THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

J. Ernest Kinard, Circuit Court Judge

Case No. 2013-CP-02-02781

Stephen P. Donohue, Appellant,

v.

City of North Augusta,
the Mayor and
City Council of North Augusta Respondents.

NOTICE OF APPEAL

Stephen P. Donohue appeals the final order of the Honorable J. Ernest Kinard entered on September 19, 2014. Appellant received written notice of the final order on September 19, 2014, which relates back to the Court's order entered on August 20, 2014.

October 17, 2014

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OCT 21 2014

S.C. SUPREME COURT

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	CASE NO.: 2013-CP-02-02781
	)	
Stephen P. Donohue,	)	
	)	
Plaintiff,	)	ORDER
	)	
v.	)	
	)	
City of North Augusta, the Mayor and City Council of North Augusta,	)	
	)	
Defendants,	)	
	)	

Subsequent to the order I executed that was filed on August 20, 2014, Plaintiff filed a motion on September 2, 2014 seeking an order to alter or amend the previous order I signed that was filed on August 20, 2014.

I have carefully considered each of the issues raised in the 12 page motion, memorandum, and the attached affidavit. I decline to alter or amend as I feel that all issues were addressed in the original order I signed, although I concede that I could have made the order much more lengthy by discussing in more detail the issues addressed.

Accordingly, the motion to alter or amend is denied.

IT IS SO ORDERED.

Honorable J. Ernest Kinard, Jr.
South Carolina Circuit Court Judge

Camden, South Carolina
September 17, 2014

FILED 9.19 2014
C.C.C.P.&G.S
12:00 pm
Deputy Clerk

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	CASE NO.: 2013-CP-02-02781
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Stephen P. Donohue,	)	
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Plaintiff,	)	ORDER
	)	
v.	)	
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City of North Augusta, the Mayor and City Council of North Augusta,	)	
	)	
Defendants,	)	

FILED August 20 14
Aiken County, S.C.
Lisa Cornett
Deputy Clerk
1:20 pm

This case was brought by Stephen P. Donohue, a resident of the City of North Augusta (the "City"). Mr. Donohue seeks to invalidate City Ordinance No. 2013-19 (the "Ordinance"). The Ordinance amended the redevelopment plan for the North Augusta Riverfront Redevelopment District to allow for the construction of a minor league baseball stadium and other amenities on a 25-acre tract of land fronting the Savannah River in downtown North Augusta. Mr. Donohue's home is located several thousand feet downriver from the stadium site. In addition to seeking to invalidate the Ordinance, the Complaint also alleged that if the stadium is built, it would represent a nuisance to Mr. Donohue's enjoyment of his property. Mr. Donohue sought money damages for the prospective nuisance.

FACTUAL/PROCEDURAL BACKGROUND

The Complaint in this action was filed on December 9, 2013. The two initial plaintiffs were Mr. Donohue and the River Club Homeowners Association. On December 23, 2013, counsel for both filed an amended complaint (the "Complaint") which dropped the River Club Homeowners Association as a party.

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, the Clerk of the Court of Common Pleas and General Sessions for said County, do hereby certify that the foregoing is a true, exact and correct copy of the Order in the above case, as the same appears of record and on file in my office.
Given under my hand this 20th day of August 2014
Lisa Cornett
Deputy Clerk

On January 15, 2014, Defendants petitioned the Supreme Court of South Carolina to remove this action to its original jurisdiction. The Court denied that motion but by administrative order gave exclusive jurisdiction over this action to this Court. Defendants answered the Complaint on April 14, 2014, effectively denying all claims. The trial of this matter was held on July 18, 2014.

The evidence at trial showed that beginning in the 19th Century, the City's riverfront area was used for industrial activities, clay mines for brick works, a public dump and similar purposes. North Augusta Mayor Lark Jones, who has served on City Council since 1985, testified that by the 1980's the riverfront area was largely abandoned and overgrown.

In 1991, the City established the North Augusta Redevelopment Commission under the terms of the South Carolina Community Development Law, S.C. Code Ann. §§ 31-10-10 *et seq.* *See* Ordinance No. 91-07 (**Joint Exhibit 1**). The City gave the commission the responsibility for "acquiring and replanning blighted and potentially blighted areas." Ordinance No. 91-07 at Section 18-10. The City also created the North Augusta Riverfront Redevelopment District to include the riverfront areas adjacent to downtown North Augusta and other adjoining properties. *See* Resolution 91-06 (**Joint Exhibit 2**). The City gave the Redevelopment Commission responsibility for redevelopment of the riverfront district.

In the early 1990's, the City contracted with the planning firm of Lane Frenchman and Associates of Boston and others to prepare a redevelopment plan of the Riverfront Redevelopment District using work down by Clemson University's planning institute. *See* Ordinance 96-10 (**Joint Exhibit 5**). Among other things, this plan established anticipated land uses within the District and the nature and potential locations of public buildings, parks, greenways and other amenities. *See* Ordinance 96-10 at Section 1.01(14)-(16). The plan

identified potential sources of funding for redevelopment including the establishment of a tax increment financing ("TIF") district under S.C. Code Ann. §§ 31-6-10 *et seq.* (the "TIF Statute").

In 1996, the City designated portions of the plan developed by Lane Frenchman as the official redevelopment plan for the District (the "Redevelopment Plan"). *See* Ordinance No. 96-10. The City also created the North Augusta Tax Increment Financing District (the "TIF District") to finance the Redevelopment Plan in part. *Id.* The City expanded the Riverfront Redevelopment District to include more of the declining commercial area on upper Georgia Avenue in the District. *Id.*

After the passage of Ordinance No. 96-10, the City began assembling title to the lands along the riverfront, the ownership of which was fragmentary or confused. The City also constructed parks and constructed and streetscaped access roads to support development of the River Club; a golf course and high-end residential development located of the riverfront east of Georgia Avenue. On the west end of the riverfront, the City located and assisted a private development group in establishing Hammond's Ferry, a walkable, mixed use development on lands assembled by the City. In addition, the City streetscaped thoroughfares and made other improvements to the older commercial area along upper Georgia Avenue, which is on the bluff immediately behind the riverfront. The City built parks and a new city administration building to help link the declining commercial district to the riverfront.

In 2001, the City issued a TIF bond in the nominal amount of $5,000 to begin the collection of revenue generated by the TIF District. *See* S.C. Code Ann. § 31-6-70. The City then used TIF revenues generated by increasing assessed values in the TIF District to pay the costs of authorized redevelopment projects on a pay-as-you-go basis.

In 2012, the City began discussions with North Augusta Riverfront Development Company, LLC, (the "Riverfront Company"), about developing the vacant 25-acre site which was immediately west of Georgia Avenue and directly on the riverfront. The Riverfront Company is the developer of Hammond's Ferry. At the time, the Riverfront Company was willing to commit to build two 4,000 square foot commercial buildings in exchange for the City's commitment to invest between $2.4 million and $3.4 million in streetscaping and parks in the adjacent area. Development Agreement at Article 5 (**Defendant's Exhibit 10**). However during these negotiations, the City was approached by a promoter about the possibility of relocating the Augusta Green Jackets minor league baseball team to a site adjacent to the City's industrial park. As the City's Administrator, Todd Glover, testified, these discussions led to discussions with the owner of the Green jackets about relocating to the 25-acre site beside Georgia Avenue. The owner, who is a developer, eventually organized Greenstone Properties, LLC and committed to a plan for the construction of a city-center development on the 25-acre site anchored by a new baseball stadium. The plan, called Project Jackson, would include a 200-room hotel, a 275 unit apartment complex, 70,000 square feet of office, commercial and restaurant space, 25 residential units and a YMCA facility. *See* Ordinance No. 2013-19 at Section 1.01 (**Joint Exhibit 14**). To support this private investment, estimated at approximately $128 million, the City would construct the baseball stadium and a convention center adjacent to the hotel. The City investment in Project Jackson would be approximately $40 million. (**Financing Scenario 43, Defendant's Exhibit 13**)

Pursuing Project Jackson required the City to amend the Ordinance 96-10 to designate a baseball stadium as part of the redevelopment project, and to extend the amount and term of TIF

obligations to finance the project. *See* Ordinance No. 2013-19. The City adopted Ordinance No. 2013-19 on November 18, 2013. This lawsuit followed.

The trial of this case took place without a jury on July 18, 2014. Based upon the documentary evidence presented, a review of all applicable statutes and ordinances, the testimony of witnesses and a review of affidavits filed by several witnesses and their credibility, the Court finds and concludes that the ordinance as passed met the form and substance of the TIF law. I further find and conclude that Plaintiff fails on his Freedom of Information Act claims and also dismiss his claim for prospective nuisance all as set forth more fully below.

LAW/ANALYSIS

Plaintiff alleges that Ordinance No. 2013-19 is invalid for two reasons. First, Plaintiff alleges that the ordinance does not comply with the statutory requirements for amending a redevelopment plan under the TIF Statute. Second, Plaintiff alleges that the City violated the provisions of the South Carolina Freedom of Information Act ("FOIA") in its enactment of the Ordinance.

I. Validity of Ordinance No. 2013-19

Plaintiff argues that for the City to amend the current Redevelopment Plan and to change the term and amount of the TIF obligations (collectively the "TIF Plan"), it was required to make findings that a) conditions of blight were present in the district currently, and b) that property values in area could remain static or decline without substantial public assistance. But that argument is based on an incorrect reading of the TIF Statute and its provisions that govern amendments of an existing redevelopment plan.

Amending the TIF District Redevelopment Plan

The TIF Statute requires findings as to blight, declining or static property values and the need for public assistance to correct them. S.C. Code Ann. § 31-6-80(A). However, I find these findings of need are made only once, before any TIF obligations are issued and within ten years of the adoption of the TIF Plan. *See* S.C. Code Ann. §§ 31-6-70 & 80(A). In this case, the required findings were made in 1996, when the TIF Plan was adopted. *See* Ordinance 96-10 Section 1.01(3)-(6).

The sections of the TIF Statute that govern the amendment of the TIF plan do not require additional or updated findings as to blight, declining or static property values or the need for public assistance to correct them. *See* S.C. Code Ann. § 31-6-80(B), (C), and (D). Instead, they require that eh procedures involve public notice and haring before the adoption of the ordinance amending the TIF plan, and notice to other taxing entities in the county—which then have the right to participate in the financing of the TIF plan or to exempt themselves from it. *Id.* There is no evidence that the City failed to follow these procedures in adopting Ordinance No. 2013-19.

Furthermore, Plaintiff's reading of the TIF Statute would result in an impractical reading of the statute as each improvement made on the property should reduce blight. The TIF Statute requires the enumerated findings to be made before issuance of TIF obligations and within ten years of the adoption of a redevelopment plan. S.C. Code Ann. § 31-6-70. Those provisions are inconsistent with Plaintiff's argument that such findings were required in 2013; 17 years after adoption of the Redevelopment Plan and 12 years after issuance of TIF obligations. Furthermore, the practical effect of Plaintiff's argument could be to prevent municipalities from making even the most simple and necessary changes in a partially completed TIF plan. That would be the case if, during the initial stages of its implementation, the initial blight and property value concerns had been ameliorated. Municipalities could be locked into implementing

outdated plans that did not meet current needs. Such a result would violate the rule that statutes are to be interpreted in a way that harmonizes their provisions, avoids inconsistency and gives them a reasonable and practical effect. *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

For the reasons stated above, the Court finds that in amending the TIF Plan under S.C. Code Ann. § 31-6-80(F)(2), the City was not required to make updated findings related to blight, declining or static property values or the need for public assistance to correct them.

Other Grounds for Upholding the Ordinance

There are several additional grounds for upholding Ordinance No. 2013-19 against the challenge that it lacks valid or sufficient findings related to blight, declining or static property values or the need for public assistance to correct them.

First, under the TIF Statute, any area designated to be a redevelopment district under the Community Redevelopment Act is "deemed to be blighted." S.C. Code Ann. § 31-6-30(1). The TIF District is such an area. *See* Resolution 91-06. Accordingly, it has been deemed blighted as a matter of law. In this regard, the Court notes that at trial, Plaintiff took the position that the existence of declining or static property values and the need for public assistance to correct them are incorporated into the blight definition and so are part and parcel of a required finding of blight. Accordingly, if blight is presumed, these other findings must be presumed also.

Second, the Ordinance in fact contains express findings of blight, declining or static property values and the need for public assistance to correct them. Ordinance No. 2013-19, Section 2.08 (c) and (d). These findings would be sufficient to meet the statutory requirements if such finding were in fact required, which I find are not. The absence of the word "values" in the

discussion of "static and declining property" is immaterial. The intended meaning is entirely clear.

The Standards for Review of Legislative Findings

At the trial in this matter, and its pretrial motion in limine, Plaintiff argued that in justifying legislative findings required by the TIF Statute, the City Council was limited to matters established in the "legislative record." In Plaintiff's view, that record consisted of documents placed before Council when considering the Ordinance and matters referenced in the minutes of the Council's deliberations concerning it. Plaintiff argued that absent sufficient facts in the "legislative record," any findings made by City Council in adopting the Ordinance, whether independently supportable or not, should be found to be arbitrary and capricious. This is not the law.

As to factual questions related to legislative determinations:

> The matter is largely within the discretion of the legislative authority, which is presumed to have investigated and found conditions such that the legislation which it enacted was appropriate, so that if the facts do not clearly show that the bounds of that discretion have been exceeded, the courts must hold that the action of the legislative body is valid. In this respect, it has been declared that the municipal governing bodies are better qualified because of their knowledge of the situation to act upon those matters than are the courts, which will not substitute their judgment for that of the legislative body.

Talbot v. Myrtle Beach Bd. Of Adjustment, 222 S.C. 165, 169-170, 72 S.E.2d 66, 68 (1952) (quoting 58 Am. Jur. 956, 975 § 23).

Courts will not overturn legislative findings in ordinances except on "convincing evidence to the contrary" showing that the findings are "clearly erroneous." *Richards v. City of Columbia*, 227 S.C. 538, 560-61, 88 S.E.2d 683, 694 (1955). The party challenging an ordinance bears the burden of proof and must show by clear and convincing evidence that the ordinance is arbitrary and capricious, and the Court will not overturn the ordinance "as long as the decision is

'fairly debatable.'" *Peterson v. City of Clemson*, 312 S.C. 162, 165, 439 S.E.2d 317, 320 (Ct. App. 1993) (citations omitted).

> [T]here are many instances where the constitutionality of an act depends upon pertinent facts and in such a case it is presumed from the mere passage of the act that there was a finding of such facts as were necessary to authorize the enactment. However, by the better rule, such implied or express finding is subject to judicial review, **and the court may consider extrinsic evidence or this purpose**, although the statute will not be held unconstitutional unless such (legislative) finding is clearly erroneous.

Richards v. City of Columbia, 227 S.C. at 561, 88 S.E.2d at 694 (emphasis supplied).

These authorities establish a highly deferential standard for the judicial review of legislative findings, one which provides for the consideration of any competent evidence supporting them. The argument that legislative are reviewed on a "legislative record" that limits the facts that may be shown to support them is entirely foreign to the law in South Carolina. Accordingly, the Court rules as a matter of law that any competent evidence relevant to the findings made in ordinance No. 2013-19 is properly before the Court.

Facts Supporting the Findings of Ordinance No. 2013-19

At trial, the City's Mayor Lark Jones, and its Administrator, Todd Glover, testified in detail concerning the continued existence of blight within the TIF District, the fact that certain properties were static and declining in value, and the fact that continued public assistance is necessary to prevent future decline. The Court finds their testimony to be credible and persuasive.

In this regard, the Court finds are a matter of fact:

1. That the specific property on which Project Jackson will be developed is unimproved since the TIF District was established 18 years ago.

2. That this property is characterized by collapsing buildings, vacant buildings, and ground which is contaminated on the surface and below the surface by waste brick, rubble and debris, including debris that is contaminated with lead-based paint.

3. That, as indicated by the testimony of Mr. Glover, a sufficient number of elements of the statutory definition of blight are met by properties within the TIF District.

4. That, for the reasons set forth in the testimony of Mr. Jones and Mr. Glover, and as documented in Defendant's Exhibit 9, there are multiple properties within the TIF District and the surrounding area that exhibit static or declining values.

5. That persuasive evidence supports the finding that substantial public assistance is necessary to allow the Project Jackson property to be developed, including evidence that the property is contaminated by waste brick and rubble, that it will require nearly $2.4 million to remediate it, and the fact that it has remained unimproved since the TIF District was established 18 years ago. This conclusion is also supported by direct and affirmative testimony of the City's witnesses that public assistance is required to counteract static or declining values in the area of the TIF District.

6. That Project Jackson is part of a larger project to reverse the ongoing decline of the City's commercial district, which is suffering from the migration of customer traffic and commercial activities to new malls and strip malls in more suburban locations.

7. That public investment in the riverfront area is necessary to attract commercial traffic back to the North Augusta downtown commercial district and thereby counteract conditions of stagnation and decline in that district. The City Administrator also indicated all officials were aware of economic improvement in similar ball park additions to cities such as Greenville, South Carolina.

8. That the 2013 development agreement with the Riverfront Company involved public investment of between $3.4 million and $4.4 million in exchange for guaranteed private investment of approximately $1.2. million.

9. That the 2013 development agreement with the Riverfront Company is not evidence that the stagnation and decline in the City's riverfront and commercial area will be counteracted without public investment, but to the contrary, it shows the need for substantial public investment to support even modest development activities on sites like the Project Jackson site.

In light of the testimony and other evidence presented at trial, the Court finds as a matter of fact that blight and declining or static property values existed within the TIF District when the Ordinance was adopted and that substantial public assistance was necessary to correct them. For that reason, the findings contained in Ordinance No. 2013-19 are neither arbitrary, capricious nor clearly erroneous as a matter of law, and I carefully considered the testimony of Tom Regan.

II. Freedom of Information Act Claims

Plaintiff alleges that the City Council violated FOIA by (1) meeting in executive sessions between January 2013 and September 2013 without properly announcing the specific purpose to be discussed and (2) by taking action in an executive session on March 11, 2013, to postpone a public hearing with the Aiken County School Board related to Project Jackson.

Announcing Executive Sessions

Under FOIA, all meetings of governmental bodies must be open to the public unless the subject being discussed falls within one of the five topics enumerated in S.C. Code Ann. § 30-4-70(a)(1)-(5). These topics include contractual negotiations, personnel matters and the receipt of legal advice, among others. Where a governmental body enters into an executive session to

discuss one of these topics, it must vote in open session to do so and the presiding officer must announce the specific purpose of the executive session. S.C. Code Ann. § 30-4-70(b).

The FOIA statute clearly establishes the level of detail required to meet the "specific purpose" standard. Specific purpose is defined as "a description of the matter to be discussed, as identified in items (1) through (5) of [Section 30-4-70(a)]." *Id.* The plain language of the definition of "specific purpose" requires only that the purpose of the executive session be identified as it is described in Section 30-4-70(a), *e.g.*, contractual negotiations, personnel matters and the receipt of legal advice. *Cf. Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001) (finding a violation of FOIA where the mayor made no announcement whatsoever as to the specific purpose of an executive session).

The record before the Court includes the minutes of all City Council meetings during the period which Project Jackson was under consideration. It also includes the affirmative testimony of the Mayor and City Administrator concerning the City's practice in convening executive sessions. Both the minutes and the testimony indicate that in each case where an executive session was held, the Mayor announced the purpose of the executive session and the Council properly voted to enter executive session. In each instance, the "specific purpose" was a description of the matter as it was identified in the list of approved purposes for executive sessions provided for in FOIA. **(Council Minutes, Joint Exhibit 6)**

The Court finds this evidence credible and persuasive. The means used by City Council to announce and convene executive sessions did not violate FOIA.

Alleged March 11, 2013 Violation of FOIA

In the Complaint, Plaintiff alleged that on March 11, 2013, the City took action in executive session to postpone certain public hearings, including a public hearing that the City

had requested before the Aiken County School Board. The City had requested the hearing to formally request that the School District enter into an intergovernmental agreement consenting to participate in the TIF financing plan under S.C. Code Ann. § 6-31-85. The decision to reschedule the presentation of this request was based on an unexpectedly negative initial reaction from County Council to a similar request.

At trial, Mayor Jones and Mr. Glover testified that Mayor Jones made the decision to postpone a public hearing several days before the executive session. He did so pursuant to the authority given to him by the City Council in Resolution 2012-01 (**Joint Exhibit 7**). The purpose of the executive session was to brief the Council on the status of negotiations related to the intergovernmental agreement and the reasons for the delay in the public hearing. Both witnesses testified that no decision of any kind was made during the March 11, 2013 executive session.

This testimony is entirely credible. The Court finds that there is no evidence that would lead to the conclusion that the City Council took any action during the executive session held at its March 11, 2013 meeting. Obviously Mr. Donohue sincerely believes that secret meetings took place, but I have no clear evidence to refute the finding I make as to FOIA compliance.

III. Speculative Nuisance Claim

Plaintiff claims that the implementation of the Redevelopment Plan may create a nuisance related to traffic congestion, noise, light pollution or parking congestion, resulting in the diminution of the value of his property in an unspecified amount at some unspecified time in the future. Speculative allegations of diminution in property value are insufficient to support a claim sounding in nuisance. *See Yadkin Brick Co., Inc. v. Materials Recovery Co.*, 339 S.C. 640, 646, 529 S.E.2d 764, 767 (Ct. App. 2000) ("[B]ald allegations are insufficient to establish a

claim for diminution in value, and the evidence must not be speculative as to the amount of the alleged diminution.") Where, as is the case here, the claim is one of anticipatory nuisance (*i.e.*, nuisance from an action that has not yet been taken), the plaintiff must show that:

> [A] nuisance will inevitably or necessarily result from the act or thing which it is sought to enjoin. It is not enough to show that the anticipated acts threatened to or may become a nuisance, but the evidence must show that a nuisance is inevitable from the proposed use of the premises or will necessarily result. If the proposed business may be operated in a way as not to constitute a nuisance, an injunction will not be issued. The alleged nuisance must be the necessary result of the operation of a business.

Strong v. Winn-Dixie Stores, Inc., 240 S.C. 244, 254, 125 S.E.2d 628, 633 (1962) (citing 39 Am. Jur. Nuisances, §§ 151 and 152). In addition, evidence was presented that Mr. Donohue's residence is currently exposed to heavy traffic, traffic noise, noise from boats using the river, and occasional lights and noise generated from an entertainment forum across the river in Georgia.

The record at trial includes credible testimony from officials of the City describing a multitude of ways in which the City might operate a baseball stadium that would mitigate any negative impacts alleged by Plaintiff. Plaintiff cannot support a claim for nuisance on these facts.

CONCLUSION

Based upon the findings of fact and conclusions of law above, the Court denies the relief prayed for by Plaintiff and finds for Defendant as to all of Plaintiff's causes of action.

IT IS SO ORDERED.

Honorable J. Ernest Kinard, Jr.
South Carolina Circuit Court Judge

Camden, South Carolina
August 13, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

J. Ernest Kinard, Circuit Court Judge

Case No. 2013-CP-02-02781

Stephen P. Donohue, Appellant,

v.

City of North Augusta,
the Mayor and
City Council of North Augusta Respondents.

PROOF OF SERVICE

I, James D. Mosteller III, hereby certify that on the 17th day of October, 2014, with proper postage prepaid via the United States Postal service have served the Appellants Notice of appeal on Belton Ziegler, Esq., C.D. Rhodes, Esq, Gary Pope Esq., all of Pope Ziegler LLC, and Kelly Zier Esq., at the addresses which appear on the second page of this document.

October 17, 2014.

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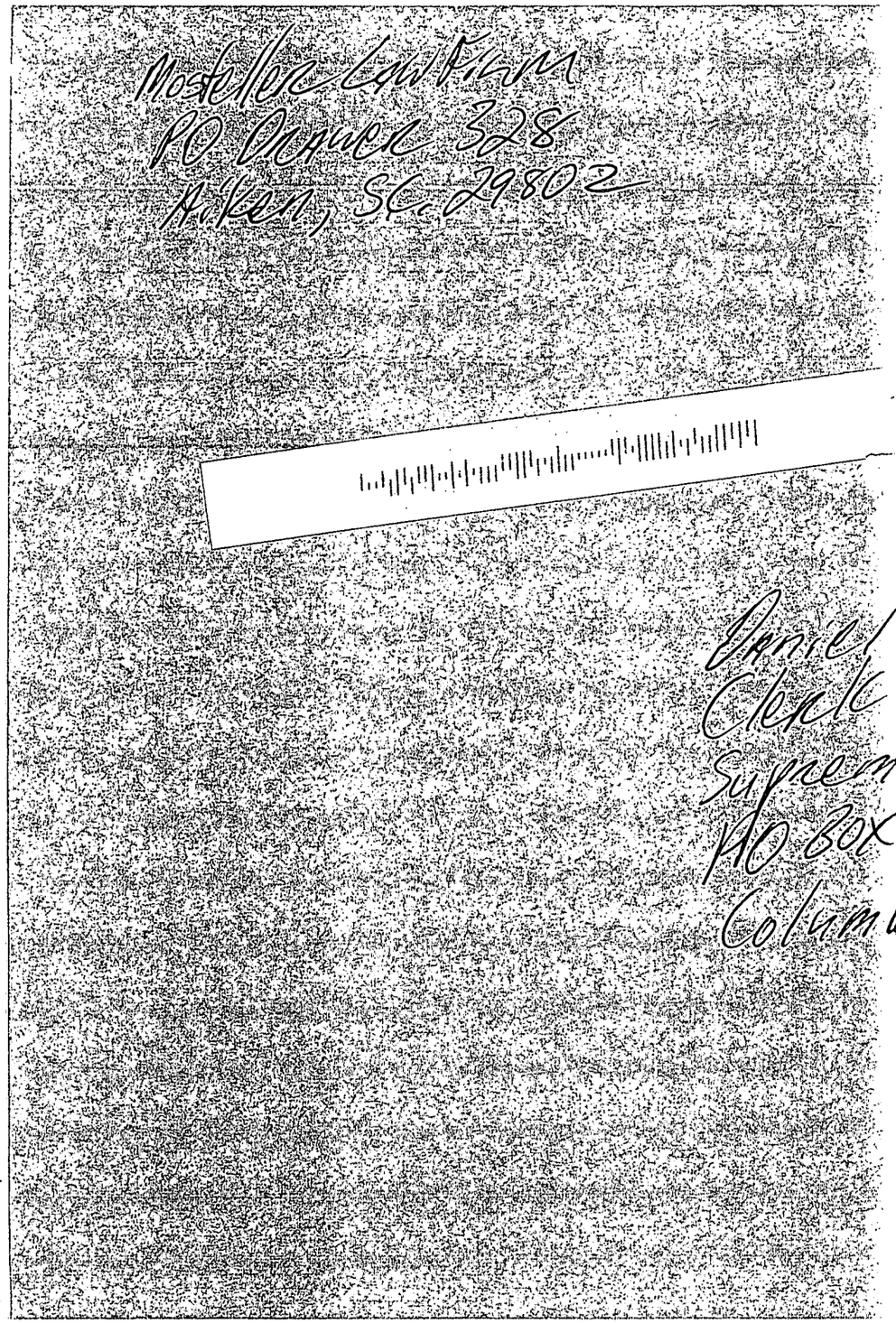

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