captured in number 9 seven, which states, "That in granting the 10 special exception, the Board of Zoning Appeals 11 may impose such reasonable and additional 12 stipulations, conditions or safeguards as, in its 13 judgment, will enhance the sitting of the 14 proposed special exception." 15 A. Correct. 16 Q. So this is not an exhaustive list? 17 A. I would consider it a list of minimums. The 18 Board can impose further requirements. 19 Q. And in number three it says, "That the use of the 20 house be limited to bathing and change of 21 clothing facilities, and occasional use as guest 22 quarters and other similar uses." 23 We just talked about that other similar 24 use. And I'm assuming your testimony is the same 25 here?	1 A. Yes. 2 Q. "That the special exception" -- this is number 3 four -- "will be in substantial harmony with the 4 area in which it is to be located." 5 What does "substantial harmony" mean? 6 A. To me it means you sort of examine the 7 surrounding land uses and you'd say, well, if 8 this is primarily surrounded by large 9 single-family oceanfront homes then it needs to 10 be harmonious with that design pattern that's 11 established for the neighborhood. 12 Q. Number five says, "That the special exception 13 will not be injurious to the adjoining property 14 owner." 15 Can you give me some examples of what you 16 would consider to be injurious of the adjoining 17 property owners? 18 A. Overcrowding of a facility, having parties that 19 extend late into the evening, being too loud, 20 noise, excessive traffic. 21 Q. Would it be safe to say that that provision and 22 the term "injurious" could be considered 23 speculative? 24 MR. RICARD: Object to form. 25 A. I would say less speculative than subjective. It

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Page 49 1 would be based on sort of common understandings 2 of activities that could be injurious to -- like 3 many definitions in the zoning ordinance, unless 4 there is a specific legal definition called out 5 in the definition section, then you fall back to 6 the standard dictionary use of the term. 7 Q. When you say "subjective," could it potentially 8 mean that one neighboring property owner doesn't 9 care, so it's not injurious to him. But then 10 someone else moves in and they think that that 11 party is going too late, it could then become 12 injurious. So, it's a sliding scale almost? 13 MR. RICARD: Object to form. 14 A. To me, your question gets at what happens after 15 the special exception is granted. The Board of 16 Zoning Appeals evaluates these things at the time 17 that the application comes in and tries to sort 18 of predict what activities would be injurious to 19 the surrounding properties. 20 Q. So, this is set in time when the Board is looking 21 at this prior to it actually being built? The 22 cabana house I'm talking about. 23 MR. RICARD: Object to form. 24 Q. That's when the announcement is being made? 25 MR. RICARD: Object to form.	Page 50 1 A. When the BZA analyzes it, yes. But I would 2 submit that a property can fall out of compliance 3 with those terms after it was permitted and 4 become subject to an enforcement action. 5 Q. Again, going back to the injurious to the 6 property owner. It may not be injurious to one 7 property owner, to the neighboring property 8 owner. That property is sold, the next neighbor 9 comes in and doesn't like it, and now we have got 10 that sliding scale of what is injurious as to 11 whether or not they fall in or out of this 12 special exception? 13 MR. RICARD: Object to form. 14 A. I don't think our definition of injurious is 15 necessarily tied to someone complaining. It's an 16 interpretation, injurious is an interpretation. 17 And that interpretation is made by the zoning 18 administrator. As part of that interpretation, 19 the zoning administrator would take into account 20 neighboring opinions but not be solely guided by 21 those. 22 Q. Can devaluation in property values be considered 23 injurious under this definition, in your opinion? 24 A. Yes, I would believe that injurious would be 25 inclusive with loss of property value.
Page 51 1 (AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR A 2 TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY 3 INJUNCTION MARKED FOR IDENTIFICATION AS 4 DEFENDANT'S EXHIBIT NO. 4.) 5 BY MR. TAMASITIS: 6 Q. I'm going to hand you what we have marked as 7 Exhibit No. 4 (handing). We talked briefly about 8 what you know are the issues in this current 9 litigation between the city and the Sun TRS 10 entities. What has been your involvement in this 11 litigation up to date? 12 A. I was first made aware of this situation when Mr. 13 Caldwell received an e-mail from the adjoining 14 property. It was a rather lengthy e-mail 15 alleging noncompliance with the zoning ordinance. 16 Q. Was that from Jim Shortle of the Sea Cloisters? 17 A. It was, yes. And when Ben received that e-mail 18 he came and informed me of the situation. 19 Because, you know, if it's my setback is not 20 right, it's three inches off, that usually is not 21 going to arise to the level of coming to my 22 attention. But something like this where it 23 could theoretically result in litigation, then 24 he'll bring that to my attention. 25 Q. What did you and Ben talk about when he brought	Page 52 1 this to you? 2 A. I briefly just asked him what the history of the 3 situation was, and we talked I think very briefly 4 about the history of the cabana house ordinance, 5 why it was adopted. All of that happened before 6 my time with the city. And then some of the 7 facts in the case. 8 Q. Do you recall what was the first steps you guys 9 took after receiving the complaint from Mr. 10 Shortle? 11 A. After I was informed by Ben, my recommendation 12 and direction to Ben was that we needed to seek 13 guidance and advice from our city attorney, Chris 14 Noury. 15 Q. We've been going for about an hour, let's take a 16 break. 17 A. Okay. 18 ----- 19 (Thereupon, at 9:12 a.m., a 20 seven-minute recess was had.) 21 ----- 22 BY MR. TAMASITIS: 23 Q. We have been talking about your involvement, sir, 24 in the litigation up to date. I have handed you 25 what's been marked as Exhibit No. 4. Do you

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1 recognize that document? 2 A. It appears to be the testimony or deposition of 3 or affidavit -- is that an affidavit? Yes, an 4 affidavit prepared by Ben Caldwell. 5 Q. I'll represent to you this is an affidavit that 6 Ben Caldwell provided in support of the city's 7 motion for a temporary restraining order and/or 8 preliminary injunction that was filed in this 9 case. 10 Did you have any hand in drafting this 11 document? 12 A. None whatsoever. 13 Q. Have you seen this document before? 14 A. I have. 15 Q. Have you reviewed it and read it for accuracy? 16 A. I have not. 17 Q. When did you first see this document? 18 A. I believe I first saw it yesterday. 19 Q. Go to paragraph number 9, which is on the bottom 20 of Page 3. And then paragraphs 9 through 12. If 21 you don't mind just going ahead and reading those 22 at your convenience. 23 A. Out loud? 24 Q. No, just read them and let me know when you're 25 done.	1 A. You said 9 through 12? 2 Q. Yes. 3 A. Okay. 4 Q. Have you read them? 5 A. Yes. 6 Q. Do you agree with the conclusion of paragraphs 9 7 through 12? 8 A. I do. 9 Q. Let's go to paragraph 13. Paragraph 13 of 10 Exhibit No. 4, it says there at the bottom, the 11 last sentence, it says, "Despite repeated demand 12 therefor, Sun TRS has failed and refused to 13 relinquish its unauthorized ownership and use of 14 the cabana house and Sun Carolina Pines has 15 failed and refused to relinquish its unauthorized 16 ownership and/or use of the cabana house." 17 Did I read that correctly? 18 A. You did. 19 Q. Based on your experience as the Director of 20 Planning & Development for the city of North 21 Myrtle Beach, are you aware of any other 22 situations during your time where the city has 23 demanded that an entity or a person relinquish 24 its ownership of property in the city? 25 A. No.
Page 55	Page 56
1 Q. Why is that the request that is made by the city 2 here? 3 MR. RICARD: Object to the form. 4 A. My interpretation of that would be that it was in 5 violation of the requirement that the cabana 6 house be owned and operated by an HOA. 7 MR. TAMASITIS: We can mark this as 8 Exhibit No. 5. 9 (SECTION 23-7, PENALTIES FOR VIOLATION, OF 10 CITY OF NORTH MYRTLE BEACH CODE OF ORDINANCES 11 MARKED FOR IDENTIFICATION AS DEFENDANT'S EXHIBIT 12 NO. 5.) 13 BY MR. TAMASITIS: 14 Q. Sir, do you recognize the ordinance that is 15 marked as Exhibit No. 5 that I just handed to 16 you? 17 A. Yes. 18 Q. And that's Section 23-7 of the city of North 19 Myrtle Beach's Municipal Code, correct? 20 A. Yes. 21 Q. And it's titled Penalties For Violations? 22 A. Yes. 23 Q. In the second sentence there it says, "Any person 24 who violates this chapter," which is Chapter 23, 25 "or fails to comply with any of its requirements	1 shall, upon conviction thereof, be fined as 2 provided in Section 1-6." 3 Did I read that right? 4 A. Yes. 5 Q. Is that the penalty provision that we were 6 talking about earlier about the penalty of a \$500 7 fine or conviction for no more than 30 days? 8 A. It is. 9 Q. I represent to you Section 1-6 of the zoning 10 code, which I have not provided to you, but I'll 11 read to you what it says. It says, "Whenever in 12 this code or in any ordinance or resolution of 13 the city or rule, regulation or order promulgated 14 by any officer or agency of the city under 15 authority duly vested in such officer or agency, 16 any act is prohibited or is made or declared to 17 be unlawful or an offense or misdemeanor, or the 18 doing of any act as required or the failure to do 19 any act is declared to be unlawful, an offense or 20 a misdemeanor, where no specific penalty is 21 provided for the violation thereof, and the 22 violation of any stuff provision of this code, 23 ordinance, resolution, rule, regulation of order, 24 shall be punished by a fine not exceeding \$500, 25 imprisonment for a period not exceeding 30 days

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1 or both." 2 That's the fine/penalty provision that we 3 were talking about earlier, correct? 4 MR. RICARD: Object to form. 5 A. Yes. 6 Q. Why did the city not seek to go ahead and fine or 7 declare a violation of the order and then fine 8 Sun TRS instead of filing litigation saying that 9 they have to cease and desist owning the 10 property? 11 MR. RICARD: Object to form. 12 A. Well, this would be speculation on my part but, 13 generally when you fine somebody you use that as 14 a tool to seek to gain compliance. And my 15 contention is that there would be no feasible way 16 to achieve compliance in this case, so, the 17 standard citation would not be an effective tool. 18 Q. Where in this Penalties For Violation, Section 19 23-7, does it allow for the city to require an 20 owner to cease and desist owning a property? 21 MR. RICARD: Object to form. 22 A. I don't read that in that section. 23 Q. So where are they getting the authority? 24 A. I do not know. 25 Q. Were you involved in the decision to not fine but	1 seek litigation against Sun TRS in this case? 2 A. No. 3 Q. Do you know who did make that final decision? 4 A. I presume it was the city attorney. 5 Q. Are you aware of any attempts by the city to 6 identify the violation of the ordinance and then 7 try to assess a fine against Sun TRS before 8 resorting to litigation? 9 MR. RICARD: Object to form. 10 A. I'm sorry, would you repeat the question, please. 11 Q. Sorry, it was poorly worded. Was there ever a 12 citation issued to Sun TRS for violation of the 13 ordinance? 14 A. I don't believe there was. 15 Q. Why not? 16 MR. RICARD: Object to form. 17 A. Because I don't believe that a citation could 18 further the goal of achieving an impossible 19 compliance with the ordinance. 20 Q. Have you ever been involved in a situation, in 21 your position as the Director of Planning & 22 Development, where there has been a violation of 23 a city ordinance and instead of issuing a 24 citation, the city went straight to the court 25 asking for the court to declare a violation of
Page 59	Page 60
1 the city ordinance? 2 A. No example comes to mind. 3 Q. Typically, and correct me if I'm wrong, the city 4 will issue the citation and then it's on the 5 person who the citation has been issued to appeal 6 that determination to the court, correct? 7 MR. RICARD: Object to form. 8 A. Or to defend themselves against the allegation, 9 yes. 10 Q. And, again, the first time you've actually seen 11 this document was yesterday, said? 12 A. Yes. 13 MR. RICARD: Object to form. Can we 14 state for the record which document you're 15 referring to. 16 MR. TAMASITIS: Exhibit No. 4. Sorry. 17 Let's mark this as Exhibit No. 6, please. 18 (LETTER FROM PAUL BLUST TO BEN POWELL, DATED JUNE 19 18, 2007 MARKED FOR IDENTIFICATION AS 20 DEFENDANT'S EXHIBIT NO. 6.) 21 BY MR. TAMASITIS: 22 Q. I hand you what's been identified as Exhibit No. 23 6. This is a letter from Mr. Blust to a Mr. Ben 24 Powell, dated June 18, 2007. Have you ever seen 25 this letter?	1 A. Yes. 2 Q. How did you come to see this letter? 3 A. I first reviewed it yesterday. 4 Q. Is it fair to say it was part of your document 5 review in preparation for this deposition? 6 A. Yes. 7 Q. Were you involved in the decision on the special 8 exception application for the cabana house at 9 issue here in 2007? 10 A. No, because I was not employed by the city at 11 that time. 12 Q. Are these letters from the zoning administrator 13 to what purports to be the owner of the cabana 14 house at the time in 2007, a standard letter 15 notifying them of approval of the special 16 exception? 17 MR. RICARD: Object to form. 18 A. Whenever the Board of Zoning Appeals issues 19 either a variance or an administrative 20 determination or a special exception, it is 21 customary practice for us to send a letter of 22 that decision informing the applicant of what the 23 decision was. 24 Q. Does that letter normally come from the zoning 25 administrator?

15 (Pages 57 to 60)

Page 61 1 A. It does. 2 MR. TAMASITIS: Mark this as Exhibit 3 No. 7. 4 (LETTER FROM PAUL BLUST TO SUN ACQ. LLC., DATED 5 MARCH 19, 2019 MARKED FOR IDENTIFICATION AS 6 DEFENDANT'S EXHIBIT NO. 7.) 7 BY MR. TAMASITIS: 8 Q. Mr. Wood, I've handed you what's been marked as 9 Exhibit No. 7. This is a letter dated March 19, 10 2019 from Paul Blust to Sun Acq, LLC. Have you 11 seen this letter before? 12 A. I have. 13 Q. When did you first see this letter? 14 A. Yesterday. 15 Q. Was this part of your review for your deposition? 16 A. It was. 17 Q. Do you know what the purpose of this letter was 18 for? 19 A. My understanding is this is part of the normal 20 duties of the zoning administrator when someone 21 makes an inquiry as to the current zoning 22 compliance status of the property. It is one of 23 those letters that we send out at the request of 24 the person making the inquiry. 25 MR. TAMASITIS: Mark this as Exhibit 8,	Page 62 1 please. 2 (E-MAIL TO JIM WOOD FROM BEN CALDWELL AND 3 ATTACHED LETTER FROM PAUL BLUST TO SUN ACQ. LLC., 4 DATED MARCH 19, 2019 MARKED FOR IDENTIFICATION AS 5 DEFENDANT'S EXHIBIT NO. 8.) 6 BY MR. TAMASITIS: 7 Q. Let me hand you what we have marked as Exhibit 8 No. 8 (handing). 9 MR. RICARD: Can we take a quick 10 recess. 11 MR. TAMASITIS: Sure. 12 ----- 13 (Thereupon, at 9:34 a.m., a 14 three-minute recess was had.) 15 ----- 16 BY MR. TAMASITIS: 17 Q. Mr. Wood, let me ask you about this Exhibit No. 18 8, which is an e-mail sent to you from Ben 19 Caldwell, dated August 25, 2021. Do you recall 20 receiving this e-mail? 21 A. Now that I have had a chance to look at it, I do 22 recall receiving it. 23 Q. Attached to this e-mail was this letter from Paul 24 Blust, dated March 19, 2019, which is Exhibit No. 25 7, is that correct?
Page 63 1 A. Correct. 2 Q. Why did Mr. Caldwell send you this letter, 3 Exhibit No. 7, on August 25, 2020? 4 MR. RICARD: Object to form. 5 A. I believe that was part of his attempt to inform 6 me fully of what the situation was. 7 Q. Did you request that he send you this letter? 8 A. I don't recall specifically requesting it. I 9 think it was just part of his due diligence in 10 sending me everything I would need. 11 Q. So, why did he send this to you then? 12 MR. RICARD: Object to form. 13 A. Again, he knows that if something gets kicked up 14 to my level that I need all the information 15 that's relevant. So, I assume that's why he sent 16 that to me. 17 Q. Let's talk about Exhibit No. 7 in more detail. 18 As we said, it's a letter from Mr. Blust to Sun 19 Acq, LLC on March 19, 2019. It appears to be a 20 zoning letter. Is that a correct assumption? 21 A. Yes. 22 Q. And Mr. Blust stated in the letter, "The above 23 referenced property," which is 1814 North Ocean 24 Boulevard, the subject property of this 25 litigation, "is zoned R-4 (resort residential).	Page 64 1 The R-4 district permits cabana house as a 2 special exception subject to the regulations 3 contained in the R-4 district of the North Myrtle 4 Beach zoning ordinance. The existing structure 5 on the property was permitted as a cabana house 6 and has been legally used as such since 7 construction. As of the date of this letter, 8 there are no known zoning violations on the 9 property." 10 Were you aware of this letter prior to it 11 being sent to Sun Acq, LLC.? 12 A. No. 13 Q. We were talking about zoning -- I'm sorry. 14 A. Those letters are so routine that they never rise 15 to my attention. Paul, in his capacity as zoning 16 administer, would have sent them out without 17 informing me. 18 Q. Are you aware of any investigation that was done 19 prior to this letter being sent? 20 A. Paul, as a matter of his job responsibilities, 21 would make sure that the statements that he made 22 were correct, so he would do whatever necessary 23 investigation to ensure that those statements 24 were correct. 25 Q. As we stand here today, are the statements in

16 (Pages 61 to 64)

Page 65 1 this letter correct? 2 MR. RICARD: Object to form. 3 Q. As of the date of the letter? 4 MR. RICARD: Object to form. 5 A. Yes. 6 Q. So, at the time of the transfer or at the time 7 this letter was written on March 19, 2019, there 8 were no known zoning violations on the property 9 for the property that's the subject of this 10 litigation, right? 11 A. Well, if that's what Paul stated then I trust 12 that he did his research. 13 Q. Do you know whether there was a homeowner's 14 association that owned the property prior to Sun 15 TRS Ocean Club? 16 A. I do not know that information. 17 Q. Do you know if there has ever been a homeowner's 18 association that owned the property prior to Sun 19 TRS Ocean Club? 20 A. I don't have that information so I don't know. 21 Q. Do you know if the cabana house on the property 22 has ever been used for a project located inside 23 North Myrtle Beach? 24 A. Yes, I believe it was used for a residential 25 project called Seabrook Plantation as their	Page 66 1 community cabana house. 2 Q. Did the Seabrook Plantation homeowner's 3 association own the property? 4 A. I don't know the answer to that. 5 MR. TAMASITIS: We're going to mark 6 this as Exhibit No. 9. 7 (FORMAL COMPLAINT FILED BY SEA CLOISTERS I and II 8 HOMEOWNER'S ASSOCIATION AGAINST SUN TRS OCEAN 9 CLUB, LLC MARKED FOR IDENTIFICATION AS 10 DEFENDANT'S EXHIBIT NO. 9.) 11 BY MR. TAMASITIS: 12 Q. Mr. Wood, do you recognize the document that I 13 just handed to you as Exhibit No. 9? 14 A. I presume this is the letter from Mr. Shortle. 15 Q. That's the formal complaint against Sun TRS. Is 16 that what it appears to be? 17 A. Filed by whom? 18 Q. It says the complaint filed by Sea Cloisters I 19 Homeowner's Association and Sea Cloisters II 20 Homeowner's Association. 21 A. Okay. 22 Q. Are you aware of this complaint? 23 A. I'm aware that there was a complaint. I have 24 never read the entirety of it. 25 Q. So you have never seen this document?
Page 67 1 A. I don't recall seeing it. 2 Q. Did you review it prior to your deposition today? 3 A. I have not. 4 Q. Have you ever visited the property that's at 5 issue in this litigation? 6 A. Driving past it, viewed it to see the 7 architectural style and things like that, yes. 8 Q. Did you ever witness any of the incidents that 9 have been complained of? 10 A. No. 11 Q. Have you ever spoken to Mr. Shortle directly 12 about his complaints? 13 A. I don't believe I have ever had a conversation 14 with Mr. Shortle. 15 Q. Have you seen correspondence from Mr. Shortle 16 about his complaints? 17 A. I believe that when Ben forwarded his e-mail to 18 me, that was part of the information that he gave 19 me. 20 Q. The investigation to this formal complaint and 21 other complaints by Mr. Shortle and Sea 22 Cloisters, were those handled by the zoning 23 administrator? 24 A. In tandem with the city attorney, yes. 25 Q. Did you have any involvement in those	Page 68 1 investigations? 2 A. Only to the extent that I was kept informed of 3 what was going on. I mean, that there was an 4 issue and that it was being looked at. 5 MR. TAMASITIS: Mark this as Exhibit 6 No. 10, please. 7 (E-MAIL FROM BEN CALDWELL TO JIM SHORTLE, DATED 8 JULY 22, 2021 MARKED FOR IDENTIFICATION AS 9 DEFENDANT'S EXHIBIT NO. 10.) 10 BY MR. TAMASITIS: 11 Q. I have handed you what's been marked as Exhibit 12 No. 10. This is an e-mail from what appears to 13 be Jim Shortle -- no, sorry. An e-mail from Ben 14 Caldwell to Jim Shortle, dated July 22, 2021. 15 Can you take a second to read that, please. 16 A. Okay. 17 Q. In the e-mail it indicates that Mr. Caldwell 18 shared the complaint with you, Jim Wood, his 19 supervisor, is that correct? 20 A. He did. 21 Q. And it's your testimony that you looked at it or 22 were kept apprised of it but you didn't read it 23 in detail, is that right? 24 A. That's correct, I did not read Mr. Shortle's 25 e-mail in full because of its length. And

17 (Pages 65 to 68)

Page 69	Page 70
1 because I assumed that it would probably end up 2 in litigation, I thought the best audience for 3 that letter would be Chris Noury, the city 4 attorney. 5 Q. It says here in the second sentence, "We have yet 6 to come to a consensus on how best to move 7 forward." 8 Who was involved in the decision making 9 process of how to handle this complaint with Mr. 10 Shortle? 11 A. Once I was notified of it, my direction to Ben 12 was let's get this in front of Chris Noury and 13 see what he advises as the city attorney. We 14 typically, when something involves sort of 15 complex legal interpretations of a code or a 16 potential lawsuit, we typically default those to 17 Chris for his advice. 18 Q. And I don't want to know what was said in those 19 conversations, I'm not asking about that. What 20 I'm going to ask you is, who were the people that 21 were involved in that process? So, it was you, 22 Caldwell, Mr. Noury. Was Mr. Mahaney involved as 23 well? 24 A. I assume he was kept informed of the situation. 25 Because if something gets kicked up to my level,	1 typically I like to keep him informed so he could 2 keep City Council informed. 3 MR. TAMASITIS: Let's mark this as 11. 4 (E-MAIL FROM MIKE MAHANEY, DATED AUGUST 16, 2021 5 MARKED FOR IDENTIFICATION AS DEFENDANT'S EXHIBIT 6 NO. 11.) 7 BY MR. TAMASITIS: 8 Q. Take a look at number 11 for me, please. Let me 9 know when you're done reading it. 10 A. Okay. 11 Q. Do you recall receiving this e-mail on August 16, 12 2021? 13 A. Yes. 14 Q. It says here "Chris," which I believe is 15 referencing Mr. Noury, "please prepare a letter 16 to Troy Bittner, Carolina Pines RV Resort," and 17 the address, "on the issues on the above as I 18 have been unable to reach him by phone. Thanks." 19 And this is from Mr. Mahaney, correct? 20 A. Yes. 21 Q. What letter was being prepared to Carolina Pines 22 RV? 23 A. I don't know. I would be speculating if I 24 guessed. 25 Q. Go ahead and speculate.
Page 71	Page 72
1 A. I presume it would be a letter stating the city's 2 position to Carolina Pines RV Resort that they 3 were out of compliance with the zoning ordinance. 4 Q. Did you have any input into what letter was sent 5 to them? 6 A. I did not. 7 Q. Did you ever review the letter before it was 8 sent? 9 A. I don't recall reviewing it. 10 Q. Was a letter ever sent? 11 A. I think so but I'm not 100 percent certain. 12 Q. Do you know whether the letter that was sent was 13 directly from the city or was it from the city's 14 attorneys? 15 A. I don't know. To me they're sort of one in the 16 same. Chris would be representing the city if he 17 sent such a letter. 18 Q. And by city's attorneys I mean outside counsel. 19 A. Oh, that I don't know. 20 MR. TAMASITIS: We'll mark this as 21 Exhibit No. 12. 22 (LETTER FROM NEXSEN, PRUET TO SUN COMMUNITIES, 23 INC. AND CAROLINA PINES RV RESORT, DATED 24 SEPTEMBER 2, 2021 MARKED FOR IDENTIFICATION AS 25 DEFENDANT'S EXHIBIT NO. 12.)	1 BY MR. TAMASITIS: 2 Q. I have handed you what's been marked as Exhibit 3 No. 12. This is a letter from Nexsen, Pruet to 4 Sun Communities, Incorporated and Carolina Pines 5 RV Resort, dated September 2, 2021. 6 Have you seen this letter before? 7 A. To the best of my recollection, this is the first 8 time I'm seeing it. I don't recall being copied 9 on it or when it was sent. 10 Q. Have you had a chance to review it? 11 A. Okay, I have had a chance to read it. 12 Q. Is there anything in this letter that you 13 disagree with? 14 A. No, I don't disagree with anything. 15 Q. In the last paragraph it states, "Pines' 16 operation of the beach club is in violation of 17 the applicable ordinance and such operation must 18 immediately cease. If this use does not cease 19 within ten days from the day hereof, NMB," North 20 Myrtle Beach, "is prepared to pursue all 21 available legal action seeking enforcement of the 22 zoning ordinance." 23 There is no mention in that paragraph of 24 any citation or fine, is there? 25 A. That is correct.

18 (Pages 69 to 72)

Page 73 1 Q. We just jumped straight to stop operation or 2 we're going to sue? 3 MR. RICARD: Object to form. 4 A. That's one interpretation, I suppose. 5 Q. Have you, in your experience as the Director of 6 Planning & Development, seen this jump from 7 you're in violation to lawsuit, as opposed to 8 you're in violation, citation, penalty, and then 9 we go through the appeal process, have you seen 10 this before? 11 A. No. 12 (E-MAIL CHAIN BETWEEN MR. SHORTLE AND MR. MAHANEY 13 MARKED FOR IDENTIFICATION AS DEFENDANT'S EXHIBIT 14 NO. 13.) 15 BY MR. TAMASITIS: 16 Q. I'll hand you what's been marked as Exhibit No. 17 13 (handing). It's an e-mail chain between Mr. 18 Shortle and Mr. Mahaney. And I'll represent to 19 you that you haven't been copied on any of these 20 e-mails, so let me summarize what's in them. 21 There is an e-mail at the bottom of the 22 page here from Mr. Shortle to Mr. Mahaney asking 23 about the status of his complaint and what's been 24 done. And he's referencing on July 12, 2021 we 25 hand delivered a formal complaint to Mr.	Page 74 1 Caldwell. 2 The response from Mr. Mahaney on Friday, 3 September 3rd, provides, "After my calls and 4 e-mails to Carolina Pines were ignored, 5 significant time was spent in legal research on 6 the best way to proceed. That resulted in a 7 cease and desist letter that has been sent to 8 them. Chris/Franklin, I need a copy of that 9 letter. Thanks." 10 Did I read that letter correctly? 11 A. Yes. 12 Q. Were you aware of this e-mail discussion between 13 Mr. Shortle and Mr. Mahaney? 14 A. I was not. 15 Q. What legal research was conducted that's 16 referenced here by Mr. Mahaney? 17 MR. RICARD: Object to form. 18 A. I presume that was the research conducted by 19 Chris Noury with input from Ben Caldwell and then 20 further seeking the advice of Nexsen, Pruet. 21 Q. Prior to Mr. Shortle's formal complaint, and this 22 is prior to it, was there any investigation or 23 citation regarding the cabana house or the 24 property at issue in this case? 25 MR. RICARD: Object to form.
Page 75 1 A. I don't believe there was. 2 Q. So Mr. Shortle's complaint basically kicked this 3 whole thing off? 4 MR. RICARD: Object to form. 5 A. Mr. Shortle's complaint made us aware of the 6 situation. 7 Q. Are you aware of Mr. Shortle making other 8 complaints about other properties in the city 9 previously? 10 A. I overheard conversations from the city manager 11 saying that Mr. Shortle has contacted him about 12 other issues. Now, what those issues were, I 13 don't know. I don't know how they resolved. I 14 just heard that as hearsay that Mr. Mahaney said, 15 I have been contacted by Mr. Shortle about other 16 things. 17 Q. What manner was he talking about that way, was it 18 exasperation or more explanatory, Mr. Shortle has 19 connected me before? 20 A. I would say explanatory. 21 Q. Do you know if there was any other complaints 22 from other neighbors at the cabana house that 23 were identified during the investigation? 24 A. I'm not aware of any. 25 Q. Do you know Mr. Shortle personally?	Page 76 1 A. I do not. 2 Q. Have you ever had any interactions with him? 3 A. No. 4 Q. Can you go through for me what the standard 5 protocol is for someone who violates a zoning 6 ordinance? 7 A. It's very situational. The overarching goal is 8 to not start off with citations, if possible. We 9 generally try to work with people and explain to 10 them what the violation is and try to achieve 11 compliance without issuing a citation, if 12 possible. Citations are by nature 13 confrontational and they can actually draw out a 14 case as opposed to get it resolved quickly. 15 So our go to action first is to have a 16 cordial discussion with the individual and try to 17 explain to them how they are not in compliance 18 and to achieve compliance so that citations are 19 not necessary. 20 And if we receive resistance and they 21 don't comply, then we sort of consider that the 22 next level of action to achieve compliance is 23 issuing a citation. 24 Q. After you issue a citation, what's the next step? 25 A. Well, a court date is established.

19 (Pages 73 to 76)

Page 77	Page 78
1 Q. And when you say court date, what court are we 2 talking about? 3 A. Municipal court. And that's part of the reason 4 that I like to avoid citations to begin with, if 5 possible. Because usually when the court docket 6 is so full, if you issue a citation it might be 7 three months before you get the case heard, and 8 it would be a lot quicker to achieve compliance 9 by working with somebody. 10 MR. TAMASITIS: The last exhibit, 11 Exhibit No. 14. 12 (PLAINTIFF'S ANSWERS TO DEFENDANT'S SUN TRS OCEAN 13 CLUB, LLC AND SUN TRS CAROLINA PINES, LLC'S FIRST 14 SET OF INTERROGATORIES TO THE CITY OF NORTH 15 MYRTLE BEACH MARKED FOR IDENTIFICATION AS 16 DEFENDANT'S EXHIBIT NO. 14.) 17 BY MR. TAMASITIS: 18 Q. Are you familiar with the other properties 19 containing cabana houses in North Myrtle Beach? 20 A. I'm familiar that we have four such facilities, 21 two of which predated me. So, I have no 22 knowledge whatsoever of the review process that 23 was followed to establish those. 24 I am most familiar with the one at 25 Barefoot because of the situation I had mentioned	1 earlier. 2 Q. What I have handed you as Exhibit No. 14 are the 3 city's Answers to Defendant's Sun TRS Ocean Club, 4 LLC and Sun TRS Carolina Pines, LLC's First Set 5 of Interrogatories. Have you seen this document 6 before? 7 A. I first saw it yesterday. 8 Q. Did you have any input with the responses that 9 were provided in this document? 10 A. No. 11 Q. If you could turn to Interrogatory number 9, 12 which is on Page 6 of Exhibit 14. 13 A. Okay. 14 Q. The question is, "List every 'cabana house' in 15 North Myrtle Beach, identify the owner of each 16 such 'cabana house' and the 'project in North 17 Myrtle Beach' used by the 'cabana house,' and 18 specify if the owner of the 'cabana house' is a 19 homeowners' association." 20 Do you see that? 21 A. Yes. 22 Q. A, is going to be the Barefoot Resort cabana 23 house; B, is the Beachwalk cabana house; C, is 24 the Links cabana house; and D, is the Tidewater 25 cabana house. Are you aware of any other cabana
Page 79	Page 80
1 houses in North Myrtle Beach other than those 2 four? 3 A. I am not. 4 Q. Of those four, which ones have you been involved 5 with personally? 6 A. Only the Barefoot Resort. Not in its original 7 approval but with it's removal and 8 reconstruction. 9 Q. Were you involved in the original approval of any 10 of these cabana houses? 11 A. I was not. They all predated my time with the 12 city. 13 Q. Do you know if all four of these cabana houses 14 have always been owned by homeowners' 15 associations? 16 A. I have no such information. 17 Q. Do you know whether any of these cabana houses 18 has ever been used for a project that's been 19 located outside of North Myrtle Beach? 20 A. I do not know. I suspect not, but I don't know 21 for sure. 22 Q. Can you give me a 3000 foot view on the dispute 23 with the Barefoot Resort cabana house? 24 A. My understanding was when they, I think, from my 25 limited understanding, and, again, the lawsuit	1 happened before me. But my limited understanding 2 of this is that somebody objected to the special 3 exception that was granted to Barefoot. And as a 4 part of that litigation, the court ordered that 5 certain rules be followed for the use of the 6 facility and certain maintenance standards 7 adhered to. 8 When the facility was torn down and 9 rebuilt, the same litigants that brought the 10 action said we just want to be sure that this 11 knew facility complies with this court order. 12 And that's when I first became aware that 13 there was such a court order that happened before 14 my time. And I looked it up and I said, wow, 15 interesting. So, there is a court order on this. 16 And then when we were reviewing the plans 17 for reconstruction, we made it very clear and our 18 review was colored by making sure that that court 19 order was complied with. 20 Q. Have you had any direct communications with 21 people associated with Sun TRS Ocean Club or 22 Carolina Pines RV Resort as part of this matter? 23 A. No. 24 Q. Do you know who else in the city apparatus has 25 had direct communications with them?

20 (Pages 77 to 80)

Page 81	Page 82
1 A. Other than Mr. Mahaney representing that he 2 attempted to contact them and was unsuccessful, I 3 don't know if anyone else has. 4 Q. Did you have any communications with the prior 5 owners of the cabana house? 6 A. No. 7 Q. If you could go in Exhibit 14 to Interrogatory 8 number 18. 9 A. Okay. 10 Q. I'm going to read you the question or the 11 Interrogatory, and then if you could read me the 12 answer back. 13 The question for number 18 is, "Please 14 explain how the zoning ordinances' limitation of 15 the use of properties zoned as 'cabana houses' 16 exclusively to 'projects in North Myrtle Beach' 17 furthers 'the general purpose of guiding 18 development in accordance with existing and 19 future needs and promoting the public health, 20 safety, morals, convenience, order, appearance, 21 property and general welfare' for the city of 22 North Myrtle Beach." 23 A. And, so, you wish me to read the answer out loud? 24 Q. Please. 25 A. "Plaintiff herein incorporates by reference its	1 Answer to Interrogatory #17, and supplements with 2 the following: This requirement operates to 3 encourage and support local, private developments 4 and their corresponding homeowner's associations 5 (as opposed to nonlocal, corporate enterprises) 6 by providing them with a private beach club and 7 access point to the beach. It also encourages 8 investment in the city rather than in projects 9 outside of the city." 10 "Ultimately, this requirement is 11 reasonable and has a tendency to promote the 12 general welfare of the adjoining properties and 13 the R-4 residential district specifically and the 14 city generally." 15 Q. Do you agree with that supplemental explanation? 16 A. Yes. 17 Q. Did you have any or provide any input in drafting 18 this particular insert? 19 A. No. 20 Q. Do you agree with all the statements in this 21 answer? 22 A. Yes. 23 Q. Is it fair to say that the property values, 24 assessing property values may be an economic 25 consideration for these restrictions?
Page 83	Page 84
1 A. I'm sorry, could you repeat the question. 2 Q. Is it fair to say that assessing property values 3 may be economic consideration for this type of 4 restriction? 5 A. Assessing property values? 6 Q. Whether they're going up or down to determine 7 whether this restriction is valid. 8 A. Yes, I think that's a reasonable economic 9 consideration. 10 Q. Is it fair to assume that some of these 11 restrictions, specifically the four projects 12 located in North Myrtle Beach are designed to 13 encourage or protect economic considerations 14 within the city? 15 A. I believe that was the original intent of that 16 section, and yes. 17 Q. What about encouraging investment in the city 18 rather than the projects outside of the city? 19 A. Yes. 20 Q. What is the city's goal here with this 21 litigation, in your opinion? 22 MR. RICARD: Object to form. 23 A. I believe it's to achieve compliance with the 24 zoning ordinance. 25 Q. What will the city do with the property if it's	1 required to be turned over and ownership to cease 2 and desist? 3 MR. RICARD: Object to the form. 4 A. The city would not own the property if it was 5 turned over. We're not condemning it. So, I 6 don't know that we would have any say in how it's 7 used other than determining if a future owner 8 uses it in a way consistent with the zoning 9 ordinance. 10 Q. How would someone go about having the specific 11 ordinance changed to eliminate the ownership 12 restriction? 13 A. Any zoning text amendment can be proposed by 14 anyone. And what our typical practice is, we 15 advise people to talk to a City Council member 16 because they are ultimately the policy body of 17 the city, and see if council, if there is any 18 interest among the City Council in changing the 19 text. 20 And if Council says, yeah, I think that's 21 a reasonable request, then they would typically 22 direct staff to prepare that amendment. 23 Q. Do you know if any discussions have been had with 24 City Council regarding a text amendment to these 25 ordinances?

21 (Pages 81 to 84)

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1	A. Not that I'm aware of.	1	CERTIFICATE
2	Q. No further questions.	2	
3	MR. RICARD: I have no questions	3	I, the undersigned, Rita Rodriguez, Notary Public
4	either. Thank you for your time.	4	in and for the State of South Carolina, do hereby
5	-----	5	certify that the foregoing statement under oath was
6	(Time noted: 10:10 a.m.)	6	taken on the aforementioned date;
7	-----	7	That the within deponent was sworn to tell the
8		8	truth, and that the foregoing is an accurate
9		9	transcription of the testimony taken under oath;
10		10	That all exhibits entered herein are attached
11		11	hereto (if requested by counsel) and made a part of
12		12	this statement under oath.
13		13	I further certify that I am neither counsel nor
14		14	solicitor to any of the parties in said suit, nor
15		15	interested in the event of the cause.
16		16	In witness whereof, I have hereunto set my hand
17		17	and seal on July 20, 2022.
18		18	
19		19	
20		20	
21		21	_____ Rita Rodriguez
22		22	Notary Public for South Carolina
23		23	My Commission Expires: 07/8/2025
24		24	
25		25	

Page 87	
1	ERRATA SHEET
2	In Re: CITY OF NMB V SUN TRS OCEAN CLUB
3	PAGE LINE CORRECTION REASON
4	____
5	____
6	____
7	____
8	____
9	____
10	
11	____
12	
13	
14	
15	____
16	I, the undersigned, JAMES W. WOOD, JR., do hereby
17	certify that I have read the foregoing deposition and
18	that to the best of my knowledge said deposition is
19	true and accurate, with the exception of the
20	corrections listed above.
21	Date: _____ Signature: _____
22	
23	Subscribed and sworn to before me
24	this day of _____, 2022.
25	_____ NOTARY PUBLIC

22 (Pages 85 to 87)

City of North Myrtle Beach v. Sun TRS Ocean Club, LLC and Sun TRS Carolina Pines, LLC
Case No. 2021-CP-26-07489
PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

EXHIBIT G

TRANSCRIPT OF ZONING ADMINISTRATOR **BEN CALDWELL DEPOSITION**

In the Matter of:

CITY OF NORTH MYRTLE BEACH

VS.

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

Benjamin Caldwell

April 26, 2022



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Page 1	Page 2
IN THE COURT OF COMMON PLEAS FOR THE STATE OF SOUTH CAROLINA HORRY COUNTY DEPOSITION OF BENJAMIN CALDWELL CITY OF NORTH MYRTLE BEACH, Plaintiff, vs. CASE NO. 2021-CP-26-07489 SUN TRS OCEAN CLUB, LLC, AND SUN TRS CAROLINA PINES, LLC, Defendants. DEPONENT: BENJAMIN CALDWELL DATE: April 26, 2022 TIME: 8:57 AM LOCATION: CITY OF NORTH MYRTLE BEACH 1018 2nd Avenue South North Myrtle Beach, SC 29582 REPORTED BY: NANCY ENNIS TIERNEY, CSR (IL)	1 APPEARANCES 2 3 FOR THE PLAINTIFF: 4 NEXSEN PRUET, LLC BY: RHETT RICARD 205 King Street, Suite 400 Charleston, SC 29401 (843) 577-9440 Rricard@nexsenpruet.com 7 8 FOR THE DEFENDANTS: 9 WILLIAMS MULLEN BY: JOHN G. TAMASITIS 1230 Main Street, Suite 330 Columbia, SC 29201 (803) 567-4615 Jtamasitis@williamsmullen.com 12 13 14 15 16 17 ALSO PRESENT: Chris Noury-Attorney, City of Myrtle Beach 18 19 20 21 22 23 24 25
Page 3	Page 4
1 INDEX 2 3 Page 4 Witness Sworn 4 5 EXAMINATION 6 By Mr. Tamasitis 4 7 By Mr. Ricard 99 8 By Mr. Tamasitis 112 9 10 Certificate of Reporter 114 11 Deponent Correction Sheet 115 12 13 EXHIBITS 14 15 Page 16 Defendants' Exhibit Number 1 22 17 Defendants' Exhibit Number 2 23 18 Defendants' Exhibit Number 3 39 19 Defendants' Exhibit Number 4 39 20 Defendants' Exhibit Number 5 39 21 Defendants' Exhibit Number 6 63 22 Defendants' Exhibit Number 7 63 23 Defendants' Exhibit Number 8 63 24 Defendants' Exhibit Number 9 63 25 Defendants' Exhibit Number 10 91	1 BENJAMIN CALDWELL, having been first duly 2 sworn, testified as hereinafter set forth. 3 EXAMINATION 4 BY MR. TAMASITIS: 5 Q. Mr. Caldwell, my name is John Tamasitis. I 6 represent SUN TRS Ocean Club, LLC, and SUN TRS Carolina 7 Pines, LLC, in a lawsuit that has been brought against 8 them by the City of North Myrtle Beach. 9 I'm here to take your deposition, okay? 10 A. Okay. 11 Q. Have you ever had a deposition taken before? 12 A. One other time. 13 Q. Can you give me the details behind that? 14 A. A HOA was suing a management company, and there 15 were -- some building permits were taken out. We had an 16 active case for property management, building and 17 property appearance. 18 There was some rotten wood, some windows 19 that were unsealed, some roofing that needed improved, 20 so we were -- I was brought into it because I had issued 21 a letter requiring them to repair their buildings, some 22 of the buildings that were associated with the case, and 23 just questions were asked back and forth about, you 24 know, procedure. 25 Q. So you were deposed in your position as the

1 (Pages 1 to 4)

Page 5	Page 6
1 zoning administrator. 2 A. Assistant zoning administrator at that time. 3 Q. And what year was this? 4 A. I don't know for certain. 5 Q. Do you remember the names of the parties 6 involved? 7 A. I don't. I think Tilghman Beach was the name of 8 the group of multifamily buildings, but I don't remember 9 anything else. 10 Q. But you've given a deposition before, and I'll 11 just go over some ground rules for today. This is not 12 supposed to be an interrogation, and I'm not here to 13 trap you. 14 So we'll go through some of these, and then 15 if you've got questions, you can ask me as we go 16 throughout the day. 17 A. All right. 18 Q. There are a couple of things I need you to do. 19 First, please answer any questions if it calls for a yes 20 or a no. I know in normal conversations we do a lot of 21 uh-huhs and huh-huhs. If you could do yeses and noes 22 for the court reporter -- 23 A. Sure. 24 Q. -- to keep a clean record today, that would be 25 very helpful.	1 Also, please understand, as I said before, 2 none of my questions are here to trick you, and I do ask 3 a lot of poor questions. I am a Yankee. I talk too 4 fast. So if you need me to slow down, if you need 5 clarification, if you need me to repeat or rephrase a 6 question, please ask me, not your counsel, and I will do 7 my best to try to accommodate. 8 A. All right. 9 Q. If you answer a question, I'm going to assume you 10 understood it. Is that fair? 11 A. Yes. 12 Q. And if you need a break at any time, please let 13 me know. The one rule with a break, though, is if we do 14 have a break and you do have a conversation with your 15 counsel off the record about the substance of your 16 testimony, I'm allowed to ask you about that. So I 17 would recommend don't talk to your counsel about what is 18 going on in the deposition while we take a break. 19 A. Okay. 20 Q. Are you under any disability, alcohol, drugs or 21 medications today that would affect your ability to 22 testify honestly? 23 A. No. 24 Q. What did you do to prepare for today's 25 deposition?
Page 7	Page 8
1 A. Just looked over whatever documents we had, 2 reviewed the zoning ordinance. That's about it. 3 Q. What specific documents do you recall reviewing? 4 A. The initial document I guess was the complaint 5 that came in from the neighboring property and Jim 6 Shortle. I reviewed that. I reviewed the affidavit for 7 myself, and reviewed the zoning ordinance. 8 Q. And by "zoning ordinance", do you mean the entire 9 zoning ordinance or just the ones that are -- 10 A. Just the specific sections pertaining to this 11 case. 12 Q. In your own words, can you please explain to me 13 your understanding of the issues, the allegations in 14 this lawsuit? 15 A. Okay. So in reviewing this, the owners of the 16 property aren't -- or do not have a project within the 17 city of North Myrtle Beach, which is one of the 18 requirements to obtaining a special exception for a 19 cabana house. 20 So, to me, not owning a project within the 21 city of North Myrtle Beach that is not close to the 22 beach, they cannot operate a cabana house within the 23 city. 24 Q. Anything else? 25 A. They were operating the cabana house in ways that	1 could be injurious to the neighboring properties. It 2 was told to me that they were operating it in ways where 3 they were having DJs present, loud music, people going 4 to the cabana house, parking in the neighboring 5 property, refusing to move their cars. 6 They were having weddings there, wedding 7 receptions it was told to me. That could be injurious 8 to the neighboring property. 9 Q. Anything else? 10 A. That's all that is coming to mind at the moment. 11 Q. Let's go through some background here. 12 What is your full name for the record. 13 A. Benjamin Edward Caldwell. 14 Q. Do you have any aliases? 15 A. I do not. 16 Q. Any other names you go by? 17 A. No; Ben. 18 Q. What is your date of birth? 19 A. 12-18-1974. 20 Q. And the last four of your Social? 21 A. 1655. 22 Q. What is your current residential address? 23 A. 617 Ellsworth Court, Myrtle Beach, South 24 Carolina. 25 Q. Is that in Horry County?

2 (Pages 5 to 8)

Page 9 1 A. It is. 2 Q. How long have you resided at that address? 3 A. About nine years. 4 Q. And where were you born? 5 A. I was born in Pennsylvania. 6 Q. Where at? 7 A. Bedford County. 8 Q. Near Pittsburgh? 9 A. Not too far. 10 Q. How did you end up in Myrtle Beach? 11 A. I applied for the job of assistant zoning 12 administrator, got that job and moved here. 13 Q. What is your marital status? 14 A. Married. 15 Q. What is your wife's name? 16 A. Karly. 17 Q. What is her occupation? 18 A. Teacher. 19 Q. Do you have any children? 20 A. I do. 21 Q. How many? 22 A. One. 23 Q. What is his or her age? 24 A. Six. 25 Q. And does he or she live with you?	Page 10 1 A. Yes. 2 Q. Do you have any relatives by blood or marriage 3 that live in Horry County? 4 A. By marriage and by blood, yes. 5 Q. What are their last names? And the reason I ask 6 that -- I know it's a weird question -- is because in 7 case there is a jury pool, we don't want someone related 8 to you. 9 A. Karly Caldwell by marriage; Olin Caldwell, my 10 son. My mother lives in Horry County, Mary Pidich and 11 her husband, John Pidich. 12 Q. And how do you spell Pidich? 13 A. P-i-d-i-c-h. 14 Q. And where was your high school education at? 15 A. Uniontown, Pennsylvania. 16 Q. And what college did you attend? 17 A. California University of Pennsylvania. 18 Q. Did you attend any technical schools? 19 A. No. 20 Q. How about a graduate degree? 21 A. Yes, same college. 22 Q. What was your graduate degree in? 23 A. Regional planning. 24 Q. What goes into that degree? 25 A. A lot of geography, city planning.
Page 11 1 Q. Are you using that degree here in your current 2 employment? 3 A. I am. 4 Q. I saw on the website for North Myrtle Beach that 5 you are designated as an AICP. What is that? 6 A. That's American Institute of Certified Planners. 7 Q. What is that? 8 A. It's a professional organization for city 9 planning, regional planning. 10 Q. It's a certification of some sort? 11 A. I'm not sure if you would classify it as a 12 certification. It's a professional organization. 13 Q. How did you get that? 14 A. Applied, wrote an essay, and then I pay a monthly 15 due. 16 Q. Is there any training that you had to take in 17 order to receive that? 18 A. There is continuing education training that is 19 required. 20 Q. And how often do you have to do that continuing 21 education? 22 A. I think it's 32 hours every two years. 23 Q. Those are classes you take online, or you go take 24 classes there? 25 A. Both.	Page 12 1 Q. Are there conferences associated with those? 2 A. There are. 3 Q. Are you involved in any other civic 4 organizations? 5 A. No. 6 Q. How about a church affiliation? 7 A. No. 8 Q. Any past military service? 9 A. No. 10 Q. Have you ever been arrested? 11 A. No. 12 Can I go back to the blood or marriage 13 question? I do have a sister-in-law, Kristy Mauro, who 14 also resides in Horry County. 15 Q. Okay. What has been your employment status and 16 history for the last ten years? 17 A. I've worked for the City of North Myrtle Beach 18 for the past -- more than the past ten years. 19 Q. How long? 20 A. About 17 years. 21 Q. What positions have you been in? 22 A. Assistant zoning administrator until 2020. 23 Q. So when did you start in that position as 24 assistant zoning administrator? 25 A. I don't know the exact date. It was in 2005.

3 (Pages 9 to 12)

Page 13 1 Q. And then is it your testimony that you became the 2 zoning administrator in 2020? 3 A. Yes. 4 Q. As assistant -- or what are the differences -- 5 strike that. 6 What is your relationship with Paul Blust? 7 A. Paul used to be the zoning administrator. I 8 worked with him for many years until he retired. 9 And then I applied for the position as 10 zoning administrator, and got that on an interim basis 11 for six months, and then was named zoning administrator. 12 Q. How long was Paul Blust the zoning administrator 13 for the City? 14 A. I would be guessing if I gave you an answer, but 15 over 25 years. 16 Q. So he was the zoning administrator when you came 17 on at first as the assistant zoning administrator? 18 A. Yes. 19 Q. And was he your boss? 20 A. He was. 21 Q. Would you classify him as a mentor? 22 A. Yes. 23 Q. What are some of the responsibilities you have as 24 the zoning administrator? 25 A. Interpreting, administrating and enforcing the	Page 14 1 zoning ordinance. 2 Q. What about as the assistant zoning administrator? 3 A. Assisting in doing that. 4 Q. Is it part of your responsibilities to be 5 well-versed in -- I will call them the zoning ordinances 6 for the City of North Myrtle Beach. 7 A. Yes. 8 Q. And what are like the day-to-day activities you 9 perform? 10 A. I review permits for new commercial construction, 11 review plans. Our site plan process is very detailed. 12 If somebody wants to do a new development within the 13 city, they first submit a site plan, and on that site 14 plan there is all the engineering, zoning things, 15 building department things, planning things that all 16 need to be reviewed. I review that. 17 I field a lot of phone calls pertaining to 18 all zoning related issues within the city, and then talk 19 with anyone that comes into the City Hall with questions 20 about zoning. 21 Q. Do you have a relationship with other zoning 22 administrators in the state? 23 A. No, not really. 24 Q. Do you consider yourself the voice for the City 25 on zoning issues?
Page 15 1 MR. RICARD: Objection, form. 2 A. Partially, because I do have a supervisor, and 3 from time to time I go to him and try to feel out if I'm 4 thinking that the zoning ordinance is -- what is a 5 better way to say it -- if I'm having a difficult time 6 interpreting a certain zoning ordinance, I will go to my 7 supervisor and say, hey, what do you think about this, 8 or from time to time I will go to the City attorney and 9 say, hey, what do you think, do you think I'm looking at 10 this the right way, and then I would give that advice 11 out to whoever is asking the question. 12 Q. (BY MR. TAMASITIS): Who is your supervisor? 13 A. Jim Wood. 14 Q. What is his position? 15 A. He's the director of planning and development. 16 Q. So how does it work? So you're the zoning 17 administrator, and then there is Jim Wood, and who is 18 above him? 19 A. The City manager. 20 Q. Do you make preliminary zoning decisions on 21 behalf of the City? 22 A. Yes. 23 Q. And how does that process work? 24 A. It can work in many different ways. Would you 25 like an example of one?	Page 16 1 A. Sure. 2 A. If someone calls and says, hey, I want to put a 3 new sign on my building, how big can it be? Well, I 4 will see what zoning district that building is located 5 in. I will review the zoning ordinance many times 6 because I don't want to give a false answer. 7 I will then say -- you know, get the 8 information I need from them to make the determination 9 on what the size of that sign can be and then relay that 10 information to them. 11 Q. What if someone is purchasing a property and they 12 want to know if there are any zoning issues on the 13 property? Would they contact you? 14 A. Yes, in many cases. 15 Q. How would that typically work? 16 A. Typically, I would get an email from someone 17 saying, hey, I need a zoning verification letter for 18 this property. 19 Q. What is a zoning letter? 20 A. A zoning letter usually is what the property is 21 zoned, and then if the current use is a use that is 22 permitted by right. 23 Q. What do you mean usually? 24 A. Well, the zoning letter requests come in from all 25 different people, and a lot of times they have different

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Page 17	Page 18
1 wording. 2 So usually what I do is I will respond and 3 say, well, can you give me exact -- can you give me back 4 a form letter stating what you need to know, and then I 5 will plug in the relevant information and send it back 6 to them. 7 Q. Does the City rely on your zoning decisions when 8 it's making its own decisions? 9 MR. RICARD: Objection, form, speculative. 10 A. I believe so. 11 Q. (BY MR. TAMASITIS): Do citizens rely on your 12 zoning decisions? 13 MR. RICARD: Objection, form, speculation. 14 A. I believe so. 15 Q. (BY MR. TAMASITIS): When you're making a zoning 16 decision, how are those issued? 17 A. It could be a phone call. It could be in person. 18 It could be a letter. It could be a text message -- not 19 a text message. It could be email. 20 Q. Are there ways to appeal your decision? 21 A. Yes. 22 Q. And how is that done? 23 A. Through the Board of Zoning Appeals, an appeal 24 form. 25 Q. If you make a decision -- say you issue a zoning	1 letter and it's not appealed, what is the effect of that 2 decision? 3 A. I have not had a zoning letter appealed. 4 Could you maybe ask me a different question? 5 Q. If you make any zoning decision, then what is the 6 effect of that decision? Is that the City stands on the 7 zoning issue? 8 MR. RICARD: Objection to form, speculation. 9 A. Yes. 10 Q. (BY MR. TAMASITIS): How about if someone calls 11 the City and has a question about the Zoning Board's 12 interpretation? Does that go to you? 13 A. It probably would go to me. It could go to Elton 14 Farmer, who is our zoning technician. 15 Q. What does a zoning technician do? 16 A. He reviews new construction permits for 17 residential, and he reviews trees for tree permits, and 18 he fields a lot of questions at the front desk, and also 19 on the phone. 20 Q. So what is, I guess, the dividing line of 21 responsibility between your making decisions of the 22 zoning interpretation and the zoning technician's? 23 MR. RICARD: Objection, form. 24 A. I think if it's a more simple question that we 25 get more regularly, like how tall can a single-family
Page 19	Page 20
1 house be in R-1 zoning, Elton can certainly answer that 2 question. 3 But if it becomes something more technical 4 that maybe doesn't come up as much, he always comes to 5 me, or a good majority of the time comes to me and says, 6 hey, what is your feeling on this or what do you think 7 about this, and then I will try to answer that question. 8 Q. (BY MR. TAMASITIS): Since you have been part of 9 the zoning process for the City, so 2005 forward, has 10 there always been a zoning technician? 11 A. No. 12 Q. When did that start? 13 A. That started after Paul Blust retired and I 14 applied to be the zoning administrator. That was during 15 COVID time, and the City was lower on resources, from my 16 understanding than what we usually were, and we weren't 17 able to fill my previous position as assistant zoning 18 administrator, so Jim Wood thought it would be an easier 19 ask to City administration if we could find a 20 lower-level position than what the zoning -- an 21 assistant zoning administrator was, so we created the 22 position of zoning technician. 23 Q. So would it be fair to say that the zoning 24 technician is essentially doing the same role as the 25 assistant zoning administrator for less pay?	1 A. No. 2 Q. How are they different? 3 A. Less responsibility than assistant zoning 4 administrator. 5 Q. Is there currently an assistant zoning 6 administrator? 7 A. No. 8 Q. Were you the last assistant zoning administrator 9 for the City? 10 A. Yes. 11 Q. And that was until 2020, correct? 12 A. Yes. 13 Q. Was -- it's Elton Farmer, correct? 14 A. Yes. 15 Q. Was Mr. Farmer involved at all in the cabana 16 house and the zoning situation that we are discussing 17 today? 18 A. I don't think so. 19 Q. Was anyone else involved, in zoning, involved in 20 this litigation? 21 MR. RICARD: Objection, form, speculation. 22 A. Paul Blust and myself. 23 Q. (BY MR. TAMASITIS): And that's the only two? 24 A. Yes, sir. 25 Q. Okay. I want to go back to this zoning letter.

5 (Pages 17 to 20)

Page 21 1 It's my understanding that a zoning letter 2 is something drafted by the zoning administrator or the 3 Zoning Board that informs a property owner, a lender, a 4 prospective buyer about the zoning conditions and the 5 zoning laws for the particular property based on the 6 zoning ordinances in place at the time, and may even 7 include past history of the site. 8 Is that a fair representation of what a 9 zoning letter is there for? 10 A. All of those things can be on a zoning letter. 11 People have asked for those in the past. 12 Q. And then a citizen can submit a zoning letter to 13 you for the determination of certain uses or planned 14 uses for a property? 15 A. I don't think I have received a zoning letter 16 from an individual in the past. 17 Q. But someone would maybe request that information 18 from you? 19 A. Yes. 20 Q. And you would return it back in a zoning letter? 21 A. Correct. 22 Q. Okay. I just want to make sure I understand 23 this. 24 And can a citizen then rely on the zoning 25 administrator's letter, zoning letter, as to what they	Page 22 1 can do with their property from a zoning perspective? 2 MR. RICARD: Objection to form, speculation. 3 A. That is my understanding, yes. 4 Q. (BY MR. TAMASITIS): Okay. We are going to go 5 through -- I just want to touch on some definitions here 6 for our conversation about the current case. 7 When I say property, I'm referring to Lot 1, 8 Block 18-A Tilghman, which is located in the city of 9 North Myrtle Beach. So that's the property that the 10 cabana house is on. 11 So I'm going to try my best to distinguish 12 between property and cabana house, okay? 13 A. All right. 14 Q. Is that fair? 15 A. Yes. 16 (Defendants' Exhibit No. 1 was marked for 17 identification.) 18 Q. (BY MR. TAMASITIS): Let's go through this first. 19 I probably should have done this in the beginning. 20 Do you recognize the document I just handed 21 to you? 22 A. Yes. 23 Q. And what is it? 24 A. It's a notice to take this deposition. 25 Q. And this is for your deposition that you are
Page 23 1 sitting for here today, correct? 2 A. Yes. 3 (Defendants' Exhibit No. 2 was marked for 4 identification.) 5 MR. RICARD: If it's okay, we're going to 6 request a Rule 30 recess just so I have an opportunity 7 to review this with him. 8 MR. TAMASITIS: Yes. 9 (A recess was taken.) 10 Q. (BY MR. TAMASITIS): Mr. Caldwell, I just handed 11 you what we have marked as Exhibit Number 2. Do you 12 recognize that document? 13 A. I do. 14 Q. And is that Section 23-2 of the code of 15 ordinances for the City of North Myrtle Beach? 16 A. Yes. 17 Q. And I want to point your attention to 18 three-quarters of the way down the first page where it 19 says "cabana house". Do you see what I'm referring to? 20 A. I do. 21 Q. If you could read that for me, please, out loud? 22 A. "Cabana house: A structure utilizing 23 single-family design and development standards in close 24 proximity to the oceanfront to be used by projects in 25 North Myrtle Beach not located near the ocean. The use	Page 24 1 of a cabana house shall be limited to drop-off and 2 parking area, bathing, changing clothes and similar 3 uses. 4 "Additionally, it can be used as an 5 occasional guest quarters and similar residential uses. 6 A cabana house shall be owned and maintained by a 7 homeowner's association with a maintenance agreement 8 submitted and approved by the planning department." 9 Q. Thank you. 10 A. You're welcome. 11 Q. Would you agree with me that this definition of 12 cabana house in Section 23-2 of the code of ordinances 13 for the City of North Myrtle Beach is at issue in this 14 litigation? 15 A. Yes. 16 Q. Do you know what the history is of this 17 definition, how it came to be? 18 A. That's probably -- 19 MR. RICARD: Objection, speculation. 20 A. That's probably a better question for Paul Blust, 21 who you will be talking to this afternoon. I believe he 22 is the author of the ordinance. 23 Q. (BY MR. TAMASITIS): Let's break down this 24 definition, and I want your interpretation of the 25 definition as the zoning administrator.

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Page 25	Page 26
1 The first part here says, "A structure 2 utilizing a single-family design and development 3 standards", is that correct? 4 A. Yes. 5 Q. What does that mean to you? 6 A. To me, that means that the building would appear 7 to be somewhat like a single-family home. And the 8 development standards, I take that to mean that when 9 we're going to the permitting process we would review it 10 to make sure it meets all the minimum standards of 11 single-family construction within the R-4 district. 12 Q. "And in close proximity to the oceanfront", what 13 does that mean to you? 14 A. That would mean, to me, probably first or second 15 row, either oceanfront or across Ocean Boulevard from 16 the oceanfront. 17 Q. So we are talking within the first two streets of 18 the ocean? 19 A. Yes. 20 Q. And then "to be used by projects in North Myrtle 21 Beach not located near the ocean", what does that mean? 22 A. From my understanding -- and, again, I think Paul 23 could better answer the question -- but I believe it was 24 Tidewater Plantation, which is a large multi-use planned 25 development district within the city that is off of	1 Little River Neck Road, which is a few miles, I would 2 assume, from the beach. 3 They wanted a place where their residents 4 could use an amenity on the oceanfront, and I believe at 5 that time they approached the City about if they could 6 do that or not. 7 And then, through those discussions, I 8 believe this ordinance was created defining cabana 9 houses and placing them as a special exception use 10 within the R-4 district. 11 Q. When it says "projects", what does that mean? 12 A. To me, that means a residential development. 13 Q. So a development is a project. So that's all it 14 can be, is a development? 15 MR. RICARD: Objection, speculation. 16 A. I hate to say ever or always, because there could 17 be maybe a different type of project that had a 18 residential component to it and they wanted the amenity 19 on the oceanfront. And if they weren't located near the 20 ocean, I think we could probably go through the process 21 of special exception to see if it could work. 22 But as far as never or always, I don't like 23 to use those terms because I don't know exactly what 24 could happen in the future. 25 Q. (BY MR. TAMASITIS): Hypothetically, as the
Page 27	Page 28
1 zoning administrator, if you were presented with an RV 2 park located within the city of North Myrtle Beach, 3 would that be considered a project? 4 MR. RICARD: Objection, speculation. 5 A. I believe so, yes. 6 Q. (BY MR. TAMASITIS): You do believe that would be 7 considered a project? 8 A. I do, yes. 9 Q. And would be covered by this ordinance? 10 A. Yes. 11 Q. The other question I have about this specific 12 piece, "to be used by projects in North Myrtle Beach not 13 located near the ocean", why the geographic limitation 14 to be -- it has to be within North Myrtle Beach? 15 MR. RICARD: Objection to form, speculation. 16 A. I don't know. I wasn't the author of the 17 ordinance. I don't know. 18 Q. (BY MR. TAMASITIS): What is your opinion? 19 A. Why -- 20 MR. RICARD: Objection to form, relevance. 21 A. Why it was limited to projects in North Myrtle 22 Beach? 23 Q. (BY MR. TAMASITIS): Yes. 24 A. I don't know. 25 Q. I will represent to you that it says the purpose	1 of the zoning ordinance in another section of the code 2 is, quote, "To guide the development in accordance with 3 existing and future needs and to promote the public 4 health, safety, morals, convenience, order, appearance, 5 prosperity and general welfare of the community." 6 Does this definition satisfy that 7 requirement? 8 A. I think so. 9 Q. Does this definition requiring the project to be 10 in North Myrtle Beach, in your view as the zoning 11 administrator, discriminate against projects outside of 12 North Myrtle Beach that may want to use a cabana house 13 in the city? 14 MR. RICARD: Objection to form. 15 A. I don't know. 16 Q. (BY MR. TAMASITIS): How does the geographic 17 limitation in North Myrtle Beach serve the purpose of 18 the public health, safety, morals, order, appearance or 19 prosperity of North Myrtle Beach? 20 MR. RICARD: Objection, form. 21 A. Could you say that again? I'm sorry. 22 Q. (BY MR. TAMASITIS): Sure. How does the 23 geographic limitation that the project has to be in 24 North Myrtle Beach serve any purpose related to the 25 public health, safety, morals, order, appearance or

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Page 29 1 prosperity of North Myrtle Beach? 2 A. I don't know that it does. 3 Q. So is it arbitrary? 4 A. I don't know. 5 Q. Is the reason that there is a geographic 6 limitation for projects to be located in North Myrtle 7 Beach in order to have a cabana house an avenue for the 8 City to protect its economy? 9 MR. RICARD: Objection to form. 10 A. I don't know. 11 Q. (BY MR. TAMASITIS): Let's go to -- it says -- 12 okay, starting with that sentence that says 13 "additionally". 14 "Additionally, it can be used as an 15 occasional guest quarters and similar residential uses." 16 Do you see that? 17 A. I do. 18 Q. What does similar residential uses mean? 19 A. Again, I don't know. 20 Q. How about a barbecue? 21 A. How about there being a barbecue grill there that 22 somebody could use? 23 Q. Well, it says similar residential uses. At my 24 house, I will have barbecues with friends. 25 Could you do that at a cabana house?	Page 30 1 A. I would think so. 2 Q. How about weddings? 3 A. I don't think there would be a problem with 4 having a wedding there. A wedding reception maybe could 5 be a little bit injurious to the neighbors. 6 Q. How so? 7 A. Loud music, late night. 8 Q. So you could have a wedding reception there, it 9 would just have to be really quiet and end at 6:00 at 10 night? 11 MR. RICARD: Objection to form. 12 A. I have never regulated through the zoning 13 ordinance where a wedding reception happens. 14 Q. (BY MR. TAMASITIS): Well, would that fall under 15 similar residential uses? 16 A. It may. 17 Q. As long as it's not injurious to an adjoining 18 property, that could be a similar residential use 19 captured by this definition? 20 A. I think so. 21 Q. Are there any zoning ordinances in the city that 22 prohibits an owner of a residential property from 23 renting his property out for, say, a private wedding 24 party or a graduation party? 25 MR. RICARD: Objection, speculation.
Page 31 1 A. What I would say is if someone purchased -- say 2 it's a single-family dwelling, and the primary purpose 3 of that dwelling was to have parties there, to have 4 weddings there, to have not residential use but more of 5 a commercial use as a part of the establishment, I think 6 that would be against the zoning ordinance in certain 7 districts. 8 Q. (BY MR. TAMASITIS): Would that be because it 9 would be operating as a business? 10 A. Correct. 11 Q. I know this comes up in some other counties that 12 I've been dealing with where you have these old 13 farmhouses that are being used for weddings and wedding 14 receptions and folks rent out their place like Airbnb 15 style to have a wedding reception there, would that be 16 allowed within the city of North Myrtle Beach if it's a 17 one-off kind of thing? 18 MR. RICARD: Objection. 19 A. If you were to rent a house in North Myrtle Beach 20 for a week and you had a wedding there, I don't think 21 there is any issue with that. 22 But if that house is used only for 23 weddings and events, then I think that would be an 24 inappropriate use. But, as you said, one-off, I don't 25 see any problem with that.	Page 32 1 Q. (BY MR. TAMASITIS): The next sentence, "A cabana 2 house shall be owned and maintained by a homeowner's 3 association", what does this mean? 4 A. It means the cabana house shall be owned and 5 maintained by a homeowners association. 6 Q. Why is the ownership restricted to having to be 7 owned by a homeowners association? 8 MR. RICARD: Object to form, speculation. 9 A. I don't know. 10 Q. (BY MR. TAMASITIS): Do you know what the purpose 11 is behind that? 12 A. I will go back to I think it's probably a better 13 question for Paul Blust, who is the author of the 14 ordinance. 15 Q. Do you know how limiting the ownership to a 16 homeowners association promotes, as we discussed before, 17 the public health, safety, morals, welfare of the city 18 of North Myrtle Beach? 19 A. I don't. 20 Q. If property that has been zoned for a cabana 21 house as a special exception is owned by a homeowners 22 association and then sold to an individual, is the 23 recourse for the City, to remedy that violation, to 24 divest the property owner of that cabana house? 25 MR. RICARD: Objection, form, speculation.

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Page 33 1 A. Can you define divest? 2 Q. (BY MR. TAMASITIS): Taken away from them. 3 A. I don't think that that is -- well, if an 4 individual buys a cabana house, and that individual is 5 not a homeowners association, then I don't see how they 6 could continue to own that property unless there was a 7 change to the ordinance to take away the requirement 8 that it's a project within the city of North Myrtle 9 Beach, a homeowners association. 10 The ordinance would have to change in order 11 for that individual to remain the owner of the property. 12 Q. So if they incorporated a homeowners association 13 to own the property, they would be fine? 14 A. "They"? 15 Q. The individual owning the property. 16 A. If they were a homeowners -- if they were a 17 homeowners association and had a project within the city 18 not near the oceanfront, they could. 19 Q. So in the situation that we were just talking 20 about, if the individual says I don't want to have a 21 homeowners association, I'm just going to own this 22 individually, what would the City then do to the 23 property? 24 MR. RICARD: Objection to form, speculation. 25 A. I can only assume that we would do the process	Page 34 1 that we are doing now. 2 Q. (BY MR. TAMASITIS): Sue them for the property? 3 MR. RICARD: Objection to form. 4 A. Let them know that they are in violation of the 5 zoning ordinance. 6 Q. (BY MR. TAMASITIS): And if they refuse to 7 comply, then the City will take steps to take the 8 property from the people owning the cabana house? 9 MR. RICARD: Object to form, speculation. 10 A. I don't know what the next step would be. 11 Q. (BY MR. TAMASITIS): What do you think the next 12 step should be? 13 MR. RICARD: Objection to form, speculation. 14 A. What do I think it should be, my personal 15 opinion? 16 Q. (BY MR. TAMASITIS): Yes. You, Ben Caldwell, 17 what is your personal opinion? 18 A. My personal opinion, I think that the owners of 19 the property should request City Council to review the 20 ordinance and see if they would be willing to put 21 forward a text amendment to change the ownership and the 22 location requirements of the special exception. 23 Q. What is a text amendment? 24 A. It's a process to change the text of a certain 25 zoning ordinance.
Page 35 1 Q. How does that process work? 2 A. Generally, someone that is interested in changing 3 the zoning ordinance would approach a City Council 4 member and try to find a champion, if you will, of a 5 text change, and then City Council could instruct staff 6 to write a zoning ordinance change, and then we would 7 take that proposed change to the Planning Commission. 8 They would review it and make a 9 recommendation to City Council, and then City Council 10 would vote on it or amend it or -- I guess either amend 11 it or vote on it. 12 Q. And then the second part of that sentence, "A 13 cabana house shall be owned and maintained by a 14 homeowners association with a maintenance agreement 15 submitted and approved by the planning department." 16 What is a maintenance agreement? 17 A. I can only assume it would be a schedule for 18 grounds cutting and tree clipping. I think property 19 maintenance overall is just an agreement on how they 20 will maintain the property. 21 Q. Have you ever seen a maintenance agreement for a 22 cabana house in the city? 23 A. I have not? 24 Q. But there are other cabana houses in the city, 25 right?	Page 36 1 A. There are. 2 Q. And who would they then submit their maintenance 3 agreement to if there was one? 4 MR. RICARD: Objection, speculation. 5 A. It says planning department here, and I think 6 that may be a broad statement. It would probably go to 7 the zoning administrator with the other paperwork filed 8 for the special exception. 9 Q. (BY MR. TAMASITIS): And it's your testimony that 10 you have never seen a maintenance agreement for another 11 cabana house in the city? 12 A. I can't recall seeing one. 13 Q. What if -- well, in this situation, the 14 allegation is my client is not a homeowners association 15 but they own a cabana house. 16 Could they then sell the property to a 17 homeowners association? Would that be legal within the 18 city zoning ordinance? 19 MR. RICARD: Object to form, speculation. 20 A. I believe so, if that homeowners association is 21 for a project within the city, not close to the beach. 22 Q. (BY MR. TAMASITIS): When a property is sold that 23 is subject to a special exception like a cabana house, 24 does the grantee of that property have to apply for 25 another special exception to keep the cabana house?

Page 37 1 A. I believe they should, yes. 2 Q. Okay. You believe they should? 3 A. Yes. 4 Q. Is it required by the zoning code? 5 A. I don't know if it's written that way anywhere. 6 But if it's a new location, I believe the Board of 7 Zoning Appeals should have an opportunity to review the 8 location, to obtain the maintenance agreement, and to 9 have all the other things discussed. 10 Q. When you say "new location", what new location 11 are you referring to? 12 A. If your clients wanted to sell to a homeowners 13 association within the city, not located near the beach, 14 I think that that homeowners association should apply 15 for a special exception to the Board of Zoning Appeals 16 so that the board can verify that they meet all the 17 criteria of a special exception. 18 Q. So when you say new location, you're not 19 referring to the new location of the cabana house, 20 you're referring to the new location of the project 21 within North Myrtle Beach? 22 A. Yes. 23 Q. But, again, that is something they should do, but 24 it's not written anywhere in the zoning ordinance to 25 your knowledge?	Page 38 1 A. To my knowledge, it's not written that way. 2 Q. When you say "that way" -- 3 A. Well, I mean, I don't think there is any text -- 4 well, there isn't any text that says when a property 5 changes hands the new homeowners association shall apply 6 for a special exception. That is not written anywhere. 7 Just in reading the requirements for a 8 special exception, I think it's place specific. So I 9 think if the homeowners association wanted to -- if your 10 client wanted to sell to another homeowners association 11 for a project within the city, I think they could do 12 that, but I think that homeowners association would need 13 to apply for the special exception. 14 Q. And just so I'm getting this definition clear, if 15 in this situation SUN TRS Ocean Club transferred title 16 of the property, including the cabana house, to a 17 developed HOA, there would still be an issue with this 18 because the RV park is located outside of the city of 19 North Myrtle Beach, correct? 20 A. Correct. 21 Q. And just so we are all clear on this, are you 22 aware of where the RV park that is at issue in this case 23 is located? 24 A. Yes. 25 Q. Where is it at?
Page 39 1 A. It's on Highway 90. 2 Q. In Conway? 3 A. I believe so. 4 Can I grab a drink of water? 5 MR. TAMASITIS: Sure. 6 (A recess was taken.) 7 (Defendants' Exhibit Nos. 3, 4 and 5 were 8 marked for identification.) 9 Q. (BY MR. TAMASITIS): Mr. Caldwell, if you could 10 turn to Exhibit Number 3, which is the document entitled 11 Section 23-22, R-4 Resort Residential District. 12 Do you see that? 13 A. Yes. 14 Q. Could you read section -- or Subsection 1 that 15 starts with "purpose"? 16 A. Yes. "Purpose. The purpose of this district is 17 to provide for the orderly development of certain areas 18 within the community where both year-round and seasonal 19 or resort housing may be developed and where, because of 20 proximity to the ocean, such mixed development would 21 promote year-round use of public facilities, and permit 22 housing choices in response to market demands, but not 23 at the expense of ocean visibility and access by the 24 community." 25 Q. Thank you. In your own words, can you put into	Page 40 1 your own words what the purpose of this Section 23-22 2 is? 3 A. I believe the purpose of this section is to have 4 a land use classification that allows a mix of uses, and 5 also protects the oceanfront. 6 Q. Are there properties in North Myrtle Beach that 7 are zoned in the R-4 residential district that are owned 8 by people who do not reside in North Myrtle Beach? 9 A. Yes. 10 Q. And are some of those investment properties? 11 A. Yes. 12 Q. They are rented out to other folks? 13 A. Yes. 14 Q. Are you aware of whether any of the condominiums 15 in the Sea Cloisters I or II are owned by folks who do 16 not reside in North Myrtle Beach? 17 MR. RICARD: Objection to form, speculation. 18 A. I do not know. 19 Q. (BY MR. TAMASITIS): Do you know whether any of 20 the condominiums in Sea Cloisters I or II are rented out 21 to folks? 22 MR. RICARD: Objection, speculation. 23 A. No. 24 Q. (BY MR. TAMASITIS): All right. Turn to 25 Subsection 4 of this ordinance entitled Special

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1 Exceptions. 2 How does this special exceptions process 3 work in the R-4 residential district? 4 A. Someone, or a party, would apply for a special 5 exception for a particular piece of property within the 6 R-4 to the Board of Zoning Appeals. 7 Q. And where does that -- how does the application 8 process track through the City? 9 A. Someone would fill out an application and submit 10 it to the zoning administrator. The zoning 11 administrator would advertise the request, and then the 12 Board of Zoning Appeals would hold their meeting and 13 they would, presumably, take action on the request. 14 Q. So by "take action", vote it up or down? 15 A. Right. 16 Q. And where would appeals from the Board of Zoning 17 Appeals go to? 18 A. They would go to the zoning administrator, who 19 would also advertise that request, and then the board 20 would hear the appeal. 21 Q. And so if you're appealing a decision by the 22 Board of Zoning Appeals for a special exception, where 23 would that go? 24 A. That would go to the Circuit Court. 25 Q. And for special exceptions in the R-4 District,	1 are you only allowed to have special exceptions that are 2 identified in Subsection 4? 3 A. I would in the R-4 District, yes. 4 Q. And Subsection (d) is for cabana houses, correct? 5 A. Yes. 6 Q. And it says, "Cabana houses subject to the 7 following:" 8 Are these additional requirements that a 9 cabana house be granted a special exception? 10 A. Yes. The board would need to find that the 11 request meets all of this criteria. 12 Q. Okay. And the first one is Number 1, "That a 13 homeowner's association shall have been established for 14 the project and a maintenance agreement has been 15 submitted to the planning department", right? 16 A. Correct. 17 Q. And that is similar language as in the definition 18 of cabana house, correct? 19 A. Correct. 20 Q. When I read through these -- I believe there are 21 seven different requirements for a cabana house. 22 There is nothing in this subsection of the 23 zoning ordinance that talks about ownership 24 requirements, is that correct? 25 A. Let me read through them just to make sure.
Page 43	Page 44
1 Q. Absolutely. 2 A. There is not. 3 Q. Why not? 4 MR. RICARD: Objection, speculation. 5 A. I don't know. 6 Q. (BY MR. TAMASITIS): Did Paul Blust write this 7 section of the zoning ordinance? 8 MR. RICARD: Objection, speculation. 9 A. I can only assume, yes, because he wrote the 10 ordinance that defined cabana house, so the cabana house 11 wouldn't be listed as a special exception prior to that 12 time. 13 Q. (BY MR. TAMASITIS): There is also a requirement 14 here in Number 2, "That at least eight parking spaces 15 per zoning standards be established on site and that 16 more spaces may be required by the board if there is no 17 other means to limit the number of cars traveling to the 18 property provided such as a shuttle service to and from 19 the property to the project." 20 Did I read that correctly? 21 A. Yes. 22 Q. Can you explain to me the reason for this 23 provision? 24 A. Do you want my guess? 25 Q. Yes.	1 A. Okay. I would think that whoever wrote this 2 special exception requirement assumed that a minimum, of 3 eight spaces would be okay, it would be enough parking 4 to provide adequate parking for a cabana house, but if 5 there wasn't something -- if there wasn't a shuttle 6 service and there wasn't maybe a gate to limit the 7 amount of cars, then a shuttle service would be needed. 8 Q. Is parking an issue in the city of North Myrtle 9 Beach that would require this subsection? 10 A. I think parking could be an issue. I don't know 11 if it is all over the city, but oceanfront parking is 12 always something that can be an issue. 13 Q. Number 3 says, "That the use of the house be 14 limited to bathing and change of clothing facilities, 15 and occasional use as guest quarters and other similar 16 uses." Do you see that? 17 A. Yes. 18 Q. What do other similar uses mean to you? 19 A. Let's see. Perhaps a barbecue, like you 20 mentioned, or a baby shower or something like that. 21 Q. Okay. Would it be fair to say something that you 22 would typically do in a single-family home would be 23 consistent with similar uses? 24 A. I believe that cabana houses has that, but less 25 intensive than a single-family house could be. But,

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1 yes, for the most part. 2 Q. Number 4, "That the special exception will be in 3 substantial harmony with the area in which it is to be 4 located." Do you see that? 5 A. Yes. 6 Q. What does substantial harmony mean? 7 A. I think it means that it's supposed to be a use 8 that is very low intensity, you know, not something 9 where there is a lot of people staying there, you know, 10 and having a lot of parties, having a lot of events, but 11 more something that would seem like a residential 12 neighborhood, just like a typical single-family house. 13 Q. Is it the special exception itself that must be 14 in substantial harmony or the use of the special 15 exception? 16 A. To allow the use of a cabana house, a special 17 exception is required. 18 Q. So the use of the cabana house is what needs to 19 be substantial harmony with the rest of the 20 neighborhood? 21 A. Yes. 22 Q. Number 5, "That the special exception not be 23 injurious to the adjoining property." 24 Did I read that right? 25 A. Correct, yes.	1 Q. Give me some examples of what could be injurious 2 to the neighboring property. 3 A. I think late night loud music, people that are 4 visiting the cabana house parking on neighboring 5 properties, refusing to move their vehicles. 6 I heard of a fist fight that occurred 7 between a cabana user and someone either staying or 8 living at Sea Cloisters, I don't know if it was I or II, 9 that I certainly think could be injurious. 10 Q. Depreciation of property values? 11 A. I don't know about that. Depreciation of 12 property values would be injurious, I would think. 13 Is that what you were asking? 14 Q. Yes. 15 A. Yes. 16 Q. So if a cabana house comes into existence and the 17 use of it is devaluing the property next door, that you 18 would consider an injurious issue? 19 A. I would, yes. 20 Q. Number 6, "That the special exception will not 21 discourage or negate the use of the surrounding property 22 for use or uses permitted by right", do you see that? 23 A. Yes. 24 Q. What does that mean to you? 25 MR. RICARD: Objection.
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1 A. I think that means that if the board found that 2 the placing of a cabana house would make uses in the 3 surrounding property -- I'm sorry. 4 If the board thought the placing of a cabana 5 house or the siting of a cabana house would make the 6 surrounding properties discouraging for potential buyers 7 or potential owners, that they would not want to approve 8 the special exception. 9 Q. (BY MR. TAMASITIS): So, again, going back when 10 we were initially discussing this section of the 11 ordinance, or to the code, this is what the Board of 12 Zoning Appeals is going to look at when it's going to 13 try to approve this special exception for a cabana 14 house? 15 A. Yes. They are going to try to look at these 16 criteria and determine whether or not it is an 17 appropriate use of the property. 18 Q. Moving on to the current litigation itself, were 19 you involved in the application by PAN, LLC, in 2007 for 20 the special exception to construct a cabana house at 21 issue here? 22 A. Yes. 23 Q. How were you involved? 24 A. I wrote the staff report to the Board of Zoning 25 Appeals for the special exception request.	1 Q. If you could take a look at Exhibit Number 4 for 2 me. Is this the document that you're referring to? 3 A. It is. 4 Q. And, again, what did you call it, a staff report? 5 A. Staff report. 6 Q. Is this typically done for special exception 7 requests? 8 A. It is. 9 Q. What is the purpose behind it? 10 A. Just to let the board know what the request is. 11 Q. And do you make a recommendation in this request? 12 A. No. 13 Q. You don't make a recommendation? 14 A. No. 15 Q. So on the document there is a header there that 16 says Recommendation, and you're saying that is not -- 17 A. Yes. Well, it says recommendation. It's not a 18 recommendation to approve or deny. It's a 19 recommendation of what action to take. 20 Q. What is the difference? 21 A. Maybe I didn't say that correctly. I wanted to 22 let the board know that they must find the following 23 criteria in order to either deny or approve the special 24 exception. 25 Q. So it's instruction to the board that this is how

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Page 49 1 you make your determination? 2 A. Yes. 3 Q. And do you recall the result of this special 4 exception request? 5 A. It was approved. 6 Q. Was there any investigation into PAN, LLC, and 7 whether it had created a homeowners association for this 8 special exception? 9 A. I don't recall any investigation. 10 Q. Were the ordinances that we have discussed today 11 requiring ownership of a homeowners association for a 12 cabana house in effect at the time of this special 13 exception? 14 A. I'm sorry. Could you repeat that? 15 Q. Were the ordinances that we've discussed today 16 requiring a cabana house to be owned by a homeowners 17 association in effect at the time PAN, LLC made this 18 special exception request? 19 A. Yes. 20 Q. Do you know if PAN, LLC, had a homeowners 21 association that owned the cabana house? 22 A. I don't. 23 Q. Do you know if any subsequent owners of the 24 cabana house were a homeowners association? 25 A. I don't.	Page 50 1 Q. Why not? 2 A. We don't review property transfers. When PAN, 3 LLC, sold it, that wouldn't have been something under 4 the purview of us. 5 We don't have the staff or the manpower to 6 keep up with that, and I can't think of any other cases 7 where ownership would be relevant, so it's not something 8 that we would normally do. 9 Q. So you're not aware of any other ordinances in 10 the zoning ordinance that have an ownership requirement 11 attached to a use? 12 A. None that I can think of. 13 Q. So would you consider this a unique ordinance? 14 A. Yes. 15 Q. And do you know why it's unique as opposed to the 16 other special exceptions? 17 A. I don't believe any of the other special 18 exceptions have the requirement for homeowners 19 association and ownership within the city. 20 Q. Do you know why for a cabana house as opposed to 21 a restaurant? 22 A. Again, I don't recall the initial intent of 23 creating the ordinance. I just know that it states 24 that. 25 Q. If you could flip to Exhibit Number 5. Do you
Page 51 1 know what this document is? 2 A. Yes. 3 Q. Can you please identify it for me? 4 A. It's the affidavit requiring me to do this 5 deposition today. 6 Q. I'm sorry. Say that again. 7 A. I believe it's the affidavit requiring me to do 8 this deposition today. 9 As I mentioned before, this is only the 10 second time I've done this. I know that this is my 11 affidavit, and I believe it's for this deposition. 12 Q. Okay. I will represent to you that this 13 affidavit was attached in support of the City's motion 14 for a temporary restraining order and/or preliminary 15 injunction related to the use of the cabana house at 16 issue. 17 A. Okay. Thank you. 18 Q. And do you recall drafting this affidavit? 19 A. I recall when it was drafted, yes. 20 Q. Did you draft this? 21 A. I did not. 22 Q. Who did? 23 A. I believe Rhett did. 24 Q. Your counsel? 25 A. I believe so.	Page 52 1 Q. Counsel for the City. Sorry. 2 What input did you have into the drafting of 3 this affidavit? 4 A. I -- once the complaint came in about the cabana 5 house, I tried to substantiate the various things 6 mentioned in the complaint and was able to verify that 7 some of them were indeed in violation of the zoning 8 ordinance. 9 Q. And what complaint are you referring to? 10 A. The Jim Shortle complaint. 11 Q. And did you review each and every paragraph of 12 this affidavit prior to executing it? 13 A. Yes. 14 Q. And is that your signature on Page 5 of Exhibit 15 5? 16 A. It is. 17 Q. I will give you a chance to review it. 18 Is everything in here true and accurate to 19 the best of your knowledge? 20 A. Yes, to best of my knowledge it is correct. 21 Q. If you could turn to Paragraph 9 of this 22 affidavit. 23 It starts out with, "Upon information and 24 belief." Can you read Paragraph 9 for me, please? 25 A. "Upon information and belief, the primary use of

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Page 53 1 the property and the cabana house thereon is for 2 occupants (patrons) and employees of the SUN RV Resort 3 located in Conway, South Carolina. 4 "Upon information and belief, SUN TRS is 5 affiliated with SUN RV Resorts and uses shuttle buses to 6 transport patrons and employees to and from the property 7 and the cabana house thereon. The Defendants' operation 8 of the property and the cabana house thereon for the 9 primary purpose of a project outside of North Myrtle 10 Beach amounts to the first violation of the NMB Code of 11 Ordinances." 12 Q. And this is your opinion as to what is a 13 violation of the code of ordinances by SUN TRS Ocean 14 Club? 15 A. Yes. 16 Q. And that last sentence says, "The Defendants' 17 operation of the property and the cabana house thereon." 18 What does that mean? 19 A. That means SUN operating a cabana on the 20 property, a cabana house on the property. 21 Q. Would it be fair to say it's their use of the 22 property? 23 A. The cabana house is the use. 24 Q. Right. So their use of the cabana house? 25 A. Yes.	Page 54 1 Q. And it says, "For the primary purpose of a 2 project outside of North Myrtle Beach." 3 Do you see that? 4 A. Yes. 5 Q. "And that amounts to the first violation of the 6 NMB code of ordinances." 7 Is primary purpose a requirement in the 8 zoning ordinance that we've discussed today? 9 A. The term shows up in the zoning ordinance. 10 Q. Where at? 11 A. In different sections. 12 Q. Can you show me? 13 A. Can you provide me a zoning ordinance? 14 Q. Are you saying it's all throughout the zoning 15 ordinance at large? 16 A. Yes. 17 Q. All right. So if the operation of the property 18 and the cabana house was a secondary purpose for a 19 project outside of North Myrtle Beach, this wouldn't 20 have been a violation? 21 MR. RICARD: Objection to form, speculation. 22 A. If SUN RV Resorts located in Conway, South 23 Carolina is operating a cabana house in North Myrtle 24 Beach and they are not a project within the city of 25 North Myrtle Beach near the ocean, then it would be a
Page 55 1 violation. 2 Q. (BY MR. TAMASITIS): Of the ordinances we have 3 discussed today? 4 A. Correct. 5 Q. And then Paragraph 10 is what you have opined as 6 the second violation. 7 Can you go ahead and read that? 8 A. "Upon information and belief, neither SUN TRS nor 9 Sun Carolina Pines operate as a homeowners' association, 10 as defined in Chapter 30, Title 27 of the South Carolina 11 Code of Laws. Operating the property and the cabana 12 house thereon without being a homeowners' association 13 represents Defendants' second violation of NMB's Code of 14 Ordinances." 15 Q. And in Paragraph 10 it says operating the 16 property and the cabana house thereon without being a 17 homeowners' association is a violation, but it's also -- 18 owning the property and the cabana house thereon is also 19 a violation, correct? 20 A. Correct. 21 Q. A violation of the zoning ordinance, to make it 22 clear? 23 A. Correct. 24 Q. When were you first informed that the cabana 25 house was not owned by a homeowners association?	Page 56 1 A. To the best of my knowledge, it was when I 2 received Jim Shortle's letter. 3 Q. Letter or complaint? 4 A. It was a complaint in letter form. 5 Q. Okay. So we are talking about the same -- that 6 complaint you were referring to earlier, that is what we 7 are talking about? 8 A. Yes. 9 Q. Were there any other discussions with Mr. Shortle 10 prior to him sending that complaint? 11 A. There was a phone conversation I believe the day 12 before I received the written -- or the letter 13 complaint. We did have a conversation about the same 14 thing. 15 Q. And to the best of your knowledge or your 16 recollection, what do you recall the conversation being? 17 A. I recall the conversation being a lengthy one, 18 including probably all of the complaints that he alleged 19 in the complaint. 20 Q. And that's the first you had heard of this issue, 21 was the day before the complaint was actually sent to 22 you? 23 A. Yes. 24 Q. Do you know whether all of the cabana houses 25 located in North Myrtle Beach are owned by homeowners

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1 associations? 2 A. I don't. 3 Q. Have you guys done an inventory of all the cabana 4 houses since this litigation has been filed? 5 MR. RICARD: Objection, speculation. 6 A. We have. 7 Q. (BY MR. TAMASITIS): You have? 8 A. Yes. 9 Q. And you haven't identified yet whether they are 10 all owned by homeowners associations? 11 A. I have not. 12 Q. Who did that inventory? 13 MR. RICARD: Objection, speculation. 14 A. Myself, Jim Wood, and I believe I spoke with Paul 15 Blust about -- had some questions about some of where 16 the cabana houses were located. 17 Q. (BY MR. TAMASITIS): Why did you do that? 18 A. To try to get an idea of all the cabana houses 19 that we have within the city. 20 Q. And what was the impetus behind that? 21 A. Just knowing what we have, I think, trying to get 22 a better understanding of how many we have in the city, 23 where they are all located. 24 Q. Was this lawsuit the predicate for you going 25 ahead and doing that?	1 A. Yes. 2 Q. And was this the first time you guys have done 3 something like that with the cabana houses located 4 within the city? 5 A. The first time I have. I don't know of any 6 other. 7 Q. And what did you guys find? 8 A. We found that -- really just found how many there 9 were and for what projects they were for. 10 Q. Did you check on the uses of them? 11 A. They all seemed to be being used as a beach 12 cabana. 13 Q. If you could go ahead and read Paragraph 11 for 14 me. 15 A. "Upon information and belief, the Defendants rent 16 the property and the cabana house thereon for weddings, 17 parties and other events. Failing to limit the use of 18 the cabana house to a bathing and change of clothing 19 facility amounts to Defendants' third violation of the 20 NMB code ordinances." 21 Q. Is that your opinion? 22 A. Yes. 23 Q. We had just reviewed Section 23-22 regarding the 24 use. 25 Is failing to limit the use to a bathing and
Page 59	Page 60
1 change of clothing facility only a violation, or can it 2 be used for other similar uses? 3 A. There are other similar uses that they could use 4 it for, yes. 5 Q. So is the real issue in Paragraph 11 that your 6 opinion is the violation is that they are renting the 7 property for weddings, parties and other events? 8 A. I believe so, yes. 9 Q. So if they weren't charging anything, it would be 10 okay? 11 MR. RICARD: Objection, speculation. 12 A. No. I think that the activity itself would be 13 injurious to the adjoining property owners. 14 Q. (BY MR. TAMASITIS): It could be? 15 A. Yes. 16 Q. But what if it wasn't? What if it was a really 17 small wedding gathering that there was no -- they 18 weren't operating a business? 19 MR. RICARD: Objection to form. 20 Q. (BY MR. TAMASITIS): We have talked about it 21 before, that that would be a similar use to a 22 residential property, right? 23 MR. RICARD: Objection to form. 24 A. Yes. 25 Q. (BY MR. TAMASITIS): So could be versus is is a	1 significant difference here in the interpretation, 2 right? 3 MR. RICARD: Objection, form. 4 A. We received complaints that there was loud music, 5 DJs, wedding receptions, and I think those activities 6 are not in keeping with the requirements of operating a 7 cabana house. 8 Q. (BY MR. TAMASITIS): Would it be fair to say that 9 had you not received the complaint, that there would be 10 no issue here? 11 MR. RICARD: Objection, speculation. 12 A. The complaint was the reason that we realized 13 that a cabana house was being operated by an entity not 14 within the city. 15 Q. (BY MR. TAMASITIS): Paragraph 12, can you go 16 ahead and read that? 17 A. "Lastly, I have received complaints against 18 Defendants' operation of the property and cabana house 19 thereon by adjoining neighbors, an example of which is 20 attached hereto, Exhibit A: July 12, 2021 letter from 21 Sea Cloisters I Homeowners Association, Incorporated, 22 and Sea Cloisters II Homeowners Association, 23 Incorporated. 24 "Based upon these complaints and by the 25 authority vested in me by NMB, I have determined

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1 Defendants' use and operation of the property and cabana 2 house thereon is in a fashion that is injurious to the 3 adjoining properties and in a manner that is not in 4 substantial harmony with the area in which it is 5 located. Therefore, Defendants' conduct here represents 6 the fourth and fifth violations of the NMB Code of 7 Ordinances." 8 Q. Again, use and operations, but not ownership, 9 correct? 10 A. Ownership is not defined or is not mentioned in 11 Paragraph 12. 12 Q. And, really, ownership is not discussed in the 13 first, second or third violations either, is it? 14 A. I don't see where it is. 15 Q. Could you read the last sentence of Paragraph 13 16 for me, please? 17 A. "Despite repeated demand therefor, SUN TRS has 18 failed and refused to relinquish its unauthorized 19 ownership and use of the cabana house and Sun Carolina 20 Pines has failed and refused to relinquish its 21 unauthorized ownership and/or use of the cabana house." 22 Q. So that's where we finally see ownership, 23 correct? 24 A. In this document, yes. 25 Q. And it's saying that they failed to relinquish	1 ownership, is that right? 2 A. Yes. 3 Q. Are you aware that Sun Carolina Pines does not 4 have any ownership in the property or the cabana house? 5 A. I am not. 6 Q. So why are they identified in this affidavit as 7 having ownership? 8 A. I believe it was intended for the -- we thought 9 that that was the owner. 10 Q. So you guys thought that both SUN TRS and Sun 11 Carolina Pines both owned the property and the cabana 12 house? 13 A. I think we probably went off of the County's 14 record as to who the current property owner was. 15 Q. And it says "despite repeated demand therefor". 16 So you guys demanded that SUN -- the City 17 demanded that SUN TRS relinquish its unauthorized 18 ownership of the cabana house? 19 A. I think we had repeated requests for them to 20 contact us, and we were unable to speak with anyone up 21 until -- or before this notice -- or this was sent out. 22 Q. So there were no demands that you have to give up 23 the property? 24 MR. RICARD: Objection, speculation. 25 A. Not to my knowledge.
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1 Q. (BY MR. TAMASITIS): Do you believe as a zoning 2 administrator that the proper remedy under the zoning 3 ordinance is for SUN TRS OC to relinquish ownership of 4 the use of the cabana house? 5 A. I think for the owner to be an entity that is not 6 a homeowners association within the city of North Myrtle 7 Beach, not near the ocean, is a violation of the zoning 8 ordinance. 9 Q. And so is the remedy for that violation 10 relinquishing ownership of the cabana house? 11 MR. RICARD: Objection, form, relevance. 12 A. That could be one solution. 13 Q. (BY MR. TAMASITIS): Is that listed anywhere in 14 the zoning ordinance that the City has that authority? 15 MR. RICARD: Objection. 16 A. Nowhere in the ordinance, to my knowledge. 17 MR. RICARD: We will request a Rule 30 for a 18 recess. 19 (A recess was taken.) 20 (Defendants' Exhibit Nos. 6, 7, 8 and 9 were 21 marked for identification.) 22 Q. (BY MR. TAMASITIS): Mr. Caldwell, we were just 23 talking about your affidavit which discussed the 24 relinquishing of the property, or the cabana house 25 specifically.	1 Can you turn to Exhibit 6 which is right in 2 front of you, and can you please review that and let me 3 know if you recognize that document? 4 A. I do recognize this document. 5 Q. And what does it represent? 6 A. Penalties for violation. 7 Q. And that is Section 23-7 of the zoning code? 8 A. Yes. 9 Q. Are you familiar with this section of the zoning 10 code? 11 A. I am. 12 Q. Can you read it for me, please? 13 A. Yes. "Violation of the provisions of this 14 chapter or failure to comply with any of its 15 requirements, including violations of conditions and 16 safeguards established in connection with grants of 17 variances or special exceptions, shall constitute a 18 misdemeanor. 19 "Any person who violates this chapter or 20 fails to comply with any of its requirements shall upon 21 conviction thereof be fined as provided in Section 1-6. 22 "Each day such violation continues shall be 23 considered a separate offense. The owner or tenant of 24 any building, structure, premises or part thereof, and 25 any architect, builder, contractor, agent or other

16 (Pages 61 to 64)

Page 65	Page 66
1 person who commits, participates in, assists in or 2 maintains such violation may each be found guilty of a 3 separate offense and suffer the penalties herein 4 provided. Nothing herein contained shall prevent the 5 City from taking such other lawful action as is 6 necessary to prevent or remedy a violation." 7 Q. And in this section it's referring to the 8 chapter, which I'm assuming is Chapter 23 of the zoning 9 code? 10 A. Yes. 11 Q. And that is the same chapter of the other two 12 ordinances that we have talked about, 23-2 and 23-22, 13 correct? 14 A. Yes. 15 Q. In this penalty section it discusses fines, 16 correct? 17 A. Yes. It refers to the section that contains the 18 fines. 19 Q. Does it discuss anywhere where the property can 20 be taken by the City for a violation of any section in 21 the chapter? 22 A. I don't know that we're talking about taking. 23 Are we talking about taking? 24 Q. As in divesting. 25 A. The term you used earlier?	1 Q. Yes. 2 A. I think where it says "nothing herein contained 3 shall prevent the City from taking such other lawful 4 action as is necessary to prevent or remedy a violation" 5 is fairly open. 6 And it means that if there is other things 7 we need to do to prevent or remedy a violation, that we 8 have the ability to do that. 9 Q. So as the zoning administrator, in your opinion, 10 would a lawful action be divesting someone from 11 ownership of property for violation of part of the 12 zoning code? 13 MR. RICARD: Objection, speculation, 14 relevance. 15 A. I think once we realized that the owner of the 16 property is not a homeowners association located within 17 the city of North Myrtle Beach near the beach, and that 18 they were not a homeowners association, that we didn't 19 see a path forward where they could meet the standards 20 of the ordinance and still maintain ownership of the 21 property. 22 Q. (BY MR. TAMASITIS): Let me break that answer up 23 real quickly. 24 You said is not a homeowners association 25 within the city of North Myrtle Beach. That is what you
Page 67	Page 68
1 said. 2 Do you mean a homeowners association for a 3 project in North Myrtle Beach? 4 A. Yes, sir. 5 Q. And it's your testimony that after finding out 6 that the cabana house in this case was not owned by a 7 homeowners association, that the next logical step is to 8 take the property from the owner of the cabana house -- 9 MR. RICARD: Objection. 10 Q. (BY MR. TAMASITIS): -- as the only remedy 11 available? 12 MR. RICARD: Object to form. 13 A. I think that is the request, but there could be 14 other ways to remedy the situation. 15 Q. (BY MR. TAMASITIS): What do you mean the 16 request? The request by -- 17 A. I'm sorry, the affidavit. Yeah, the affidavit. 18 Q. So in that final paragraph of the affidavit where 19 it says "we requested multiple times to SUN TRS"? 20 A. Yes. 21 Q. Can you read that sentence again? 22 A. All of Number 13? 23 Q. No, just the last sentence that we were talking 24 about. 25 A. "Despite repeated demand therefor, SUN TRS has	1 failed and refused to relinquish its unauthorized 2 ownership and use of the cabana house and Sun Carolina 3 Pines has failed and refused to relinquish its 4 unauthorized ownership and/or use of the cabana house." 5 Q. Now, correct me if I'm wrong. I recall that your 6 earlier testimony was that you weren't aware of any 7 request for them to relinquish ownership? 8 A. I was not. 9 Q. But now you're saying, well, yeah, we could do 10 that, though? 11 A. Could you rephrase that? 12 Q. That the City could lawfully, as an action, a 13 lawful action, request relinquishment of ownership of 14 the cabana house for a violation of the zoning 15 ordinance? 16 MR. RICARD: Objection. 17 A. Yes. 18 Q. (BY MR. TAMASITIS): And to you, as the zoning 19 administrator, that is a lawful action covered by this 20 penalty provision? 21 MR. RICARD: Objection, speculation. 22 A. I think it could be. I'm not aware of it 23 happening prior. 24 Q. (BY MR. TAMASITIS): This will be my next 25 question.

17 (Pages 65 to 68)

Page 69 1 Are you aware of any time that the City has 2 taken property from a property owner for a violation of 3 the zoning code? 4 MR. RICARD: Objection. 5 A. I don't recall, or I don't know. 6 Q. (BY MR. TAMASITIS): Has it happened since you 7 have been the zoning administrator? 8 A. No. 9 Q. Has it happened since you have been the assistant 10 zoning administrator? 11 A. Not to my knowledge. 12 Q. As a zoning administrator for the City, are you 13 aware of what authority is required to take property 14 from a private property owner by a government entity? 15 A. Not the specifics of it, no. 16 Q. If you could go to Exhibit Number 7. Do you 17 recognize that document? 18 A. I do. 19 Q. Tell me what it is. 20 A. It's a complaint by Jim Shortle for Sea Cloisters 21 I and Sea Cloisters II. 22 Q. And is this the complaint that we were talking 23 about earlier? 24 A. It is. 25 Q. And what is the date on the complaint?	Page 70 1 A. July 12th, 2021. 2 Q. And you said there was a phone conversation 3 between you and Mr. Shortle on the day previous to this 4 complaint being sent? 5 A. Now that I was able to read an email -- can I 6 reference an exhibit that hasn't been brought up yet? 7 Q. Yeah, sure. Which exhibit is it? 8 A. The one where -- I'm sorry, Defendants' 9 Exhibit 8. 10 In here Jim Shortle, I believe, yes, is 11 updating what I assume is the board for Sea Cloisters I 12 or II, I'm not sure which one. 13 And in reading that, I recall some of the 14 interactions I had with Mr. Shortle, and I believe it 15 was a face-to-face, not a phone conversation as I 16 earlier stated. 17 Q. We will discuss Exhibit 8 here shortly. 18 A. Okay. 19 Q. Is this complaint from Mr. Shortle, in Sea 20 Cloisters I and Sea Cloisters II, what you relied upon 21 in making your determination that it was as encompassed 22 in your affidavit? 23 A. Once I got this report, or this complaint, I did 24 my own investigation, and I found that the owners were 25 not owners of a property for a project within the city
Page 71 1 of North Myrtle Beach, and they were not a homeowners 2 association that I could determine. Those are the main 3 two things that I found after receiving complaints. 4 Some of the other things listed in the 5 complaint, if they were to have been being -- if they 6 were to have occurred they would be, I believe, a 7 violation of the criteria of the special exception for a 8 cabana house. 9 Q. So the main two things in reading this complaint 10 that you took away was the ownership of the cabana house 11 was not by a homeowners association, correct? 12 A. Correct. 13 Q. But that's not identified in your affidavit, is 14 that correct? 15 A. I think that is correct. 16 Q. Why not, if it was the two main things you took 17 away from the complaint? 18 A. I don't know. 19 Q. You did mention some of the things you did after 20 you saw this complaint as far as your investigation. 21 What specifically did you do after you 22 received this complaint by way of investigation? 23 A. I looked on the County's geographic information 24 system to see who the owner was, and then I was able to 25 see that it was Carolina Pines RV Resort. And by	Page 72 1 knowing where that was located, I knew that it was not 2 within the city, and that I couldn't find that the 3 owners of the beach cabana were owners or a homeowners 4 association of a project within the city. 5 Q. Go back there for me. You looked at the GIS 6 property and it said what about the Carolina Pines RV 7 Resort? 8 A. It just had the ownership listed in the GIS. 9 Q. That the property was owned by Carolina Pines RV 10 Resort? 11 A. I don't recall exactly what it said as the owner. 12 Q. Did it say SUN TRS OC, LLC? 13 A. I can't recall exactly what it said. 14 Q. But somehow you found a way to tie it to Carolina 15 Pines RV Resort? 16 A. Yes. 17 Q. And we established earlier that is located in 18 Conway? 19 A. Yes. 20 Q. So you checked the GIS, got the ownership. 21 Did you do that for any of the cabana houses 22 you guys took a look at after this lawsuit was -- 23 A. I did not. 24 Q. So you have not verified whether the other cabana 25 houses are owned by homeowners associations?

18 (Pages 69 to 72)

Page 73 1 A. I have not. 2 Q. And then after looking at the GIS, what is the 3 next thing you did? 4 A. I don't remember exactly what I did next. What I 5 probably did is I took my findings to Jim Wood, and then 6 we probably took those findings to the City manager and 7 to the City attorney, huddled up, if you will, on what 8 we should do next. 9 And after reviewing that they are not a 10 homeowners association for a project within the city of 11 North Myrtle Beach, we didn't see a way forward where 12 simply sending a notice of violation or a citation would 13 help anything, or how it would fix the situation and 14 make it -- we didn't see a way for them to come into 15 compliance with the requirements of the zoning 16 ordinance. So the next step was to, you know, talk with 17 additional attorneys. 18 Q. Outside counsel? 19 A. Correct. 20 Q. Who is Jim Wood again? 21 A. Jim Wood is the director of planning and 22 development. 23 Q. And what is the name of the City attorney? 24 A. Chris Noury? 25 Q. Did you do anything by way of investigation into	Page 74 1 the use of the property that was complained of in the 2 complaint? 3 A. I'm sorry. Can you say that again? 4 Q. Yeah. Let me rephrase it. 5 There is a lot of allegations in here about 6 incidents involving Sea Cloisters I and II and a cabana 7 house. 8 Did you do any investigation into whether 9 those incidents actually occurred? Did you verify any 10 of them? 11 A. I visited the property. I don't know who was 12 parking where or anything like that. I just thought 13 that if those incidents were occurring, then those 14 incidences would be injurious to Sea Cloisters I and II 15 or both. 16 Q. But they were never verified that those incidents 17 actually occurred? 18 A. I didn't witness any of those, no. 19 Q. Did you talk with anyone other than Jim Shortle 20 to verify whether those incidents occurred? 21 A. No. 22 Q. So is it fair to say that the main finding you 23 had through your investigation was the complaint that 24 the property and the cabana house were not owned by a 25 homeowners association for a project in North Myrtle
Page 75 1 Beach? 2 A. Correct. 3 Q. And based on that determination, you then met 4 with Mr. Wood and Mr. Noury, correct? 5 A. Yes. 6 Q. And the discussions between you and Mr. Wood is 7 what I'm referring to now. What was the -- what was the 8 basis of that conversation? What did you guys talk 9 about? 10 A. From the best of my memory, after I received the 11 written complaint, I reviewed it. I visited the site. 12 I did the research on the County's GIS for ownership. 13 And when I compiled that information, I went to Jim. 14 Q. And what did you guys talk about? 15 A. I said, hey, I don't see a way forward for this, 16 what should we do, what do you think we should do next. 17 Q. And what did he say? 18 A. I believe that he said, well, let's go talk to 19 Chris, and then we talked to the City manager as well. 20 Q. Who is the City manager? 21 A. Mike Mahaney. 22 Q. And what was Mr. Mahaney's conclusion and 23 recommendation? 24 A. He tried to contact someone with SUN TRS, I 25 believe, or Carolina Pines. I believe he tried to	Page 76 1 contact the manager, and was unsuccessful in doing that. 2 And after being unsuccessful in doing that, 3 I believe that's when we talked to outside counsel. 4 Q. Was this ever taken up to City Council for 5 discussion? 6 A. No. 7 Q. If you could turn to Page 4 of Exhibit Number 7. 8 On Page 4, in the second full paragraph, 9 there is a discussion about the tax assessments on the 10 cabana house. Do you recall reading about that? 11 A. I have read this complaint, yes. 12 Q. Why were issues with -- the alleged issues with 13 the tax assessment for the cabana house not included in 14 your affidavit as a violation? 15 A. Taxation isn't covered in zoning. 16 Q. Okay. And there is also discussion about the 17 restrictive covenants for the property in 1979 and 2007. 18 Why were those discussions not included in 19 your affidavit as a part of the violations? 20 A. I have always been of the understanding that 21 zoning doesn't check protective covenants. 22 Q. Why not? 23 A. That's what Paul Blust told me. 24 Q. Was there a reason behind that or -- 25 A. I don't know.

19 (Pages 73 to 76)

Page 77	Page 78
1 Q. As part of your investigation into this complaint 2 and the allegations contained therein, did you look at 3 the history of the property to see if the cabana house 4 had ever been owned by a homeowners association? 5 A. I was under the belief that the original 6 applicant for the special exception, PAN, LLC, I believe 7 they were a homeowners association. 8 Ben Pal (phonetic), I believe, was the 9 declarant of the property, he was developing the 10 property, and I believe he was the homeowners 11 association, for lack of a better term, for that 12 project. 13 Q. Did you go back and investigate the previous 14 property owners to determine whether each one of them 15 was a homeowners association? 16 A. No, I did not. 17 Q. Do you know today whether or not any of the 18 previous property owners for the cabana house was a 19 homeowners association? 20 A. It seems like through this process that none of 21 the owners have been a homeowners association. 22 Q. What process are you referring to? 23 A. Some -- I don't recall what document. One of the 24 documents highlights or details each owner over the 25 course of history.	1 Q. Your affidavit? 2 A. Yes. 3 Q. And so through that process, the affidavit 4 process, you determined that there were no homeowner 5 associations that ever owned the cabana house? 6 A. It appears that none of them were ever homeowners 7 associations. 8 Q. Is that significant to you at all? 9 A. In that we don't follow property transfers, so we 10 don't have the ability to review and see if it's going 11 to be a homeowners association of the properties. 12 Q. And is that the case for all special exceptions 13 in the city, that you guys don't follow the transfers of 14 properties that are subject to special exceptions? 15 A. I think that's similar to what we said earlier, 16 in that it's rather unique in that the special exception 17 for cabana houses requires the ownership to be a project 18 within the city. 19 Q. Right. So that a special exception that's not 20 tethered to ownership requirements, you wouldn't have to 21 follow the deeds as they go forward to make sure that 22 the ownership is proper, correct? 23 A. Correct. 24 Q. So let's go to Exhibit Number 8. And I will 25 represent to you that this was an email that we received
Page 79	Page 80
1 via production of documents, production for a subpoena 2 to Sea Cloisters I. 3 This is an email that was contained therein, 4 and it discusses conversations that Mr. Shortle had with 5 you, Ben Caldwell, as the zoning administrator. 6 And let me point you to the -- in the first 7 full paragraph it says, quote, "I had a discussion with 8 Ben Caldwell, the zoning administrator, and found that 9 he knows more than I would think that he would know 10 about this property." 11 Do you recall this conversation? 12 A. I don't recall that. 13 Q. Why -- 14 A. Well, no, no, I had a conversation with Jim 15 Shortle, sure. 16 Q. Okay. Is this the phone conversation he's 17 referring to? 18 A. It was actually -- I referred to it as a phone 19 conversation earlier, but I believe it was a 20 face-to-face. He came into the office with the 21 information, with the complaint. 22 Q. With the complaint? 23 A. Yes. 24 Q. So do you recall, did he show up on the date of 25 the complaint, the day prior, the day after?	1 A. I believe I stated earlier that I talked to him 2 one day and I received the complaint the next day, but I 3 think he brought in a paper copy. Now that I read this, 4 it kind of jogs the memory. 5 Q. And by "this" you mean Exhibit Number 8? 6 A. Yes. 7 Q. I'm going to read this first full paragraph and 8 then we're going to talk about it. 9 "I had a discussion with Ben Caldwell, 10 Zoning Administrator, and found that he knows more than 11 I would think that he would know about this property. 12 Something has been going on. He told me that he did 13 talk with Carolina Pines and their lawyers several times 14 but was not aware that they had submitted a beer/wine 15 permit. He insists that the City will never give a city 16 permit to operate a bar at the facility but was a bit 17 confused about a restaurant. 18 "We surmised that maybe they were going to 19 convert the whole place to a restaurant/bar under a 20 conditional use exemption. The restaurant would just 21 happen to have a pool and beach access. He said that 22 probably cannot happen because of backset and parking 23 limits. He was under the impression that a restaurant 24 could be inside a cabana house, but I pointed out that 25 the 'accessory uses' which include a restaurant, are for

20 (Pages 77 to 80)

Page 81 1 hotel/resorts and do not include cabana houses." 2 Did I generally read that right? I know 3 there were some typos in there. 4 A. Generally. 5 Q. It says here that "he told me that he did talk 6 with Carolina Pines and their lawyers several times." 7 How often did you talk to folks at Carolina 8 Pines and about what? 9 A. I don't recall ever having a conversation with 10 anyone at Carolina Pines or any of their lawyers. 11 Q. So Mr. Shortle is just making this up? 12 MR. RICARD: Objection, speculation. 13 A. I don't recall any conversation with anyone at 14 Carolina Pines or any lawyers pertaining to Carolina 15 Pines. 16 Q. (BY MR. TAMASITIS): All right. When there is 17 this discussion of the restaurant at the cabana house it 18 says that "he said", which would be you, Ben Caldwell, 19 "it probably cannot happen because of backset and 20 parking limits. He was under the impression that a 21 restaurant could be inside a cabana house, but I pointed 22 out the accessory uses which would include a restaurant, 23 are for hotels/resorts and do not include cabana 24 houses." 25 What does that sentence mean?	Page 82 1 MR. RICARD: Objection, speculation. 2 A. What I recall from our conversation is once he 3 told me that they had applied for a beer and wine, I was 4 thinking that maybe they wanted to seek special 5 exception for a restaurant in R-4, which is a use 6 allowed as a special exception in R-4. 7 But then I was also thinking that the 8 board probably wouldn't approve that because that -- he 9 says backset. We call them setbacks, minimum setbacks 10 from property lines, are greater for a restaurant than 11 they are for a cabana house. So it would be a difficult 12 ask to allow a restaurant that doesn't meet the required 13 setback. 14 Also, I thought parking would be an 15 issue. Restaurants require much more parking. I don't 16 know what the exact parking requirement would be because 17 I don't know the exact square footage of the building. 18 But I believe parking would be an issue, having enough 19 parking spaces on site. 20 Q. (BY MR. TAMASITIS): And then the beginning of 21 the second full paragraph it says, "I also splained" -- 22 should be explained -- "the deed restrictions, but he 23 said they don't do deed restrictions. So I just showed 24 him where it says that they do the deed restrictions and 25 he sort of agreed."
Page 83 1 Do you recall that part of the conversation? 2 A. I do, and I would say that agreeing was me 3 agreeing that we don't review deed restrictions. 4 Q. And that is consistent with your previous 5 testimony, that you guys don't look at deed 6 restrictions? 7 A. Right. 8 Q. Based on your reading of this email, does this 9 accurately capture the conversation between you and Mr. 10 Shortle? 11 A. Some of it. 12 Q. What parts of it does it not? 13 A. I don't ever remember talking with anyone from 14 Carolina Pines or any of their lawyers. 15 I don't remember the part about me saying a 16 restaurant could be an accessory use for a cabana house. 17 I think the rest is pretty accurate. 18 Q. The second paragraph towards the end says, "He 19 also doesn't think that the Zoning Board of Appeals has 20 the authority to grant a variance for the requirement 21 that a homeowners association owns the property. City 22 Council would have to pass a special ordinance to permit 23 this to happen. He's not sure who would have the 24 authority to shut the place down since they don't have a 25 business license to suspend. It's like having squatters	Page 84 1 on the property, not doing anything correct, but nobody 2 has the authority to stop it." 3 Let's break that apart, okay? 4 A. Okay. 5 Q. In this it says, "He also doesn't think" -- so 6 you don't think -- "that the Zoning Board of Appeals has 7 the authority to grant a variance for the requirement 8 that a homeowners association owns the property." 9 Is that consistent with your opinion? 10 A. Yes. 11 Q. What is a variance as opposed to a special 12 exception? 13 A. A variance is a variance of a requirement of the 14 zoning ordinance. 15 Q. And how would you achieve -- obtain a variance? 16 A. A similar application to a special exception, but 17 it's an application for variance, would be submitted to 18 the zoning administrator, advertised in the local paper, 19 and then held at a board zoning appeals meeting to be 20 reviewed by the Board of Zoning Appeals. 21 Q. And is it your opinion, as the zoning 22 administrator, that the Zoning Board of Appeals does not 23 have the authority to grant a variance for the 24 requirement that a homeowners association owns the 25 cabana house?

21 (Pages 81 to 84)

Page 85 1 A. That is my understanding. But if they were to 2 apply for a variance of that specific code section, I 3 would contact the City attorney and see if he was of the 4 same thinking about that they would not have the 5 authority to grant that variance before I would say, no, 6 you can't submit this application or, yes, you can 7 submit this application. 8 Q. Why would they not have the authority to grant 9 it? 10 MR. RICARD: Objection, speculation. 11 A. I just don't believe they do. I'm sorry. I 12 can't think of a better response than that. 13 Q. (BY MR. TAMASITIS): That's fine. And then it 14 says, "City Council would have to pass a special 15 ordinance to permit this to happen." 16 What is a special ordinance? Is that like 17 the text amendment we were discussing? 18 A. No. I don't think the terminology is the same 19 terminology we would use for an ordinance change. 20 What he's referring to, I believe, is that a 21 text amendment would need to occur in order for a 22 homeowners association to not have to own the property. 23 Q. And that is what we discussed earlier today, 24 right? 25 A. Yes.	Page 86 1 Q. And then it says here in the last two sentences, 2 "He's not sure who would have the authority to shut the 3 place down since they don't have a business license to 4 suspend. It's like having squatters on the property not 5 doing anything correct but nobody has any authority to 6 stop it." 7 Is that an accurate summary of what you 8 explained to Mr. Shortle? 9 A. I wouldn't have used that terminology in talking 10 about the situation. 11 We did talk about the business -- he 12 mentioned that there wasn't a business license on file 13 with Carolina Pines. And from what I recall, I just 14 said, well, I don't know if I have the authority to make 15 them stop operating. 16 Q. In that same paragraph, this second paragraph, it 17 says -- I will just start reading and see if you can 18 capture it. 19 "He agreed that Carolina Pines should have 20 applied for a special exception before opening, and 21 there should have been a hearing before the exception 22 was granted." 23 Did you see where I'm reading? 24 A. Yes. 25 Q. Is that consistent with the previous testimony
Page 87 1 that if -- for this ordinance that deals with ownership 2 in cabana houses, that the additional property owners 3 should seek another special exception? 4 A. Yes. I think that any time the property being 5 used as a cabana house changes hands that there should 6 be a new submittal to the Board of Zoning Appeals for a 7 special exception. 8 Q. But that's not required in the zoning ordinance? 9 A. It's not specifically stated, no. 10 Q. And if it's not specifically stated, how would a 11 property owner, new to Myrtle Beach that is buying a 12 cabana house, know that they need to get another special 13 exception? 14 MR. RICARD: Objection. 15 A. I would respond that how would they know any of 16 the rules and regulations. 17 Q. (BY MR. TAMASITIS): So if they did, if they read 18 the zoning ordinance, it's not specifically stated, 19 correct? 20 A. Correct. 21 Q. So how would they know? 22 A. If they were to perhaps request information on 23 the property via a zoning verification letter or 24 specific request, like do I need this, do I need that, 25 then we would put that in writing and send it back to	Page 88 1 them. 2 Q. So there could potentially be a zoning letter 3 from you on that request as the zoning administrator 4 that says you're good to go, there is no zoning issues 5 for the property? 6 A. Could you say that again? 7 Q. That there could be a letter from the zoning 8 administrator, you, or a previous zoning administrator, 9 to the property owner saying either, yes, you need to do 10 X, Y, Z or, no, there is no zoning ordinance violations 11 or issues, you're good to go? 12 A. If an entity wanted to operate a cabana house, 13 and they asked for a zoning verification letter, we 14 would issue them one with the requirements that they 15 would need to follow in order to operate one. 16 Q. But what if, like in this situation, there is 17 already a cabana house on the property, how would they 18 know that they needed a specific request or a special 19 exception? 20 A. How would anyone know that they needed a special 21 exception or a variance? 22 Q. They would look at the zoning ordinance, right? 23 And if they look in the zoning ordinance here, would it 24 specifically state that? 25 A. No.

22 (Pages 85 to 88)

Page 89	Page 90
1 Q. And the last piece of this Exhibit 8 about 2 shutting the place down, do you recall having a 3 conversation with Mr. Shortle about nobody having the 4 authority to shut the place down? 5 A. Not in that terminology, I don't think. 6 Q. What was the terminology? 7 A. I think he just was telling me that they didn't 8 have a business license, and I was referring -- well, he 9 already knew they didn't have a business license, and he 10 may have asked about this, but I don't really recall. I 11 don't -- I don't recall exactly what was said about, 12 quote, shutting them down. 13 Q. If you could flip to Exhibit Number 9. Have you 14 seen this document before? 15 A. I believe so. 16 Q. Could you tell me what it is? 17 A. A certified letter by Nexsen Pruet. 18 Q. To whom? 19 A. To Sun Communities, Incorporated, and Carolina 20 Pines RV Resort. 21 Q. And this is a letter addressed to them in regards 22 to what? 23 A. To the operation of the cabana house. 24 Q. And specifically it says in the regards line, it 25 says "zoning violation", correct?	1 A. Yes. 2 Q. Did you have any input into this letter? 3 A. Not to how it's written, but to the effect that I 4 believe there was a zoning violation occurring on the 5 property and they are quoting part of Section 23-2, 6 definition of cabana house, and how it's being violated. 7 Q. And then you see the last sentence to this letter 8 says, "If this use does not cease within ten days from 9 the date hereof NMB" -- that is North Myrtle Beach -- 10 "is prepared to pursue all available legal action 11 seeking to enforcement of the zoning ordinance." 12 Did I read that correctly? 13 A. Yes. 14 Q. I know you're not a lawyer, so I'm not going to 15 ask you what legal actions can be taken. 16 But based on our reading of the penalty 17 ordinance earlier, do you believe that would include 18 having -- requiring the owner of the cabana house to 19 relinquish the property? 20 MR. RICARD: Objection, speculation, 21 relevance. 22 A. How could -- in what terms would relinquish refer 23 to? 24 Q. (BY MR. TAMASITIS): Having to give it back. Who 25 are they going to deed it to?
Page 91	Page 92
1 A. In that penalty section, again, it talks about 2 "nothing herein contained shall prevent the City from 3 taking such other lawful action as necessary to prevent 4 a violation." 5 If that was a way to remedy the violation, 6 then it could. 7 Q. But in your time as an assistant zoning 8 administrator and as the zoning administrator, you're 9 not aware of any time that the City has taken property 10 from a private person or entity because of violations of 11 the zoning code? 12 A. I'm not aware of any. 13 MR. TAMASITIS: This will be Exhibit 10. 14 (Defendants' Exhibit No. 10 was marked for 15 identification.) 16 MR. RICARD: We will request a recess again. 17 (A recess was taken.) 18 Q. (BY MR. TAMASITIS): Mr. Caldwell, please turn to 19 Exhibit Number 10. Do you recognize this document? 20 A. I did not recognize this document. 21 Q. Do you recognize it now? 22 A. I've had the chance to look it over. 23 Q. And I will represent to you these are the City of 24 North Myrtle Beach's answers to SUN TRC Ocean Club, 25 LLC's, and SUN TRS Carolina Pines, LLC's, first set of	1 interrogatories. 2 Did you have any input into the responses 3 for these interrogatories? 4 A. Not really the responses. More so I did go 5 around and get the addresses of the different cabana 6 houses within the city, and I see they are listed in 7 here. So I did give that information. 8 Q. For interrogatory Number 1, give the names and 9 addresses of persons known to have facts about the 10 litigation, do you know who Arnett Vereen is? 11 A. I do not. 12 Q. How about Chris Martucci? 13 A. I do not. 14 Q. Now, going to interrogatory Number 9, and this is 15 listing every cabana house in North Myrtle Beach, you 16 said you did assist with this interrogatory? 17 A. Yes. 18 Q. Are these the only cabana houses, to your 19 knowledge, in North Myrtle Beach other than the one at 20 issue in this litigation? 21 A. Five, I believe that's correct. 22 Q. There is four listed here. 23 A. I'm sorry. The -- 24 Q. And ours is fifth. Got it. Okay. 25 Are there any of these cabana houses listed

23 (Pages 89 to 92)

Page 93	Page 94
1 in A through D that are currently not owned by a 2 homeowners association? 3 A. I don't know. 4 Q. Have any of these A through D ever not been owned 5 by a homeowners association, to your knowledge? 6 A. I don't know. 7 Q. Is the project for each one of these cabana 8 houses located in North Myrtle Beach, to your knowledge? 9 A. Yes, they all are. 10 Q. So for Barefoot Resort Cabana House, that 11 project, Barefoot Resort & Golf, that is located in 12 North Myrtle Beach? 13 A. It is. 14 Q. The Beachwalk Cabana House, the project is 15 Beachwalk Villas. Is that located in North Myrtle 16 Beach? 17 A. Yes. 18 Q. The Links Cabana House, the project is The Links, 19 that is located in North Myrtle Beach? 20 A. Yes. 21 Q. And the same thing for D, Tidewater Cabana House, 22 the project Tidewater Plantation, that is located in 23 North Myrtle Beach? 24 A. Yes. 25 Q. Is that Tidewater Cabana House, is that the	1 original cabana house that the ordinance was set up for? 2 A. I believe so. 3 Q. And that is the one you said Mr. Blust was 4 intimately involved with as the first special exception 5 and the ordinance that created it, correct? 6 A. Yes. 7 Q. Have you ever been involved in any zoning 8 enforcement activity related to any of these cabana 9 houses? 10 A. None of the ones listed, no. 11 Q. How about any others? 12 A. The one complaint from Jim Shortle. 13 Q. The current litigation? 14 A. That's it. 15 Q. And that's the only one? 16 A. The only one I could find, yes. 17 Q. So since 2005 and early 2007, because that's when 18 this came into existence, since 2007, in your time in 19 the zoning group for North Myrtle Beach, you have never 20 come into a zoning enforcement issue involving a cabana 21 house other than the one involved in this litigation? 22 A. I can't recall any. 23 Q. Has there been any challenges or complaints to 24 the ownership of these four cabana houses identified in 25 interrogatory Number 9?
Page 95	Page 96
1 A. There may have been something with Barefoot 2 Resort Cabana House. I believe the neighbors did not 3 want it, so there may have been some type of -- there 4 may have been something submitted to the City on behalf 5 of them speaking against it. 6 I believe the first time they went to the 7 Board of Zoning Appeals, I think they were denied. And 8 they came back with additional information and then 9 would have been approved with some safeguards. 10 Q. Do you know why they were initially denied? 11 A. I don't. 12 Q. Does the City maintain those records? 13 A. Yes. 14 Q. Where do they keep those records? 15 A. We have them online, and we have several years in 16 our coffer as well. 17 Q. Have you been asked for records related to this 18 litigation? 19 A. Yes, I believe so. 20 Q. And you produced them all to your attorney? 21 A. I believe so. 22 Q. Are there any other special exceptions in 23 progress right now, special exception applications in 24 progress right now for cabana houses in North Myrtle 25 Beach?	1 A. No. 2 Q. Did you have any direct communication with people 3 associated with SUN TRS OC or Carolina Pines RV Resort 4 regarding this case? 5 A. No. 6 Q. Did you have any communication with folks from 7 SUN TRS OC or Carolina Pines RV Resort regarding the 8 cabana house other than involving this litigation? 9 A. I don't think so. 10 Q. Do you know if anybody working for you -- go 11 ahead. 12 A. I'm sorry. When we met in Conway the first time, 13 well, the only time, I did speak with someone who works 14 for Carolina Pines, I believe. 15 Q. When did you meet in Conway? 16 A. I don't recall the date. 17 Q. This year, two years ago? 18 A. This year, yeah, I think January or February. 19 Q. Who was there? 20 A. I don't recall her name. 21 Q. And what was the purpose of you visiting Carolina 22 Pines RV Resort? 23 A. Oh, I didn't visit there, no. I'm sorry. When I 24 said Conway, I meant the courthouse in Conway. 25 Q. Got you. So this was for the hearing on the

24 (Pages 93 to 96)

Page 97 1 preliminary injunction? 2 A. Yes. 3 Q. So you never actually went to Conway to -- 4 A. No, no, no. I've never been on the premises. 5 Q. Do you know of anyone else in the City who was 6 having communications with SUN TRS or Carolina pines RV 7 Resort regarding this litigation? 8 MR. RICARD: Objection, speculation. 9 A. I don't. 10 Q. (BY MR. TAMASITIS): Did you have any 11 communications with prior owners of the cabana house 12 regarding any zoning issues? 13 A. Not to my recollection, no. 14 Q. Have you ever had conversations with Mace Watts 15 about the cabana house? 16 A. I've had conversations with Mace Watts, but I 17 don't recall if it was about the cabana house or not. 18 Q. Who is Mace Watts? 19 A. He's a local developer. 20 Q. Was he or any of his entities -- did he or any of 21 his entities have ownership of the cabana house at any 22 point? 23 A. Yes. 24 Q. Do you recall which entity it was? 25 A. I'd be guessing if I tried to tell you what I	Page 98 1 thought the name would be, or was. 2 Q. Did you have any conversations with Shep Guyton 3 regarding this lawsuit? 4 A. I don't think I had any direct conversations with 5 Shep Guyton pertaining to this, I don't think so. 6 Q. What conversations did you have with him 7 regarding the cabana house? 8 A. I don't recall any about the cabana house. 9 Q. Do you know if anybody at the City has talked to 10 him about this lawsuit? 11 A. With Shep? 12 MR. RICARD: Objection, speculation. 13 A. I had heard, I believe from Chris Noury, that SUN 14 or Carolina Pines was talking with Shep Guyton about 15 representing them, but I don't think I heard anything 16 else about that after that. 17 Q. (BY MR. TAMASITIS): And Chris Noury is the City 18 attorney, correct? 19 A. That's correct. 20 Q. Going over the course of our conversation today, 21 is there anything that you said that you would like to 22 change or anything you would like to clarify? 23 A. I can't think of anything. 24 Q. And all of your answers you gave me today were to 25 the best of your knowledge?
Page 99 1 A. Yes. 2 MR. TAMASITIS: I have no further questions. 3 MR. RICARD: I just have a few questions. 4 EXAMINATION 5 BY MR. RICARD: 6 Q. Mr. Caldwell, at the beginning of this morning 7 you were asked some questions about Mr. Elton Farmer, 8 Chris Noury, Jim Wood. 9 Is it fair to say that the City staff has a 10 number of individuals that work and are involved in 11 zoning issues? 12 A. Yes. 13 Q. What type of process is used amongst the 14 discussion of that group when it comes to determinations 15 for the City? 16 A. I'm sorry. Could you maybe state that a 17 different way. 18 Q. Sure, and I will be more specific. 19 Would you characterize it as a collaborative 20 process, or would you characterize it as somebody having 21 unilateral authority? How would you characterize the 22 process to come to determinations on -- 23 A. Collaborative process. 24 Q. I believe you may have also testified that only 25 you and Mr. Paul Blust were involved in the cabana	Page 100 1 house, something to that effect. 2 Is it fair to say that others may have also 3 been involved in determinations about the cabana house 4 at issue in this litigation? 5 A. You're correct. There would have been more 6 people involved in the discussion of this cabana house 7 and the current ownership. 8 Q. Can you talk a little bit about the zoning office 9 in particular and how it operates and how it enforces 10 zoning violations? 11 And I will be specific. Does your office 12 actively hunt for zoning violations, or does it rely 13 upon, you know, firsthand observations when you're just 14 out and about casually, or complaints that come into 15 your office? Can you just give a description of how 16 your office operates? 17 MR. TAMASITIS: Object to the form. 18 A. For the most part, we are a complaint-based 19 organization when it comes to enforcement. If there 20 could be a zoning violation that maybe looks like it's a 21 life safety issue, then we would be proactive. 22 But for the most part, zoning violations are 23 determined after we receive a complaint and are able to 24 verify if it's actually a violation. 25 Q. (BY MR. RICARD): How large is the staff in the

25 (Pages 97 to 100)

Page 101 1 zoning office? 2 A. Particularly, for zoning, there is three people. 3 Q. And you may have described this before, but can 4 you describe and explain who those people are? 5 A. Myself as the zoning administrator, Elton Farmer 6 as the zoning technician, and Dorian Dixon as the zoning 7 enforcement officer. 8 Q. I believe you also testified that your office 9 doesn't have the staff to investigate every property 10 transfer. 11 Do you recall testifying to that effect? 12 A. Yes. 13 Q. My follow-up question to that is, is the zoning 14 office ever even notified of property transfers that 15 occur within the city of North Myrtle Beach? 16 A. I can't think of a reason why we would. 17 Q. Do you recall in your tenure in the zoning office 18 of ever being notified of a property transfer? 19 A. No. 20 Q. I believe you also -- 21 A. Well, I'm sorry. 22 Q. Go ahead. 23 A. From time to time someone will apply for a 24 variance, and they will be the proposed new owners of 25 the property or the proposed -- proposed new owners, and	Page 102 1 it might be a case where they would need to get the 2 variance if they were going to purchase the property. 3 Say -- for instance, I think I remember one 4 where there was a swimming pool that they wanted to put 5 in the front yard. The ordinance doesn't allow swimming 6 pools in a front yard. They weren't going to buy the 7 property unless they could get the pool in the front 8 yard. So I was kind of aware that there was going to be 9 a transaction, but wasn't notified that there was a 10 transaction for any purchase. 11 Q. Right. So is it fair to say the only way you 12 would be notified of a property transfer is if somebody 13 actively is making a request through the zoning office 14 or through the Board of Zoning Appeals or some other 15 kind of entity associated with the zoning? 16 A. Would you say that again? 17 Q. Sure. I will rephrase it. 18 Is there any automatic -- does the City 19 itself automatically, like probate court, send out 20 notifications to the zoning office notifying the office 21 of every single property transfer that occurs in the 22 city? 23 A. No. 24 MR. TAMASITIS: Object to the form. 25 Q. (BY MR. RICARD): So the only way the City --
Page 103 1 excuse me -- that the zoning office would be notified is 2 if a property owner themselves submits some type of 3 request to the zoning office? 4 A. It wouldn't be a request, I don't think, for a 5 change of ownership. We wouldn't have anything to 6 review in the case of ownership, unless possibly it 7 would be for a change of ownership of a cabana house. I 8 can't think of any other reason why. 9 Q. Okay. And that didn't happen in this particular 10 case, did it? 11 A. Not to my knowledge. 12 Q. Switching topics, Mr. Caldwell, I believe you 13 testified that you're not aware of any other ordinances 14 that have ownership restrictions. 15 Do you recall that testimony? 16 A. Yes. 17 Q. Would you need to review the entire code of 18 ordinances to confirm the accuracy of that statement? 19 A. Probably, yes. 20 Q. Because today you're just relying on your memory; 21 is that fair to say? 22 A. Correct. 23 Q. So prior to answering that question, you didn't 24 have the opportunity to review the entire codes? 25 A. I did not.	Page 104 1 Q. You were asked some questions about what 2 investigation you conducted on the other cabana houses 3 in the city. 4 A. Yes. 5 Q. Did you ever receive any complaints about those 6 other cabana houses? 7 A. Not to my knowledge. 8 Q. Except for maybe -- you testified maybe one about 9 Barefoot, is that right? 10 A. I don't know if it was a complaint. I think it 11 was just an objection to the issuance of a special 12 exception for the Barefoot Cabana House. 13 Q. So specifically related to complaints about the 14 use, such as noise, lighting, parking, violence 15 associated with cabana houses, have you ever received 16 complaints of that nature at these other cabana houses? 17 A. Not to my knowledge. 18 Q. You were asked some questions about what you 19 considered injurious to the neighborhood and community, 20 and I believe you mentioned some testimony about 21 property values decreasing. 22 Do you recall that testimony? 23 A. Yes. 24 Q. Is it fair to say that property values -- 25 assessing property values is an economic consideration?

26 (Pages 101 to 104)

Page 105	Page 106
1 A. Yes. 2 Q. Is it possible that some of these restrictions 3 that are in the special exceptions are designed to 4 encourage -- or designed to protect economic 5 considerations within the city? 6 A. Yes. 7 Q. And what about maintenance agreements? Is it 8 possible maintenance agreements are designed in order to 9 maintain landscaping, upkeep the slightly appearance of 10 the city? 11 A. Yes. 12 Q. I want to direct your attention to I believe it's 13 Exhibit 10, the discovery request. 14 Specifically, if you could turn to Page 9, 15 Question 17. I'm going to read Question 17 and, if you 16 don't mind, I would like you to respond by reading the 17 answer, okay, and then I'll have a question for you, all 18 right? 19 A. Okay. 20 Q. Question 17. "Please explain how the zoning 21 ordinances restricting ownership of properties zoned as 22 cabana houses exclusively to homeowners' associations 23 furthers the general purpose of guiding development in 24 accordance with existing and future needs and promoting 25 the public health, safety, morals, convenience, order,	1 appearance, property, and general welfare for the City 2 of North Myrtle Beach." 3 A. "This requirement supports the homogeneous and 4 harmonious use of the property alongside adjacent 5 properties, all of which are, after all, located within 6 a residential district. 7 "Specifically, the restriction supports the 8 homogeneous and harmonious use because the subject 9 property is located between adjoining, beach-front 10 condominium development with their own respective 11 homeowner's association. These adjoining properties 12 share the same name, Sea Cloisters I and Sea Cloisters 13 II, they are essentially mirror-images in their design 14 and layout, and the two homeowner's associations 15 coordinate with and mutually-support each other. 16 Requiring there to be a stretch of three homeowner's 17 association, rather than allowing for a commercial 18 enterprise engaging in non-residential, commercial uses 19 of the property at best, or creating a nuisance at 20 worst, between such close homeowner's associations, is 21 reasonable and has a tendency to promote the general 22 welfare of the adjoining properties and the R-4 23 residential district specifically and the City 24 generally." 25 Q. Did you provide any input or help draft this
Page 107	Page 108
1 particular answer? 2 A. No. 3 Q. Do you disagree with any of the statements that 4 are contained within this answer? 5 A. No. 6 Q. And you said you agree with these statements? 7 A. Yes. 8 Q. So a similar question, but same thing for 9 Question 18. 10 "Please explain how the Zoning Ordinances' 11 limitation of the use of properties zoned as cabana 12 houses exclusively to projects in North Myrtle Beach 13 furthers the general purpose of guiding development in 14 accordance with existing and future needs and promoting 15 the public health, safety, morals, convenience, order, 16 appearance, property, and general welfare for the City 17 of North Myrtle Beach." 18 A. "Plaintiff herein incorporates by reference its 19 Answer to interrogatory Number 17, and supplements with 20 the following: This requirement operates to encourage 21 and support local, private developments and their 22 corresponding homeowner's associations, as opposed to 23 non-local, corporate enterprises, by providing them with 24 a private beach club and access point to the beach. 25 "It also encourages investment in the City	1 rather than in projects outside of the City. 2 Ultimately, this requirement is reasonable and has a 3 tendency to promote the general welfare of the adjoining 4 properties and the R-4 residential district specifically 5 and the City generally." 6 Q. Did you provide any input or help draft this 7 particular answer? 8 A. No. 9 Q. Do you find any disagreement with any of the 10 statements within this answer? 11 A. No. 12 Q. Instead, do you agree with all the statements in 13 this answer? 14 A. I do. 15 Q. And to piggyback on a conversation that we just 16 had, or the questions and answers that we just had, 17 economic considerations. 18 You talked about property value decrease and 19 how that might be injurious to adjoining properties, is 20 that correct? 21 A. It is. 22 Q. And is this another type of restriction that 23 could also be an economic consideration, the requirement 24 to limit a cabana house to a project within North Myrtle 25 Beach?

27 (Pages 105 to 108)

Page 109 1 A. It could be. 2 Q. Question 19. "Please explain how the Zoning 3 Ordinance's requirement that a cabana house shall be 4 owned and maintained by a homeowner's association with a 5 maintenance agreement submitted and approved by the 6 planning department furthers the general purpose of 7 guiding development in accordance with existing and 8 future needs and promoting the public health, safety, 9 morals, convenience, order, appearance, property, and 10 general welfare for the City of North Myrtle Beach." 11 A. "Plaintiff herein incorporates by reference its 12 Answers to interrogatory Number 17 and Number 18, and 13 supplements with the following: This requirement 14 supports the aesthetics of the residential district, 15 because it encourages the upkeep and slightly 16 landscaping, which is reasonable and has a tendency to 17 promote the general welfare of the adjoining properties 18 and the R-4 residential district specifically and the 19 City generally." 20 Q. And, for the record, that actually might be a 21 typo. Do you think that slightly might actually be 22 slightly landscaping? 23 A. Yes. 24 Q. Did you provide any assistance or input in 25 drafting this answer?	Page 110 1 A. No. 2 Q. Had you provided input, do you think you might 3 have caught that typo? 4 A. Hopefully. 5 Q. Do you disagree with any statements contained 6 within this answer? 7 A. I don't. 8 Q. Instead, do you agree with all the statements 9 within this answer? 10 A. Yes. 11 Q. So looking at all of the answers to Questions 17, 12 18 and 19, were these considerations that you had in 13 mind when you were reviewing your affidavit? 14 A. Yes. 15 Q. And also in coming to determinations that there 16 were or, upon information and belief, might be 17 violations that were occurring at the subject property? 18 A. Yes. 19 Q. One moment. I'm not sure I hit on this before, 20 Mr. Caldwell, but just to be clear, the restriction on a 21 project within North Myrtle Beach, in your opinion, 22 would that still allow for guests of that project within 23 North Myrtle Beach to come from outside of North Myrtle 24 Beach? And if that question don't make sense, I can 25 rephrase.
Page 111 1 A. Could you please rephrase? 2 Q. Sure. So you're aware of the restriction that 3 the project has to be within North Myrtle Beach, 4 correct? 5 A. Yes. 6 Q. And those projects, you testified before, 7 generally are developments, correct? 8 A. Uh-huh. 9 Q. Those developments would have property owners, 10 perhaps? 11 A. Yes. 12 Q. They might also have guests that are invited onto 13 the property? 14 A. Yes. 15 Q. So this restriction limiting cabana houses to a 16 project within North Myrtle Beach, would that disallow 17 guests from outside of North Myrtle Beach to visit and 18 access the cabana house? 19 MR. TAMASITIS: Object to the form. 20 A. I would say, which I think is the answer you're 21 asking -- or the question you're asking is if I rented a 22 house in Tidewater and I'm from Iowa, I could then use 23 their cabana house. 24 Q. (BY MR. RICARD): Okay. Right. So there is no 25 restriction on non-residents of North Myrtle Beach being	Page 112 1 able to access the cabana house as long as they are 2 associated with a project within North Myrtle Beach? 3 A. Correct. 4 MR. RICARD: Thank you, Mr. Caldwell. I 5 don't have any further questions for you. 6 FURTHER EXAMINATION 7 BY MR. TAMASITIS: 8 Q. Just a couple of follow-ups based on that. 9 Dorian Dixon, what is her role, or his 10 role? 11 MR. RICARD: Objection, scope. 12 A. His role is zoning enforcement officer. 13 Q. (BY MR. TAMASITIS): And what is the 14 responsibility of a zoning enforcement officer? 15 A. He does most of our in-the-field inspections for 16 construction, and he investigates possible zoning 17 violations. 18 Q. Was he involved in the investigation of the 19 cabana house here? 20 A. No. 21 Q. You guys went over discovery responses 17, 18 and 22 19, responses to the interrogatories. 23 And your testimony was you did not have any 24 involvement with drafting these responses, is that 25 correct?

28 (Pages 109 to 112)

Page 113 1 A. That's correct. 2 Q. Who did draft these responses? 3 MR. RICARD: Objection, speculation. 4 A. I don't know. 5 Q. (BY MR. TAMASITIS): And if we go to 6 interrogatory Number 18 which states, "Please explain 7 how the Zoning Ordinances' limitation of the use of 8 properties zoned as cabana houses exclusively to 9 projects in North Myrtle Beach furthers the general 10 purpose of guiding development in accordance with 11 existing and future needs and promoting the public 12 health, safety, morals, convenience, order, appearance, 13 property, and general welfare for the City of North 14 Myrtle Beach", you said you agreed with the contents of 15 the answer in response to that interrogatory, correct? 16 A. Yes. 17 Q. And so you agree with the sentence that "it also 18 encourages investment in the City rather than in 19 projects outside of the City", correct? 20 A. Correct. 21 MR. TAMASITIS: Thank you. No further 22 questions. 23 (The deposition was concluded at 12:15 p.m.) 24 - - - 25	Page 114 1 STATE OF SOUTH CAROLINA) 2) 3 COUNTY OF CHARLESTON) 4 I, Nancy Ennis Tierney, Certified Shorthand Reporter 5 and Notary Public for the State of South Carolina at 6 Large, do hereby certify that the witness in the 7 foregoing deposition was by me duly sworn to testify to 8 the truth, the whole truth and nothing but the truth in 9 the within-entitled cause; that said deposition was 10 taken at the time and location therein stated; that the 11 testimony of the witness and all objections made at the 12 time of the examination were recorded stenographically 13 by me and were thereafter transcribed by computer-aided 14 transcription; that the foregoing is a full, complete 15 and true record of the testimony of the witness and of 16 all objections made at the time of the examination; and 17 that the witness was given an opportunity to read and 18 correct said deposition and to subscribe the same. 19 Should the signature of the witness not be affixed to 20 the deposition, the witness shall not have availed 21 himself/herself of the opportunity to sign or the 22 signature has been waived. 23 I further certify that I am neither related to nor 24 counsel for any party to the cause pending or interested 25 in the events thereof. Witness my hand, I have hereunto affixed my official seal this 19th day of May, 2022, at Charleston, Charleston County, South Carolina. Nancy Ennis Tierney, CSR (IL) My Commission Expires: June 12, 2024
Page 115 1 ATTESTATION 2 In Re: City of North Myrtle Beach v. SUN TRS 3 Ocean Club, LLC, et al. 4 Case No.: 2021-CP-26-07489 5 Deposition of: Benjamin Caldwell 6 Date Taken: April 26, 2022 7 Taken Before: Nancy Ennis Tierney, CSR (IL) 8 9 I have read the transcript of my deposition and find 10 that no changes are necessary. 11 _____ 12 Benjamin Caldwell 13 14 Having read the transcript of my deposition, I wish 15 to make the following corrections: 16 Page Line: 17 Page Line: 18 Page Line: 19 Page Line: 20 Page Line: 21 Page Line: 22 _____ 23 Benjamin Caldwell 24 Sworn to and subscribed before me this ____ day of 25 _____, 2022, in _____ County, South Carolina. _____ Notary Public State of South Carolina My Commission Expires: _____	

29 (Pages 113 to 115)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	CA No. 2021-CP-26-07489
	)	
CITY OF NORTH MYRTLE BEACH,	)	
	)	
Plaintiff,	)	DEFENDANTS' REPLY IN SUPPORT
	)	OF THEIR MOTION FOR PARTIAL
vs.	)	SUMMARY JUDGMENT
	)	
SUN TRS OCEAN CLUB LLC and SUN	)	
TRS CAROLINA PINES LLC,	)	
	)	
Defendants.	)	
	)	
	)	

Defendants Sun TRS Ocean Club LLC ("Sun TRS OC") and Sun TRS Carolina Pines LLC ("Sun TRS Carolina Pines," and collectively, the "Sun Defendants"), by and through their undersigned counsel, submit this Reply in Support of their Motion for Partial Summary Judgment.

INTRODUCTION

The Sun Defendants acknowledge that additional briefing on their Motion is disfavored. However, the City of North Myrtle Beach's (the "City") attempt to obfuscate both the law and the facts at issue in this case in its Memorandum of Law in Opposition to the Motion needs to be addressed. The City's analysis misses the boat entirely and while the Sun Defendants welcome rigorous debate and discussion on this important constitutional issue, they cannot be made to suffer the repeated red herrings, flawed logic, and cherry-picking of quotes that permeate the City's memorandum.

The absurdity of the City's arguments can only logically mean that the City is trying desperately to survive summary judgment by confusing the issues and attempting to pull the

proverbial wool over the Court's eyes. Accordingly, the Sun Defendants offer this brief Reply to set the record straight.

I. Suggesting that the Commerce Clause is not implicated by the Zoning Ordinance under the circumstances in this case is illogical.

The City is correct that there are two broad categories of activity that may implicate the Commerce Clause: (1) channels and instrumentalities of interstate commerce and (2) activities that “substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 556-60 (1995). Surprisingly, the City cites *Wickard v. Filburn* to support its argument – a case that stands for the proposition that choosing not to engage in commerce could have a “substantial effect” on interstate commerce. To argue that ownership and utilization of a cabana house/beach club supporting a commercial enterprise does not have a substantial effect on interstate commerce strains credulity.¹

For the City to argue that the real “question” in this case is about “whether the existence and/or ability of this one amenity . . . substantially effects the number of reservations and/or length of reservations” at the RV Resort misses the analysis entirely. (Pl. Memo. Opp. Mot. For Partial Summ. J., p. 12). It is not the substantial effect on the Sun Defendants’ business that is at issue in this case, but the substantial effect of the Zoning Ordinance **on interstate commerce**. Accordingly, the Court should simply discard this section of the City’s argument in its entirety.

¹ Other competing resorts in the City have private beachfront access, and a beachfront pool. A cabana house is a valuable amenity and the reason Sun TRS OC invested significant funds in acquiring the Property and upgrading it. The Carolina Pines RV Resort competes with other resorts for guests, which all have guests coming from outside of South Carolina. Moreover, Sun TRS OC is a Michigan limited liability company that owns the Property. The ownership and use of a cabana house in the City for a “project” clearly involves interstate commerce. The analysis would be no different if the Zoning Ordinance said that condominiums could only be rented by condominium owners who were residents of the City. Sun TRS OC has clearly been and will continue to be deprived of the benefit of its investment and property rights if it cannot use the facility or is forced to divest it, simply because the Carolina Pines RV Resort does not reside or operate within the City limits.

II. The City attempts to shirk the significant burden the Constitution imposes on it to discriminate against interstate commerce.

There are two tests applicable legal tests for a dormant Commerce Clause claim: The first test, referred to as the *Pike* test, is available when there is **no patent discrimination** against interstate trade, and an ordinance regulates even handedly with only incidental effects on interstate commerce. If this is the case, then the ordinance is valid unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The burden of proof in that case is on the party challenging the ordinance.

The second test, and the only test at issue in this Motion, is where an ordinance **discriminates** against interstate commerce “facially, in its practical effect, or in its purpose.” *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992)). When the ordinance, as the one here, **discriminates** against interstate commerce, on its face, in its effect, and in its purpose,² it is subject to **strict scrutiny**, where **the City has the burden** to show that the ordinance advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93, 100-02 (1994).³

The City spends approximately four pages of its memo arguing that the Zoning Ordinance that facially discriminates against projects not located “in the City” is not “directly” discriminatory against “Out-of-State Interests,” and goes on to cite non-authoritative case law that does not

² See the City’s responses to the Sun Defendant’s First Set of Interrogatories cited in the Memo in Support at page 17.

³ As the Court is well aware, strict scrutiny is perhaps the highest level of scrutiny that a court must impose on its review of the constitutionality of an ordinance and only in the rarest of circumstances can the government show that no reasonable nondiscriminatory alternatives exist; hence, the reason why such discriminatory laws are considered “per se invalid.” *Brown v. Hovatter*, 561 F.3d 357, 363 (4th Cir. 2009).

involve the analysis of a facially discriminatory ordinance or statute. *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040-41 (10th Cir. 2009) (ordinance not discriminatory on its face); *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 36 (1st Cir. 2007) (statute is evenhanded on its face).⁴ Shockingly, in the same section, the City admits that the applicable sections of the Zoning Ordinance do, in fact, discriminate (or as the City's calls it "recognizes distinctions" with projects outside the City) but that such discrimination is acceptable because all zoning ordinance are "inherently discriminatory." While that may be true with respect to the use of property, no zoning ordinance in the United States is allowed to discriminate against a person or business because of who owns the property and where they do business. That form of discrimination is not "inherent," it is unconstitutional.

To suggest the applicable sections of the Zoning Ordinance that, on their face, prohibit a person or entity from owning a particular piece of property as a cabana house within the City limits because of where that person or entity does business is not discriminatory ignores the law. Indeed, it is the City's burden to justify the discrimination by a valid factor unrelated to economic protectionism. *Fort Gratiot Sanitary Landfill v. Mich. Dep't of Natural Resources*, 504 U.S. 353, 359-61 (1992).

⁴ The City's penchant for citing cases for the wrong proposition, taking quotes out of context, or completely ignoring the actual holding of the case happens repeatedly throughout the memo. The Sun Defendants trust that the Court will not be fooled by the City's tenuous grip on the case law. For example, see Pl. Memo. Opp. Mot. For Partial Summ. J., p. 16, fn. 5 where the cases cited either do not cite *Dean Milk* in any respect or specifically distinguish the facts in *Dean Milk* from the circumstances in the case at bar. The City incorrectly cites these cases for the proposition that *Dean Milk*'s holding has been curtailed by these very cases.

III. Finally, this case is not (and cannot) just be about Sun TRS OC. It must focus on interstate commerce as a whole and the City fails to recognize (or chooses to ignore) this reality.

The City spends an inordinate amount of time breaking down the “free of charge” amenities at the Carolina Pines RV Resort, the parking at the Property and in the City, the impact of the Cabana House on reservations at the RV Resort, and the bathing and change of clothing facilities available to the guests of the Resort. None of these facts are relevant to the Court’s analysis.

In conducting the discrimination inquiry, the Court should focus on discrimination against **interstate commerce** – not merely discrimination against the specific parties before it. *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013). “[A] state or local law discriminates by restricting market participation or curtailing the movement of articles of interstate commerce based on whether a market participant or article of commerce is in-state versus out-of-state, or local versus non-local.” *Florida Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230, 1244 (11th Cir. 2012). Focusing exclusively on discrimination against individual companies, like the Sun Defendants “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.” *Hazel*, 733 F.3d at 543.

Indeed, as pointed out in Sun Defendant’s Memorandum in Support, the Zoning Ordinance’s limitation of ownership of cabana houses to persons who are using it for projects located “in North Myrtle Beach” not only discriminates against projects in other cities in South Carolina, but also potential owners/projects in North Carolina or Kansas.⁵ This discrimination on

⁵ As stated in the Sun Defendants’ memo in support, Calabash, North Carolina is located less than 10 miles from City Hall.

the face of the Zoning Ordinance is unconstitutional and the City has the burden of showing no reasonable alternatives exists to achieve its purposes. A burden the City cannot satisfy.

CONCLUSION

Based on the foregoing and the arguments set forth in the Sun Defendant's Memorandum in Support, the geographical restriction imposed on **ownership** (not the uses) of cabana houses in the City of North Myrtle Beach by Sections 23-2 and 23-22 of the Zoning Ordinance discriminates against interstate commerce and constitutes a per se violation of the dormant Commerce Clause. The remaining provisions of Section 23-22 of the Zoning Ordinance are clear evidence that non-discriminatory alternatives exist to advance the City's alleged legitimate local interest related to "responsiveness" and "quality of life" issues without needing to resort to the discriminatory restrictions that currently exist. Therefore, there are no genuine issues of material fact and Sections 23-2 and 23-22 of the City's Zoning Ordinance are unconstitutional as a matter of law, and this Court should grant the Sun Defendants' Motion.

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November 14, 2022
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	CA No. 2021-CP-26-07489
	)	
CITY OF NORTH MYRTLE BEACH,	)	
	)	
Plaintiff,	)	SUN DEFENDANTS' RENEWED
	)	MOTION FOR PARTIAL
vs.	)	SUMMARY JUDGMENT
	)	
SUN TRS OCEAN CLUB LLC, SUN TRS	)	
CAROLINA PINES LLC, and SUN TRS	)	
CAROLINA PINES RV LLC,	)	
	)	
Defendants.	)	
	)	

PLEASE TAKE NOTICE THAT Defendants, Sun TRS Ocean Club LLC, Sun TRS Carolina Pines LLC, and Sun TRS Carolina Pines RV LLC (collectively, the “Sun Defendants”), by and through their undersigned counsel, hereby move, pursuant to Rule 56, SCRCP, for partial Summary Judgment in the Sun Defendants’ favor as to their counterclaim for Declaratory Judgment/Injunctive Relief – Unconstitutionality of the Zoning Ordinance under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. The grounds for this Motion are as follows:

1. Plaintiff City of North Myrtle Beach (the “City”) filed this declaratory judgment action seeking a declaration from the Court that the Sun Defendants’ ownership and use of the Cabana House, located on the subject Property, is in violation of the applicable sections of the City’s Zoning Ordinance, and asks the Court to order the Sun Defendants’ ownership and use of the subject Property “immediately cease and desist.” The Sun Defendants filed their counterclaim alleging, *inter alia*, that the relevant sections of the City’s Zoning Ordinance violate the dormant Commerce Clause of the United States Constitution.

2. The Commerce Clause not only vests Congress with “Power . . . [t]o regulate Commerce with foreign Nations, and among the Several States,” U.S. Const. art. I, § 8, cl. 3, but also prohibits states and municipalities from discriminating against interstate commerce – commonly known as the dormant Commerce Clause. *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (holding that the implicit restraints imposed by the Commerce Clause apply to municipalities, too). The sections of the City’s Zoning Ordinance at issue, Sections 23-2 and 23-22, discriminate against interstate commerce on their face, in their effect, and in their purpose by expressly limiting the use of the subject Property and associated Cabana House exclusively to “projects” that are located in North Myrtle Beach and by prohibiting ownership of the subject Property and Cabana House by any persons or entity other than a “homeowners’ association.” *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (internal quotation marks omitted) (explaining that state and local laws that discriminate against interstate commerce confront “a virtually *per se* rule of invalidity”).

3. Accordingly, the sections of the Zoning Ordinance at issue are *per se* invalid and the City thus bears the burden of demonstrating that the sections’ discriminatory provisions “advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008). The City cannot withstand its heavy burden and, therefore, Sections 23-2 and 23-22 of the Zoning Ordinance should be declared unconstitutional as a matter of law.

4. Sun Defendants filed their original Motion for Partial Summary Judgment on similar grounds, which Motion was heard by the Court on November 16, 2022. The Court entered its order denying the original Motion for Partial Summary Judgment on November 28, 2022 on the grounds that a “more comprehensive factual record” was desirable to fairly determine the

appropriate result. Since that time, the parties have engaged in extensive discovery and the factual record related to the relevant issues on Sun Defendants' dormant Commerce Clause counterclaim is complete.

5. For the reasons set forth above, and as will be more fully described in any Affidavit or Memorandum of Law filed in support of this Motion, there is no genuine issue as to any material fact on Sun Defendants' dormant Commerce Clause counterclaim and the Sun Defendants are entitled to judgment as a matter of law declaring that the sections of the Zoning Ordinance at issue are unconstitutional under the Commerce Clause of the United States Constitution. This Motion is based upon the pleadings in this action, the South Carolina Rules of Civil Procedure, all applicable statutory and common law, any affidavit that may be provided in support of this Motion, and upon any Memorandum of Law to be filed in connection herewith and additional arguments as may be submitted to the Court in support hereof.

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Attorneys for the Sun Defendants

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	CA No. 2021-CP-26-07489
	)	
	)	
CITY OF NORTH MYRTLE BEACH,	)	
	)	
Plaintiff,	)	SUN DEFENDANTS’ MEMORANDUM
	)	IN SUPPORT OF THEIR RENEWED
vs.	)	MOTION FOR PARTIAL
	)	SUMMARY JUDGMENT
SUN TRS OCEAN CLUB LLC and SUN	)	
TRS CAROLINA PINES LLC,	)	
	)	
Defendants.	)	
	)	
	)	

Defendants Sun TRS Ocean Club LLC (“Sun”), Sun TRS Carolina Pines LLC (“Sun CP”), and Sun TRS Carolina Pines RV, LLC (the “RV Resort,” and collectively, with Sun and Sun CP, the “Sun Defendants”) submit this Memorandum in Support of their Renewed Motion for Partial Summary Judgment as to their dormant Commerce Clause counterclaim. The Motion asks the Court to declare two sections of the North Myrtle Beach Zoning Ordinance, Sections 23-2 and 23-22 (as they relate to the cabana house special exception), unconstitutional and permanently enjoin their continued enforcement.¹ Specifically, these sections purport to restrict the ownership of beachfront cabana houses to local homeowners’ associations and confine the use of such cabana houses exclusively to projects located within the limits of the City of North Myrtle Beach. These restrictions discriminate against interstate commerce on their face, in their effect, and in their purpose.

¹ See Sections 23-2 and 23-22 of the City’s Zoning Ordinance discussed in more detail *infra*. Copies of Sections 23-2 and 23-22 are attached hereto as **Exhibits A and B**, respectively.

INTRODUCTION

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) (citing *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008)). To date, only one such U.S. Supreme Court case has been able to meet this exceedingly high standard. *Maine v. Taylor*, 477 U.S. 131 (1986) (holding Maine’s ban on the importation of out-of-state bait fish was constitutional, even though the law discriminated against interstate commerce on its face, because Maine had no other means to prevent the spread of parasites to its unique, native fish species). 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 Centers of America, LLC v. Hazel*, 733 F.3d 535, 542-43 (4th Cir. 2013) (quoting *Oregon Waste Sys., Inc. v. Dep’t of Envtl. Quality*, 511 U.S. 93, 99 (1994)).²

The Zoning Ordinance for the City of North Myrtle Beach (the “City”) authorizes property owners in the R-4 (Resort Residential) district to apply for a special exception permit to build a “cabana house” (also known as a beach club) on beachfront property for the use of “projects” not located near the ocean. These “cabana houses” are utilized almost exclusively by communities located in the City. Specifically, the homeowners’ and property owners’ associations connected with Barefoot Resort & Golf, The Links Golf and Racquet Club, and Tidewater Planation, all located within the city limits of North Myrtle Beach, own cabana houses on the City’s beachfront. The lone exception is the “cabana house” at issue in this case, which is owned by Sun (a limited

² 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 Natural Res.*, 504 U.S. 353, 361 (1992).

liability company organized under the laws of Michigan) for the benefit of guests of the RV Resort located in Conway, South Carolina, as well as eight (8) dues paying members from Seabrook Plantation (which is located in North Myrtle Beach) – and therein lies the issue.

On February 15, 2019, Sun purchased beachfront property with an already approved and operating cabana house in North Myrtle Beach for approximately \$2.5 million from NMB Ocean Club Partners, LLC.³ The goal of the purchase was to utilize the existing cabana house as a Beach Club for guests of the RV Resort in Conway. This ownership and use were expressly authorized by the Zoning Administrator for the City prior to purchase. After Sun owned and operated the Beach Club for more than two (2) years without any complaints from the City, the City initiated the above-captioned lawsuit, in reaction to complaints from the property’s adjacent homeowner’s associations, Sea Cloisters I & II condominiums.

The City’s justification for the lawsuit is based on two sections of the City’s Zoning Ordinance.⁴ According to the City’s interpretation, these sections require that a cabana house be owned and operated by a homeowner’s association for a “project” located in North Myrtle Beach, and the cabana house must be used exclusively by residents and guests of that local “project.” Therefore, Sun’s very ownership, as well as the RV Resort’s use of the subject property and the Beach Club is, according to the City, illegal. The City contends that it is entitled to an order from this Court “that the ownership and use of the Cabana House by [Sun Defendants] is in violation of

³ Importantly, NMB Ocean Club Partners, LLC, which sold the Beach Club to Sun, was not a homeowner’s association and did not operate a “project” in the City and, therefore, according to the City’s current interpretation of the Zoning Ordinance, would also be in violation of the Zoning Ordinance; however, no enforcement action was ever brought against this owner of the property or any other owner of the subject property, as will be discussed in more detail *infra*.

⁴ These “violations” of Sections 23-2 and 23-22 form the basis of the City’s declaratory judgment action against Sun Defendants, which precipitated this dispute.

the applicable Zoning Ordinance and that such ownership and use must immediately cease.” (Compl. at ¶ 21).⁵

These specific provisions of the Zoning Ordinance restricting the ownership and exclusive use of the Beach Club to homeowner’s associations for “projects” located in the City are unconstitutional because they violate the dormant Commerce Clause. The United States Supreme Court has explained in numerous cases that state and local laws that discriminate against interstate commerce in favor of local investment are *per se* invalid, except for a very narrow set of circumstances where the City can demonstrate, under the strictest judicial scrutiny, that it does not have any other means to advance a legitimate local interest, other than by discriminating against interstate commerce.

The City is keenly aware of this reality and has gone to great lengths to thwart Sun Defendants’ attempts to obtain a ruling on this straightforward issue.⁶ The City knows that its rationale for the restrictions set forth in the Zoning Ordinance cannot pass constitutional muster. Accordingly, the City is desperately searching for any diversion to keep this issue from being decided by the Court. But the City’s avoidance efforts cannot detract from the inevitable result of this case – Sections 23-2 and 23-22 of the Zoning Ordinance are flatly unconstitutional as written and enforced.

⁵ It is unclear how the Court or the City can require Sun’s ownership of the Property to “cease and desist” without ordering a sale of the Property, which would invariably lead to a taking by a government entity and a corresponding analysis of just compensation.

⁶ We anticipate more of the same in response to this Motion and expect the City to request more time to “complete” discovery, even though the parties have been litigating this case for over 20 months and the City has served 17 different sets of Requests for Production and Sun Defendants’ have produced almost 5,750 documents (as opposed to 799 documents produced by the City). Resolution of this constitutional issue is not fact-dependent and the time for discovery on this specific issue is over.

RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

I. Procedural History

On November 11, 2021, the City initiated this declaratory judgment action seeking a declaration from the Court that Sun’s “ownership and use” of the Beach Club is in violation of the applicable sections of the City’s Zoning Ordinance. The City asked the Court to order Sun’s ownership and the RV Resort’s use of the Property to “immediately cease and desist.”

In response, Sun Defendants counterclaimed for Declaratory Judgment/Injunctive Relief, asking the Court to declare two relevant sections of the Zoning Ordinance unconstitutional under the dormant Commerce Clause, the Fourteenth Amendment Due Process and Equal Protection Clauses, and for violation of 42 U.S.C. § 1983 for deprivation of the Defendants’ constitutional rights.⁷ Defendants also asserted a counterclaim for Inverse Condemnation/Regulatory Taking of the Property, based on the City’s claim for relief.

At the outset of the litigation, the City moved for a preliminary injunction seeking to enjoin the Sun Defendants from utilizing the Property during the pendency of this action. At the preliminary injunction hearing before Judge McCoy, the parties agreed to enter into a Consent Order regarding use of the Property during the pendency of this litigation, that limits use of the Property and its facilities to certain members of the Beach Club not affiliated with the RV Resort.⁸

On August 1, 2022, Sun Defendants moved for partial summary judgment as to their dormant Commerce Clause counterclaim. That Motion was denied based on the assertions from

⁷ To streamline the issues before the Court, Sun Defendants have withdrawn their Equal Protection claim.

⁸ The reason Sun Defendants agreed to the Consent Order was because the parties also agreed to jointly submit this case to the South Carolina Business Court, for an expedited merits hearing, before the tourist summer season began. Unfortunately, Judge Young declined to accept the case because it involved a public entity. Now, nearly two years later, the Beach Club remains closed pending a decision by the Court on the Consent Order’s continued inequitable enforcement.

the City that it needed more time to conduct discovery into the issues related to this specific claim.⁹ Since that time, the City has served fifteen (15) separate sets of Requests for Production, and the parties have taken ten (10) depositions, which includes Rule 30(b)(6) designees for all parties.

The parties have recently agreed to a Consent Order bifurcating the trial between jury and non-jury matters, as well as to complex case designation. The dormant Commerce Clause issue is a matter of law for the Court's determination alone, and it is overdue for a decision. No further discovery is necessary to decide upon the legal matters raised in this Motion.

II. History of the Property

The beachfront property at issue is owned by Sun and identified as Lot 1, Block 18-A, Tilghman, Parcel Number 35501040048 located at 1814 N Ocean Blvd. in the City of North Myrtle Beach, Horry County, South Carolina (the "Property").¹⁰ On or around March 28, 2005, Pan, LLC acquired the Property in an undeveloped condition to build a high-rise condominium project. That proposal was subsequently blocked by the adjoining neighbors to the Property, Sea Cloisters I & II Homeowners' Associations ("Sea Cloisters"), on the grounds that the deed restriction on the Property limits the use of the Property for "recreational purposes and the improvement of said property shall be limited to a clubhouse for recreational purposes."¹¹

Sometime in May 2007, Pan, LLC (the developer of Seabrook Plantation) applied for a special exception permit to the City's Board of Zoning Appeals to construct an oceanfront cabana house on the Property for the use of Seabrook Planation (the "Special Exception Application"). When the Special Exception Application was submitted to the City's Board of Zoning Appeals, the Property was zoned in the R-4 (Resort Residential) district, as it is now. It is Sun Defendants'

⁹ The Order denying the previous Motion for Partial Summary Judgment was entered by the Court on November 28, 2022.

¹⁰ An aerial photograph of the Property is attached hereto as **Exhibit C**.

¹¹ A copy of the Restrictive Covenants for the Property is attached hereto as **Exhibit D**.

understanding that the cabana house special exception was created in 1996 for the R-4 District by City Council in response to an inquiry from the owner of Tidewater Plantation to allow off-beach developments to build beach clubs for their residents' and guests' use. (Ex. E, Blust Dep. Tr. 22:6-16; 25:6-21).¹²

The City has testified that the municipal interests furthered by Sections 23-2 and 23-22 are as follows: "responsiveness," "quality of life," and "preservation of local property values." (Ex. F, City Dep. Tr. 126:5-10).¹³ However, the City has not conducted any study or analysis regarding these interests or how they are furthered by the restrictions set forth in Sections 23-2 and 23-22 of the Zoning Ordinance. (*Id.* at 123:6-9; 124:8-20; 125:14-21; 129:8-22). Rather, the City's assertion that the aforementioned legitimate municipal interests are advanced by the restrictions set forth in Sections 23-2 and 23-22 of the Zoning Ordinance are simply conclusory and not based on any evidence.

On June 18, 2007, Paul Blust, the Zoning Administrator for the City at the time, informed Pan, LLC via letter that the Special Exception Application was approved. The Board of Zoning Appeals found the design of the building to be placed upon the Property was similar to a single-family house, the proposed use of the building was consistent with the limitations set forth in the City's Zoning Ordinance at the time, and the parking at the Property met or exceeded the requirements of the City's Zoning Ordinance at the time (the "Approval Letter").¹⁴

After receipt of the Approval Letter, Pan, LLC caused to be constructed on the Property a physical structure with an inground pool, among other internal and external improvements and fixtures (the "Beach Club"). Pan, LLC, thereafter, referred to the Property as the "Ocean Club at

¹² A copy of the relevant portions of Paul Blust's deposition transcript is attached hereto as **Exhibit E**.

¹³ A copy of the relevant portions of the City's Rule 30(b)(6) deposition transcript is attached hereto as **Exhibit F**.

¹⁴ A copy of the Approval Letter is attached hereto as **Exhibit G**.

Tilghman Beach.” At the time of construction, Pan, LLC did not create a homeowner’s association to own the Beach Club or the Property, nor was it asked to do so by the City in order to comply with Sections 23-2 and 23-22 of the Zoning Ordinance.¹⁵ At no time did the City or its Zoning Administrators raise the issue that Pan, LLC was not a homeowners’ association, nor did Pan, LLC ever convey the Beach Club to a homeowners’ association, or limits its use to a “project” in North Myrtle Beach.

Following the construction of the Beach Club, the Property was conveyed several times. As indicated in the public record, on August 24, 2009, Pan, LLC conveyed the Property to NMB Oceanclub, LLC. In June 2012, NMB Oceanclub, LLC conveyed the Property to NMBOC Holding Co., LLC. In April 2017, NMBOC Holding Co., LLC conveyed the Property to NMBOC Holding Co. II, LLC. Finally, in August 2017, NMBOC Holding Co. II, LLC conveyed the Property to Sapphire, LLC, which immediately conveyed the Property to NMB Ocean Club Partners, LLC. None of the aforementioned owners of the Property and the Beach Club were homeowner’s associations, nor was the Beach Club exclusively used by a “project” located in the City. Instead, the Beach Club was operated as a private membership club, with no restrictions as to the residency of its members.

It was well known during the time the Property was owned by NMB Ocean Club Partners, LLC that it was not owned by a homeowners’ association nor was it exclusively used by a “project” located within the City. Instead, the adjacent neighbors were well aware that the Property was a

¹⁵ Interestingly, the cabana house currently owned by Barefoot Resort Residential Owners Association, Inc. (“Barefoot”), which acquired its special exception on May 15, 2001, was not owned by a homeowner’s association for over ten (10) years before it was deeded to Barefoot in 2011. (Barefoot Depo Tr. 13:10 – 16:18). A copy of the relevant portions of the Barefoot deposition transcript is attached hereto as **Exhibit H**. Likewise, the cabana house for the Links Golf & Racquet Club was not owned by a homeowner’s association until 2018, even though it had been in use since the late 1970s. (Links Dep Tr. 16:3 – 18:14). A copy of the relevant portions of the Links Golf & Racquet Club Homeowner’s Association, Inc.’s (the “Links”) deposition transcript is attached hereto as **Exhibit I**.

“paid membership club marketed as a private beach club, a place to park, private access to the beach, a pool and cabana house” that was “operated as a commercial business not conforming to the zoning ordinances”¹⁶ However, the Sea Cloisters’ residents and homeowners’ associations did not report these alleged zoning infractions to the City, because NMB Ocean Club Partners, LLC’s ownership did not disturb the residents of those projects. (Ex. K, Sea Cloisters I Dep. Tr. 33:22 – 34:18; 100:20-24).¹⁷ Regardless, in the Spring of 2018, Sea Cloisters rebuffed NMB Ocean Club Partners, LLC’s efforts to remove the deed restriction, in order to build a high-rise condominium project on the Property. As a result, NMB Ocean Club Partners, LLC decided to sell the Property. (*Id.* at 31:10 – 32:24).

III. Property Sold to Sun

On or about February 15, 2019, Sun entered into a Real Estate Purchase and Sale Agreement with NMB Ocean Club Partners LLC (the “Purchase Agreement”). Pursuant to the Purchase Agreement, NMB Ocean Club LLC warranted the following with respect to the Property:

To the best of Seller’s Knowledge, the Assets and the operation of the Beach Club comply in all respects with all Permitted Exceptions and all applicable laws, ordinances, codes, rules and regulations, including those pertaining to zoning To the best of Seller’s knowledge, there are no existing facts or conditions which may result in the issuance of, any violations of any building, zoning, safety, fire, environmental, health or other code, laws, ordinances, or regulations with respect to the Assets, the appurtenances thereto or the maintenance, repair or operation thereof. To the best of Seller’s knowledge, Parking at the Real Estate complies with all requirements for the operation of the Beach Club.

Prior to closing the sale of the Property and during its due diligence period, Sun, through its acquisition team, requested a zoning letter from the City, inquiring as to the current zoning of the Property and whether the Property or the Beach Club was subject to any violations of the City’s

¹⁶ A copy of the Formal Complaint from Sea Cloister I & II is attached hereto as **Exhibit J.**

¹⁷ A copy of the relevant portions of Sea Cloisters I’s deposition is attached hereto as **Exhibit K.**

Zoning Ordinance.¹⁸ In response, on March 19, 2019, Mr. Blust, then-Zoning Administrator for the City, informed Sun in writing (the “Zoning Letter”) 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.”¹⁹

Mr. Blust admitted in his deposition that, after receipt of the request for the Zoning Letter, he did not check to see if the Cabana House was owned by a homeowner’s association, or whether the Beach Club was being used by a “project” located in the City. (Ex. E at 47:5 – 13). Instead, Mr. Blust testified that when he visited the Property to conduct his investigation, he visually inspected the Property, noticed it was not then in use (it was March), and “since it was not being used at all, whoever owned it didn’t really matter to me as far as whether it was a zoning violation or not.” (*Id.* at 47:14-21).²⁰ As a result, the City, through the Zoning Letter and its 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.

Thereafter, on May 3, 2019, the Property (along with the Beach Club) was conveyed to Sun via General Warranty Deed, which deed was recorded in the Horry County Register of Deeds on May 10, 2019 in Deed Book 4206 at Page 2963. Sun purchased the Property for approximately

¹⁸ A zoning letter, as explained by the City’s current Zoning Administrator, Benjamin Caldwell, is a letter from the City requested by a property owner (or prospective purchaser) stating what the property in question is zoned, and if the current use of the property is a use that is permitted. (Caldwell Dep. Tr. 16:19 – 17:6). A copy of the relevant portions of Mr. Caldwell’s deposition transcript is attached hereto as **Exhibit L**.

¹⁹ A copy of the Zoning Letter is attached hereto as **Exhibit M**. The City has testified that the Zoning Administrator speaks for the City on behalf of any zoning-related issues and that his or her decision can be interpreted as the official position of the City. (Ex. F at 26:5-22).

²⁰ Mr. Blust’s candid testimony is appreciated, but startling, given that his only task was to determine if the Property was compliant with all applicable zoning ordinances.

\$2.5 million and began to use the Beach Club for the RV Park's guests. (Ex. N, Sun Defs' Dep. Tr. 367:25 – 368:2).²¹

IV. Sun Communities, Inc. and the Carolina Pines RV Resort

Sun is a wholly owned subsidiary 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. (*Id.* at 340:22 – 341:7). As of September 30, 2022, Sun Communities, Inc. and its subsidiaries own interests in 671 such communities in the United States, Canada, Puerto Rico, and the United Kingdom consisting of over 180,000 developed sites and over 48,000 wet slips and dry storage lots. (Aff. of Kirtley at ¶ 3).²² Sun Communities, Inc. is the largest business of its kind in the United States.

Sun has an agreement with the RV Resort, whereby it permits the RV Resort to use the Property (and the Beach Club) as a private beach club for guests staying at the RV Resort in Conway. The Property also honors memberships to the Cabana House held by certain individuals, some of whom do not reside in North Myrtle Beach yearlong.

Approximately 69% of the guests who have made reservations at the RV Resort since its grand opening on July 1, 2019 are from outside South Carolina. The RV Resort has hosted more than 75,000 families since its first year of operation and maintains a resort destination that is unlike your ordinary RV park. The RV Resort provides an array of amenities (including a waterpark,

²¹ A copy of the relevant portions of Sun Defendants' Rule 30(b)(6) deposition transcript is attached hereto as **Exhibit N**.

²² A copy of the Affidavit of Mindy Kirtley, Division Vice President for Sun Outdoors, a Division of Sun Communities, Inc. has been filed concurrently herewith. Sun Communities, Inc.'s substantial economic resources are relevant to this matter. Unlike a local homeowners' association, whose only source of revenue would be dues paid by members, Sun has the economic means and support to improve and maintain the Beach Club as a high-end facility – consistent with or superior to its neighbors. It can certainly be "responsive" to the City and can operate the facility so as to not adversely affected anyone's "quality of life." Yet the City has made no effort to achieve these goals through ordinary zoning enforcement methods.

arcade, miniature golf, bowling alley, etc.), upscale dining, standalone cottages for short-term renting, oversized RV sites, a specialty gift shop and general store, on-site food delivery, and access to the South Carolina coastline. Since opening, the RV Resort has expanded twice, adding hundreds of new RV sites and cottages. The current total amount of guest sites currently stands at 829, which includes 159 annual sites where guests stay yearlong. (*Id.* at ¶¶ 4-6).

The primary attraction of the RV Resort is its proximity to the beach. In addition to the over 30 on-site amenities, the RV Resort provides shuttle transportation as part of its 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 Grand Strand. (*Id.* at ¶ 7; Ex. N at 209:1 – 214:8). Most importantly, the shuttle transportation was utilized primarily to transport guests to the Beach Club during the “peak season” of the summer months, something that the City was directly involved with approving and permitting. (Ex. O, Martucci Dep. Tr. 24:6 – 25:4; 44:22 – 46:1).²³

While at the Beach Club, guests of the RV Resort and Beach Club members patronized local restaurants and shopping locations in the vicinity, and are allowed to bring food and drink into the Beach Club. (*Id.* at 132:21-25). The Beach Club, along with the cabana houses 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 beach access, as does Sea Cloisters, which directly benefits the City by alleviating demand on public facilities (restrooms, trash collection, beach access points, etc.).²⁴ As the City explained, the cabana house special exception was created to

²³ A copy of the relevant portions of Chris Martucci’s deposition is attached hereto as **Exhibit O**. Mr. Martucci oversaw the operations of the Beach Club for the RV Resort after it was first opened.

²⁴ Ex. H at 19:19-20; Tidewater Dep. Tr. 16:23-25; Ex. I at 23:3-5; Ex. K at 95:9-11. A copy of the relevant portions of Tidewater’s deposition transcript is attached hereto as **Exhibit P**.

direct resort and residential investment away from the coastline – which is to say that cabana houses allow the coastline to remain unimpeded by high-rises and the associated traffic, while also providing beach access to “projects” located away from the beachfront (but only if they are located within the City’s limits). (Ex. F at 42:11-22).

V. Tourism Economy in the Grand Strand

Tourism is the largest economic driver in the Grand Strand and, more specifically, North Myrtle Beach. (Ex. Q, Destination North Myrtle Beach (“Destination NMB”) Dep. Tr. 18:7-10; Ex. R, Myrtle Beach Area Convention & Visitors Bureau (“Myrtle Beach Area CVB”) Dep. Tr. 31:4-8).²⁵ In 2022, 17.2 million visitors traveled to the Grand Strand²⁶ and, out of that number, Destination NMB (an affiliate of the North Myrtle Beach Chamber of Commerce) estimates between three and five million people visited the City of North Myrtle Beach. (Ex. Q at 22:18 – 23:4).

As part of their mission to advance tourism in their respective areas, Destination NMB and the Myrtle Beach Area CVB focus their advertising campaigns for local tourism on certain out-of-state markets to attract visitors to the area. For Destination NMB, the top locations for its website users by traffic in 2020 included North Carolina, Georgia, New York, Pennsylvania, Ohio, Virginia, Michigan, Tennessee, and Illinois. (*Id.* at 20:16 – 21:21). Destination NMB considers these states their “primary” or “secondary” markets. (*Id.*) The top origin markets for visitors to the Grand Strand include Charlotte, North Carolina; Raleigh, North Carolina; Winston Salem, North Carolina; New York, New York; Wilmington, Delaware; and Philadelphia, Pennsylvania.

²⁵ Copies of the relevant portions of Destination North Myrtle Beach’s and Myrtle Beach Area CVB’s deposition transcripts are attached hereto as **Exhibits Q and R**, respectively.

²⁶ Ex. R at 21:14 – 22:12.

Outreach avenues to these markets, and others, also include newspapers, billboards, social media, promotions, sponsorships, magazines, television, and radio. (Ex. R at 23:8-19).

The economic impact of tourism to the area is significant. According to the Myrtle Beach Area CVB's industry research data, tourism provides more than \$11.1 billion in economic impact annually with another \$2.2 billion in labor impact.²⁷ Importantly, for the purposes of the issue before the Court, lodging accommodations and short-term rentals dominate the market and directly fund marketing of tourism for the area through the accommodation taxes collected. In the City of North Myrtle Beach alone, during peak season there are over 8,880 rooms for rent in the City, which includes vacation rentals, condominiums, and hotel rooms. (Ex. Q at 27:23 –29:20).

The City funds the marketing of its tourism industry through the collection of accommodation taxes, which are remitted back to the City from Columbia. The accommodations tax is levied on overnight accommodations for things such as hotels, motels, and short-term rentals. (Ex. F at 112:13-15). After collection, a portion of the money raised through the state accommodation tax is then returned to the local area where the accommodation tax was originally assessed to be utilized for marketing the area's tourism. (*Id.* 109:24 – 110:6).

Thus, the accommodation taxes raised in the local area through lodging and short-term rentals help fund Destination NMB and Myrtle Beach CVB in their mission to bring more tourism to the area. In other words, Destination NMB and Myrtle Beach Area CVB are publicly funded by the very tourism that they are promoting. (Ex. Q at 27:10-13). Importantly, if accommodation taxes are collected outside the City, like in Conway for example, those monies would not be reimbursed back to the City. (*Id.* at 27:6-9).

²⁷ See Ex. R at 7:17 – 8:3; Myrtle Beach Area Convention & Visitors Bureau, *Myrtle Beach Area Industry Research* (June 9, 2023); <https://www.myrtlebeachareacvb.com/industry-research>.

The two main takeaways are: (1) tourism is big business in the Grand Strand that necessarily involves interstate commerce and (2) the City clearly has a financial incentive to foster the types 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. A sizable portion of the funds raised through the accommodation tax help to pay for the marketing done by Destination NMB to promote tourism into the City. Additionally, accommodation tax revenues that are not earmarked to help fund the marketing of tourism for the City are deposited directly into City's general fund to pay for various other projects and to cover expenses at the discretion of the City's administration. (Ex. F at 113:9 – 114:11).²⁸ As a result, the City is financially motivated to ensure that visitors to the area stay in the City's limits, and the restrictions set forth in Sections 23-2 and 23-22 help achieve that goal.

VI. Sun's Ownership of the Property and the City's Selective Enforcement of the Zoning Ordinance

Between May 3, 2019 and September 2, 2021, the RV Resort used the Beach Club without any complaint from the City. However, on September 2, 2021, approximately 28 months after Sun purchased the Property, the City issued a cease-and-desist letter to Sun explaining that the use of the Property/Beach Club and related shuttle services to and from the Property were in violation of the City's Zoning Ordinance (the "Cease-and-Desist Letter"). The Cease-and-Desist Letter (along with this lawsuit) was prompted by a "formal complaint" submitted to the City by Sea Cloisters I & II on July 12, 2021. (Ex. F at 84:16-21).

²⁸ For Fiscal Year 2023, the City anticipates it will receive \$335,000 from the accommodations tax to be deposited into the City's general fund. (Ex. F at 114:15-19). The remaining amount of the anticipated accommodations tax reimbursement for the City (\$5,125,250) is earmarked to support and foster tourism within the City. (*Id.* at 114:3-24).

Specifically, the Cease-and-Desist Letter explained that Sun Defendants were operating the Property in violation of Section 23-2 of the City's Zoning Ordinance, which defines "cabana house" as:

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, SC, Ordinances, Sec. 23-2 (emphasis added). The City has further explained that its interpretation of Section 23-2 requires that an approved cabana house must be used exclusively by a project physically located in North Myrtle Beach. (Ex. F at 72:22 – 73:8).

The City also alleges in its Complaint that Sun Defendants violated Section 23-22(4)(d) of the Zoning Ordinance, which sets forth the permitted uses for a cabana house subject to the special exception requirements. The City alleges that Sun Defendants have violated this particular section of the Zoning Ordinance in the following regards:

- a. **In the use of the Property by a project(s) not in North Myrtle Beach;**
- b. **In the ownership of the Cabana House by an entity that is not a Homeowners Association;**
- c. In failing to limit the use of the Cabana House to bathing and changes of clothing facilities, occasionally using as a guest quarters and other similar uses;
- d. In failing to use the Cabana House in a manner that is in substantial harmony with the area in which it is located; and
- e. In utilizing the Cabana House in a fashion that is, upon information and belief, injurious to the adjoining property.

(See Compl. ¶¶ 15, 16 (emphasis added)). However, when questioned about what is truly important to the City in this lawsuit, the City Manager, Mike Mahaney, testified that the ownership of the Property is not the primary concern, but rather the “late night activities, parking in the street, buses backing out, parking on the sidewalk, all those sorts of quality of life issues.” (Ex. S, Mahaney Dep. Tr. 51:21 – 52:8).²⁹ Of course, all of those concerns can be addressed by the normal zoning enforcement process – notices, citations, and fines for non-compliance, which the City never tried in this case. Sun Defendants remain amenable to reasonable conditions of use to remedy any related concerns of the City or its neighbors, but the City has never provided Sun Defendants with this opportunity.

VII. Summary of the Provisions of the Zoning Ordinance at Issue

As mentioned previously, there are two distinct provisions in Sections 23-2 and 23-22 of the Zoning Ordinance at issue in this case. The first provision is found in Section 23-2 that defines a “cabana house.” As discussed above and alleged in the City’s Complaint, a “cabana house” located in North Myrtle Beach must be used by a “project” located in North Myrtle Beach not near the ocean. The term “project” is not defined in the Code of Ordinances. (Ex. F at 31:8-19). However, the City acknowledges that (1) an RV Resort would classify as a “project” under the Zoning Code, and (2) that Section 23-2 does not prohibit commercial “projects” from using a “cabana house.” (*Id.* at 31:20 – 32:2).

The City explained that the drafters of the “cabana house” definition were attempting to guard against the development of high-rise oceanfront hotels and condominium projects that would “completely obscure the view of the ocean and enjoyment of the area” in a manner similar to Miami. (*Id.* at 32:12 – 33:3). Accordingly, City Council “felt that one way to accomplish that

²⁹ A copy of the relevant portions of Mr. Mahaney’s deposition transcript is attached hereto as **Exhibit S**.

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.” (*Id.*). The concern was that if you did not give developers that option, “then perhaps the decision would be made for them to purchase oceanfront property and put a very large condo project on it.” (*Id.*). It is ironic that the RV Resort is precisely the type of “project” that the drafters of Sections 23-2 and 23-22 were trying to facilitate.

With regards to the geographic limitation that a “cabana house” must be used by a “project located in North Myrtle Beach,” the City acknowledged that such a restriction does not exist anywhere else in the Zoning Code. (*Id.* at 33:10-13). When asked directly about the purpose behind the geographical restriction on the use of a “cabana house” the City provided the following in response to Sun Defendants’ First Set of Interrogatories:

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.

(emphasis added).³⁰ The City further explained that under its current interpretation of Section 23-2, in order for a “cabana house” to be permitted under the Zoning Ordinance, it must be used “**exclusively**” by a project in North Myrtle Beach because “expanding the use to residents or

³⁰ A copy of the City’s Responses to Sun Defendants’ First Set of Interrogatories is attached hereto as **Exhibit T**. Again, it is precisely this kind of regulation, designed to “encourage investment in the City rather than in projects outside the City,” that run afoul of the dormant Commerce Clause.

entities outside of the project would violate the spirit of the **intent** of that ordinance.” (Ex. F at 72:22 – 73:3 (emphasis added)).

The second provision at issue exists in both Sections 23-2 and 23-22. The definition of “cabana house” in Section 23-2 goes on to provide that “[a] cabana house shall be owned and maintained by a homeowner’s association” Additionally, Sections 23-22(4)(d)(1), which governs the authorized uses for a “cabana house,” states that “a homeowner’s association shall have been established for the project” (emphasis added).

Like the restriction that a “cabana house” must be used exclusively by “project” located in North Myrtle Beach, the City acknowledged that the restriction that a homeowner’s association must own a “cabana house” and be established for the local “project” does not exist for any other special exception use in the Zoning Ordinance. (Ex. F at 39:18-22).

When asked why the ownership of a “cabana house” is restricted to homeowner’s associations, the City stated the following:

It's the City's long experience that homeowners' associations are uniquely responsive to the City's interests in keeping order and safety and in advancing the goals that are stated in Section 23 of the Code. We have a very long history of having good relationships with HOAs, and they have a documented history of being responsive to the City when issues arise.

(*Id.* at 37:13-21). However, the City has not commissioned any studies to show that homeowner’s associations are uniquely responsive to the City’s interests and is relying on purely anecdotal evidence of past interactions. (*Id.* at 129:15-22).

To be sure, pursuant to Zoning Ordinance, a homeowner’s association must own the property where a cabana house is located, and a homeowner’s association must be established for the North Myrtle Beach project that uses the cabana house. Under South Carolina law, homeowner’s associations must register their governing documents in the county where the

property owned by the homeowner's association is located to be enforceable. S.C. Code Ann. § 27-30-130(A)(1). Accordingly, any homeowner's association associated with a cabana house in North Myrtle Beach (whether by ownership or use) must necessarily be located in Horry County under the City's interpretation of Sections 23-2 and 23-22.

SUMMARY JUDGMENT STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases which do not require a fact finder." *Englert, Inc. v. LeafGuard USA, Inc.*, 377 S.C. 129, 134, 659 S.E.2d 496, 498 (2008) (quoting *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCF. Any disagreements over evidence or its meaning must be material, in addition to being both genuine and concerning an issue of fact. *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("Only disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment." (alteration in original) (quoting, in parenthetical, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986))).

As it pertains to the relief requested in this Motion, none of the material facts are in dispute—the relevant provisions of Sections 23-2 and 23-22 of the Zoning Ordinance are unambiguous, and the City's representatives have confirmed the purported rationale for the restrictions on ownership and use of a cabana house in the Zoning Ordinance that differentiate between interests "in" and "outside" the City.

In its attempt to defend the indefensible, the City has been doing its best to create immaterial factual disputes that do not pertain to the issues before the Court as to this Motion. The

City has concocted discovery issues with respect to privileged matters (which were unsuccessful), and has littered the record with “deficiency letters” and “requests for supplementation” regarding matters claiming that it does not have enough information to properly defend this particular claim. The City knows it is in trouble because it is trying to defend sections of its Zoning Ordinance that are *per se* invalid. All the discovery the City seeks cannot change the literal terms of the Zoning Ordinance, which is where the constitutional violation lies.³¹

The Motion before the Court is purely a legal question about whether the restrictions on ownership and use found in Sections 23-2 and 23-22 of the City’s Zoning Ordinance discriminate against interstate commerce and, thus, are unconstitutional. This specific issue is ripe for summary judgment.

ARGUMENT

I. The Dormant Commerce Clause – A Primer

A. General Principles

The Commerce Clause grants to 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*, 139 S.Ct. 2449, 2459 (2019); *see also Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control*, 424 S.C. 80, 88, 817 S.E.2d 633, 637 (Ct. App.

³¹ Indeed, the City has spent an inordinate amount of time focusing on what it contends are problematic “use” issues involving the RV Resort’s activities at the Beach Club (e.g., sunrise weddings, overcrowding, noise complaints, bright lighting, parking issues, etc.). However, none of those issues matter to the resolution of this Motion. All of these “use” considerations could have been handled through the normal zoning enforcement mechanisms provided elsewhere in the Zoning Ordinance (i.e., notices, citations, and fines), and would not have required the filing of a declaratory judgment action asking the Court to order the Sun Defendants to “cease and desist” owning and operating the Beach Club.

2018). “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’n v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 433 (2005) (alteration and internal quotation marks omitted).

“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) (emphasis added) (internal quotations and citations omitted); *see also Amisub of South Carolina, Inc.*, 424 S.C. at 88, 817 S.E.2d at 637. “‘The common thread among those cases in which the [United States Supreme] 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 South Carolina, Inc.*, 424 S.C. at 88, 817 S.E.2d at 637 (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 Natural 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. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (emphasis added); *accord Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (“In thus erecting an economic barrier protecting a major local industry against competition from without the State, [the City of] Madison plainly discriminates against interstate commerce.”).

B. Two-Step Analysis

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 Motion, is when the law or regulation directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interest over out-of-state interest. In such cases, the Supreme Court has “generally struck down the statute without further inquiry.” *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Brown v. Hovatter*, 561 F.3d 357, 363 (4th Cir. 2009); *see also Davis*, 553 U.S. at 338 (noting a “discriminatory” law is one enacted for the “forbidden purpose”). Unless it is “demonstrably justified by a factor unrelated to economic protectionism, a ‘discriminatory law is virtually *per se* invalid.’” *Brown*, 561 F.3d at 363 (quoting *Davis*, 553 U.S. at 338); *see also Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005) (“[W]hen the state statute amounts to simple economic protectionism, a virtually *per se* rule of invalidity has applied.”) (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992)); *Env'tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996) (explaining that when a state law discriminates on its face or has a discriminatory effect or purpose, the law must be “demonstrably justified by a valid factor unrelated to economic protectionism,” and there must be an absence of “nondiscriminatory alternatives adequate to preserve the local interests at stake.”).

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. In that case, the law will be struck down only if the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Id.* at 142.³²

Recently, the Supreme Court clarified the role of *Pike* in its dormant Commerce Clause jurisprudence. In *Nat'l Pork Producers*, the Supreme Court held that the National Pork Producers Council's lawsuit regarding California's restrictions on pork sold within the state did not state a claim as a matter of law under the dormant Commerce Clause. *Nat'l Pork Producers Council*, 143 S. Ct. at 1149-50. In so holding, a plurality of the Supreme Court explained that the *Pike* line of cases and its balancing test is inextricably linked to the antidiscrimination element of the dormant Commerce Clause. *Id.* at 1157; *see also Nat'l Pain & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995) (explaining that *Pike*'s line of analysis is necessary in the category of cases where the laws appear to be neutral among states but bears more heavily on interstate commerce than on local commerce).

However, if it is established that a law or regulation discriminates directly against interstate commerce by differentiating between local and non-local/out-of-state entities – the need to resort to *Pike*'s balancing test is not necessary. *Nat'l Pork Producers Council*, 143 S. Ct. at 1157-59. The lesson of *Pike*, according to the plurality of the Supreme Court, is that an analysis of a law's

³² 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 (whether on its face, in its effect, or in its purpose), the analysis ends, and the Court must shift the burden to the government to show no reasonably nondiscriminatory alternatives exist to achieve its policy goals. *See, e.g., Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (2022) ('The district court held that the residency requirement discriminated against interstate commerce. That was the right call. But the court then applied the *Pike* test to uphold the law. That was a mistake . . .").

practical effects may also disclose the presence of a discriminatory purpose even if the law regulates even-handedly on its face. *Id.*³³

In the present case at bar, the Court need not enter the *Pike* balancing test quagmire because Sections 23-2 and 23-22, along with the City’s candid explanation of the discriminating purpose behind the restrictions set forth therein, show that the provisions in question discriminate directly against interstate commerce. Accordingly, the Court’s analysis in this case is straightforward, and there is no need to resort to *Pike*’s balancing test to weigh the City’s protectionist goals, which are *per se* unconstitutional.

II. The Zoning Ordinance’s Substantial Effect on Interstate Commerce.

The City went to great lengths in its arguments against Sun Defendants’ first Motion for Summary Judgment to argue that the Commerce Clause is not applicable in this case or, in the alternative, that the City needed “further discovery” to better analyze the issue. Specifically, the City argued it needed more information to determine whether the lack of a cabana house has an impact on the RV Resort’s guest reservations and its overall business. Sun Defendants have no doubt the City will take the same tact again here; but again, this is not the appropriate analysis.

As the Supreme Court stated in *Hughes v. Oklahoma*, 441 U.S. 322 (1979): “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.” *Id.* at 326, n. 2. 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

³³ More clearly stated: a law “that burdens interstate commerce in clear excess of its putative local benefits flunks *Pike* balancing. In most cases, *Pike*’s ‘general rule’ reflects a commonsense principle: Where there’s smoke, there’s fire.” *Id.* at 1166-67 (Barrett, J., concurring in part) (internal citations omitted).

persons or things in interstate commerce, even if the threat may come only from intrastate activity; and *finally*, Congress' commerce power includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce. *U.S. v. Lopez*, 514 U.S. 549, 558-59 (1995) (internal quotations and citations omitted).

In *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564 (1997), the Supreme Court held that an otherwise generally applicable state property tax violated the dormant Commerce Clause because its exemption for property owned by charitable institutions excluded organizations operated principally for the benefit of nonresidents. *Id.* at 571-595. The appellant 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, and Congress has no power to enact a tax on real estate. *Id.* at 572.

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

The Supreme Court explained that summer camps, like the one at issue, were comparable to hotels that offer their guests goods and services consumed locally. To bolster its analogy and analysis, the Supreme Court cited to *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964),³⁴ for the proposition that interstate commerce is substantially affected by the activities of hotels that solicit patronage from across the country through national advertising media. *Id.* Accordingly, the Supreme Court stated that discrimination “that limits the access of nonresidents to summer camps creates a similar impediment . . . [e]ven when business activities are purely local, if ‘it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.’” *Id.* at 573-74 (quoting *Heart of Atlanta*, 379 U.S. at 258) (emphasis added). The Supreme Court held that the services the camp operator provided to its principally out-of-state campers clearly had a substantial effect on interstate commerce, as did the state restrictions on making those services available to nonresidents. *Id.* at 574.

The lessons on interstate commerce set forth in *Camps Newfound/Owatonna* are directly applicable to the facts presented here. The RV Resort advertises its product nationally through its website and social media platforms, and those advertising efforts have proven successful; 69% of the RV Resort’s guests are from out-of-state. (Aff. of Kirtley at ¶¶ 4, 11, 13-15). Likewise, the RV Resort marketed the Beach Club and various other amenities on its advertising platforms and social media, together with an opportunity to enjoy the natural beauty of the South Carolina coastline, to guests throughout the country. (*Id.*) The RV Resort engages in commerce, as a purchaser of goods and as a provider of goods and services (*Id.* at ¶ 5, 7-12, 16) and transports its guests throughout the local area whether to the Beach Club or to other various commercial

³⁴ 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.

locations via its shuttle service. (Ex. N at 209:1 – 214:8). And, like *Camps Newfound/Owatonna*, the attendance of the RV Resort’s guests necessarily generates the transportation of persons across state lines that has long been recognized as a form of commerce.

This apt comparison between the case at bar and *Camps Newfound/Owatonna* is bolstered by analyzing the ownership and use of the other cabana houses in the City. Tidewater’s homeowner’s association utilizes its cabana house to host gatherings of the property owners at what it considers to be its most popular amenity, and it promoted the cabana house on its website. (Ex. P at 17:16 – 21:10). 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. (Ex. H at 18:23 – 24:18). 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. (Ex. I at 19:6-23). To be sure, the City has testified that the limits on the use of the cabana house to just owners in certain communities is a creation of those specific associations, and not a mandate by the City. (Ex. F at 72:8-21). In actuality, there is no prohibition on the use of a cabana house by short-term renters in communities that own a cabana house in the City and there is no restriction on cabana house owners from advertising their amenity to the public. Further, as stated previously, there is no restriction on a cabana house being used by a commercial “project.” (*Id.* at 31:20 – 32:2). Moreover, homeowner’s associations, like the camp in *Camps Newfound/Owatonna*, are non-profit organizations engaged in interstate commerce by providing goods and services to their members through their respective cabana houses.

The RV Resort is comparable to hotels or short-term rentals that offer their guests goods and services that are consumed locally. (Ex. N at 270:18 – 271:16; 355:14 – 356:3). These types of platforms, which comprise a significant part of the main economic driver in the Grand Strand –

tourism, clearly have a substantial effect on interstate commerce, as does the Zoning Ordinance's restrictions on making those services available to nonresidents. *Cf. Carbone*, 511 U.S. at 391. Likewise, the services that the RV Resort provides, which in large part includes access to the Beach Club, to its principally out-of-state guests and the Zoning Ordinance restricting the ownership and use of a cabana house also clearly have a substantial effect on interstate commerce, for the reasons set forth above.³⁵

III. Zoning Ordinance Plainly Discriminates Against Interstate Commerce.

Once the interstate commerce issue is resolved, the rest of this analysis is straightforward. If a law or ordinance discriminates against interstate commerce, it is in serious jeopardy because “[a] discriminatory law is virtually *per se* invalid.” *Davis*, 553 U.S. at 338. It may be upheld only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Id.* If there are **any** available alternative methods for enforcement the City's legitimate policy goals, the law is unconstitutional. *Hignell-Stark v. City of New Orleans*, 46 F.4th 317, 325 (5th Cir. 2022); *see also Hughes*, 441 U.S. at 337 (“At a minimum such facial discrimination invokes the strictest judicial scrutiny of any purported legitimate local purpose and of the **absence** of nondiscriminatory alternatives” (emphasis added)). This type of analysis applies where a state or local law discriminates against interstate commerce on its face, in its practical effect, or in its purpose. *Env'tl. Tech. Council*, 98 F.3d at 785.

Under such a review, “‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *McBurney v. Young*, 667 F.3d 454, 468 (4th Cir. 2012) (quoting *United Haulers Ass’n v. Oneida-Herkimer Solid*

³⁵ Stated in perhaps simpler terms, a company from Michigan paid \$2.5 million for a beach club that the City contends it cannot use or own. But, if it was a homeowner's association located in the City, and the “project” it was associated with was located in the City, all would be well. This is anathema to the U.S. Constitution and, more specifically, the dormant Commerce Clause.

Waste Mgmt. Auth., 550 U.S. 330, 338 (2007)). The U.S. Supreme Court’s decisions show that state and local laws discriminate in violation of the dormant Commerce Clause in a couple of ways.

First, a state or local law discriminates by restricting market participation or curtailing the movement of articles of interstate commerce based on whether the market participant or article of commerce is in-state versus out-of-state, or local versus non-local. *Amisub of South Carolina, Inc.*, 424 S.C. at 89, 817 S.E.2d at 638 (quoting *Florida Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230, 1244 (11th Cir. 2012)); see also *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 (1996); *Fort Gratiot*, 504 U.S. at 361; *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 526 (1949). This is the type of discrimination implicated by Sections 23-2 and 23-22.

Second, a state or local law discriminates against interstate commerce by conditioning participation in an interstate market on the in-state or local processing of goods. In other words, a state or local government may not require diversion of resources of an interstate market into the local market to serve local economic interests. See, e.g., *Carbone*, 511 U.S. at 390; *Dean Milk*, 340 U.S. at 354. Here, the City candidly concedes its purpose is to favor local interest over “non-local” interests. (See Ex. T).

Significantly, a discriminatory law is no less discriminatory simply because it applies “alike to the people of all States, including the people of the State enacting such [a law].” *Fort Gratiot*, 504 U.S. at 361 (internal quotations omitted); accord *Dean Milk*, 340 U.S. at 354 n. 4 (explaining that local ordinance’s subjecting non-local, in-state residents to the same proscription as out-of-state residents is “immaterial” to the dormant Commerce Clause analysis). A state or local law may impermissibly discriminate against interstate commerce even if that law also has a discriminatory effect on in-state interests not within the City.

“The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.” *Carbone*, 511 U.S. at 390 (citing *The Federalist* No. 22, pp. 143-145 (C. Rossiter ed. 1961) (A. Hamilton); Madison, *Vices of the Political System of the United States*, in 2 *Writings of James Madison* 362-363 (G. Hunt ed. 1901)). The Supreme Court has “interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State.” *Id.*

A. The Zoning Ordinance’s “Residency Requirement” on the Exclusive Use of a Cabana House by “Projects” Located in the City Plainly Discriminates Against Interstate Commerce.

By its *explicit* terms, Section 23-2 and 23-22 impose an unconstitutional burden on interstate commerce without any justification through its “residency requirement” for use of a cabana house. As mentioned previously, 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.**” North Myrtle Beach, SC, Ordinances, Sec. 23-2. Section 23-22 requires that a “homeowner’s association shall have been established” for that same project. *Id.* at 23-22(4)(d)(1). The City alleges that Sun Defendants have violated the particular sections of the Zoning Ordinance in the following regards: “In the use of the Property by a project(s) not in North Myrtle Beach . . .” (Compl. ¶¶ 15-16).

The City’s representatives have testified on multiple occasions that a RV Resort is encompassed by the term “project.” (Ex. U, Wood Dep. Tr. 27:11-24³⁶; Ex. F at 42:5-10). Accordingly, an RV Resort located within the City limits fits within the parameters of Sections

³⁶ A copy of the relevant portions of James Wood’s deposition transcript is attached hereto as **Exhibit U**. Mr. Wood is the City’s Director of Planning and Development.

23-2 and 23-22; whereas the RV Resort at issue in this case does not because it is located in Conway. *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.”).

Without explanation or evidence, the City has posited that this geographic restriction somehow advances the City’s municipal interest of “quality of life.” (Ex. F at 42:11 – 43:3). Regardless, 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 of the Zoning Ordinance excludes the ownership and use of cabana houses in North Myrtle Beach from persons or entities located anywhere outside of the City’s limits, including locations in nearby North Carolina.³⁷ The fact that the applicable sections of the Zoning Ordinance apply equally to in-state “projects,” like the RV Resort, does not change the analysis, 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*, 340 U.S. at 354 n. 4. The City’s employees most responsible for zoning enforcement could not offer any justification for its different treatment of “projects” simply because they are located outside of the City.³⁸

Not surprisingly, both the City Manager and Destination NMB testified that the economic bloodline of the City is tourism. (Ex. S at 13:19 – 14:2) (“First of all, we’re in a tourism environment in North Myrtle. There is [sic] 20 million visitors to the Grand Strand in the course

³⁷ The town of Calabash, North Carolina is located less than 10 miles from City Hall.

³⁸ Mr. Blust was the Zoning Administrator at the time these sections of the Zoning Ordinance were enacted and helped draft these sections related to the Cabana House. He testified that he could not recall the County Council’s reason for the geographical location. (Ex. E at 22:6-19).

of a year.”); (Ex. Q at 18:7-10). 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 (emphasis added). Through Sections 23-2 and 23-22 of the Zoning Ordinance, the City ensures that only local residents can benefit economically from ownership and use of a cabana house on the City’s coastline. This is blatantly unconstitutional.

The City’s geographic restriction plainly discriminates on its face against non-local projects, like the RV Resort or a similar project located outside the City. The City doesn’t just make it more difficult for non-local entities to compete in the market for tourists or visitors who want unfettered beach access through a cabana house in the R-4 district; it forbids them from participating altogether. Sections 23-2 and 23-22 prohibit anyone from using a property as a cabana house unless the “project” it is associated with is located in the City. And the City will not offer special exceptions to own a cabana house, unless the cabana house is used exclusively by a “project” in North Myrtle Beach. (Ex. F at 72:22 – 73:3). The upshot is that only residents of the City may enter the market to own and use a cabana house in the City; whether for themselves or as part of an effort to attract visitors to rent their properties.³⁹

Hotels, residential developments that consist of short-term rental properties, other “projects” 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 (quotation omitted). All are private entities, not public entities carrying out traditional government functions. *See id.*, at 341-43; *United Haulers*, 550 U.S. at 342-45. And all seek to compete in the highly

³⁹ The purchase of a cabana house is a significant investment. The Property and Beach Club at issue in this case cost Sun approximately \$2.5 million, which at present cannot be used and, according to the City, cannot be owned by anyone other than a homeowner’s association associated with a “project” located within the City’s limits.

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 in Sections 23-2 and 23-22, is that one group does not reside in the City. Accordingly, the geographic restriction set forth in Sections 23-2 and 23-22 directly discriminates against interstate commerce for the purposes of the dormant Commerce Clause analysis.

A recently decided case out of the Fifth Circuit Court of Appeals is particularly instructive on the nature of the geographic restriction 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 licenses to property owners to rent their homes for less than thirty (30) days. *Id.* at 321. One year into the initial licensing regime, the city commissioned a study to reevaluate its STR policies and found that the rapid proliferation of STRs brought nuisances to the city. *Id.* Specifically, it discovered that STRs in residential neighborhoods “had lowered residents’ **quality of life.**” *Id.* (emphasis added). The study also determined that expansion of STRs into residential neighborhoods led to “a loss of neighborhood character” and it had collected “**anecdotal evidence**” that the increasing STR market had made housing less affordable to residents. *Id.* (emphasis added).

Because of the study, the city revised its STR licensing regime in 2019. First, the city imposed a 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.* Second, the city imposed new advertising restrictions on STR license holders. *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, citing *Pike*, because the burden it imposed was not “clearly excessive in relation to the putative local benefits.” *Id.* at 322 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The Fifth Circuit disagreed and overturned the district court, explaining that the *Pike* test did not apply to a regulation that discriminated by its very terms between local and non-local market participants. *Id.* at 325.

The Fifth Circuit explained that because the residency requirement in the new licensing regime – which prohibited anyone from using a property as an STR unless the property was located on the same lot of record as the owner’s primary residence – 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 forbids them from participating in the STR market in residential neighborhoods altogether and, even though the city did not adopt the residency requirement to protect its residents from interstate competition, “the dormant Commerce Clause prohibits more than laws with protectionist purposes. It also prohibits laws that discriminate against interstate commerce on their face.” *Id.* at 325-327 (citation omitted). According to the Fifth Circuit, “the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory.” *Id.* at 327 (quoting *Or. Waste Sys., Inc. v. Dep’t of Env’t Quality of Or.*, 511 U.S. 93, 100 (1994)). The Fifth Circuit explained that the law could be upheld

only if it satisfies the dormant Commerce Clause’s stringent test for discriminatory laws, not the Pike test. *Id.* at 327-329.

The same is true here. The City’s residency requirement with respect to the exclusive use of cabana houses to “projects” located in the City cannot be saved by the *Pike* test. 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 in this case directly discriminates against interstate commerce on its face – by forbidding non-local projects from participating in the market to utilize a cabana house in the City – it is *per se* invalid.

B. Section 23-2 and 23-22’s Restriction Against Ownership and Use of a Cabana House by Any Entity Other than a Homeowners Association Also Discriminates Against Interstate Commerce In Its Effect.

Section 23-2 provides that a cabana house must be owned by a homeowner’s association. Section 23-22(4)(d)(1) provides, in relevant part, that a homeowner’s association must be established for the local project utilizing the cabana house. Accordingly, the homeowner’s association requirement is inextricably linked to the “residency requirement” for projects located in North Myrtle Beach described above and violates the dormant Commerce Clause for similar reasons.

Under South Carolina’s Homeowners’ Association Act, a homeowner’s association is defined as an entity developed to manage a planned community or horizontal property regime for which there is a declaration requiring a person, by virtue of his ownership of a separate property within the planned community or horizontal property regime, to pay assessments for a share of taxes, insurance premiums, maintenance, or improvement of common elements and other real estate described in that declaration. S.C. Code Ann. § 27-30-120(6). The governing documents of the homeowner’s association must be recorded in the Register of Deeds office in the county

where the property owned by the association is located to be enforceable. S.C. Code Ann. § 27-30-130(A)(1). Likewise, under South Carolina’s Horizontal Property Act (which also applies to condominiums), the master deed or lease that creates and establishes the association must be recorded in the Register of Deeds in the county where the property owned by the association is located. S.C. Code Ann. § 27-31-100.

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) since the subject property and associated “project” must be located in North Myrtle Beach. This precludes a homeowner’s association not registered in Horry County from owning a cabana house or establishing a “project” to use a cabana house. This restriction directly discriminates against interstate commerce for the same reasons that the “residency requirement” discussed above discriminates against interstate commerce.

Undoubtedly, the City will argue that the discrimination complained of in this section falls short of implicating the dormant Commerce Clause because the Zoning Ordinance requires ownership by a homeowners’ association and such “not for profit” entities are not “substantially similar” to commercial entities like Sun and the RV Resort. *Davis*, 553 U.S. at 342 (quotation omitted). However, the City would again be wrong in its analysis. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564 (1997).

In conducting the discrimination inquiry, the Court is required by ample precedent 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). “[A] state or local law discriminates by restricting market participation or curtailing the movement

of articles of interstate commerce based on whether a market participant or article of commerce is in-state versus out-of-state, or local versus non-local.” *Florida Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230, 1244 (11th Cir. 2012). Focusing on discrimination against individual entities, like Sun or the RV Resort, “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.” *Hazel*, 733 F.3d at 543.

Indeed, the Zoning Ordinance’s limitation of ownership of cabana houses to homeowner’s associations that must necessarily be located in Horry County due to the location of the property and the project, not only discriminates against potential ownership entities and projects in other counties in South Carolina, but also potential owners/projects in other states. These other entities, like the associations in the City and the RV Resort, compete for short term renters and vacationers that want access to the South Carolina coastline. They are also private entities engaged in private transactions. *Davis*, 553 U.S. at 341-43. In that vein, they are remarkably similar to the RV Resort and, as previously mentioned, the City itself has admitted that the term “project” encompasses RV Resorts and other commercial enterprises. Consequently, the City’s homeowner’s association restriction set forth in Sections 23-2 and 23-22 plainly discriminates against interstate commerce in both its practical and legal effect.

C. By the City’s Own Admission, Sections 23-2 and 23-22 of the Zoning Ordinance Discriminate Against Interstate Commerce in their Purpose.

In response to an Interrogatory propounded by Sun Defendants regarding the purpose behind the geographical use and ownership restrictions set forth in Sections 23-2 and 23-22 of the Zoning Ordinance, the City stated:

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 the following: This requirement supports the aesthetics of the residential district, because it encourages the upkeep and slightly [sic] 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.

(Ex. T) (emphasis added).

These candid admissions concede Sun Defendants’ case. The City admits that the purpose 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 Whether such a market has materialized yet is beside the point; 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; *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 339-40 (2009).

Additionally, the Court will recall the City testified that under its interpretation of Section 23-2, in order for a “cabana house” to be permitted under the Zoning Ordinance, it must be used “**exclusively**” by a project in North Myrtle Beach because “expanding the use to residents or entities outside of the project would violate the spirit of the **intent** of that ordinance.” (Ex. F at 72:22 – 73:3 (emphasis added)). This is another revealing admission by the City that the true purpose behind the restrictions is economic protectionism.

As discussed previously, the City has a direct economic interest in ensuring that visitors to the City decide to stay in the City. By allowing an RV Resort in Conway to have access to a “cabana house” and private beach access, it eliminates 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 accommodations within the City limits. Consequently, the restrictions set forth in Sections 23-2 and 23-22 limiting ownership and use of the Beach Club promote financial investment within its limits, to the exclusion of out-of-state and non-local entities, and evince the City’s economic protectionist agenda in enacting those restrictions. This is flatly unconstitutional.

Avoiding this sort of “economic Balkanization” and the retaliatory acts of local government, is one of the central purposes of the dormant Commerce Clause. *Hughes*, 441 U.S. at 325. By encouraging economic isolationism, prohibitions on non-local access to local resources “serve the very evil that the dormant Commerce Clause was designed to prevent.” *Camps Newfound/Owatonna*, 520 U.S. at 578. Therefore, Sections 23-2 and 23-22 discriminate against interstate commerce in their purpose, as admitted by the City.

IV. The City Cannot Withstand its Constitutional Burden.

The conclusion that the ownership and use restrictions set forth in Sections 23-2 and 23-22 discriminate against interstate commerce put them “on death’s doorstep.” *Hignell-Stark*, 46 F.4th at 328. The Court will recall that “[a] discriminatory law is virtually *per se* invalid.” *Davis*, 553 U.S. at 338 (emphasis added). The restrictions can “survive only if [they] advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Id.* As stated previously, only one case in the Supreme Court’s long history with the dormant Commerce Clause has been able to withstand that burden. *Maine v. Taylor*, 477 U.S. 131 (1986).

The City has 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.” (Ex. F at 138:13-17). Sun Defendants do not dispute that these are legitimate local interests; however, all these interests can be adequately served by reasonable nondiscriminatory alternatives, so none of them can justify the restrictions.

First, the City claims that the homeowner’s association ownership requirement is necessary to address its “responsiveness” concerns. The City claims that it has a successful track record dealing with homeowner’s associations and believes that they are more responsive to the City’s concerns, and address issues more quickly than other forms of entities. (*Id.* at 124:21-25). Granted, the City has not conducted any studies to back up this assertion but believes that its impressions are sufficient.

While the homeowner’s 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 (which the City chose not to follow by bringing this action first in the Court of Common Pleas) to find a reasonable nondiscriminatory alternative. Section 23-7

provides that violations of the conditions and safeguards established in connection with special exceptions, like the Beach Club, shall constitute a misdemeanor, and any person who violates the Zoning Ordinance or fails to comply with its requirements “shall upon conviction thereof be fined as provided in section 1-6 [which calls for a fine not exceeding \$500.00, imprisonment for a period not exceeding 30 days, or both].”⁴⁰ Each day such violation continues shall be considered a separate offense. Accordingly, this enforcement mechanism could be utilized to ensure that 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 give cabana house owners stronger incentive to quickly respond to the City when it calls and would also help to fund the City to increase its enforcement efforts.

Second, the City says that limiting the ownership to homeowner’s associations and the use of cabana houses to exclusively projects in North Myrtle Beach preserves “quality of life.” (Ex. F at 127:6-14). Specifically, the City testified that quality of life in the community is “advanced when land uses, projects, [and] neighborhoods are developed in a safe and efficient manner that the City wishes for them to be developed” and that requiring a cabana house to be used exclusively by a project within the City “helps take pressure off the of the oceanfront and direct and promote those residential developments in the area that we want.” (*Id.*) More succinctly, the City stated that “the quality of life of the community is advanced by directing growth into areas where we think it’s appropriate **within the City.**” (*Id.* at 128:12-18) (emphasis added).

Although tacitly admitting again that the City’s “quality of life” concerns are in fact motivated by economic protectionism, the City’s stated concerns about public safety and “quality of life” for the Beach Club’s neighbors are easily achievable by enforcement of the remaining

⁴⁰ A copy of Section 23-7 of the Zoning Ordinance is attached hereto as **Exhibit V.**

provisions in Section 23-22 (a remedy the City has chosen to abjure). These provisions govern the use of an approved cabana house. 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.” *Id.* at (4)(d)(5) – (6). And again, as stated above, enforcement of these provisions through Section 23-7 of the Zoning Ordinance would not only incentivize cabana house owners and users to adhere to the additional requirements set forth in Section 23-22 but would also fund increased enforcement for the City to adequately police these issues.

Finally, the City claims that the preservation of property values, although more of an “ancillary consideration,” is another interest served by the discriminatory restrictions contained in Sections 23-2 and 23-22. (Ex. F at 128:19 – 129:3). However, as discussed in detail above, increased enforcement of the other provisions already identified in Section 23-22 through the enforcement mechanism provided for in Section 23-7 present a clear reasonable alternative method for achieving the City’s interest in preserving property values. Moreover, there has been no showing by the City that the ownership and use restrictions set forth in Sections 23-2 and 23-22 have had any impact with respect to the property values of the RV Resort’s neighbors. On the contrary, in the damages phase of this case to compensate them for violations of their constitutional rights, Sun Defendants will present expert testimony that the market restrictions on ownership of a cabana house have had the opposite effect.

Through these other provisions already in existence, the City has all but affirmatively shown that reasonable nondiscriminatory alternative measures exist to advance its legitimate local interests regarding the ownership and use of cabana houses, without resorting to discriminating

against interstate commerce in violation of the dormant Commerce Clause. Although the City's stubborn position is that there are no other alternatives to achieve its interests of "responsiveness," "quality of life," and "preservation of property values" other than prohibiting non-local ownership and use of the Beach Club as discussed above (*see id.* at 138:13-24), common sense says otherwise.

CONCLUSION⁴¹

The restrictions set forth in Sections 23-2 and 23-22 of the Zoning Ordinance that a cabana house must be owned by a local homeowner's association and used exclusively by a project located in the City of North Myrtle Beach that is managed by a local homeowner's association discriminate against interstate commerce and constitute *per se* violations of the dormant Commerce Clause. The remaining provisions of Section 23-22 of the Zoning Ordinance and the enforcement mechanism set forth in Section 23-7 are unmistakable evidence that reasonable non-discriminatory alternatives exist to advance the City's proffered legitimate local interests of "responsiveness," "quality of life," and "preservation of property values," without resort to the discriminatory restrictions that currently exist.

If the City passed an ordinance stating that only residents of North Myrtle Beach could own and use beachfront property within the City's limits, that ordinance would be struck down as unconstitutional without a second thought. This case is no different.

⁴¹ The practical effect of the challenged provisions of the Zoning Ordinance is that Sun has purchased a \$2.5 million beachfront property in the City that it must maintain but cannot use. The City's request that the Court declare the ownership of the Property to be unlawful, and presumably require its sale to a local homeowner's association, is unprecedented, which the City has admitted. (Ex. F at 96:19-25). On the other hand, permitting Sun and the RV Resort to own and use the Property in a manner consistent with the surrounding uses is all Sun Defendants seek. Continued non-use and a compelled sale of the Property are manifestly unreasonable and unfair, especially considering the constitutional infirmities contained within Sections 23-2 and 23-22 of the Zoning Ordinance. Moreover, these continued restrictions expose the City to an unconstitutional regulatory taking claim and mounting attorneys' fees under 42 U.S.C. § 1988. The Court will be doing the City a favor by granting Sun Defendants' motion, as their continued ownership and use of the Beach Club will only benefit the City and increase tourism into the local area.

The City does not merely make it more difficult for RV Resorts and other similar projects located outside the City to compete in the market for visitors who want beach access through a beach club or a cabana house; it outright forbids them for participating in the market altogether, simply because they are “outsiders.” The conclusion is that only residents of the City (and those who will pay accommodation taxes to benefit the City) may own and use a cabana house, whether for themselves or as part of an effort to participate in the lucrative tourism market in North Myrtle Beach. These types of restrictions represent the very laws grounded on local “economic protectionism” that “the Constitution was designed to prevent.” *Carbone*, 511 U.S. at 390 (citing *The Federalist* No. 22, pp. 143-145 (C. Rossiter ed. 1961) (A. Hamilton); Madison, Vices of the Political System of the United States, in 2 Writings of James Madison 362-363 (G. Hunt ed. 1901)).

There are no genuine issues of material fact in dispute with respect to this issue. The restrictions previously identified Sections 23-2 and 23-22 of the City’s Zoning Ordinance are unconstitutional as a matter of law, and this Court should grant Sun Defendants’ Motion.

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July 20, 2023
Columbia, South Carolina

Exhibit A

Sec. 23-2. Definitions.

Generally. For the purpose of this chapter, certain words and terms are herein defined. Words used in the present tense shall include the future; words in the singular number include the plural number, and words in the plural number include the singular number; the word "lot" includes the word "plot"; the word "building" includes the word "structure"; the word "shall" is mandatory and not directory. Any words not herein defined shall carry their customary dictionary definition.

Accessory building: A subordinate building, the use of which is incidental to and customary in connection with the principal building or use, and which is located on the same lot with such principal building or use.

Accessory use: A subordinate use which is incidental to and customary in connection with the principal building or use and which is located on the same lot with such principal building or use.

Alley: A public or private way, at the rear or side of property, permanently reserved as a means of providing secondary or service vehicular access to abutting property, less in size than a street, and which is not designed for general vehicular traffic.

Boatyard: A facility for the construction or major repair of watercraft, including overhaul of hull, engines and other major components.

Body piercing: Any method of piercing of the human skin of one (1) person by another person with the intention of inserting any object including, but not limited to jewelry. For the purposes of this zoning ordinance, the term body piercing shall also include any process of marking or disfiguring the skin or other tissue of any person by branding or scarification but shall not include the piercing of the fatty lobe of the ear by an ear-piercing gun designed solely for the purpose, or physician-authorized surgical procedures. This definition of body piercing includes that process commonly referred to as implantation.

Building: Any structure having a roof supported by columns or walls for the shelter or enclosure of persons or property.

Building height: The highest vertical distance measured from the finished grade at ground level at the building line to the midpoint between the eave and the highest point of the roof.

For the purpose of calculating side setbacks in R-2A, R-4, HC and RC, the height of the roof section (if not devoted to living or storage space) shall not be considered in determining the height of the structure.

Building, principal: A building in which is conducted the main or principal use of the lot on which the building is located.

Cabana house: 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.

Caliper: The diameter of a tree measured three (3) feet above the base of the tree. The two (2) largest diameters of multiple trunk trees shall be added to obtain the caliper.

Camp, youth day or educational: A camp providing facilities for groups with nonpermanent accommodations, not to include recreational vehicles or mobile homes, used for related youth recreational or educational purposes. This can also include adult educational and training activities.

Club: Buildings and facilities owned or operated by a corporation, association, person or persons for a social, educational or recreational purpose, but not primarily for profit and not primarily to render a service which is customarily carried on as a business.

Commercial center: Two (2) or more retail stores, service establishments, professional offices, and/or mixed-use, or any other businesses serving a community or neighborhood, not necessarily owned by one (1) party nor by a single land ownership, which occupy a common and/or adjacent building(s) on premises and also utilize common parking area(s).

Commercial craft: Any boat that is used for excursions such as dinner cruises, sightseeing cruises (excluding smaller sightseeing boats with no more than forty (40) seats and a maximum authorized capacity of forty (40) passengers), overnight cruises and similar trips, commercial fishing and shrimping (excluding smaller charter fishing), industrial uses such as tug boats, tankers, barges, and military craft. Gaming/gambling boats are commercial craft, which are further defined elsewhere.

Compact automobile space: Designated parking space which allows parking for only compact automobiles. The overall dimensions of the same space are fifteen (15) feet by eight (8) feet.

Conditional use: A zoning ordinance provision that imposes conditions, special provisions, or limitations on a use that are in addition to those applicable to other uses permitted by right in the same zoning district. S.C. State Law requires that the list of conditions must be set forth in the text of the Zoning Ordinance, and then; when all are met, the "conditional use" may be permitted by the zoning administrator without review of the board of appeals.

Condominium: A condominium is an ownership arrangement, not a land use. It is individual ownership of a unit in a multi-unit structure.

Condotel: A condominium set up like a hotel in which each room is individually owned and in which some or all rooms are available to transients for rent.

Convenience store: A one-story, retail store containing less than three thousand (3,000) square feet of gross floor area that is designed and stocked to sell primarily food, beverages, and other household supplies to customers who purchase only a relatively few items. It is designed to attract and depends upon a large volume of stop-and-go traffic.

Court: An open space which may or may not have direct street access and around which is arranged a single building or group of related buildings.

Day care facilities, including:

- (1) *Family day care home:* A family day care home is one in which care is given in a family only during the day for one (1) but not more than seven (7) children, including the day care parents' own children.
- (2) *Child care center:* A child care center shall mean or include any home, center, agency or place, however styled, where children not related to the operator are received for custodial care, apart from their parents whether for compensation, reward, or otherwise, during part or all of the day or night and upon any number of successive days or nights.

Density: The number of dwelling units per acre of "developable land" within the boundaries of a residential project.

Developable land: The term developable land or land which is suitable for development is defined to mean all lands within a project's boundaries, including lands or parcels designated for support of the development; that is, all areas for lots, parking areas, drives, roads, drainage and utility easements or rights-of-way, sign easements, entrance structure easements, and lands designated for private recreation. Off-site parking, marsh and wetlands shall not be included as developable land for purposes of calculating density, except that marsh and wetlands held in fee simple may be applied to the open space requirements of this chapter.

Developments of regional significance: Retail and/or office uses in which the gross floor area of combined buildings within a development equals or exceeds seventy-five thousand (75,000) square feet.

Dwelling: A structure or portion thereof which is used exclusively for human habitation.

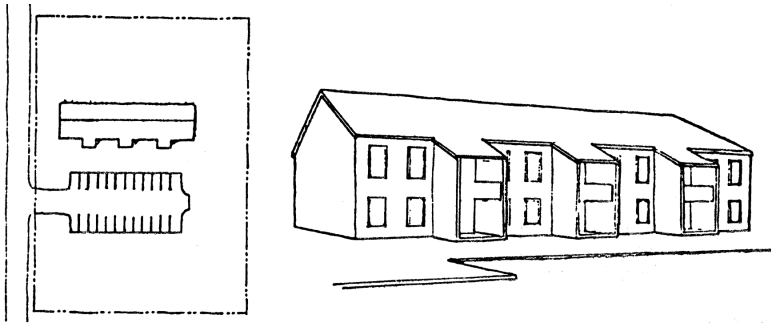
Dwelling, attached: A dwelling unit attached to two (2) or more dwelling units by common vertical walls.

Dwelling, boarding house: A detached residential structure similar in style to a single-family structure where lodging is provided for periods in excess of two (2) weeks, for compensation or other consideration, for three (3) or more individual boarders. This definition excludes the use of boarding houses in single-family, duplex, multifamily, and other residential uses separately defined. Houses parties, groups of golfers, shaggers, bikers, and other tourist-related groups with a commonality and prearranged purpose are not included in this definition.

Dwelling, detached: A dwelling which is not attached to any other dwelling by any means.

Dwelling, duplex: A structure on a single lot containing two (2) dwelling units, each of which is totally separated from the other by an unpierced wall extending from ground to roof or an unpierced ceiling and floor extending from exterior wall to exterior wall, except for a common stairwell exterior to both dwelling units.

Dwelling, garden apartment: A multifamily dwelling up to three (3) stories in height.

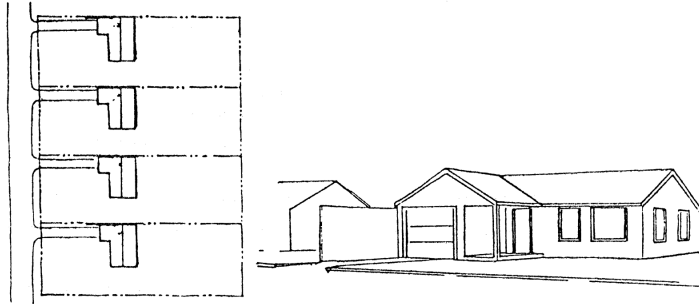


Dwelling, Garden Apartment

Dwelling, mobile/manufactured home: A structure transportable in one (1) or more sections, which in the traveling mode, is eight (8) body feet or more in width, or forty (40) body feet or more in length or when erected on site is three hundred twenty (320) or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein. The term mobile/manufactured home shall not include the term modular building or structure as herein separately defined, or the term recreational vehicle or camping trailer.

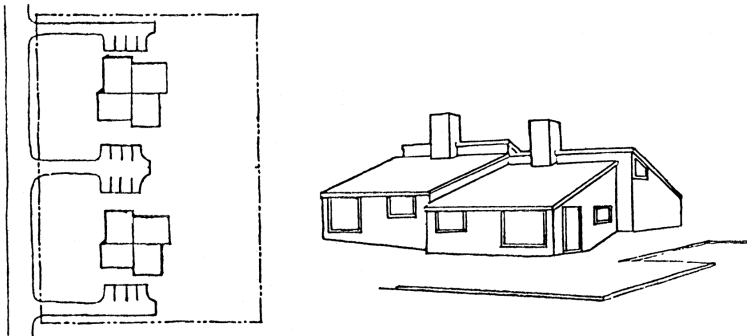
Dwelling, multifamily: A structure containing more than two (2) dwelling units, not including triplexes or quadruplexes, separately defined by this chapter.

Dwelling, patio home: A single-family dwelling on a separate lot with open space setbacks usually on three (3) sides. The term is usually synonymous with zero lot line dwellings.



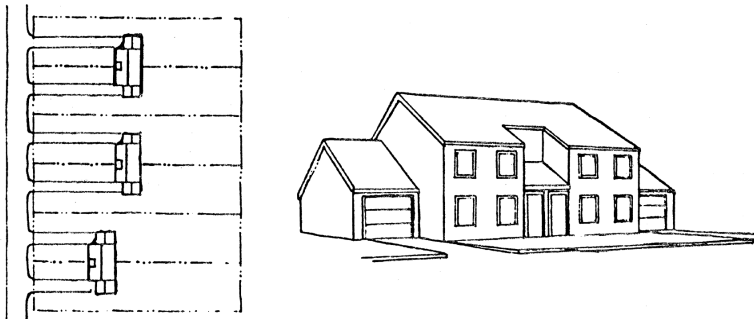
Dwelling, Patio Home

Dwelling, quadruplex: A multiplex containing four (4) attached dwellings in one (1) structure. Each unit has two (2) open space exposures and shares one (1) or two (2) walls with adjoining unit or units.



Dwelling, Quadruplex

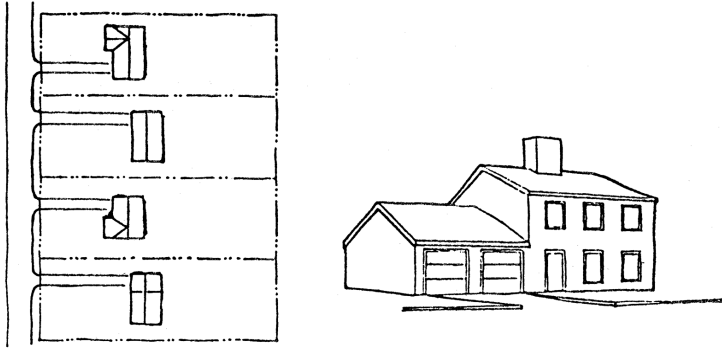
Dwelling, semidetached: A dwelling attached to one (1) other dwelling by a common vertical wall, and each dwelling located on a separate lot.



Dwelling, Semidetached

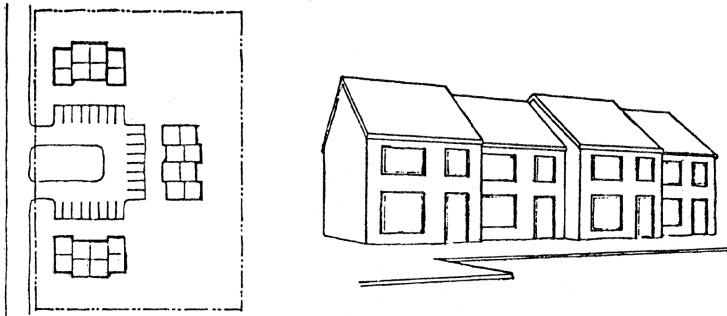
Dwelling, single-family: A building containing one (1) dwelling unit.

Dwelling, single-family detached: A dwelling which is designed for and occupied by not more than one (1) family and surrounded by open space or yards and which is not attached to any other dwelling by any means.



Dwelling, Single-Family Detached

Dwelling, townhouse: A single-family dwelling in a row of at least three (3) such units in which each unit has its own front and rear access to the outside, no unit is located over another unit, each unit is separated from any other unit by one (1) or more common fire-resistant walls, and each unit is serviced by separate utilities.



Dwelling, Townhouse

Dwelling, triplex: A multiplex dwelling containing three (3) dwelling units, each of which has direct access to the outside or to a common hall.

Dwelling unit: One (1) or more rooms designed, occupied, or intended for occupancy as separate living quarters, with cooking, sleeping and sanitary facilities provided within the dwelling unit for the exclusive use of a single-family maintaining a household.

Family: One (1) or more persons occupying premises and living together as a single housekeeping unit.

Flood hazard area: Any area of the city so designated on FEMA Flood Hazard Boundary Maps.

Floor area: The square feet of floor space within the surrounding exterior walls of a building or portion thereof, exclusive of vent shafts and courts. It does not include porticos, garages, or space in a basement or cellar when the basement or cellar space is used for storage or incidental uses.

Floor area ratio: The total floor area of a building excluding porches, decks and attic space but including garages and other enclosed storage areas divided by the square footage of the lot.

Frontage: The side of a lot abutting on a street, the front lot line.

Gaming/gambling boats: Any boat or other floating structure or craft on which any game of chance is played. This includes all electronic video game machines that are available to play or simulate the play of games utilizing a

video display and microprocessors in which the player may receive free games or credits that can be redeemed for cash and all dice, card, roulette, and lottery type games in which money is staked or a wager made.

Gazebo: A freestanding, wood-constructed, roofed structure, open on all sides, no larger than one hundred forty-four (144) square feet, intended as a shady rest area, but shall not be utilized for any commercial activity. An unenclosed shower and lighting are permissible as accessories.

Gross trailer area: Gross trailer area is the total living area of a recreation vehicle measured to the maximum horizontal projection of exterior walls when in the setup mode.

Home occupation: Any occupation within a dwelling and clearly incidental thereto, carried on by a member of the family residing on the premises, provided that no person not a resident of the premises is employed, no stock in trade is kept or commodities sold, no mechanical equipment is used except such that is normally used for family, domestic or household purposes, and there is no exterior indication that the building is being used for any purpose other than a dwelling. When within the above requirements, a home occupation includes but is not limited to the following: (a) art studio; (b) dressmaking; (c) salesman, real estate agent, insurance agent, or other similar occupation; (d) teaching, with musical instruction limited to one (1) or two (2) pupils at a time.

Hotel: A building in which lodging or boarding and lodging are provided and offered to the public for compensation and in which ingress and egress to and from all rooms is made through an inside lobby or office supervised by a person in charge at all times. As such, it is open to the public in contradistinction to a multifamily structure which is herein separately defined.

Impervious surface: Impervious surfaces are those that do not absorb rain. All buildings, parking areas, driveways, roads, sidewalks, and any areas in concrete and asphalt shall be considered impervious surfaces within this definition. In addition, other areas determined by the zoning administrator to be impervious within the meaning of this definition will also be classed as impervious surfaces.

Impervious surface ratio: The impervious surface ratio is a measure of the intensity of land use. It is determined by dividing the total area of all impervious surfaces within the site by the total site area.

Institution: A nonprofit establishment for public use.

Interior court: An open space other than required yards or setbacks which does not have direct street access and around which is arranged on three (3) sides a group of related buildings.

Junk yard: A junk yard is defined as a place where two (2) or more wrecked or disabled vehicles, without current license tags, and/or otherwise inoperable are placed or stored in an open area, including parts thereof, scrap building material, scrap contractor's equipment, tanks, cases, cans, barrels, boxes, drums, piping, bottles, glass, old iron, machinery, rags, paper, excelsior, mattresses, beds, or bedding, or any kind of scrap or waste material.

Landscaped area: An area that is permanently devoted to and maintained for the growing of shrubbery, grass and other plant material.

Lot: A parcel of land which fronts on and has access to a street and which is occupied or intended to be occupied by a building or buildings with customary accessories and open space.

Lot, corner: A lot abutting upon two (2) or more streets at their intersection.

Lot, depth: The mean horizontal distance between the front and rear lot lines.

Lot, double frontage: A lot having a frontage on two (2) nonintersecting roads, as distinguished from a corner lot.

Lot, interior: A lot other than a corner lot.

Lot, width: The width of a lot at the front building line.

Lot of record: A lot or parcel of land the plat or deed of which has been legally recorded.

Marina: There are four (4) types of marinas, defined as follows:

- (1) *Marina, noncommercial multiple docking facility:* A basin or marine terminal that provides space, docks, moorings for five (5) or more boats on a private or noncommercial basis. This includes multiple docking facilities such as for condominiums or other residential uses or subdivisions, and includes nonprofit "yacht clubs." It does not include service generally associated with commercial marinas, such as fuel, overnight docking, ship's store, etc. Dry storage and/or dry stack facilities are prohibited.
- (2) *Marina, commercial:* A basin or marine terminal that provides space, docks, moorings, and related facilities and services for five (5) or more pleasure boats. This includes the sale and minor in-water repair of recreational marine craft and the sale of fuel, food, beverages, supplies, hardware and other accessory uses. The overhaul of hulls and the painting, finishing and building of boats are prohibited. Commercial craft are prohibited from docking, mooring or being repaired. Dry storage and/or dry stack is permitted as a special exception if approved by the zoning board of appeals.
- (3) *Marina, boatyard:* A basin or marine terminal that provides space, docks, moorings, and related facilities and services for five (5) or more boats, including pleasure and commercial craft. This includes the sale, repair, painting, finishing, and building of boats, dry storage, and/or dry stack, fueling operations, and other uses permitted by commercial marina definition.
- (4) *Marina, dry stack:* A facility for storing and keeping boats out of water. This is principally a land operation, where boats are dry stored or "stacked" in a common structure until such time as they are transferred to the water for use.

Massage parlor: An establishment or business which provides the services of massage and body manipulation, including exercises, heat and light treatments of the body, and all forms and methods of physiotherapy, unless operated by a medical practitioner or professional physical therapist licensed by the state.

Mini-warehouse: A structure comprised of individually rented units for the purpose of storage, separated by permanent walls with individual exterior doors. Each unit generally not exceeding three hundred (300) square feet in floor area.

Mini-warehouse, climate controlled: A building where individually rented units for the purpose of storage are contained within the wall of the building, and no unit opens directly to the exterior of the building, but rather to an interior hall with security, controlled through an interior office area. Climate control shall be by central heat and air only.

Mini-warehouse facility: A warehouse facility complex designed with numerous component storage units, each for lease to clients for storage.

Mixed use building/site: A single building that contains a residential dwelling unit or units and commercial uses or a site that has multiple uses in multiple, separate buildings located upon it.

Mobile/manufactured home park: A parcel of land under single ownership, with required improvements and utilities for the long-term parking and occupancy of mobile/manufactured homes where mobile/manufactured home sites are available for rent or lease and which may include services and common facilities for the residents.

Mobile/manufactured home site: A parcel of land (space) within a mobile/manufactured home park for the placement of a mobile/manufactured home and its accessory buildings and structures and containing approved sewer and water connections.

Mobile/manufactured home subdivision: A subdivision designed and intended for residential use, where residence is primarily in mobile/manufactured homes.

Modular building or structure: A structure or building including the necessary electrical, plumbing, heating, ventilating, and other service systems, manufactured off-site and transported to the point of use for installation or

erection, with or without other specified components, as a finished building, and not designed for ready removal to another site. The term is applicable to all buildings or structures, including residential, commercial, industrial, institutional, etc. When meeting the requirements of the Modular Building's Construction Act (23-43 of the South Carolina Code of Laws), said building or structure may be located in any of the city's several zoning districts.

Motel: A building or buildings in which lodging, with or without meals, is provided and offered through an on-site office to the public for compensation, which is open to transient or permanent guests.

Neighborhood convenience store: A convenience store limited to three thousand (3,000) square feet of gross floor space including storage and providing convenience items and services to the general public but excluding sale of motor fuels. Such establishments are limited to the following uses: drug and food stores, flower shops, beverage stores, confectioneries, delicatessens, and bakeries whose products are sold exclusively at retail and on premises.

Overlay zone: A zone imposed over a primary zoning district which imposes a set of requirements or relaxes a set of requirements imposed by the underlying primary zoning district when there is a special public interest in a particular geographical area that does not coincide with the underlying district boundaries.

Park and sports complex. A tract of publicly owned land one hundred (100) acres or more in size, with athletic fields, active and/or passive recreation facilities and regional attractions such as, but not limited to, zip lines and water parks and associated facilities and activities, dog parks, biking/hiking trails, water activities, and entertainment/gathering venues. Such facilities may also have accessory on-site sales and consumption of food, legal beverages, gifts, clothing, ticket sales, equipment rental and similar activities.

Primary zoning district: Geographic sections of the city delineated on the official zoning map and designated in the zoning ordinance text in which requirements for the use of land and building and development standards are prescribed.

Protected tree: Any tree regulated by the tree protection regulation article of this chapter excluding pine trees.

Public buildings: Any nonrecreational state, county, or municipal building used for public purposes.

Public park and recreation facilities: Any noncommercial park, playground, or other recreation facility, and/or open space officially designated as a public park or recreation facility including community centers, passive and active outdoor uses and indoor uses, and all structures associated with such uses.

Recreational vehicle: A vehicular type unit primarily designed to provide seasonal or temporary living quarters which has its own motive power or is towed by another vehicle and may be connected to utilities necessary for operation of installed fixtures and appliances and with a gross trailer area not exceeding four hundred (400) square feet when in the setup mode. The basic entities are: travel trailer, folding camping trailer, park trailer, truck camper, motor home and multi-use vehicle.

Resort accommodations: A building in which lodging or boarding and lodging are provided and offered to the public for compensation in which ingress and egress to and from all rooms can be made through an inside lobby or office supervised by a person in charge at all times and which may have individual units owner occupied as dwelling units within the same building.

Retail, "big box": A single retail establishment that exceeds fifty thousand (50,000) square feet in gross sales floor area either as a single use on a property or within a commercial center.

Retail, convenience: Convenience retail establishments are those providing convenience items and services to the general public, such as drug, beverage, grocery stores, hardware, etc.

Retail, primary: Primary retail establishments are those selling commodities in small quantities to the consumer, usually low bulk comparison items which are normally found in large regional shopping centers, including department stores and stores selling general merchandise, variety merchandise, shoes, millinery, clothing, jewelry, etc.

Retail, secondary: Secondary retail establishments are those selling primarily one-stop items usually high bulk and very often more expensive items than those found in the primary retail establishments, including stores selling appliances, radios, televisions, floor coverings, furniture, etc.

Short term rental: Any residential unit offered for lease for a period of ninety (90) days or less.

Sleeping area: As it relates to *short term rentals*, a sleeping area is any room (including bedrooms) that is not one of the following: A kitchen, a hallway not exceeding seven (7) feet in width, a mechanical room designed primarily for containing HVAC equipment or hot water heaters or electrical panels or similar, a bathroom, a closet not exceeding seventy (70) square feet in size, or an elevator or stairwell.

Story: That portion of a building included between the surface of any floor and the surface of the floor next above it; or if there is no floor above it, then the space between such floor and the ceiling next above it. If the finished floor level directly above a basement or cellar is more than six (6) feet above grade, such basement or cellar shall be considered a story.

Structure: Anything constructed, erected or established, including but without limiting the generality of the following: swimming pools, buildings, signs, trailers, fences, screened enclosures, patio walls, backstops and sun decks or similar activities.

Structural alteration: Any change except those required by law or ordinance, which would prolong the life of the supporting members of a building or structure, such as bearing walls, columns, beams or girders, not including openings in bearing walls as permitted by other ordinances.

Tavern: For the purpose of regulating adult uses and amusements, a tavern is any establishment which sells or is authorized to sell alcoholic beverages to patrons by the individual drink for consumption on the premises. A tavern or bar is an establishment used primarily for the serving of alcohol for on-premises consumption to the general public, and where food is served only as accessory to the primary use.

Town center: A large contiguous (including streets) commercial area which contains at least twenty (20) acres and a minimal commercial area of at least fifty thousand (50,000) square feet within a Planned Development District (PDD) and not covering more than fifty (50) percent of the total land area of the entire PDD.

Video gaming establishment: Any building (under one (1) roof) in which more than five (5) video gaming machines or stations are located.

Video gaming machine: An electronic video game machine that, upon insertion of cash, is available to play or simulate the play of games as authorized by the South Carolina Tax Commission utilizing a video display and microprocessors in which the player may receive free games or credits that can be redeemed for cash.

Yard: A required open space other than a court occupied and unobstructed by a structure or portion of a structure from twelve (12) inches above the general ground level of the graded lot upward; however, fences, walls, poles, posts, permitted signs, and other customary yard accessories, ornaments and furniture may be permitted in any yard subject to height limitations and requirements limiting obstruction of visibility.

- (1) *Yard, front:* A yard extending between side lot lines across the front of a lot adjoining a street or the twelve and one-half feet (12.5) easement on twenty-five feet (25) private rights-of-way. In one (1) required front yard, no fence or wall shall be permitted which materially impedes vision across that yard above the height of thirty (30) inches, and no hedge nor vegetation shall be permitted which materially impedes vision across such yard between the heights of thirty (30) inches and ten (10) feet.
- (2) *Yard, side:* A yard extending along the side lot line from the front yard to the rear yard.
- (3) *Yard, rear:* A yard extending between side lot lines across the rear of the lot.

(Ord. No. 88-35, 11-1-88; Ord. No. 90-3, §§ 1, 2, 2-20-90; Ord. No. 90-35, § 1, 8-28-90; Ord. No. 91-8, §§ 2, 3, 2-4-91; Ord. No. 93-36, §§ 1, 2, 10-4-93; Ord. No. 94-1, § 1, 1-3-94; Ord. No. 95-4, § 1, 2-6-95; Ord. No. 95-49, § 1, 10-16-95; Ord. No. 96-02, § 1, 2-5-96; Ord. No. 97-31, § 1, 8-18-97; Ord. No. 98-37, § 1, 12-7-98; Ord. No. 99-46, § 1,

11-15-99; Ord. No. 00-15, § 1, 3-6-00; Ord. No. 00-45, § 1, 10-16-00; Ord. No. 01-12, § 1, 2-19-01; Ord. No. 01-51, §§ 1, 2, 11-19-01; Ord. No. 02-03, § 2, 2-4-02; Ord. No. 03-13, § 1, 4-21-03; Ord. No. 03-34, § 1, 8-18-03; Ord. No. 06-46, § 1, 7-17-06; Ord. No. 07-09, § 1, 2-19-07; Ord. No. 07-21, § 1, 6-18-07; Ord. No. 09-17, § 1, 3-2-09; Ord. No. 09-21, § 1, 6-1-09; Ord. No. 09-36, § 1, 11-16-09; Ord. No. 11-28, § 1, 10-17-11; Ord. No. 11-30, § 1, 11-21-11; Ord. No. 12-16, § 1, 9-17-12; Ord. No. 15-18, § 1, 5-18-15; Ord. No. 17-12, § 1, 6-5-17; Ord. No. 18-19, § 1, 10-15-18)

Exhibit B

Sec. 23-22. R-4 Resort Residential District.

- (1) *Purpose.* The purpose of this 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.
- (2) *Permitted uses:* Within the R-4 District, a building or lot shall be used only for the following purposes:
- (a) Dwellings, including:
 - Single-family detached.
 - Semidetached.
 - Patio homes.
 - Two-family (duplex).
 - Multiplex (triplex and quadruplex).
 - Townhouse developments.
 - Multifamily, including garden.
 - Mid-and high-rise apartments.
 - Zero lot line single-family detached developments, as provided in section 23-119.
 - Boarding house.
 - Resort accommodation.
 - (b) Hotels, motels, inns, [and] lodges.
 - (c) Accessory uses customarily incidental to dwellings.
 - (d) Accessory uses customarily included in hotels, motels, inns, lodges and resort accommodations: provided such uses are located within the principal building and are accessible only from an interior court, lobby corridor or pool deck except for poolside activities as regulated under section 23-118: Further that such uses shall be limited to the following: restaurants, newsstands, snack bars, florists, gift shops, confectionery stores, beach and convenience retail shops, automobile rental agencies, drug and sundry shops, nightclub and radio broadcasting studios, health clubs, barber and beauty shops.
 - (e) Parking lots.
 - (f) Signs permitted by and in accord with all applicable provisions of Article III.
- (3) *Development standards for uses in R-4 District:*

	Hotels, Motels, Inns, Lodges Resort Accommodation ⁷	Nonresi- dential Uses	Single- family Detached	Semi- detached	Duplex	Multi- plex Boarding house	Town- house	Multi- family ⁷	Restaurant
Minimum site area	15,000	NA	5,000	7,000	7,000	10,000	16,000	15,000	10,000

(square feet)									
Minimum lot area* (square feet)	NA	NA	5,000	3,500	3,500	2,000	2,000	NA	NA
Minimum lot width	100 feet	NA	50 feet	35 feet	55 feet	75 feet	14 feet ⁸	100 feet	70 feet
Minimum yards:									
Front	15 feet	15 feet	15 feet	15 feet	15 feet	15 feet	15 feet	15 feet	10 feet
Side	³	5 feet	5 feet	5 feet	5 feet	7.5 feet	²	³	10 feet
Rear	15 feet	15 feet	15 feet	15 feet	15 feet	15 feet	⁴	15 feet	15 feet
Maximum impervious surface ratio	90%	60%	60%	60%	60%	60%	60%	80%	90%
Common open space	10%	NA	NA	NA	NA	15%	25%	20%	NA
Maximum height of buildings	90 feet ⁵	90 feet	90 feet	90 feet	90 feet	90 feet	90 feet	90 feet ⁵	35 feet
Maximum height of signs	30 feet					10 feet	10 feet	10 feet	8 feet
Minimum distance between buildings	Where more than one (1) principal building is located on a lot, minimum distance between buildings shall be twenty (20) feet with one (1) additional foot for each six (6) feet in height over thirty-five (35) feet, using the highest building.								

*Per dwelling unit

Notes:

¹ A five-foot setback shall be applied to the ends of the structure and the exterior property lines, and zero (0) setback shall be allowed for the common interior property line.

² Zero (0) between units; ten (10) feet between end structures and side property line; no more than six (6) units shall be attached in one (1) building.

³ Ten (10) feet for first thirty-five (35) feet in height and fifteen (15) feet for buildings in excess of thirty-five (35) feet in height.

⁴ Rear yard shall be ten (10) feet except where contiguous to the project site property line, then a twenty-foot setback shall be required, and shall remain unoccupied by any accessory building or structure.

⁵ Hotel/motel, resort accommodation and multifamily uses may exceed the ninety-foot height limitation by one (1) floor of units for each full level of above grade parking deck construction below the principal building not to exceed four (4) additional floors of units.

[⁶ *Reserved.*]

⁷ The use may be constructed in the airspace above a noncontiguous parking lot of the same use subject to the requirements of section 23-41 and an agreement between the owners sharing the off-site lot and the city; and/or an easement protecting access and required off-site parking; and deed restriction of off-site spaces; and compensation for any lost required interior landscaping.

⁸ Minimum lot width and/or unit width.

- (4) *Special exceptions:* Owing to their potential negative impact on the community and surrounding areas, the following uses may be approved as special exceptions by the board of zoning appeals:
- (a) Noncommercial marinas, subject to the siting standards of section 23-120.
 - (b) Fishing piers, provided that the uses permitted on such piers are limited to restaurants, bait and tackle shops, and marine accessories. Refer to section 23-124 for separation requirements.
 - (c) Lighted tennis courts, subject to the following:
 - 1. That the proposed lighted tennis court not be located closer than fifty (50) feet to any residential structure.
 - 2. That the lighting be a minimum to sufficiently illuminate the playing surface utilizing sharp cut-off lights with adjustable glare shields.
 - 3. When in close proximity to a residential structure or lot, the board may require a vegetative screen as described in section 23-58(2)(d) on the side(s) of the court or other method to minimize noise levels.
 - 4. In granting the special exception, the board of zoning appeals may impose such reasonable and additional stipulations, conditions or safeguards as, in its judgement will enhance the siting of the proposed special exception.
 - (d) Cabana houses subject to the following:
 - 1. That a homeowner's association shall have been established for the project and a maintenance agreement has been submitted to the planning department.
 - 2. That at least eight (8) parking spaces per zoning standards be established on site and that more spaces may be required by the board if there is no other means to limit the number of cars traveling to the property provided such as a shuttle service to and from the property to the project.
 - 3. That the use of the house be limited to bathing and change of clothing facilities, and occasional use as guest quarters and other similar uses.
 - 4. That the special exception will be in substantial harmony with the area in which it is to be located.
 - 5. That the special exception will not be injurious to the adjoining property.
 - 6. That the special exception will not discourage or negate the use of surrounding property for use(s) permitted by right.

7. That in granting the special exception, the board of zoning appeals may impose such reasonable and additional stipulations, conditions or safeguards as, in its judgment, will enhance the siting of the proposed special exception.
- (5) *Conditional uses:* Due to the manner of operations, conditional uses must meet certain conditions stated in this section, as well as the restrictions and/or limitations applicable to all land uses in the R-4 District and all applicable supplemental regulations for the use contained throughout the zoning ordinance (See Article I, section 23-2 of this chapter entitled "Definitions"). If the conditions or standards are met, the zoning administrator may permit the use without review by the board of [zoning] appeals. (S.C. Code 6-29-720 of the S.C. Comprehensive Planning Act of 1994).
- (a) *Restaurants.*
1. That the use complies with all applicable development standards in the R-4 district and/or an R-4 site also designated in an "Activity Center Overlay" area.
 2. That the use will be an enhancement to the character and sense of place of the area in which it is to be located, increasing pedestrian accessibility to eating establishments and reducing traffic congestion. Towards this goal, auto oriented drive through pickup restaurants are not eligible for this conditional use.
 3. That parking requirements/incentives be met as follows:
 - a. Any proposed R-4 restaurant site also located in a designated activity center overlay will be eligible for the fifty (50) percentage parking requirement reduction, as well as the ability to satisfy parking requirements off site within five hundred (500) feet and located on land owned or leased by the restaurant owner.
 - b. Any proposed R-4 restaurant site that does not fall in an activity center overlay designated area will also qualify for the fifty (50) percent parking reduction and the ability to locate the other fifty (50) percent of the parking off site (on owned or leased within five hundred (500) feet and not necessarily adjacent); with one major exception that the offsite parking be improved to full city parking lot standards including lighting, landscaping, surfacing, and drainage).
 - c. In cases where there is a change of use in an existing building from some other use to restaurant, the zoning administrator shall evaluate the site on a case-by-case basis to determine if there is room to provide on-site parking. If there is he/she may require any number and combination of vehicular, bicycle, and golf cart parking stalls to be provided as a condition for issuance of the permit. For purposes of this section, a bicycle stall shall mean a space in a standard bicycle rack specifically designed for the temporary parking and securing of bicycles. A golf cart space shall have a dimension not less than six (6) feet wide by ten (10) feet deep, and shall be identified as "golf cart parking only" via small informational signage.

NOTE: Restaurants allowed as accessory uses to the permitted use of resort accommodations in R-4 (see Article II Sec. 22-23(d) of this section) will not require parking in addition to that calculated for the hotel/permitted principal use. Also see Article IV of this chapter, off street parking)
 4. That the use has taken measures to not be injurious to adjoining property including, but not limited to:
 - i. Controlling and shielding all lighting so as not to cast undue glare onto adjoining residential uses. In addition, landscape buffers and/or fencing must be added if the R-4 adjoins an R-1

District parcel. These requirements will be based on buffering of R-1 from adjacent commercial uses in other commercial districts in this chapter.

- ii. Signage will be limited to wall signage as permitted this use if it were locating in The RC District. However there will be no freestanding signage allowed, other than pedestrian oriented (sandwich/menu boards) per RC District standards.
 - iii. Controlling all elements that produce noise, such as interior/exterior music and table availability announcements for waiting customers so as not to create a nuisance for neighboring properties.
5. That the use is limited to restaurant and not bar/nightclub. (For purposes of this section, a bar/nightclub shall be defined as any establishment licensed by the State of South Carolina to serve alcoholic beverages, and whose sale of such beverages constitutes forty (40) percent or more of its gross revenues. For those applicants who wish to claim that their sales of such beverages constitute less than forty (40) percent of gross revenues, the burden of proof shall rest with the applicant to so demonstrate.)
 6. That the use will contribute to the economic vitality and promote the general welfare of the community.
 7. That the use will not discourage or negate the use of surrounding property for use(s) permitted by right in the district.
- (6) *Off-street parking:* Off-street parking [requirements] for the various uses permitted herein are set forth in Article IV.
- (Ord. No. 88-35, 11-1-88; Ord. No. 89-16, § 1, 4-18-89; Ord. No. 95-10, § 7, 3-20-95; Ord. No. 95-16, § 2, 4-3-95; Ord. No. 95-40, § 1, 7-3-95; Ord. No. 95-45, § 1, 7-17-95; Ord. No. 96-02, § 2, 2-5-96; Ord. No. 98-10, § 3, 4-20-98; Ord. No. 98-11, §§ 1, 2, 4-20-98; Ord. No. 98-13, § 3, 5-4-98; Ord. No. 98-35, § 3, 11-2-98; Ord. No. 99-35, § 2, 9-20-99; Ord. No. 02-14, § 1, 4-15-02; Ord. No. 03-13, § 2, 4-21-03; Ord. No. 04-51, § 1, 10-4-04; Ord. No. 06-10, §§ 1—4, 2-20-06; Ord. No. 12-13, § 1, 7-2-12; Ord. No. 21-02, § 2, 3-1-21)

Exhibit C



FILED 2023 BY 201 JLM FOR COMMON PLEAS - CASE#2021CP2607489

Exhibit D

Bl. 663 pg. 846 19377
Jan. 2, 80

STATE OF SOUTH CAROLINA FILED
HORRY COUNTY
COUNTY OF HORRY 1980-1-24 3:28
JAN -27 PM 3:28

RESTRICTIVE COVENANTS

WHEREAS, Charles T. Tilghman, M.W. Tilghman, Catherine M. Tilghman and Mary Elizabeth Tilghman Dent are the owners of certain properties situate in Horry County, South Carolina, which is more fully described on Exhibit A attached hereto and made a part hereof; and

WHEREAS, said owners have heretofore conveyed to Sea Cloisters Corporation certain properties adjoining the within described property on two sides; and

WHEREAS, a part of the consideration for the sales of adjoining properties to Sea Cloisters Corporation was the restriction of use of the within described property.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that the undersigned owners do hereby impose the following conditions, restrictions and covenants upon the within described property:

1. Said property shall be used only for recreational purposes and the improvement of said property shall be limited to a clubhouse for recreational purposes.
2. These restrictions shall run with the land and shall be binding upon the undersigned owners, their heirs and assigns and may be amended or modified only with the written consent of Sea Cloisters Corporation, its heirs or assigns.

WITNESS our hands and seals this 31st day of December, 1979.

Shelby Hardwick
Shelby Hardwick

Charles T. Tilghman
CHARLES T. TILGHMAN

Shelby Hardwick
Shelby Hardwick

M.W. Tilghman
M.W. TILGHMAN

Shelby Hardwick
Shelby Hardwick

Catherine H. Tilghman
KATHERINE H. TILGHMAN

Shelby Hardwick
Shelby Hardwick

BOOK 663 PAGE 846

Mary Elizabeth Tilghman Dent
MARY ELIZABETH TILGHMAN DENT

846

STATE OF South Carolina)
COUNTY OF Horry)

PERSONALLY appeared before me Deborah M. Vinson and made oath that she saw the within named Charles T. Tilghman sign, seal and as his act and deed, deliver the foregoing Restrictive Covenants, and that she with Shelby Hardwick witnessed the execution thereof.

Deborah M. Vinson

SWORN to before me this
31st day of December, 1979.

Shelby Hardwick (LS)
Notary Public for:
My Commission Expires: January 13, 1988

STATE OF South Carolina)
COUNTY OF Horry)

PERSONALLY appeared before me Deborah M. Vinson and made oath that she saw the within-named M.W. Tilghman sign, seal and as his act and deed, deliver the foregoing Restrictive Covenants, and that she with Shelby Hardwick witnessed the execution thereof.

Deborah M. Vinson

SWORN to before me this
31st day of December, 1979.

Shelby Hardwick (LS)
Notary Public for:
My Commission Expires: January 13, 1988

FILED
COUNTY
JAN 2 1980
CLERK OF COURT

BOOK 663 PAGE 847

847

STATE OF South Carolina)
COUNTY OF Horry)
PERSONALLY appeared before me Deborah M. Vinson and
made oath that she saw the within-named Katherine M. Tilghman
sign, seal and as her act and deed, deliver the foregoing
Restrictive Covenants, and that she with Shelby Hardwick
witnessed the execution thereof.

Deborah M. Vinson

SWORN to before me this
31st day of December, 1979.
Shelby Hardwick (LS)
Notary Public for:
My Commission Expires: January 13, 1988

STATE OF South Carolina)
COUNTY OF Horry)
PERSONALLY appeared before me Deborah M. Vinson and
made oath that she saw the within-named Mary Elizabeth Tilghman
Dent sign, seal and as her act and deed, deliver the foregoing
Restrictive Covenants, and that she with Shelby Hardwick
witnessed the execution thereof.

Deborah M. Vinson

SWORN to before me this
31st day of December, 1979.
Shelby Hardwick (LS)
Notary Public for:
My Commission Expires: January 13, 1988

BOOK 66 PAGE 348

848

ALL AND SINGULAR all that certain piece, parcel or lot of land, situate, lying and being in Little River Township, County and State aforesaid, and being more particularly known and designated as Block 18A, Tilghman Estates as is shown on a map of Blocks 18, 18A and 19 Tilghman Estates prepared by C.B. Berry, RLS #2075, dated July 10, 1979, and recorded in the Office of the Clerk of Court for Horry County in Plat Book 67 at page 153, and being described as follows:

Beginning at an iron at the right of way of Ocean Boulevard, which iron is located at the northwestern corner of Block 19, and running along Block 19 as shown on said plat South 18 degrees 31 minutes East for a distance of 230 feet to an iron; thence turning and running along the Strand area of the Atlantic Ocean South 71 degrees 29 minutes West for a distance of 87.75 feet to an iron; thence turning and running along Block 18 as shown on said plat North 18 degrees 31 minutes West for a distance of 230 feet to an iron; thence turning along the right of way of said Ocean Boulevard North 71 degrees 29 minutes East for a distance of 87.75 feet to the point of commencement.

BOOK 66J PAGE 849

849

Instrument#: 2007000156123, DEED BK: 3289 PG: 1059 DOCTYPE: 082 11/01/2007 at
 01:13:00 PM, 1 OF 5 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS
TMS Number correct
 1442811905

RE-RECORDED TO
 CORRECT LEGAL DESCRIPTION

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)

RESTRICTIVE COVENANTS

WHEREAS, PAN, LLC, a SC limited liability company, is the owner of certain property situate in Horry County, South Carolina, which is more fully described on Exhibit "A" attached hereto and made a part hereof; and

WHEREAS, said owner has entered into a Settlement Agreement with Sea Cloisters I Homeowners Association, Inc. and Sea Cloisters II Homeowners Association, Inc. (hereinafter the "HOAs") regarding the use of that certain property described in the attached Exhibit "A"; and

WHEREAS, pursuant to the terms of that Settlement Agreement, PAN, LLC, has agreed to impose restrictive covenants regarding the use of the within described property. These restrictive covenants shall be in addition to those certain restrictive covenants regarding the use of the within described property found in the Horry County Register of Deeds Office at Deed Book 663 at page 846, and recorded again in Deed Book 665 at Page 569.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that the undersigned owner, for valuable consideration, the receipt and sufficiency of which are hereby acknowledged, does hereby impose the following conditions, restrictions and covenants upon the within described property:

I. Any improvement constructed on the within described property shall have the following minimum setbacks: ten feet (10') from each side, thirty-five feet (35') from the front boundary adjacent to the street, and twenty-five feet (25') from the rear boundary adjacent to the Beach.

Instrument#: 2007000156123, DEED BK: 3289 PG: 1060 DOCTYPE: 082 11/01/2007 at 01:13:00 PM, 2 OF 5 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

2. Any building constructed on the within described property shall not exceed ten thousand (10,000) square feet.

3. Any building constructed on the within described property shall have no roofline higher than the highest roofline of the HOAs, excluding cupolas or other ornamental features not to exceed another ten feet (10') in height.

4. These restrictions shall be for the benefit of and appurtenant to each of the condominium units of the HOAs, shall be enforceable by any owner(s) of any such unit or by either HOA, shall be permanent, shall run with the land described herein, and shall be binding upon the undersigned owner, its successors and assigns.

5. Despite any language that could be construed to the contrary, including any restriction contained herein or any restriction contained in the restrictive covenants found in Book 663 at page 846, or Book 665 at Page 569, the HOAs, their owners and their invitees shall have no right of use of the within described property, except the right to maintain an existing well and piping on the said property under the terms of a well easement granted by the undersigned owner to the HOAs, which well easement the undersigned owner has the option to terminate under certain terms and conditions.

WITNESS our hands and seals this the 23rd of Oct, 2007.


Witness

Witness/Notary

PAN, LLC


By: Ben P. Powell, Jr.
Its: Member

Instrument#: 2007000156123, DEED BK: 3289 PG: 1061 DOCTYPE: 082 11/01/2007 at 01:13:00 PM, 3 OF 5 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

<u>[Signature]</u> Witness <u>[Signature]</u> Witness/Notary <u>[Signature]</u> Witness <u>[Signature]</u> Witness/Notary	<u>[Signature]</u> By: PMB, Inc. Member of PAN, LLC Its: President, Paul M. Bendik <u>[Signature]</u> By: H. Crayne Howes Its: Member

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
PROBATE

PERSONALLY appeared before me the undersigned witnesses and made oath that she saw the within named Ben P. Powell, Jr., as Member of PAN, LLC, a SC limited liability company, sign, seal and as the company's act and deed, deliver the foregoing Restrictive Covenants, and that she with the other witnesses witnessed the execution thereof.

SWORN to before me this 23rd
day of Oct, 2007.

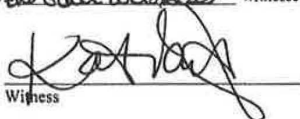
[Signature]
Notary Public for South Carolina
My Commission Expires: 9/6/13

[Signature]
Witness

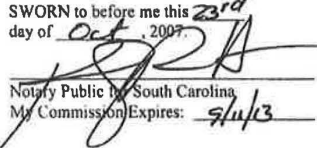
Instrument#: 2007000156123, DEED BK: 3289 PG: 1062 DOCTYPE: 082 11/01/2007 at
01:13:00 PM, 4 OF 5 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY) PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that she saw the within named Paul M. Bendik, President of PMB, Inc., as Member of PAN, LLC, a SC limited liability company, sign, seal and as the company's act and deed, deliver the foregoing Restrictive Covenants, and that she with the other witnesses witnessed the execution thereof.

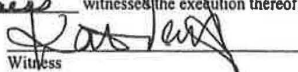

Witness

SWORN to before me this 23rd
day of Oct, 2007.

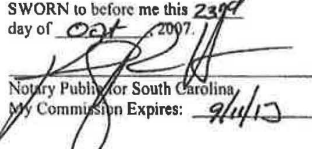

Notary Public for South Carolina
My Commission Expires: 9/11/13

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY) PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that she saw the within named Crayne Howes, as Member of PAN, LLC, a SC limited liability company, sign, seal and as the company's act and deed, deliver the foregoing Restrictive Covenants, and that she with the other witnesses witnessed the execution thereof.


Witness

SWORN to before me this 23rd
day of Oct, 2007.


Notary Public for South Carolina
My Commission Expires: 9/11/13

Instrument#: 2007000156123, DEED BK: 3289 PG: 1063 DOCTYPE: 082 11/01/2007 at
01:13:00 PM, 5 OF 5 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

[SEE ATTACH EXHIBIT A.]
EXHIBIT A

ALL AND SINGULAR all that certain piece, parcel or lot of land, situate, lying and being in Little River Township, County of Horry and State of South Carolina, and being more particularly known and designated as Block 18A, Tilghman Estates as is shown on a map of Blocks 18, 18A and 19 Tilghman Estates prepared by C.B. Berry, RLS #2075, dated July 10, 1979, and recorded in the Office of the Clerk of Court for Horry County in Plat Book 67 at page 153, and being described as follows:

Beginning at an iron at the right of way of Ocean Boulevard, which iron is located at the northwestern corner of Block 19, and running along Block 19 as shown on said plat South 18 degrees 31 minutes East for a distance of 230 feet to an iron; thence turning and running along the Strand area of the Atlantic Ocean South 71 degrees 29 minutes West for a distance of 87.75 feet to an iron; thence turning and running along Block 18 as shown on said plat North 18 degrees 31 minutes West for a distance of 230 feet to an iron; thence turning along the right of way of said Ocean Boulevard North 71 degrees 29 minutes East for a distance of 87.75 feet to the point of commencement.

TMS# 144-08-11-005

\$

Exhibit E

IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
HORRY COUNTY

DEPOSITION OF PAUL BLUST

CITY OF NORTH MYRTLE BEACH,
Plaintiff,

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

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

Defendants.

DEPONENT: PAUL BLUST

DATE: April 26, 2022

TIME: 1:22 PM

LOCATION: CITY OF NORTH MYRTLE BEACH
1018 2nd Avenue South
North Myrtle Beach, SC 29582

REPORTED BY: NANCY ENNIS TIERNEY, CSR (IL)

1 Q. (BY MR. TAMASITIS): How about an RV park located
2 in the city of North Myrtle Beach?

3 MR. RICARD: Objection, speculation. You
4 may answer.

5 A. An RV park would be a project, yes, sir.

6 Q. (BY MR. TAMASITIS): Why was the projects, or
7 what we are supposed to be using, cabana houses,
8 geographically limited to being in the city of North
9 Myrtle Beach?

10 A. I don't recall the reason for that, but, you
11 know, City Council is always looking out for the good of
12 the citizens, the citizens of North Myrtle Beach, and I
13 would assume since the Tidewater project -- again, the
14 reason we wrote this was for Tidewater. It was within
15 the city of North Myrtle Beach. And I guess it was
16 to -- well, I don't know.

17 Q. Do you recall having any discussions with members
18 of City Council about this geographical --

19 A. No, I don't remember that. No, I don't.

20 Q. And then in the third sentence, this is talking
21 about the use of the cabana house, it says,
22 "Additionally, it can be used as an occasional guest
23 quarters and similar residential uses. "

24 What would you consider similar residential
25 uses?

1 **A. I don't know that either.**

2 Q. All right. The final sentence here, "A cabana
3 house shall be owned and maintained by a homeowner's
4 association with a maintenance agreement submitted and
5 approved by the planning department."

6 So this is two parts. It says here, "Shall
7 be owned and maintained by a homeowner's association."

8 Why does the property, cabana house, need to
9 be owned and maintained by a homeowners association?

10 **A. I don't really know that one either. That was**
11 **something that City Council wanted.**

12 And the homeowners association, again, I go
13 back to Tidewater, because at the time we wrote this,
14 that's what we were responding to. Tidewater's
15 homeowners association had asked us for that. A lot of
16 times on these definitions -- not definitions, but on a
17 lot of things that somebody else has asked Council to
18 make an ordinance for to help them out, it's always been
19 to try to make it as narrow as possible toward what they
20 are asking so that it doesn't open things just wide open
21 to everything.

22 Again, I don't know if I'm explaining that
23 correctly. But the homeowners association had to ask us
24 to allow them to build a cabana house, and so the
25 ordinance was kind of tied to the homeowners

1 **A. Yes.**

2 Q. And it says here, "As of the date of this letter,
3 there are no known zoning violations on the property."

4 **A. Correct.**

5 Q. Do you recall, when answering the question that
6 was posed by whoever asked for this letter to be
7 drafted, whether you checked to see if the cabana house
8 on the property was owned by a homeowners association?

9 **A. No, sir.**

10 Q. Do you recall whether or not you checked to see
11 if the cabana house was being used by a project located
12 in North Myrtle Beach?

13 **A. No, sir.**

14 Q. So then how did you know there were no zoning
15 violations on the property?

16 **A. Well, I went out and looked at the property and**
17 **it wasn't being used at all. And since it as not being**
18 **used at all, whoever owned it didn't really matter to me**
19 **as far as whether it was a zoning violation or not.**
20 **There is nothing happening here, and so I see no zoning**
21 **violations.**

22 Q. Go with me on this. This is a hypothetical.

23 If after getting the question posed to you
24 about this letter, and you went on the -- into the
25 property records and found that this property was owned

Exhibit F

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2)
3 COUNTY OF HORRY) CA NO. 2021-CP-26-07489

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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

DEPOSITION OF: JAMES W. WOOD 30(b)(6)

Date: Wednesday, March 22, 2023

Time: 10:00 a.m. to 2:40 p.m.

Location: City of North Myrtle Beach
1018 2nd Avenue South
North Myrtle Beach, South Carolina 29582

Volume: 1
Pages: 1-140
Exhibits: 15

Christine E. Borrelli
Registered Professional Reporter
Registered Merit Reporter



1 City attorney.

2 Q. And who makes the decision to file suit on behalf of the
3 City related to a zoning enforcement matter?

4 A. The City Manager.

5 Q. What is the role of the zoning administrator?

6 A. The zoning administrator is basically the custodian of
7 this zoning ordinance. They interpret the clauses of the
8 ordinance as it relates to development, proposals, and
9 enforcement actions for violation of the zoning ordinance.

10 Q. If you go to page 206 out of 229 in the zoning code, do
11 you see that, Section 23-150?

12 A. Yes.

13 Q. Okay. Would you agree that Section 23-150 of the zoning
14 ordinance expressly provides that, "The intention of this
15 chapter is that all questions arising in connection with the
16 enforcement of this chapter are first to be presented to the
17 zoning administrator"?

18 A. Yes.

19 Q. Okay. Would you agree that the zoning administrator is
20 authorized to speak on behalf of the City with respect to
21 enforcement of the zoning ordinance?

22 A. Yes.

23 Q. Is it reasonable for the City to rely on statements by
24 the zoning administrator regarding zoning issues and land use
25 issues with North Myrtle Beach?

1 A. As it has been applied within the City, I believe that
2 term means that it's either oceanfront or possibly second row.

3 Q. What do you mean by "second row"?

4 A. A lot that is directly across the street from the ocean.

5 Q. And you said as applied. The zoning code does not define
6 "close proximity" anywhere?

7 A. That is correct.

8 Q. Okay. So the next part of this says, "to be used by
9 projects in North Myrtle Beach not located near the ocean."
10 What are "projects"?

11 A. In our zoning definition section, the way the zoning
12 ordinances work is if you have -- if something appears in the
13 definition section, that means it has a very specific
14 definition as applied to the zoning ordinance. When it does
15 not appear in the definition section, you are to take the
16 common dictionary usage of the term.

17 Q. But this term is not defined in the Code of Ordinances;
18 correct?

19 A. Correct.

20 Q. This zoning ordinance does actually not say anywhere that
21 a project must be a planned residential development; correct?

22 A. It does not say that.

23 Q. And it does not state that it's -- the zoning code does
24 not prohibit commercial projects; right?

25 A. It does not.

1 Q. How about an RV resort, would that classify as a project?

2 A. Yes.

3 Q. What else -- what would be considered not a project?

4 MR. RICARD: Object to form.

5 THE WITNESS: It's difficult for me to speculate on that.

6 I'm not sure I have a good answer to that. I believe
7 that -- or the City believes that a project is a -- you
8 know, meets the definition that is shown in the dictionary
9 which relates to a, sort of, organized collection of
10 activities or uses on a piece of property that is planned
11 and approved as a project whole.

12 Q. (By Mr. Tamasitis) And the next part of what we are
13 talking about here, it says -- why is the geographical
14 limitation to "in North Myrtle Beach"?

15 MR. RICARD: Object to form.

16 THE WITNESS: The thinking that City Council had at the
17 time was that we wanted to be sure that the City did not
18 form or develop in a manner similar to Miami where there
19 were dozens and dozens of, you know, highrise oceanfront
20 hotels and condo projects that would completely obscure the
21 view of the ocean and enjoyment of the area as more of a
22 family beach. And so they felt that one way to accomplish
23 that would be to provide or promote a way for projects to be
24 located off of the beach but still take advantage of that
25 oceanfront amenity. If you did not give them that

1 opportunity, then perhaps the decision would be made for
2 them to purchase oceanfront property and put a very large
3 condo project on it.

4 Q. (By Mr. Tamasitis) You said the City Council's thinking
5 on that. Who did you speak with to gain that insight?

6 A. I spoke with the former zoning administrator who was
7 present, who was employed with the City at the time, Mr. Paul
8 Blust, and also, you know, reading minutes of the meetings
9 and, sort of, teasing that out through the discussions.

10 Q. This restriction to "in North Myrtle Beach" does not
11 exist for any other special exception variance in the zoning
12 code; correct?

13 A. That is correct.

14 MR. TAMASITIS: I'll mark this as Exhibit Number 3.

15 (Defendant's Exhibit 3, Amendment Proposal, marked
16 for identification)

17 Q. (By Mr. Tamasitis) So what I have handed you for Exhibit
18 Number 3 -- this is how it was produced to us, and it appears
19 to be a proposal for a zoning text amendment to create the
20 cabana house. Do you see that? Is that correct?

21 A. Yes.

22 Q. And the date on it is prepared -- it looks like it's
23 November 29, 1995.

24 A. Yes.

25 Q. And it was prepared by Mr. Blust?

1 Q. If you have a bigger house, can you get more people?

2 A. It's logical to say that a larger structure can
3 accommodate more people.

4 Q. Who makes the ultimate decision?

5 A. The Board of Zoning Appeals in deciding whether the
6 special exception is granted or not makes the decision on
7 whether it meets those criteria.

8 Q. But who makes the decision as to whether or not the use
9 is a similar residential use?

10 A. That would be the zoning administrator.

11 Q. Next part of the definition talks about -- it says,
12 "Shall be owned and maintained by a homeowners association."

13 Why is the ownership of a cabana house restricted to
14 homeowners associations?

15 A. It's the City's long experience that homeowners
16 associations are uniquely responsive to the City's interests
17 in keeping order and safety and in advancing the goals that
18 are stated in Section 23 of the code. We have a very long
19 history of having good relationships with HOAs, and they have
20 a documented history of being responsive to the City when
21 issues arise.

22 In fact, I was recently reviewing the website of the
23 Tidewater Community HOA, and on the front page of their
24 website, they brag about what a special relationship they have
25 with the City in terms of being intimately tied with City

1 that ownership?

2 A. I don't believe so because there would presumably be
3 other entities in the partnership and -- which was not
4 contemplated in the way the ordinance was drafted.

5 Q. How about a partner in a partnership that owns property?

6 MR. RICARD: Objection to form.

7 THE WITNESS: An HOA being that partner?

8 Q. (By Mr. Tamasitis) Just the ownership in general. We're
9 talking about the term "ownership property."

10 A. Okay. Could you repeat the question, please?

11 Q. Would a partner in a partnership that has -- that owns
12 property, would that partner have an ownership interest in the
13 property?

14 MR. RICARD: Object to form.

15 THE WITNESS: It's my belief that that would not satisfy
16 the fee simple ownership intent of having that HOA own the
17 property.

18 Q. (By Mr. Tamasitis) And this restriction that a
19 homeowners association owns the property, that does not exist
20 for any other special exception variance in the zoning
21 ordinance; correct?

22 A. Correct.

23 Q. HOAs, they have to -- members of the HOAs have to pay
24 fees or dues to the HOA; correct?

25 A. Yes.

1 Beach; is that correct?

2 MR. RICARD: Object to form.

3 THE WITNESS: I apologize. Can you please repeat the
4 question?

5 Q. (By Mr. Tamasitis) Hotels, motels, beachfront rentals,
6 condos, trailers, RV parks, under the zoning ordinance, these
7 can all be owned and used by persons and projects not located
8 in North Myrtle Beach?

9 MR. RICARD: Objection to form.

10 THE WITNESS: Yes.

11 Q. (By Mr. Tamasitis) How specifically does restricting the
12 use of a cabana house only to projects located in the City of
13 North Myrtle Beach guide development in accordance with
14 existing future needs?

15 A. Limiting them to projects within the City -- one of the
16 needs of the City is to have vibrant residential communities
17 within the City, and one way to promote those developments
18 within the City is to offer this unique and limited provision
19 that they can have an oceanfront amenity, for the purposes I
20 stated earlier; that it takes the pressure off of the
21 oceanfront and promotes residential development within the
22 areas the City wishes to have residential development.

23 Q. You used the word "vibrant," what does that mean?

24 A. Neighborhoods that have a high quality of life in terms
25 of -- you know, they're safe, attractive. They provide

1 housing that is desirable for the City residents and for
2 second homeowners, such as neighborhoods that are not, you
3 know, run down or suffering from severe problems.

4 Q. So there is a socioeconomic consideration on that?

5 A. Yes.

6 Q. How does restricting use only to projects in North Myrtle
7 Beach promote the public health, safety, morals, convenience,
8 order, appearance, prosperity or general welfare of the City?

9 A. I'm sorry. Could you repeat the question?

10 Q. Yeah. How does restricting use only to projects in North
11 Myrtle Beach promote the public health, safety, morals,
12 convenience, order, appearance, prosperity or general welfare
13 of the City?

14 A. In this specific example, which is very limited, it's to
15 cabana houses. The way that that promotes the general health,
16 safety, and welfare of the City is that it takes pressure off
17 of the oceanfront for developments that would otherwise seek
18 to erect large developments on the oceanfront, and it promotes
19 the ability to -- for developers to consider other areas of
20 the City for developing projects and helps guide that growth
21 in areas of the City where -- that the City has identified
22 that they wish to have such residential growth.

23 Q. How specifically does restricting the ownership of a
24 cabana house to homeowners associations guide development in
25 accordance with existing and future needs?

1 cabana house at times.

2 Q. (By Mr. Tamasitis) Does that satisfy the ordinance's
3 requirements to be utilized for a project in North Myrtle
4 Beach?

5 MR. RICARD: Object to form.

6 THE WITNESS: It satisfies it as long as no other user is
7 also using it in violation.

8 Q. (By Mr. Tamasitis) So the use of a cabana house can only
9 be used by individuals associated with a project in North
10 Myrtle Beach. Is that your testimony?

11 A. Associated with that project and/or their guests as
12 determined by the rules of the HOA. For example, Barefoot
13 Resort, I believe, in their agreement, they specifically state
14 that guests of a resident may also take advantage of the
15 cabana house, but that would be up to the individual HOA to
16 determine their rules for who uses it.

17 Q. And that agreement is known as the consent order that was
18 entered into to resolve the case; correct?

19 A. Yes.

20 Q. That wasn't a requirement from the City; right?

21 A. That is correct.

22 Q. So is it the City's opinion that in order for a special
23 exception for a cabana house to be proper under the ordinance,
24 it must be used exclusively by a project in North Myrtle
25 Beach?

1 A. Yes. I believe that expanding the use to residents or
2 entities outside of the project would violate the spirit of
3 the intent of that ordinance.

4 Q. But that's not what it says in the zoning ordinance;
5 correct?

6 A. Well, it's -- the implication is certainly there, if it
7 says "by use for projects within the City." I'm not aware of
8 any reasonable alternative interpretation of that.

9 (Defendant's Exhibit 8, Plaintiff's Memorandum of
10 Law, marked for identification)

11 Q. (By Mr. Tamasitis) I'm going to hand you what's been
12 marked as Exhibit Number 8. This is the plaintiff's
13 memorandum of law in support of its motion for a preliminary
14 injunction that was filed with the court in this case.

15 What I really care about here is the affidavit that is
16 attached to the memo. So if you go to the affidavit in
17 support of plaintiff's motion.

18 A. Can you please refer to a page number?

19 Q. Yeah, it's, like, an exhibit.

20 A. Okay.

21 Q. It's Exhibit B.

22 A. Okay.

23 Q. Are you familiar with this affidavit?

24 A. I have read it.

25 Q. Okay. And it's from Ben Caldwell; correct?

1 Q. Who in the administration?

2 A. City Manager.

3 MR. TAMASITIS: It's 12:20. Do you want to break now?

4 MR. RICARD: If now a good time, yeah. If you have 20
5 minutes more with the questioning, I mean, we can go 20 more
6 minutes.

7 MR. TAMASITIS: Now is a good time.

8 (Off record, 12:19 p.m. to 1:00 p.m.)

9 (Defendant's Exhibit 9, Zoning Complaint, 7/12/21,
10 marked for identification)

11 Q. (By Mr. Tamasitis) Mr. Wood, let me hand you what we're
12 marking as Exhibit Number 9, and I'll ask you if you recognize
13 that document?

14 A. Yes, I recognize it.

15 Q. Okay. And what is it?

16 A. It is appears to be a document of -- a zoning complaint
17 prepared by Mr. Jim Shortle and submitted to the City.

18 Q. So this is the, I guess, formal complaint of zoning
19 violations submitted by Sea Cloisters I and Sea Cloisters II
20 against the cabana house that is at issue in this litigation?

21 A. It is.

22 Q. Were there any conversations between the City and Sea
23 Cloisters prior to this complaint being submitted on July 12,
24 2021?

25 A. In particular -- in regard to any issue in particular or

1 (Defendant's Exhibit 11, Letter, 9/2/21, marked
2 for identification)

3 Q. (By Mr. Tamasitis) I'm handing you what we're marking as
4 Exhibit Number 11. Take a review of that, and let me know if
5 you recognize that document.

6 A. Okay.

7 Q. Do you recognize this document?

8 A. I do.

9 Q. Okay. Is this the cease and desist letter dated
10 September 2, 2021 from the City's law firm, Nexsen Pruet, to
11 Sun Communities?

12 A. It is.

13 Q. Did the City have any input into this letter?

14 A. I would assume that our consultations, or our
15 communications with our attorney, were the basis of their
16 understanding of how to draft the letter. So yeah, certainly,
17 that would not have been generated without consulting the
18 City.

19 Q. I believe I have answered this already, but are you
20 aware -- has the City ever instituted an action to force a
21 property owner to divest itself of ownership based on alleged
22 violation of the zoning ordinance?

23 MR. RICARD: Objection to form.

24 THE WITNESS: I am not aware of any instance where that
25 has happened.

1 the Chamber does, but I don't believe the City tracks that.

2 Q. Mr. Mahaney testified that he estimates there's about
3 20 million visitors to the Grand Strand in the course of the
4 year. Would you have any reason to disagree with that?

5 A. That sounds reasonable.

6 Q. Where did he get that number from, do you know?

7 MR. RICARD: Objection, form.

8 THE WITNESS: I think they are his duties as a City
9 Manager, you know, he has various interactions with Chamber
10 groups, and so he's probably heard that number in various
11 conversations, but that is purely speculation.

12 Q. (By Mr. Tamasitis) Do you know how many hotels are
13 located in North Myrtle Beach?

14 A. No. That's something that I can research and find out,
15 but I don't know off the top of my head.

16 Q. But that's something the City has information on?

17 A. Yes. By virtue of business licensing, we could achieve
18 that or acquire that information, if it were asked.

19 Q. Who is the person responsible for business licensing?

20 A. Sarah Wood, my wife. I would have to ask her nicely,
21 though.

22 Q. Do you know how many room units are in those hotels?

23 A. I do not.

24 Q. How does the City market its tourism industry?

25 A. By virtue of collections of accommodations tax through

1 the state. I believe it's a state law that the money that is
2 returned to the City through the state collection of
3 accommodations tax has to be used for the purpose of marketing
4 the City. We don't have a marketing arm ourselves. So what
5 we do is we allocate funds during the budget process to the
6 Chamber of Commerce and let them do that function.

7 Q. When you say the "Chamber of Commerce," I have also heard
8 it referred to as "Destination North Myrtle Beach," is that
9 right?

10 A. Yes.

11 Q. So we're talking about one and the same?

12 A. Yes.

13 Q. And it's funded through the accommodations taxes, the
14 state accommodations tax?

15 A. The state accommodations tax. It may also be partially
16 funded through local accommodations tax, but I'm not positive.

17 Q. Who are the biggest players in the North Myrtle Beach
18 tourism market?

19 A. Probably the resorts, such as the Wyndham, Wyndham
20 Resort, which has timeshares. Basically some of the
21 oceanfront towers that are condos and timeshares.

22 Q. How about Elliott Rentals?

23 A. Yeah, they would be pretty significant. They manage a
24 lot of single-family and condominium rental units, but by
25 virtue of short-term rentals.

1 Q. What is the fiscal year budget?

2 A. It is the required by state law that we have a document
3 that sets forth the revenues and the expenditures of the City,
4 and usually that's proposed revenues and estimated -- I'm
5 sorry, proposed expenditures, estimated revenues, on an annual
6 basis, and it's prepared every year and adopted by the City
7 Council.

8 Q. Who prepares the budget?

9 A. The Finance Department.

10 Q. And this document is available for public viewing; is
11 that correct?

12 A. It is.

13 Q. What is an accommodations tax?

14 A. It's a tax that is levied on overnight accommodations for
15 things such as hotels, motels, rentals.

16 Q. And there is a difference between the state
17 accommodations tax and the local accommodations tax; is that
18 right?

19 A. Yes. I believe my understanding is that the state
20 assesses a 2 percent state accommodations tax, and that the
21 City can assess a one-and-a-half-percent local tax. And I
22 believe also Horry County assesses 2 percent in addition,
23 which they return part of that to us.

24 Q. And what is a hospitality fee?

25 A. That would be things on events, tickets, like going to

1 the Alabama Theater, ticket sales for things like that.

2 Q. If you turn to page 265 in the budget, are you there?

3 A. Yes.

4 Q. What is a revenue item?

5 A. It is a -- the City is required in its budget -- any time
6 we receive funds, we are required to categorize those funds
7 into different descriptions and characterizations of where
8 those funds are coming from and for what purpose.

9 Q. And on this page 265, it's discussing revenue items as
10 accommodations taxes or tax?

11 A. Yes.

12 Q. And it says in there the fund is a general fund. Is that
13 where the tax is then placed for the City?

14 A. Yes.

15 Q. And for the budget of fiscal year 2023, it's anticipated
16 \$335,000 from accommodations tax into the general fund, down
17 in the right-hand corner?

18 A. Yes, that's correct. That's what the Finance Department
19 estimated.

20 Q. And the actual funds in FY2021 was \$255,816?

21 A. Correct.

22 Q. If you go to page 279 --

23 A. 279?

24 Q. Yes, sir.

25 A. Oh, we're going down in numbers instead of up.

1 Q. I know, I'm sorry.

2 A. Okay.

3 Q. All right. This also has revenue item. This is also an
4 accommodations tax, but it's going to a different fund. It's
5 going to accommodations tax fund. Do you know why it would be
6 moved to a different fund?

7 A. Because those accommodations taxes are disbursed
8 according to the laws of the State of South Carolina in a
9 different manner than funds are disbursed in a general fund
10 there. They are specifically required to be used for
11 activities that support and foster tourism within the City.

12 Q. And if you look in the comments on page 279, it says,
13 "The proceeds of the accommodations tax, which began in 1984,
14 are to be used for the promotion of tourism through
15 advertising, enhance the ability of the City to attract and
16 provide services to tourists, and provide additional services
17 that are tourist related."

18 Does that align with your testimony?

19 A. Correct.

20 Q. And so the budget for fiscal year 2023, with respect to
21 this portion of the accommodations tax, is \$5,125,250?

22 A. That's correct. That is their estimate of what that
23 money will come into -- what that money will be when it's all
24 said and done.

25 Q. And the actual in fiscal year 2021 was \$4,385,508?

1 citations.

2 "Ultimately, there are multiple reasons for restricting
3 the ownership and use of cabana houses in the R-4 district to
4 projects and homeowners associations within the City. First,
5 homeowners associations are effectively quasi-governmental
6 entities. As such, these entities are more responsive to the
7 City, as evidenced by the deposition testimony from the City
8 Manager, Mr. Mahaney, and by the RV resort's manager,
9 Mr. Bittner, ignoring Mr. Mahaney's attempts at informal
10 resolution. Further, these entities are more responsive to
11 their similarly-situated neighbors rather than a commercial
12 project that has little connection to the City or its
13 neighbors, which supports homogenous development and
14 continuity in the R-4 district."

15 Can you define for me what "responsiveness" means in this
16 context?

17 A. Sure. It is my belief that a homeowners association --
18 one of their primary missions or drivers of their existence is
19 to, sort of, advance the similar goals that we have for
20 adoption of our zoning ordinance within their specific
21 community.

22 So they are -- we are on a parallel track. They want to
23 advance the health and safety tract in this, efficiency and
24 convenience, and safety of their community, as does the City
25 for the City as a whole. So we have, sort of, parallel

1 A. Well, I think people have a reasonable expectation that
2 they can use their property in a manner that they have the
3 peace and enjoyment and not be constantly flagged with, sort
4 of, negative externalities of activities around them, such as
5 noise, congestion, things like that.

6 Q. Has the City done or conducted any studies with respect
7 to quality of life as it pertains to projects in the City
8 versus projects outside of the City?

9 A. We would have no reason to conduct such a study.

10 Q. So how do you know that project in the City create a
11 better quality of life than projects outside of the City?

12 MR. RICARD: Objection to form.

13 THE WITNESS: I don't believe I made that statement.

14 Q. (By Mr. Tamasitis) Well, it's one of the reasons -- one
15 of the interests that the City has posited as the reason for
16 restricting ownership of cabana houses to projects inside the
17 City.

18 MR. RICARD: Objection, form.

19 THE WITNESS: Can you show me where it says that?

20 Q. (By Mr. Tamasitis) Absolutely. "This section is
21 discussing the legitimate municipal interests and local
22 benefits clearly exceed any indirect relationship to commerce,
23 and one of the benefits, the multiple interests and benefits,
24 is the quality of life created" --

25 A. Okay.

1 Q. -- "by the projects inside of the City."

2 MR. RICARD: Is that a question? I'm sorry.

3 MR. TAMASITIS: Well, I'm just trying to clarify what --
4 he was asking what I meant, and he didn't understand what I
5 was saying.

6 THE WITNESS: I'm still not sure I understand the
7 question.

8 Q. (By Mr. Tamasitis) Well, my question is, the City is
9 stating that one of the municipal interests that is promoted
10 by having projects restricting the ownership of cabana houses
11 to projects in the City is quality of life issues. And I
12 asked you, has there ever been any studies that have been done
13 to determine whether or not the quality of life issues differ
14 for projects outside of the City versus projects inside the
15 City. And you said, well, we would have no reason to do that.
16 And so the City is just assuming that projects inside of North
17 Myrtle Beach create a better quality of life than projects
18 outside?

19 MR. RICARD: Object to form.

20 THE WITNESS: We have conducted no such study.

21 Q. (By Mr. Tamasitis) Okay. How about with homeowners
22 associations?

23 A. Our experience there, again, just be experiential and
24 anecdotal. We have a long track record of working well with
25 homeowners associations.

1 Q. And the last one, if we flip to page 19, the first full
2 paragraph, it talks about the preservation of property values
3 as a legitimate local interest.

4 A. Yes.

5 Q. The City indicated that three of the City's employees in
6 this memo indicated the depreciation of property values as
7 being a concern.

8 A. Uh-huh.

9 Q. Does the City share that concern?

10 A. Yes. I mean, that is one of many factors that are
11 considered in policy decisions that we make regarding the land
12 use. It's not the most important factor. It's not the only
13 factor, but it is a factor.

14 Q. What studies has the City conducted regarding restriction
15 of the ownership of cabana houses to projects in North Myrtle
16 Beach and its impact on preserving property values?

17 A. No such studies have been done that I'm aware of.

18 Q. Okay. How about with homeowners associations?

19 MR. RICARD: Objection. Asked and answered.

20 THE WITNESS: Again, as in terms of a formal study, no,
21 just good old work experience.

22 Q. (By Mr. Tamasitis) What other legitimate municipal
23 interests are furthered by the restrictions we have discussed
24 as they relate to the cabana house, specifically ownership by
25 homeowners association and limited to projects within the City

1 of North Myrtle Beach?

2 MR. RICARD: Object to form.

3 THE WITNESS: I believe I have stated the City's position
4 on those, so I will let my previous testimony stand.

5 Q. (By Mr. Tamasitis) So the three that the City is
6 identifying are responsiveness, quality of life, and
7 preservation of property values?

8 MR. RICARD: Object to form.

9 THE WITNESS: I would not say that's an exhaustive list,
10 but it is -- they are three.

11 Q. (By Mr. Tamasitis) So what other ones, then?

12 A. Preservation of -- well, I mean, quality of life is a
13 very large umbrella term, and a lot of things fall under that.
14 So, safety relates to quality of life. The reasonable quiet,
15 peaceful enjoyment of your property, and how that can be
16 impacted by activities around you. So, again, that's -- the
17 umbrella term is quality of life, but it talks -- it
18 incorporates many factors.

19 Q. (By Mr. Tamasitis) So it's the City's testimony that
20 with respect to cabana houses operating for projects that are
21 within North Myrtle Beach, that a cabana house operating for a
22 project outside of North Myrtle Beach would not be as
23 responsive?

24 A. That would be a speculation because I don't believe the
25 ordinance was written to require it for an in-City project for

1 that reason, but it wasn't for the responsiveness reason; that
2 gets to the HOA requirement not the location of the project.

3 Q. Okay. So the project limitation is not for
4 responsiveness?

5 A. That's correct.

6 Q. Okay. Is the project restriction for quality of life
7 purposes?

8 A. Yes, I believe so because quality of life in the
9 community is advanced when land uses, projects, neighborhoods
10 are developed in a safe and efficient manner that the City
11 wishes for them to be developed. And one -- that tool of
12 requiring it to be a project within the City helps take
13 pressure off of the oceanfront and direct and promote those
14 residential developments in the areas that we want.

15 Q. How does it take pressure off the oceanfront?

16 A. Well, if you're a developer and you want to do a
17 thousand-unit project and you have no ability to have a cabana
18 house on the ocean, then you might consider that more of an
19 incentive to try to acquire oceanfront property and put a
20 large oceanfront tower as opposed to, well, I don't need to
21 have oceanfront property. I can put my project elsewhere
22 within the City and still have that access to the beach as an
23 amenity for my residents.

24 Q. So it's trying to keep the investment inside the City as
25 opposed to running off to Miami?

1 A. Well, no. I think it's trying to direct the investment
2 to areas where we consider the growth to be appropriate within
3 the City.

4 Q. But if you wanted to have a project, a homeowners
5 association project in Calabash, North Carolina, which is
6 10 miles from here, from where we sit today, then that's a
7 no-go under the zoning ordinance; correct?

8 A. For owning a cabana -- owning and operating a cabana
9 house, yeah, that's a no-go.

10 Q. And that's for quality of life issues; correct?

11 A. Yes.

12 Q. And how are the quality of life issues impacted by having
13 it in Calabash versus having it within the City?

14 A. Well, again, the quality of life of the community is
15 advanced by directing growth into areas where we think it's
16 appropriate within the City.

17 Q. Within the City?

18 A. Yes.

19 Q. Okay. How about preservation of property values, is that
20 a factor with the restriction on where the project is located?

21 A. I would consider it more of an ancillary consideration in
22 the sense that property values can anecdotally be damaged by
23 activities that are inconsistent with, you know, being good
24 neighbors to the surrounding properties, you know, to the
25 extent that some of those negative externalities of noise,

1 partying, traffic congestion, to the extent those could be
2 mitigated, that helps to preserve property values within the
3 City.

4 Q. So back to responsiveness of the homeowners association,
5 since that's -- responsiveness matches up with the homeowners
6 association requirement; right?

7 A. Yes.

8 Q. Okay. So the City's -- has the City done studies on
9 whether a homeowners association located outside the City is
10 less responsive than a homeowners association located in the
11 City?

12 MR. RICARD: Objection.

13 THE WITNESS: We would have to do research to do such a
14 study.

15 Q. (By Mr. Tamasitis) Yeah, sorry. That was a
16 poorly-worded question. Has the City done a study where the
17 ownership of property by homeowners associations is more
18 responsive than ownership of property not by a homeowners
19 association?

20 MR. RICARD: Objection to form.

21 THE WITNESS: Not a formal study. Again, it's just based
22 anecdotal experience.

23 Q. (By Mr. Tamasitis) And are there other alternatives that
24 the City could implement to achieve its interests of
25 responsiveness, quality of life, and preservation of property

1 questions about the various different ordinances and the
2 various different subsections.

3 So the ordinance -- I'm just going to kind to refer to it
4 as the project ordinance, but what I mean by that is the
5 ordinance that requires the project to be within the City of
6 North Myrtle Beach. So do you understand that when I refer to
7 "project ordinance," that's the one I'm referring to. Okay?

8 A. Yes.

9 Q. Okay. And then the next ordinance requirement is for it
10 to be owned and operated by a homeowners association. So I'll
11 colloquially call that the "HOA ordinance."

12 A. Yes.

13 Q. Okay. So, those two. Is it your testimony that they
14 also are designed to achieve some of the goals, such as
15 responsiveness, quality of life, preservation of property
16 values, and guiding development as well?

17 A. Yes.

18 Q. Okay. And the other ordinances, all of the other ones
19 that I have not defined or described to you, but the -- you
20 know, injurious nature, substantial harmony, all those as
21 well, those just in and of themselves would not be sufficient
22 to achieve the degree and expectations and the legitimate
23 government interest that the City has?

24 A. That is correct.

25 Q. Okay. I think that's all of the questions I have for you

Exhibit G



June 18, 2007

Ben Powell
PO Box 750
North Myrtle Beach, SC 29597

Dear Mr. Powell,

The North Myrtle Beach Board of Zoning Appeals met on June 14, 2007 to hear and decide on two applications submitted by you for special exception #SE3-07 and #SE4-07. Special exception #SE3-07 was to create an amenity area for storage of RVs and boats for your new subdivision Seabrook Plantation and special exception #SE4-07 was for an oceanfront cabana house for Seabrook Plantation in the R-4 (Resort Residential) district to be located at 1814 North Ocean Boulevard.

This letter is notification to you that the Board voted to approve both of these requests for special exception. The specific finding of fact on the RV and boat storage area was that this property abuts commercially zoned property and it is very well screened from the proposed lots that will be platted upon recording of a final plat. The specific findings of fact for the oceanfront cabana was that the design of the building is similar to a single-family house, the use of the building will be according to the limitations contained in the Zoning Ordinance and the parking meets and exceeds the minimum requirement of the code.

If you have any questions on either of these two cases please call me at 280-5565.

Sincerely,

Paul Blust
Zoning Administrator

Exhibit H

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2)
3 COUNTY OF HORRY) CA No. 2021-CP-26-07489

4

4 City of North Myrtle Beach, :

5 Plaintiff, :

6 vs. :

7 Sun TRS Ocean Club, LLC; Sun TRS :

8 Carolina Pines, LLC; and Sun TRS :

8 Carolina Pines RV, LLC, :

9 Defendants. :

10

11

12 30(b)(6) Deposition of KELLY NELSON WHITE, taken

13 before Michele E. Starkey, Court Reporter and Notary

14 Public in and for the State of South Carolina,

15 commencing at the hour of 9:51 A.M., May 16, 2023,

16 at the office of Ponderosa Management, LLC, 4876

17 Barefoot Resort Road, Suite C, North Myrtle Beach,

18 South Carolina.

19

20 Reported by
21 Michele E. Starkey

22

23

24

25

1 A The association -- excuse me -- the building was
2 built in 2001 or 2002-ish. Centex was the developer
3 of control until 2011, and they deeded that property
4 to the association.

5 MR. TAMASITIS: We're going to mark these as
6 Exhibits 2 and 3.

7 (Defendant's Exhibit Nos. 2 and 3 were marked.)

8 Q Ms. White, are you familiar with these documents?

9 A I've seen them before, yes.

10 Q Okay. And you said that Centex Homes deeded the
11 property to the association sometime in 2011?

12 A That's when they transitioned the property, yes.

13 Q Okay. And who owned the property prior to Centex?

14 A Silver Carolina.

15 Q And when -- do you know when Silver Carolina
16 Development Company deeded the property to Centex?

17 A I do not.

18 Q If you look at Exhibit No. 2, it would appear the
19 date on there says October 24, 2002?

20 A Yes.

21 Q Okay. Do you have any reason to dispute that?

22 A No.

23 Q Do you know who Silver Carolina Development Company
24 was?

25 A I do.

1 Q And who was or is it?

2 A Sammy Puglia, the original developer of Barefoot
3 Resort.

4 Q That was his company?

5 A Mm-hmm, yes.

6 Q And you said -- what was Centex's home role in this
7 process?

8 A It's my understanding that they purchased property
9 from Silver Carolina and developed that property.

10 Q Okay. And one of those pieces of property was the
11 property where the cabana house is situated?

12 A Yes.

13 Q And Centex Home owned the property from 2002 to
14 2011?

15 A Yes.

16 Q Do you know -- strike that.

17 MR. TAMASITIS: Let's mark this as Exhibit
18 No. 4.

19 (Defendant's Exhibit No. 4 was marked.)

20 Q It's my understanding that the use of the cabana
21 house as it's currently situated is subject to a
22 settlement agreement stemming back from a lawsuit
23 brought back in 2002; is that correct?

24 A Yes.

25 Q Okay. And is Exhibit No. 4 an accurate copy of that

1 settlement agreement?

2 A Yes.

3 Q And I should have asked this before. Do you
4 recognize that document?

5 A I do.

6 Q Do you know what the background was behind the
7 dispute that led to that settlement agreement?

8 A I do not.

9 Q And who are the parties to that settlement
10 agreement?

11 A Emerald Cove is -- if you're looking at the beach
12 cabana, I believe -- and I get them confused. I
13 believe Emerald Cove is the property on the right
14 and Crescent Sands is the one on the left. They're
15 condominium buildings.

16 Q And was it Silver Development -- Silver Carolina
17 Development Company is the one that entered into the
18 settlement agreement with Emerald Cove and the other
19 neighbor?

20 A Yes.

21 Q And the city is listed as a party to this suit. Do
22 you know how the city was involved in this case?

23 A I do not.

24 Q If you look at the recitals, so if you look at it,
25 it says on the first page, recitals, the second

1 recital, so it's the next page, provides that a
2 special exception was granted for the cabana house
3 in May 15th of 2001. Is that accurate?

4 A I was not here in 2001.

5 Q Do you have any reason to dispute that that date is
6 accurate?

7 A No.

8 Q So from May 15th of 2001 until October 24th of 2002,
9 the property and the cabana house were owned by
10 Silver Carolina?

11 A I believe so, yes.

12 Q Okay. And from October 24th , 2002 until September
13 27th, 2011, the property and the cabana house was
14 owned by Centex Homes?

15 A That's my understanding.

16 Q And then in 2011 Centex Homes deeded the property to
17 the association?

18 A Yes.

19 Q Do you know how much the association purchased the
20 property from Centex Homes for?

21 A They did not.

22 Q What do you mean by that?

23 A Well, there's an agreement. I don't know the title
24 of the agreement. There was -- it's legalese for
25 five dollars.

1 Q Is there any fee in addition to any dues that are
2 normally paid by property owners to use the cabana
3 house?

4 A Not in addition.

5 Q How does the association classify the cabana house?
6 Do they classify it as an amenity?

7 A Yes.

8 Q And who does the association -- who has the
9 association hired to maintain the cabana house?

10 A Daily maintenance?

11 Q Yes, ma'am.

12 A We have a staff. There's -- this season there will
13 be ten part-time employees that are required to keep
14 the building clean and neat. We also hire outside
15 vendors as necessary.

16 Q Okay. And who does the hiring?

17 A Ponderosa Management through the board of directors.

18 Q Okay. So just so I'm clear on the control here, the
19 association's hired Ponderosa Management to then
20 hire third parties necessary to maintain the cabana
21 house?

22 A Yes.

23 Q This is a very broad question, up front. What
24 restrictions are in place governing the use of the
25 cabana house? For example, what types of events are

1 allowed to be there, what's the occupancy rate?

2 A Private events are not permitted. Occupancy rate I
3 believe is 300.

4 Q You said private events. Are there other events
5 that are hosted at the cabana house?

6 A If the association sponsors them, yes.

7 Q What are some examples of events the association
8 sponsored?

9 A We had -- this past Christmas season they had Photos
10 with Santa. This weekend they're having an ice
11 cream social.

12 Q Any others that you can think of?

13 A We had a grand opening event when the building was
14 completed.

15 Q Were there food and drinks served at those events?

16 A At the grand opening it was coffee, hot chocolate.
17 For Photos with Santa, I think it was cookies. And
18 then this weekend will be ice cream.

19 Q Does the cabana house have beach access?

20 A Yes.

21 Q Are folks allowed to go to local restaurants or
22 other locations and bring food to the cabana house?

23 A They are.

24 Q Do they routinely, are you aware?

25 A They do.

1 Q Is there any restrictions on what types of food or
2 drink they're allowed to bring back to the cabana
3 house?

4 A The only restriction is glass.

5 Q Does the cabana house have, like, a refreshment
6 center or vending machines or anything?

7 A No vending machines. There are two commercial ice
8 makers and a small kitchen area that has a sink and
9 a refrigerator.

10 Q Random question. Who does the landscaping for the
11 cabana house?

12 A Mainscape Landscape.

13 Q Does the association advertise the cabana house?

14 A Not currently, no.

15 Q What do you mean by not currently?

16 A As part of the transition agreement, when Centex
17 turned it over, Barefoot hired a marketing company
18 to take photos. Barefoot leased billboard space and
19 the cabana space was advertised on one of those
20 billboards.

21 Q So the association hired a third party to do the
22 advertising for the cabana house?

23 A Yes.

24 Q So the cabana house is advertised?

25 A It was advertised.

1 Q Okay. And do you remember who that third party was?

2 A Lamar had the billboards. 90 Degrees did the
3 marketing.

4 Q And why was it marketed?

5 A It was part of the transition agreement.

6 Q And that was the agreement between Centex and the
7 association?

8 A Yes.

9 Q Why did they need to market the cabana house?

10 A Barefoot wasn't completely built out at that point.
11 Centex was still building.

12 Q Currently does the association market the cabana
13 house on its websites or anything like that?

14 A It's on the association website.

15 Q And why do they have it marketed?

16 A So the owners are aware that it's there and they
17 post the rules and regulations.

18 MR. TAMASITIS: Let's mark this as Exhibit
19 No. 5.

20 (Defendant's Exhibit No. 5 was marked.)

21 Q And this is -- I pulled this off of the Barefoot
22 website where it discusses the cabana house. Is
23 this what you were talking about, how the homeowners
24 association posts information about the cabana
25 house?

1 A I don't believe this is from the Barefoot website.

2 Q Okay. Where is that from?

3 A It appears to be the golf course website.

4 Q Okay. What's the relationship between the golf
5 course and the association?

6 A They're a member of the association.

7 Q Are they a member of the association that can
8 utilize the cabana house?

9 A That's a good question. They have not asked for
10 access to the beach cabana.

11 Q Okay. How does someone get access to the beach
12 cabana?

13 A As an owner, we require the deed and we provide the
14 owner with two access cards and two vehicle decals.

15 Q Are those like RFID decals?

16 A No. They're parking decals for their vehicles and
17 the access cards you swipe to enter the building and
18 the parking lots.

19 Q So that's for parking access. How does the
20 association manage guests of homeowners that want to
21 visit the cabana house?

22 A They have to enter the building with the owner with
23 an access card.

24 Q So the only way you can get in the building is the
25 access card?

1 A Correct.

2 MR. TAMASITIS: No. 6.

3 (Defendant's Exhibit No. 6 was marked.)

4 Q I believe this is the website from the HOA's or --
5 yeah, this is the website pulled from the HOA's
6 website?

7 A It is, yes.

8 Q So this discusses the amenities that are afforded
9 for owners of Barefoot Resort?

10 A The Barefoot Residential Association.

11 Q Sorry. My apologies.

12 A Yeah.

13 Q Barefoot Residential Association. And so this is
14 utilized for the owners themselves?

15 A The website, yes.

16 Q Yeah. Are there brochures that are handed out to
17 prospective property owners that depict the cabana
18 house?

19 A Not through the association.

20 MR. TAMASITIS: No. 7.

21 (Defendant's Exhibit No. 7 was marked.)

22 Q So I've handed you Exhibit No. 7. I'll represent to
23 you that I did a search for the Barefoot cabana
24 house and this came up on USA Today. Were you aware
25 of this website?

1 A One of my board members brought it to my attention
2 when it was on this website.

3 Q Okay. And when was that?

4 A Sometime last year. I don't recall exactly when.

5 Q And it discusses down there under beachfront cabana,
6 says -- it discusses guests having access to the
7 cabana house but that's not correct, right?

8 A It is not.

9 Q Do you know whether the realtors that sell in
10 Barefoot advertise the cabana house as part of the
11 marketing scheme for homes that are for sale?

12 A I believe they do.

13 Q Does Barefoot provide any shuttle services to and
14 from the cabana house?

15 A Not to the cabana. To public parking.

16 Q So can you explain that to me?

17 A So we -- the joint committee contracts with the
18 shuttle company to take owners from Barefoot the
19 resort down to the public access parking lot on 46th
20 Avenue. If an owner takes the shuttle, the owner
21 would have to disembark the shuttle and walk down to
22 the cabana.

23 Q And how far is it from the 46th Avenue?

24 A About a block.

25 Q Is there a fee associated with that shuttle for

Exhibit I

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2)
3 COUNTY OF HORRY) CA No. 2021-CP-26-07489

4

4 City of North Myrtle Beach, :

5 Plaintiff, :

6 vs. :

7 Sun TRS Ocean Club, LLC; Sun TRS :

8 Carolina Pines, LLC; and Sun TRS :

8 Carolina Pines RV, LLC, :

9 Defendants. :

10

11

12 30(b)(6) Deposition of KENNETH LLOYD McKELVEY,
13 taken before Michele E. Starkey, Court Reporter and
14 Notary Public in and for the State of South Carolina,
15 commencing at the hour of 9:51 A.M., May 19, 2023, at
16 the law office of Wright, Worley, Pople, Ekster, and
17 Moss, 628-A Sea Mountain Highway, North Myrtle Beach,
18 South Carolina.

19

20 Reported by
21 Michele E. Starkey

22

23

24

25

1 was fairly closely connected to it throughout the
2 years.

3 Q And it appears here that based on Exhibit No. 2
4 Defender Development Corporation, Inc., deeded the
5 property to the Links Golf and Racquet Club
6 Homeowners Association, Inc. and the Links Golf and
7 Racquet Club II Homeowners Association, Inc., on
8 July 5th of 2018. Is that correct?

9 A Yes, that's correct.

10 Q And how long, if you know, did Defender Development
11 Corporation own the property?

12 A Just by the date here of 2018, it had to have been
13 probably from the time it was originally acquired
14 from whoever was the owner at that time back in --
15 in the -- probably the mid '80s would be my best
16 guess, maybe as late as early '90s, sometime during
17 that time period, and it was obviously placed in the
18 name of -- who was developing the Links at the time
19 was Defender Development Corporation, and so they
20 put it in the name of the corporation and it just
21 stayed there.

22 Well, about 2018, Defender Development
23 Corporation obviously as a developer wasn't -- had
24 anything to do with the Links because it sold it out
25 many, many years prior to that, and this instrument

1 simply got it out of the name of Defender

2 Development Corporation into the proper owner, the
3 homeowners association.

4 Q Based on your understanding of the chain of title,
5 B.C. Inabinit, Jr. deeded the property on February
6 28, 1983. Does that sound right to you?

7 A Oh, yes. 1983, yeah. What? February of '83?

8 Q In February 28 of 1983 the chain of title says that
9 B.C. Inabinit deeded the property to Defender
10 Development Property Corporation. Does that sound
11 right to you?

12 A Yes, it does.

13 Q Do you know when the special exception was acquired
14 for the cabana house?

15 A No, I do not.

16 Q Okay. Was it prior to July 5th of 2018?

17 A I wouldn't have any knowledge of it one way or the
18 other. I would surmise that it was because it's
19 obviously been used for its purpose right now.

20 Q And maybe that's a better question, is how long has
21 the Links Homeowners Association used the cabana
22 house?

23 A The entire time period. As a matter of fact, the
24 Links Association's contractor at the time built it.
25 And if you would have noticed many years ago,

1 because it changed now, it was actually built so
2 that it appeared like the units at the Links, same
3 kind of outside construction.

4 Q So was it prior to 1983 that it's been using the
5 cabana house?

6 A It probably was. It probably was -- as I said
7 before, in the late, late '70s or early '80s, as
8 B.C. and his partner had began constructing the
9 Links onsite. I'm talking about the condominiums
10 themselves.

11 Q Is the cabana house that's on the property now, is
12 that the only cabana house that's ever been utilized
13 by the association?

14 A Yes.

15 Q Let's discuss the rules governing the use of the
16 cabana house. Do you know who is allowed to access
17 the property in the cabana house?

18 A They have to be -- well, let me clarify. I don't
19 know what the rules are today, but the rules have
20 always been, with respect to the association, that
21 you have to be in residence on property. And
22 because it's got limited parking, obviously you've
23 got to check with the front desk at the Links in
24 order to take a vehicle over there. Or if you want
25 to be transported, that's where you get transported

1 from. There's a van that operates in the wintertime
2 about perhaps as much as three or four times a day;
3 weekends, probably six or seven times a day; in
4 season, literally is driving back and forth almost
5 all the time while it's daylight, I mean.

6 Q When you say you have to be in residence, are guests
7 allowed to use the cabana house?

8 A If they're in residence at the Links. You have to
9 be occupying a unit.

10 Q So you have to be an owner or a renter?

11 A Well, an owner or a renter or an exchanger. Because
12 it's timeshare, we also take exchangers.

13 Q Got it. So if there's a short-term rental of a
14 property in the Links, would those short-term
15 renters be able to use the cabana house?

16 A Yes, as long as they're in residence at the Links.

17 Q Okay. And you say in residence. That just means
18 they're occupying the location for the time?

19 A Yes, because we have some owners obviously that live
20 fairly close, and obviously there's not that much
21 parking there and availability so that's one of the
22 requirements is that you have to be in residence on
23 property in order to use the cabana.

24 Q Is there a fee for renters to use the cabana house?

25 A No.

1 go on the beach or, you know, a cooler with their
2 drinks or sodas or whatever in it. That's about it.

3 Q This might sound like a very basic question, but
4 does the cabana house have beach access?

5 A Oh, yes.

6 Q Does it have like a vending center or refreshment
7 center there?

8 A We've tried that a couple of times. It doesn't
9 work.

10 Q Why not?

11 A Just doesn't make enough money to do anything.
12 Timeshare guys are not going to go over and pay \$2
13 for a Coca-Cola and get them out of the refrigerator
14 and take them with them.

15 Q Is the cabana house managed by a third party? So
16 the -- I guess the association hired, when you were
17 there, Defender to manage the association. Is it
18 also -- was it also your responsibility to manage
19 the cabana house?

20 A That's correct, yes.

21 Q Do you hire third-party maintenance crews?

22 A No. No, because the Links has a fairly good-sized
23 maintenance crew, so the maintenance crew was
24 charged with the maintenance of the property.
25 Housekeeping was charged with the housekeeping of

Exhibit J

To: Mr. Ben Caldwell
Zoning Administrator
City of North Myrtle Beach

July 12, 2021

FORMAL COMPLAINT OF MULTIPLE ZONING ORDINANCE VIOLATIONS for the property located at 1814 N. Ocean Blvd. in North Myrtle Beach owned by Sun TRS Ocean Club, LLC. of Southfield Michigan and operated as the "Carolina Pines Ocean Club".

COMPLAINT FILED BY: Sea Cloisters I Homeowners Assoc., Inc. (1806 N. Ocean Blvd.) and Sea Cloisters II Homeowners Assoc., Inc. (1820 N. Ocean Blvd.)

HISTORY: The property at 1814 N. Ocean Blvd. was an empty, ocean front lot, 88 feet wide by 230 feet deep owned by the Tilghman/Dent family estates designated Tilghman Estates BL 18-A. It is located between Sea Cloisters I and Sea Cloisters II condominiums in an R-4 zoning district. All neighboring properties are also zoned R-4. On December 31, 1979, the Tilghman family placed restrictive covenants on the property limiting its use in perpetuity "... only for recreational purposes and the improvement of said property shall be limited to a clubhouse for recreational purposes." In March, 2005, it was sold to PAN, LLC, a corporation registered in North Myrtle Beach. Pan, LLC sued the Sea Cloisters I and II HOA's to have the 1979 covenants removed, with the intent of building a high rise condominium on the property. In 2007, the Sea Cloisters HOA's prevailed in court, the 1979 covenants were confirmed, and additional restrictive covenants and an easement were placed on the property which included restrictions on the size of any building on the property, set back limits that exceeded the zoning requirements, height restrictions, and an easement for a water well on the property. Clocked copies of both the 1979 and 2007 Restrictive Covenants are attached hereto for your convenience.

Having been denied the ability to build a high rise condominium on the property, PAN, LLC purportedly entered into an agreement with the developers of SeaBrook Plantation to build a clubhouse (cabana house) for the exclusive use of the property owners of the SeaBrook Plantation development located in North Myrtle Beach. That development had not been formed and the cabana house was constructed by PAN, LLC, without the establishment of a homeowner's association for the project or a maintenance agreement, in violation of zoning ordinance Sections 23-22(4)(d)1 and 23-2-Cabana house. When the cabana house was constructed, it included a pool which is a violation of the 1979 restrictive covenants, and as hereinafter explained, the cabana house has been and is now being used in violation of numerous zoning ordinance provisions, including special exception Section 23-22(4)(d)(3), which limits the use of a cabana house to "...bathing and change of clothing facilities, and occasional use as guest quarters [it should be noted that any use as guest quarters would violate the 1979 restrictive covenants] and other similar uses." We were not notified of any zoning hearing pertaining to any special exception to be granted for the subject property and are not aware of any special exception being granted for the construction of a cabana house. The cabana house was built in violation of the 10 ft. side set-back requirements in the 2007 restrictive covenants, and thus also in violation of the last sentence of zoning ordinance Section 23-5. Although the city building department was notified of that violation, it apparently approved the construction based upon the zoning side set back of 5 ft., and not the 10 ft. specified in the 2007 restrictive covenant.

Shortly after the cabana house was completed, the SeaBrook Plantation development failed, and during the period of 2009 until 2017 the property changed owners several times, never being owned by a homeowner's association as required by the last sentence of Section 23-2-Cabana house. The cabana house sat unused and unkempt for many years.

In August, 2017, the property was purchased by NMB Ocean Club Partners, LLC. We are informed that this corporation operated the cabana house as a private club, not associated with any homeowner's association. That "Ocean Club at Tilghman Beach" was a paid membership club marketed as a private beach club, a place to park, private access to the beach, a pool and cabana house. The owners of the facility attempted to get developers of nearby new developments to purchase memberships to the club as home purchase incentives, but apparently no deals came to fruition. NMB Ocean Club Partners, LLC did obtain a business license in North Myrtle Beach, and to our knowledge, this was the first and only business license issued to this address. It was apparently operated as a commercial business not conforming to the zoning ordinances that limit a cabana house in an R-4 zoning district. There was no homeowner's association established, and we were not informed of any hearing by the zoning board of appeals to permit the use of this property for a private club or other non-conforming use.

CURRENT CONDITIONS: In May, 2019, NMB Ocean Club Partners, LLC sold the property to the current owner, Sun TRS Ocean Club, LLC of Southfield MI. Sun TRS is affiliated with Sun RV Resorts, operator of Carolina Pines RV Resort in or near Conway, SC. The cabana house is now operated as "Carolina Pines Ocean Club," a private, commercial cabana house for the use of mostly transient patrons of the Sun RV Resort at Conway, as well as remaining members that had purchased memberships during the ownership by NMB Ocean Club Partners, LLC. It is our understanding that there are currently less than 30 families that own memberships to the "Carolina Pines Ocean Club," and the primary use of the facility is for the occupants ("patrons") and employees of the Sun RV Resort at Conway. In addition to the daily use by the RV resort patrons, the operators rent out the facility for weddings, parties and other "events." Their use of the facility as an "event center" is clearly well outside of any acceptable use in an R-4 zoning district, and a violation of the 1979 restrictive covenants.

Although they have about 10 parking spaces and operate a shuttle bus to and from the RV resort, the limited parking is reserved for paying members of the "Carolina Pines Ocean Club." Patrons of the RV resort have no parking privileges at the "Carolina Pines Ocean Club." A significant number of the patrons of the RV resort prefer to drive to the beach rather than take the shuttle. These patrons are forced to park at public pay-to-park lots at 18th Ave. or Shorehaven Dr., or elsewhere they may find. Often, these patrons feel empowered to park in one of the Sea Cloisters' lots, and more often they pass through our properties to and from their various parking spaces, hauling their beach chairs, umbrellas and coolers between the Sea Cloisters residents' cars and trampling the plantings along our parking lots. We are fearful of damage to our residents' cars from the careless patrons of the RV resort and their "equipment." Additionally, these patrons that drive from the RV resort frequently use our parking lots for drop off and pickup of their parties going to the "Carolina Pines Ocean Club." They cause traffic issues in our parking lots while waiting and loading/unloading. This is not acceptable to the owners of Sea Cloisters units. It is evident that the parking requirements specified in Section 23-22(4)(d)2 of the R-4 zoning ordinance are not being met, in that "more spaces" are clearly required for the current usage of this cabana house property. Although they do provide a

shuttle bus from the RV resort which may reduce the number of vehicles traveling to the "Carolina Pines Ocean Club," they have no means to limit the number of cars their patrons use traveling to the property. It seems clear that the intention of the cited subsection (d)(2) is to require sufficient parking spaces to handle the vehicles of all persons driving to the cabana house. The parking spaces at the cabana house may be sufficient for the owner class of patrons, but those few spaces are clearly insufficient for the many more RV resort patrons. Those latter patrons are specifically restricted from entering the cabana house parking lot. "Carolina Pines Ocean Club" does not provide an area for their patrons to be drop-off or picked up. They are expected to walk with all of their beach equipment, coolers, toddlers, etc. from Shorehaven Dr. or 18th Ave. public parking lots, or from wherever else they may find to park. As a rule, the groups that drive from the RV resort are not permitted inside of the gated parking lot at the cabana house, even for pick-up and drop off.

Some of the patrons of the "Carolina Pines Ocean Club" that trespass on the Sea Cloisters properties for parking, drop off and pass through are known for being obnoxious and often drunk. After a physical assault on one of our residents by a foul mouthed woman and three males who were with her, we have advised our residents to not confront them, since they could be dangerous. Sea Cloisters I has posted signs stating that there is no pick-up or drop off permitted for Carolina Pines and there is no access through our plantings along our parking lot. This has been only slightly successful and probably not worth the money or effort to erect the signs. The obnoxious patrons of the RV resort just ignore the signs and continue to park, drop off and pass through.

Sea Cloisters I graciously permitted the "Carolina Pines Ocean Club" shuttle buses to use the Sea Cloisters I parking lot for pick-up and drop off for a short period when the "Carolina Pines Ocean Club" first opened, as the gate system on the "Carolina Pines Ocean Club" parking lot would not permit the shuttle from entering their parking lot. The city was involved with this issue and stopped them from drop off/pick-up roadside on Ocean Blvd. The city was also involved with the modifications to their parking gate arrangement, insisting that they mark off two prime parking spaces as an area for the bus to turn around. This area is seldom used.

During the summer of 2019, their first summer of operation, the traffic was low and these problems were not evident. Last summer, because of the COVID-19 issues, the traffic was also low and the problems not nearly so severe. Starting in the spring of this year, the issues have become totally unacceptable. We have tried to work with the management of the "Carolina Pines Ocean Club" and were promised in May that they would erect their signs to control their patrons. These signs have not been erected. Phone calls to the general manager are not returned. We have exhausted all avenues for dealing directly with the Carolina Pines organization, and we request that the city take appropriate action to strictly enforce the zoning ordinances, including the provision in the last sentence of Section 23-5 pertaining to restrictive covenants. There is no doubt that the operation at this location does not meet the zoning requirements necessary to grant a special exception allowing a cabana house, based upon Section 23-22(4)(d), paragraphs 1 through 7.

In looking at the available information on the cabana house property, we are unable to find a business license for the "Carolina Pines Ocean Club." There is no active business license registered to the address 1814 N. Ocean Blvd. The last license listed was in the name of NMB OCEAN CLUB PARTNERS LLC, Ben Oats and Mace Watts, closed on April 30, 2019.

Clearly, there is a commercial business being run at this address, apparently without a business license. Sun TRS Ocean Club, LLC has no other presence in the City of North Myrtle Beach, and is in fact a Michigan LLC.

The maintenance of the grounds at this facility is less than desirable. Although tens of thousands of capital dollars have been spent since Sun TRS, LLC purchased the property, the grounds are generally neglected. Shrubs are untrimmed, weeds are taller than the shrubs and the grounds are unsightly from the road. The view from the neighboring units at Sea Cloisters is also generally unsightly. We have not been able to locate any maintenance agreement that should have been submitted to the planning department as required in 23-22(4)(d)1.

We also have questions about the tax assessment on this cabana house property. Although it was sold to the current owner in 2019 for \$2.5 million according to the recorded deed, the tax appraisal is only \$100,000.00, and real property taxes in 2020 were only \$1,342.80, of which only \$270.00 went to the City of North Myrtle Beach. There was no personal property tax paid. To contrast this, The Links cabana house at 1018 S. Ocean Blvd, which is a cabana house for The Links Golf and Racquet Club HOA, is a legitimate 815 sq. ft. cabana house owned by a homeowner's association for a project within the City, in an R-4 zoning district, compliant with the Section 23-22(4)(d) special exception, with parking and no pool. That property is appraised at \$400,220 and paid real property taxes of \$5,373.44 in 2020, including \$1,080.45 to the city, and additional personal property taxes. There appears to be something seriously wrong with the tax assessment on the "Carolina Pines Ocean Club." There are notes on the tax records stating "these are common area recreational facilities that are deed restricted for this use in perpetuity" and "use restricted clubhouse." Clearly, although the deed restrictions do exist, this property is NOT used as a common area recreational facility, but rather as a commercial business operation. There is a private club with paying members in addition to a non-conforming cabana house, which is also used as an event center operating for profit on this property. The City, for its own benefit and that of all residents, should investigate this assessment.

COMPLAINT: The homeowners associations of Sea Cloisters I and II request that the Zoning Administrator, Zoning Board of Appeals and/or other appropriate City of North Myrtle Beach administrator, board, commission or department investigate the "Carolina Pines Ocean Club" operation conducted at 1814 N. Ocean Blvd.; take all legal actions necessary to bring the property into compliance with the appropriate zoning ordinances including Sections 23-2-Definitions-Cabana house, 23-22(4)(d), 23-5 (including the last sentence thereof as applied to the attached restrictive covenants), 23-6, and 23-7; and, order closure and/or substantial daily fines until full compliance is achieved.

The property is currently in violation of at least those portions of the zoning ordinance highlighted in underlined **bold** below:

*23-2 Cabana house: 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.

This cabana house is being used by an RV project near Conway, not by a project located in North Myrtle Beach as required. It is being used for purposes not allowed including being rented out for weddings and being operated as a paid membership club. It is not and has never been owned or maintained by a homeowner's association as required, but rather it is a private facility owned and operated for profit by a Michigan company. Thus, no homeowner's association's maintenance agreement could have ever been submitted and approved by the planning department as required.

23-22(4) *Special exceptions: Owing to their potential negative impact on the community and surrounding areas [emphasis added], the following uses may be approved as special exceptions by the board of zoning appeals:*

.....
(d) Cabana houses subject to the following:

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

Not in compliance as explained under Section 23-2 above.

2. That at least eight (8) parking spaces per zoning standards be established on site and that more spaces may be required by the board if there is no other means to limit the number of cars traveling to the property provided such as a shuttle service to and from the property to the project.

Although there are about 10 parking spaces, the primary users of the "Carolina Pines Ocean Club," who are patrons of an RV resort near Conway, are not permitted to use them. There is no means to limit the number of cars traveling to the property and no area for pick-up and drop off. This is a clear violation of the intended parking requirements in the zoning ordinance.

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.

The owners have expanded the use of the house to include renting it for weddings and other events, entertainment such as catered events with live bands, and other prohibits uses described in this Complaint. Usage as an event center is clearly outside of the limits of this subsection and a violation of the 1979 restrictive covenants. In addition, the owner has applied for a "beer/wine" sales license. The operation of a bar/nightclub within an R-4 Zone is explicitly prohibited in the zoning ordinance Section 23-22(5)(a)(5), but restaurants may be permitted in R-4 Zones. To become licensed to sell alcoholic beverages, the sale of alcoholic beverages must be less than 40% of the gross revenue of the establishment. The application of a beer/wine license seems to indicate that there will be a food service establishment considered a restaurant at the subject property. It would be a clear violation of the 1979 restrictive covenants, as well as the parking, building setback and even the sign regulations, to operate this cabana house as a restaurant, and there are no provisions in the zoning ordinances that would allow a restaurant within a "cabana house."

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

Although the cabana house is nice and could have a nice street appearance, the owners do not care for the property and landscaping. It does not compare to any of the neighboring properties including both Sea Cloisters condominiums, Tilghman Beach and Golf Resort and the Tilghman Lakes community. In addition to the general appearance of the property, the increased vehicle traffic and parking in the area due to the lack of parking availability at the "Carolina Pines Ocean Club" is a nuisance to the area.

The restriction of their RV resort patrons from using their parking lot, even for pick-up and drop off, creates traffic problems when the patrons attempt entry to the "Carolina Pines Ocean Club" and must back out onto N. Ocean Blvd. They often do not understand that their electronic "badges" issued by the RV resort do not work to open the gates. Although, the badges are required to open the gate to enter the pool area, they will not open the vehicle gates. Forcing the vehicles to back into traffic on N. Ocean Blvd. is a serious safety hazard.

The original intent of the "special exception" for a cabana house being permitted in an R-4 residential zoning district, as written in the zoning ordinance, is exemplified by the cabana houses for The Links Golf and Racquet Club HOA and The Tidewater Plantation Community Association. These are both within R-4 residential zones and conform to the intention and letter of the "special exception" in Section 23-22(4)(d). They are each a beach cabana house specifically for the use of the residents of a residential community that is in North Myrtle Beach. These communities are privately owned residences. In contrast, "Carolina Pines Ocean Club" is operated by a Michigan company and is almost exclusively for the use of transient renters at the Carolina Pines RV Resort at Conway, clearly a commercial operation. Transient renters being vacationers are a substantially different crowd than the local resident beach goers expected to use a cabana house. There are believed to be many hundreds of RV lots and an unknown number of cabins at the said RV resort, and there is no known method of controlling the capacity of users of the "Carolina Pines Ocean Club." This operation is definitely NOT in harmony with the area in which it exists.

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

The cabana house is located between the two Sea Cloisters condominium complexes, and the manner in which it is operated is injurious to both of the Sea Cloisters properties, as well as the area in general. Its manner of operation has resulted in traffic in our parking lot, both pedestrian and vehicle, unauthorized parking on our property, damage to our landscaping, potential injury to our residents, and damage to their cars from the traffic. We have to put up with dangerous patrons of the "Carolina Pines Ocean Club" on our property, physically and/or verbally assaulting our owners. Some patrons of "Carolina Pines Ocean Club" are known to be boisterous and foul mouthed while in their pool. Catered events at the Club are often loud with bands, music and loud speakers going well after 10:00 pm and as early as 6:30 am. The sides of the Sea Cloisters buildings that face the "Carolina Pines Ocean Club" are bedrooms, porches and balconies and the residents of those units are disturbed by noise, foul language, late night events and lighting. This operation is definitely injurious to the adjoining properties and the neighborhood.

6. That the special exception will not discourage or negate the use of surrounding property for use(s) permitted by right.

The operation of the "Carolina Pines Ocean Club" has increasingly compromised the uses permitted by right of the Sea Cloisters I and II property owners. In addition to the operations previously mentioned, the violation of the side set-back requirements of the 2007 restrictive

covenants places the Club's unsightly and noisy air conditioners and pool equipment only 15 ft. from the bedroom windows, balconies and screen porches of the residences in the Sea Cloisters.

The traffic through our properties by patrons of the "Carolina Pines Ocean Club," and their management's inability or desire to control their patrons, also compromises the rights of the Sea Cloisters residents to the peaceful enjoyment of their property and the use of and safe passage through their own private parking lot.

7. *That in granting the special exception, the board of zoning appeals may impose such reasonable and additional stipulations, conditions or safeguards as, in its judgment, will enhance the siting of the proposed special exception.*

This facility was constructed in 2007-08 without a proper hearing for the granting of a "special exception." It was built, occupied and is operated in violation of many provisions of the applicable zoning ordinance as detailed above. Since its original construction, the facility has changed ownership several times and each time that the ownership changed, the operation was moved farther and farther from conformance with the zoning ordinances. With each change in ownership and change in use, another hearing should have been held and the residents of North Myrtle Beach and specifically Sea Cloisters I and II should have been afforded the opportunity to comment on the changes and request of the Board of Zoning Appeals additional stipulations, conditions and safeguards to protect the residential aspects of the zone and their individual property rights.

ACCEPTABLE RESOLUTION TO THIS COMPLAINT: The homeowner's associations of Sea Cloisters I and Sea Cloisters II are requesting that the City of North Myrtle Beach act to immediately shut-down the operations at "Carolina Pines Ocean Club" until such time that the operation and ownership of the facility can be made to fully conform to all applicable zoning ordinances and other applicable city ordinances and county and state laws and full conformance to the 1979 and 2007 restrictive covenants on the property. Since the use of the property has changed from its original intent and usage, a variance and special exception hearing is required before the operation may continue. In addition to any special exception and variance, additional reasonable stipulations, conditions and safeguards should be required before the City can permit this facility to reopen. Sea Cloisters I and II homeowner's associations and their individual owners will protest any variance or special exceptions that do not fully conform to the reasonable stipulations, conditions and safeguards stated below.

A. The definition of a cabana house and the "special exception" requirement for a cabana house in an R-4 zoning district specifically state that "a homeowner's association shall have been established," that the cabana house must be "owned and maintained" by the homeowner's association under a "maintenance agreement ...approved by the planning department," and that the cabana house be exclusively "used by projects in North Myrtle Beach." All of these requirements must be complied with before the cabana house property can be re-opened. The Sea Cloisters I and II homeowner's associations would strongly oppose the granting of any variance that would allow the cabana house property to be used in any way that would violate, avoid or diminish the applicable provisions of the zoning ordinance cited herein, or the 1979 or 2007 restrictive covenants that are required to be taken into account by the City under the last sentence of zoning ordinance Section 23-5.

B. A maintenance agreement by the homeowner's association for a project located in North Myrtle Beach not near the ocean must be submitted to the planning department and

approved by that department. The owners shall improve the landscaping on the property with attention to the street view and the side property lines adjoining the neighboring residences. This is a requirement for a special exception permitting a cabana house to reside in an R-4 zone. Historically, this property has been unsightly and the conditions have not greatly improved under the current owner. The owner must commit to conforming to the required homeowner's association's approved maintenance agreement.

C. The parking and pick-up/drop off situation must be resolved so that the operator of the cabana house provides either sufficient, on-site parking for all of their patrons that need or want parking, or the operator must provide a pick-up and drop off location on the cabana house property to eliminate the use of neighboring properties and eliminate the need for patrons to back out onto N. Ocean Blvd. Proper signage must be included in the necessary rearrangement of the parking lot and gate system.

D. The City must mandate that the cabana house be used only in compliance with the applicable zoning ordinance and restrictive covenants. No "event center" type rentals for parties, weddings or other catered or private events shall be permitted, and no sales or rental of anything on the property shall be permitted, including but not limited to food, alcohol, beverages, souvenirs and beach supplies. Sun TRS Ocean Club LLC must withdraw its application for a beer and wine sales license for this cabana house property.

E. The set-back violations must be corrected. Pool equipment on the north side and second level air conditioners and the associated platform on the south side encroach into the side set-back requirements specified in the restrictive covenants. These encroachments must be removed and relocated within the set back lines as specified in the restrictive covenants and appropriate zoning ordinance, including the last sentence of Section 23-5.

F. The owner of the cabana house property shall be required to erect a fence that complies with the zoning ordinances along the side lines of the property from the ocean dune sand fence to the inward boundary of the Ocean Blvd. right-of-way to protect the residences on each side of the facility from the cabana house patrons and contain those patrons within the cabana house property. The fence shall be a minimum of 4 ft. high.

G. The owner of the cabana house property shall be required to monitor its patrons so as to reasonably prevent them from trespassing on the adjoining properties and erect signs stating that the cabana house patrons are not permitted to park or trespass on the neighboring properties and will be ejected from the cabana house property if they violate that policy. Enforcement of trespassing by its patrons and illegal parking shall be the responsibility of the operators.

H. No music, public address or any other type of electronically amplified sound shall be permitted on the cabana house property including patrons' personal equipment. No live entertainment of any type shall be permitted on the property at any time. No cooking shall be permitted on the property that would cause odor or smoke to disturb the enjoyment of the neighbors on their porches, balconies or outside areas. The existing kitchenette may remain with no additions.

I. Signs shall be erected in prominent locations on the cabana house property informing the patrons that they are in a residential area and loud, boisterous behavior and foul language is not acceptable and they are subject to ejection for violations. The owner of the cabana house property shall enforce these restrictions on their patrons.

J. The lights on the pool area and ocean side of the cabana house must be turned off every night no later than 10:00 pm. Quiet hours shall be imposed from 10:00 PM until 8:00 AM.

K. Any violation of the terms of the special exception or the restrictive covenants will result in immediate closure of the cabana house facility until such violation is permanently corrected.

L. The City shall investigate the method in which this facility is billed for storm water and trash pick-up and confirm that it is billed as a "commercial establishment."

M. The City shall only issue a business license for the operation of a business on this property after all of the stipulations and requirements contained in this document are implemented and all required physical modifications to the cabana house property are completed. Until that time, the facility must remain closed. The City shall investigate the operation of this facility and lack of business license and apply all appropriate penalties specified in the business license ordinances.

There is historical precedence for the City of North Myrtle Beach to prevent a "cabana house" from being used in a non-conforming zoning district and the City forcing the owning homeowner's association to divest the property to a conforming owner. It is our understanding that in 1995/1996 Southern Land & Golf Co. made an effort to convert the property at 1706 N. Ocean Blvd into a cabana house for the Tidewater Community. The City did not permit a special exception or variance in the existing zoning district and did not permit the neighboring R-4 zoning district to be expanded to include this single property.

In the event of any request for a variance or special exception for this property, we wish to call to your attention these specifics in Section 23-161:

23-161(2)(b)1. The granting of the variance shall be in harmony with the general purpose and intent of the regulations imposed by this chapter and shall not be injurious to the neighborhood or otherwise detrimental to the public welfare.

We believe that we have illustrated in this document that the current operation at the "Carolina Pines Ocean Club" is not in harmony with the general purpose and intent of the regulations and is in fact a clear violation of that purpose and intent. No variance should be granted for the continued operation.

23-161(2)(b)3. There must be proof of unnecessary hardship. It is not sufficient proof of hardship to show that greater profit would result if the variance were granted. Furthermore, the hardship complained of cannot be self-created; nor can it be established on the basis by one who purchases with or without knowledge of the restrictions; it must result from the application of this chapter; it must be suffered directly by the property in question; and evidence of variance granted under similar circumstances shall not be considered.

Although Sun TRS Ocean Club, LLC purchased this property and apparently did not complete a thorough due diligence investigation into the zoning ordinances and other restrictions on the use of this property (or chose to ignore them), that cannot be considered when deciding on granting any use variance for this property.

23-161(2)(a)ii. In granting a variance, the board may attach to it such conditions regarding the location, character, or other features of the proposed building, structure, or use as the board may consider advisable to protect established property values in the surrounding

23-161(2)(a)ii. In granting a variance, the board may attach to it such conditions regarding the location, character, or other features of the proposed building, structure, or use as the board may consider advisable to protect established property values in the surrounding area, or to promote the public health, safety, or general welfare.

We have specified herein the minimum conditions that Sea Cloisters I and II homeowner's associations respectfully submit should be attached to any variance the board might elect to grant, but under the circumstances described herein, we sincerely hope and expect that no such variance would be granted if one were requested.

The homeowners of Sea Cloisters I and II are proud of our facilities and spend a great deal of time and money to maintain the properties. The existence of a cabana house between our properties in the R-4 zone could be acceptable to us only if all of the applicable zoning ordinances are complied with and enforced as written and the restrictive covenants are complied with. Until such time as the "Carolina Pines Ocean Club" property is brought into full compliance, we respectfully request that the board deny any variance or special exception and issue promptly a closure order for this facility.

This formal complaint is respectfully submitted by:

James Shortle
President
Sea Cloisters I HOA, Inc.
843-274-5301



Contact information:

Sea Cloisters I HOA, Inc.
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1908 Highway 17 S.
North Myrtle Beach, SC 29582

Sea Cloisters II HOA, Inc.
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Powhatan, VA 23139

Attorney for both HOA's:

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McCrackin, Barnett & Richardson, LLP
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Myrtle Beach, SC 29578
mbarnett@sc.rr.com

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



Bob DORAN
For MICHAEL STEPHENSON

[SEE 2 SETS OF RESTRICTED COVENANTS ON FOLLOWING PAGES.]

St. 663 pg. 846
Jan 2, 80 19377

STATE OF SOUTH CAROLINA FILED
HORRY COUNTY
COUNTY OF HORRY 1980 1-2 3:28 RESTRICTIVE COVENANTS
JAN -27 PM 3:28

WHEREAS, Charles T. Tilghman, M.W. Tilghman, Catherine M. Tilghman and Mary Elizabeth Tilghman Dent are the owners of certain properties situate in Horry County, South Carolina, which is more fully described on Exhibit A attached hereto and made a part hereof; and

WHEREAS, said owners have heretofore conveyed to Sea Cloisters Corporation certain properties adjoining the within described property on two sides; and

WHEREAS, a part of the consideration for the sales of adjoining properties to Sea Cloisters Corporation was the restriction of use of the within described property.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that the undersigned owners do hereby impose the following conditions, restrictions and covenants upon the within described property:

1. Said property shall be used only for recreational purposes and the improvement of said property shall be limited to a clubhouse for recreational purposes.
2. These restrictions shall run with the land and shall be binding upon the undersigned owners, their heirs and assigns and may be amended or modified only with the written consent of Sea Cloisters Corporation, its heirs or assigns.

WITNESS our hands and seals this 31st day of December, 1979.

Shelley Hardwick
Shelley Hardwick

Charles T. Tilghman
CHARLES T. TILGHMAN

Shelley Hardwick
Shelley Hardwick

M.W. Tilghman
M.W. TILGHMAN

Shelley Hardwick
Shelley Hardwick

Catherine M. Tilghman
CATHERINE M. TILGHMAN

Shelley Hardwick
Shelley Hardwick

BOOK 663 PAGE 846

Mary Elizabeth Tilghman Dent
MARY ELIZABETH TILGHMAN DENT

846

STATE OF South Carolina)
COUNTY OF Horry)

PERSONALLY appeared before me Deborah M. Vinson and made oath that she saw the within named Charles T. Tilghman sign, seal and as his act and deed, deliver the foregoing Restrictive Covenants, and that she with Shelby Hardwick witnessed the execution thereof.

Deborah M. Vinson

SWORN to before me this 31st day of December, 1979.

Shelby Hardwick (LS)
Notary Public for:
My Commission Expires: January 13, 1988

STATE OF South Carolina)
COUNTY OF Horry)

PERSONALLY appeared before me Deborah M. Vinson and made oath that she saw the within-named M.W. Tilghman sign, seal and as his act and deed, deliver the foregoing Restrictive Covenants, and that she with Shelby Hardwick witnessed the execution thereof.

Deborah M. Vinson

SWORN to before me this 31st day of December, 1979.

Shelby Hardwick (LS)
Notary Public for:
My Commission Expires: January 13, 1988

FILED
COUNTY
JUL 20 2 38 PM '23
CLERK OF COURT

BOOK 466 PAGE 547

847

STATE OF South Carolina)
COUNTY OF Horry)

PERSONALLY appeared before me Deborah M. Vinson and
made oath that she saw the within-named Katherine M. Tilghman
sign, seal and as her act and deed, deliver the foregoing
Restrictive Covenants, and that she with Shelby Hardwick
witnessed the execution thereof.

Deborah M. Vinson

SWORN to before me this
31st day of December, 1979.

Shelby Hardwick (LS)
Notary Public for:
My Commission Expires: January 13, 1988

STATE OF South Carolina)
COUNTY OF Horry)

PERSONALLY appeared before me Deborah M. Vinson and
made oath that she saw the within-named Mary Elizabeth Tilghman
Dent sign, seal and as her act and deed, deliver the foregoing
Restrictive Covenants, and that she with Shelby Hardwick
witnessed the execution thereof.

Deborah M. Vinson

SWORN to before me this
31st day of December, 1979.

Shelby Hardwick (LS)
Notary Public for:
My Commission Expires: January 13, 1988

BOOK 66 PAGE 418

848

ALL AND SINGULAR all that certain piece, parcel or lot of land, situate, lying and being in Little River Township, County and State aforesaid, and being more particularly known and designated as Block 18A, Tilghman Estates as is shown on a map of Blocks 18, 18A and 19 Tilghman Estates prepared by C.B. Berry, RLS #2075, dated July 10, 1979, and recorded in the Office of the Clerk of Court for Horry County in Plat Book 67 at page 153, and being described as follows:

Beginning at an iron at the right of way of Ocean Boulevard, which iron is located at the northwestern corner of Block 19, and running along Block 19 as shown on said plat South 18 degrees 31 minutes East for a distance of 230 feet to an iron; thence turning and running along the Strand area of the Atlantic Ocean South 71 degrees 29 minutes West for a distance of 87.75 feet to an iron; thence turning and running along Block 18 as shown on said plat North 18 degrees 31 minutes West for a distance of 230 feet to an iron; thence turning along the right of way of said Ocean Boulevard North 71 degrees 29 minutes East for a distance of 87.75 feet to the point of commencement.

BOOK 66J PAGE 849

849

Instrument#: 2007000156123, DEED BK: 3289 PG: 1059 DOCTYPE: 082 11/01/2007 at
 01:13:00 PM, 1 OF 5 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS
TMS Number correct
 1440811905

RE-RECORDED TO
 CORRECT LEGAL DESCRIPTION

STATE OF SOUTH CAROLINA }
 }
 COUNTY OF HORRY }

RESTRICTIVE COVENANTS

WHEREAS, PAN, LLC, a SC limited liability company, is the owner of certain property situate in Horry County, South Carolina, which is more fully described on Exhibit "A" attached hereto and made a part hereof; and

WHEREAS, said owner has entered into a Settlement Agreement with Sea Cloisters I Homeowners Association, Inc. and Sea Cloisters II Homeowners Association, Inc. (hereinafter the "HOAs") regarding the use of that certain property described in the attached Exhibit "A"; and

WHEREAS, pursuant to the terms of that Settlement Agreement, PAN, LLC, has agreed to impose restrictive covenants regarding the use of the within described property. These restrictive covenants shall be in addition to those certain restrictive covenants regarding the use of the within described property found in the Horry County Register of Deeds Office at Deed Book 663 at page 846, and recorded again in Deed Book 665 at Page 569.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that the undersigned owner, for valuable consideration, the receipt and sufficiency of which are hereby acknowledged, does hereby impose the following conditions, restrictions and covenants upon the within described property:

1. Any improvement constructed on the within described property shall have the following minimum setbacks: ten feet (10') from each side, thirty-five feet (35') from the front boundary adjacent to the street, and twenty-five feet (25') from the rear boundary adjacent to the Beach.

Instrument#: 2007000156123, DEED BK: 3289 PG: 1060 DOCTYPE: 082 11/01/2007 at 01:13:00 PM, 2 OF 5 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

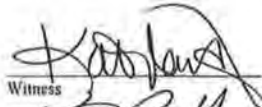
2. Any building constructed on the within described property shall not exceed ten thousand (10,000) square feet.

3. Any building constructed on the within described property shall have no roofline higher than the highest roofline of the HOAs, excluding cupolas or other ornamental features not to exceed another ten feet (10') in height.

4. These restrictions shall be for the benefit of and appurtenant to each of the condominium units of the HOAs, shall be enforceable by any owner(s) of any such unit or by either HOA, shall be permanent, shall run with the land described herein, and shall be binding upon the undersigned owner, its successors and assigns.

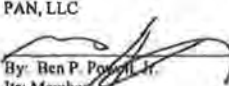
5. Despite any language that could be construed to the contrary, including any restriction contained herein or any restriction contained in the restrictive covenants found in Book 663 at page 846, or Book 665 at Page 569, the HOAs, their owners and their invitees shall have no right of use of the within described property, except the right to maintain an existing well and piping on the said property under the terms of a well easement granted by the undersigned owner to the HOAs, which well easement the undersigned owner has the option to terminate under certain terms and conditions.

WITNESS our hands and seals this the 23rd of Oct, 2007.


Witness

Witness/Notary

PAN, LLC

By: 
Its: Member

Instrument#: 2007000156123, DEED BK: 3289 PG: 1061 DOCTYPE: 082 11/01/2007 at 01:13:00 PM, 3 OF 5 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

<u>[Signature]</u> Witness <u>[Signature]</u> Witness/Notary <u>[Signature]</u> Witness <u>[Signature]</u> Witness/Notary	<u>[Signature]</u> By: PMB, Inc. Member of PAN, LLC Its: President, Paul M. Bendik <u>[Signature]</u> By: H. Crayne Howes Its: Member

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY) PROBATE

PERSONALLY appeared before me the undersigned witnesses and made oath that she saw the within named Ben P. Powell, Jr., as Member of PAN, LLC, a SC limited liability company, sign, seal and as the company's act and deed, deliver the foregoing Restrictive Covenants, and that she with the other witnesses witnessed the execution thereof.

SWORN to before me this 23rd
day of Oct, 2007.
[Signature]
Notary Public for South Carolina
My Commission Expires: 9/4/13

[Signature]
Witness

Instrument#: 2007000156123, DEED BK: 3289 PG: 1062 DOCTYPE: 082 11/01/2007 at
01:13:00 PM, 4 OF 5 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF HORRY)

PERSONALLY appeared before me the undersigned witness and made
oath that she saw the within named Paul M. Bendik, President of PMB, Inc., as Member of PAN,
LLC, a SC limited liability company, sign, seal and as the company's act and deed, deliver the
foregoing Restrictive Covenants, and that she with the other witnesses witnessed
the execution thereof.

[Signature]
Witness

SWORN to before me this 23rd
day of Oct, 2007.

[Signature]
Notary Public for South Carolina
My Commission Expires: 9/11/13

STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF HORRY)

PERSONALLY appeared before me the undersigned witness and made
oath that she saw the within named Crayne Howes, as Member of PAN, LLC, a SC limited
liability company, sign, seal and as the company's act and deed, deliver the foregoing Restrictive
Covenants, and that she with the other witnesses witnessed the execution thereof.

[Signature]
Witness

SWORN to before me this 23rd
day of Oct, 2007.

[Signature]
Notary Public for South Carolina
My Commission Expires: 9/11/12

4

Instrument#: 2007000156123, DEED BK: 3289 PG: 1063 DOCTYPE: 082 11/01/2007 at
01:13:00 PM, 5 OF 5 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

[SEE ATTACH EXHIBIT A.]
EXHIBIT A

ALL AND SINGULAR all that certain piece, parcel or lot of land, situate, lying and being in Little River Township, County of Horry and State of South Carolina, and being more particularly known and designated as Block 18A, Tilghman Estates as is shown on a map of Blocks 18, 18A and 19 Tilghman Estates prepared by C.B. Berry, RLS #2075, dated July 10, 1979, and recorded in the Office of the Clerk of Court for Horry County in Plat Book 67 at page 153, and being described as follows:

Beginning at an iron at the right of way of Ocean Boulevard, which iron is located at the northwestern corner of Block 19, and running along Block 19 as shown on said plat South 18 degrees 31 minutes East for a distance of 230 feet to an iron; thence turning and running along the Strand area of the Atlantic Ocean South 71 degrees 29 minutes West for a distance of 87.75 feet to an iron; thence turning and running along Block 18 as shown on said plat North 18 degrees 31 minutes West for a distance of 230 feet to an iron; thence turning along the right of way of said Ocean Boulevard North 71 degrees 29 minutes East for a distance of 87.75 feet to the point of commencement.

TMS# 144-08-11-005

Exhibit K

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.) SEA CLOISTERS I
SUN TRS OCEAN CLUB, LLC;) HOMEOWNERS ASSOCIATION,
SUN TRS CAROLINA PINES,) INC.
LLC; and SUN TRS CAROLINA)
PINES RV, LLC,)
Defendants.)
by JAMES SHORTLE

DATE: Wednesday, May 17, 2023

TIME: 10:06 a.m.

LOCATION: THE PEARCE LAW GROUP
1314 Professional Drive
Myrtle Beach, S.C. 29577

REPORTED BY:
Cara-Leigh V. Richardson

1 the clubhouse, change rooms, and beach access.

2 Q: Did you ever purchase a membership?

3 A: No. Now, this is, this is what I've been told by
4 Ben Oats. I don't know how their organization was
5 set up.

6 MR. TAMASITIS: MARK THIS IS EXHIBIT NUMBER 3.

7 DEFENDANT'S EXHIBIT NUMBER 3

8 MARKED FOR IDENTIFICATION

9 MR. TAMASITIS CONTINUES:

10 Q: All right, Mr. Shortle, I want to discuss this
11 document a little bit. If you look at the bottom
12 right-hand corner, I'll represent to you that this
13 was produced by Sea Cloisters I in response to a
14 subpoena for documents that we sent a while back.

15 A: Mm-hmm.

16 Q: Do you recognize this document?

17 A: Yeah. It's a draft from a letter that we sent to
18 Ben Oats and Mace Watts. They had come to us on
19 the spring of '18 to build a high-rise unit there,
20 and so it -- this one I recall, we discussed it at
21 the Board. Again, I had two -- Lyston and I --
22 Lyston Lee was the President of Sea Cloisters II at
23 the time, and we both told them at the, at the
24 meeting that, you know, we had fought hard to
25 maintain those restrictions and it probably

1 wouldn't fly. But again, there were two lawyers on
2 the Board at the time and this is -- they took over
3 composing this, and this is the, the, you know, the
4 letterhead and stuff. I do remember there was
5 discussion, why don't we have letterhead paper?

6 So, -- but this was a letter that was sent to
7 Mace Watts and Oats to decline their offer.

8 Q: So, let's talk about it a little bit. It says here
9 in the second sentence of the body of the letter,
10 "One of the issues considered by the Board was the
11 verbal offer that you made to me and Lyston Lee on
12 March 29th of this year."

13 A: Mm-hmm.

14 Q: What was the offer that was made?

15 A: I, I don't believe there was any, any dollars
16 involved. It was just they wanted us to remove it
17 so they could build -- remove the deed
18 restrictions, close out the deed restrictions, so
19 they could build a high-rise. I don't recall any
20 money being offered.

21 Q: So, they made an offer to you to remove the
22 restrictions and they didn't offer anything in
23 return for that, is that correct?

24 A: To my recollection, that is correct.

25 Q: Was the owners of the property at the time, 2018,

1 did they ever offer to the Association an
2 opportunity for membership in the beach club?

3 A: No.

4 Q: Did they offer individuals at Sea Cloisters
5 membership in the beach club?

6 A: What do you mean "offer"? I mean, their offers
7 were out to anybody. You could have walked in
8 there and joined. But, you know, as a gift or
9 anything? Not to my knowledge.

10 Q: Okay. It says here, going back now to Exhibit
11 Number 2, in that same paragraph we were
12 discussing, that begins, "In August, 2017." The
13 final sentence there, it says, "There was no
14 homeowners association established and we were not
15 informed of any hearing by the Zoning Board of
16 Appeals to permit the use of this property for a
17 private club or other nonconforming use."

18 A: What page are you on?

19 Q: That's page 2 of 19, on the same paragraph that we
20 were just on, that last sentence in the paragraph.

21 A: Yes.

22 Q: Was the NMB Ocean Club Partners, LLC's operation as
23 a private club ever reported to the City?

24 A: By us?

25 Q: By the Association?

1 A: No.

2 Q: Why not?

3 A: We didn't know that it was an issue. I mean, the
4 zoning ordinances are a pretty good size set of
5 ordinances, and we had no reason to delve into
6 them. We knew that we were an R4 Zone and really
7 didn't look at -- you know, provided that they were
8 not violating this, these deed restrictions, we
9 really had no reason to look into it any further.

10 It was when assaults and disturbances and
11 noise and things like that happened, when we opened
12 the ordinances and went looking for something that
13 we could do, and I would assume that the City's in
14 the same situation. They granted an exemption
15 originally when it was built, and decided that that
16 exemption ran with the land, provided that it
17 wasn't violated, you know, the conditions of the
18 exemption, and that's what we got into.

19 Q: Okay. But as you're aware from your investigation
20 into this history, with the property not being
21 owned by homeowners association ---

22 A: That was not correct.

23 Q: I'm sorry; let me finish my question and then I'll
24 give you a chance.

25 A: Okay.

1 A: Short.

2 Q: Does Sea Cloisters have a pool associated with its
3 property?

4 A: A pool? Yes.

5 Q: Who has access to that pool?

6 A: Any of the residents.

7 Q: Do their renters have access?

8 A: Yes.

9 Q: Does Sea Cloisters have beach access associated
10 with the property?

11 A: Yes.

12 Q: Who can use the beach access?

13 A: Anybody that's a resident of Sea Cloisters.

14 Q: Including renters?

15 A: Including renters, yeah, anybody that has access to
16 a unit. We have a, we have a passcode just like
17 the Ocean Club, and the passcode is posted in the
18 unit.

19 Q: Approximately how many of the individuals that own
20 property in Sea Cloisters I are residents in a
21 state other than South Carolina?

22 A: About 39 out of 45, give or take; I may have missed
23 one.

24 Q: Has Sea Cloisters I made any other complaints to
25 the City regarding the zoning ordinance in the

1 it's, it's not good.

2 Q: What do you mean by "before"? Are you talking
3 about when Mace Watts owned the property?

4 A: Yeah, when they owned it. There was -- it was, it
5 was operating more like it was intended to operate
6 in the zoning ordinance and in the, in the deed
7 restrictions, and the intent for what a cabana
8 house is.

9 Q: What was the intent?

10 A: To give people from a not waterfront development,
11 like SeaBrook Plantation, like Tidewater, a place
12 to go to the beach and park. Now, this one's got a
13 pool. Most of them don't have pools, but a place
14 to park, change clothes, take a shower, go to the
15 beach, someplace close. To tell you the truth, if
16 I didn't own my unit at Sea Cloisters, I may have
17 considered a membership there when Mace and Ben
18 owned it, because, you know, it's three bucks an
19 hour to park at a public lot.

20 Q: But as we discussed earlier, when Mace Watts'
21 entity owned the property, it was in violation of
22 the zoning ordinance?

23 A: It was, but it wasn't problems to us. It didn't
24 affect us.

25 Q: So, if Carolina Pines operated the cabana house in

Exhibit L

IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
HORRY COUNTY

DEPOSITION OF BENJAMIN CALDWELL

CITY OF NORTH MYRTLE BEACH,

Plaintiff,

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

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

Defendants.

DEPONENT: BENJAMIN CALDWELL

DATE: April 26, 2022

TIME: 8:57 AM

LOCATION: CITY OF NORTH MYRTLE BEACH
1018 2nd Avenue South
North Myrtle Beach, SC 29582

REPORTED BY: NANCY ENNIS TIERNEY, CSR (IL)

1 A. Sure.

2 A. If someone calls and says, hey, I want to put a
3 new sign on my building, how big can it be? Well, I
4 will see what zoning district that building is located
5 in. I will review the zoning ordinance many times
6 because I don't want to give a false answer.

7 I will then say -- you know, get the
8 information I need from them to make the determination
9 on what the size of that sign can be and then relay that
10 information to them.

11 Q. What if someone is purchasing a property and they
12 want to know if there are any zoning issues on the
13 property? Would they contact you?

14 A. Yes, in many cases.

15 Q. How would that typically work?

16 A. Typically, I would get an email from someone
17 saying, hey, I need a zoning verification letter for
18 this property.

19 Q. What is a zoning letter?

20 A. A zoning letter usually is what the property is
21 zoned, and then if the current use is a use that is
22 permitted by right.

23 Q. What do you mean usually?

24 A. Well, the zoning letter requests come in from all
25 different people, and a lot of times they have different

1 wording.

2 So usually what I do is I will respond and
3 say, well, can you give me exact -- can you give me back
4 a form letter stating what you need to know, and then I
5 will plug in the relevant information and send it back
6 to them.

7 Q. Does the City rely on your zoning decisions when
8 it's making its own decisions?

9 MR. RICARD: Objection, form, speculative.

10 A. I believe so.

11 Q. (BY MR. TAMASITIS): Do citizens rely on your
12 zoning decisions?

13 MR. RICARD: Objection, form, speculation.

14 A. I believe so.

15 Q. (BY MR. TAMASITIS): When you're making a zoning
16 decision, how are those issued?

17 A. It could be a phone call. It could be in person.
18 It could be a letter. It could be a text message -- not
19 a text message. It could be email.

20 Q. Are there ways to appeal your decision?

21 A. Yes.

22 Q. And how is that done?

23 A. Through the Board of Zoning Appeals, an appeal
24 form.

25 Q. If you make a decision -- say you issue a zoning