

IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

**RECEIVED**  
MAY 18 2017  
SC Court of Appeals

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Case No. 2015-CP-26-8179  
Appellate Case No. 2016-002175

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Robert DeCiero,..... Appellant,

v.

Horry County, State of South Carolina,..... Respondent.

---

**RECORD ON APPEAL**

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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
 )  
 Robert Deciero, a resident of Long Bay )  
 Estates Subdivision, Myrtle Beach, )  
 South Carolina, )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 Horry County, State of South Carolina, )  
 )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 FIFTEENTH JUDICIAL CIRCUIT  
 CASE NO.: 2015-CP-26-8179

**Order of Dismissal**  
 (Rule 12(b)(6). S.C.R.C.P.)

2016 JUL 19 AM 8:41  
 Horry County  
 MELANIE HARRIS  
 CLERK OF COURT

HEARING DATE: June 1, 2016  
 PRESIDING JUDGE: Benjamin H. Culbertson  
 PLAINTIFF'S ATTORNEY: Thomas C. Brittain  
 DEFENDANT'S ATTORNEY: Elise F. Crosby  
 COURT REPORTER: Grace Hurley

This matter comes before the court upon motion of the defendant for dismissal of Plaintiff's Complaint under Rule 12(b)(6), South Carolina Rules of Civil Procedure.

In support of its motion, Defendant argues Plaintiff fails to allege facts sufficient to constitute a cause of action and lacks standing.

Findings of Fact and Conclusions of law

Plaintiff's Complaint fails to allege facts sufficient to constitute a cause of action. Under Rule 12(b)(6), SCRCPP, a Complaint will be dismissed if it fails "to state facts sufficient to constitute a cause of action." *Carnival Corp. v. Historic Ansonborough Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (S.C. 2014.) In considering a motion to dismiss under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint. *Id.*, citing *Doe v. Marion*, 373 S.C. 390 (2007).

Under Rule 8(a), SCRCPP, a civil pleading stating a claim for relief "shall contain (1) a short

*MHC*

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and plain statement of the grounds including facts and statutes, upon which the court's jurisdiction depends, ... (2) a short and plain statement of the facts showing the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled." The plaintiff alleges "every home in Long Bay Subdivision is currently zoned as a SF6 residential district and, as such, is to be comprised of single family and duplex family dwellings." He further cites Section 431 of the Horry County Zoning Ordinance: "Family: An individual, or two or more persons related by blood, marriage, or adoption, living together as a single household unit, or a group of not more than five persons not related by blood, marriage, or adoption, living together as a single household unit," and Section 1300, an enforcement provision. There is no short and plain statement of the grounds or the facts showing Plaintiff is entitled to relief. There are no causes of action. Finally, there is no prayer for relief. The Complaint's deficiencies under Rule 8(a) entitle the defendant to relief under Rule 12(b)(6).

Furthermore, I conclude as a matter of law the zoning ordinance upon which the plaintiff relies restricts construction in Long Bay Estates to single-family homes or duplex dwellings, neither of which restricts short-term rental or the number of occupants.

Lastly, if his Complaint were interpreted to seek relief from a public zoning authority for harm as alleged in his Complaint, Plaintiff lacks standing. For a plaintiff to possess standing he must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. *Carnival Corporation*, citing *Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res.*, 345 S.C. 594 (2001). In order for an injury to be particularized, it must affect the plaintiff in a personal way. *Carnival* at 851, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). "§6-29-950's requirement that a private party seeking to enjoin a zoning violation must be

2  
/MHC

specially damaged incorporates the particularized injury requirement of general standing doctrine as a requirement.” *Carnival* at 852. The Complaint alleges no injuries particular to the plaintiff. I find as a matter of law the plaintiff fails to allege a particularized injury and therefore fails to establish standing.

In light of the Court’s findings and conclusions, no matters outside the pleadings presented to the court were considered. Therefore, as a result of this ruling, the Defendant’s Motion for Summary Judgment is moot.

NOW, THEREFORE, it is hereby

ORDERED, that the plaintiff’s Complaint is DISMISSED under Rule 12(b)(6), SCRPC; it is further

ORDERED, that the defendant’s Motion for Summary Judgment is MOOT.

AND IT SO ORDERED.



Benjamin H. Culbertson  
Presiding Judge

Conway, South Carolina  
June 22, 2016

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-26-8179

Robert Deciero  
PLAINTIFF(S)

Horry County, State of South Carolina  
DEFENDANT(S)

Submitted by: Benjamin H. Culbertson, Presiding Judge	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

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.  See Page 2 for additional information.
- 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
- 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.

FILED  
16 SEP 22 PM 1:11  
CLERK OF COURT

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

**Plaintiff's Motion to Reconsider Order of Dismissal is DENIED.**  
(This motion is decided without oral arguments.)

ORDER INFORMATION

This order  ends  does not end the case.  
Additional Information for the Clerk : \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	\$ N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

*Benjamin H. Culbertson*  
Benjamin H. Culbertson, Circuit Court Judge

2148  
Judge Code

Sept. 16, 2016  
Date

RECEIVED  
10-14-16



STATE OF SOUTH CAROLINA )

COUNTY OF HORRY )

Robert DeCiero, a resident of Long Bay Estates )  
Subdivision, Myrtle Beach, South Carolina, )

Plaintiff(s) )

vs. )

Horry County, State of South Carolina, )

Defendant(s) )

Submitted By: Thomas C. Brittain, Esq.  
Address: 4614 Oleander Drive  
Myrtle Beach, SC 29577

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015 -CP-26-8179

SC Bar #: 00893  
Telephone #: 843.449.8562  
Fax #: 843.497.6124  
Other:  
E-mail: tommyb@brittainlawfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

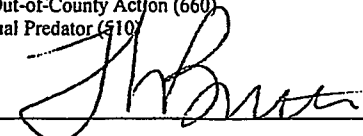
- JURY TRIAL demanded in complaint.  NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- |   |  |   |  |
|---|--|---|--|
| <p><b>Contracts</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Constructions (100)</li> <li><input type="checkbox"/> Debt Collection (110)</li> <li><input type="checkbox"/> Employment (120)</li> <li><input type="checkbox"/> General (130)</li> <li><input type="checkbox"/> Breach of Contract (140)</li> <li><input type="checkbox"/> Other (199)</li> </ul>  | <p><b>Torts - Professional Malpractice</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Dental Malpractice (200)</li> <li><input type="checkbox"/> Legal Malpractice (210)</li> <li><input type="checkbox"/> Medical Malpractice (220)</li> <li>Previous Notice of Intent Case #<br/>20 -NI- -</li> <li><input type="checkbox"/> Notice/ File Med Mal (230)</li> <li><input type="checkbox"/> Other (299)</li> </ul>  | <p><b>Torts - Personal Injury</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Assault/Slander/Libel (300)</li> <li><input type="checkbox"/> Conversion (310)</li> <li><input type="checkbox"/> Motor Vehicle Accident (320)</li> <li><input type="checkbox"/> Premises Liability (330)</li> <li><input type="checkbox"/> Products Liability (340)</li> <li><input type="checkbox"/> Personal Injury (350)</li> <li><input type="checkbox"/> Wrongful Death (360)</li> <li><input type="checkbox"/> Other (399)</li> </ul>   | <p><b>Real Property</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Claim &amp; Delivery (400)</li> <li><input type="checkbox"/> Condemnation (410)</li> <li><input type="checkbox"/> Foreclosure (420)</li> <li><input type="checkbox"/> Mechanic's Lien (430)</li> <li><input type="checkbox"/> Partition (440)</li> <li><input type="checkbox"/> Possession (450)</li> <li><input type="checkbox"/> Building Code Violation (460)</li> <li><input checked="" type="checkbox"/> Other (499) Zoning Violation</li> </ul>  |
| <p><b>Inmate Petitions</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> PCR (500)</li> <li><input type="checkbox"/> Mandamus (520)</li> <li><input type="checkbox"/> Habeas Corpus (530)</li> <li><input type="checkbox"/> Other (599)</li> </ul>  | <p><b>Administrative Law/Relief</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Reinstate Drv. License (800)</li> <li><input type="checkbox"/> Judicial Review (810)</li> <li><input type="checkbox"/> Relief (820)</li> <li><input type="checkbox"/> Permanent Injunction (830)</li> <li><input type="checkbox"/> Forfeiture-Petition (840)</li> <li><input type="checkbox"/> Forfeiture-Consent Order (850)</li> <li><input type="checkbox"/> Other (899)</li> </ul> | <p><b>Judgments/Settlements</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Death Settlement (700)</li> <li><input type="checkbox"/> Foreign Judgment (710)</li> <li><input type="checkbox"/> Magistrate's Judgment (720)</li> <li><input type="checkbox"/> Minor Settlement (730)</li> <li><input type="checkbox"/> Transcript Judgment (740)</li> <li><input type="checkbox"/> Lis Pendens (750)</li> <li><input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760)</li> <li><input type="checkbox"/> Confession of Judgment (770)</li> <li><input type="checkbox"/> Petition for Workers Compensation Settlement Approval (780)</li> <li><input type="checkbox"/> Other (799)</li> </ul> | <p><b>Appeals</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Arbitration (900)</li> <li><input type="checkbox"/> Magistrate-Civil (910)</li> <li><input type="checkbox"/> Magistrate-Criminal (920)</li> <li><input type="checkbox"/> Municipal (930)</li> <li><input type="checkbox"/> Probate Court (940)</li> <li><input type="checkbox"/> SCDOT (950)</li> <li><input type="checkbox"/> Worker's Comp (960)</li> <li><input type="checkbox"/> Zoning Board (970)</li> <li><input type="checkbox"/> Public Service Comm. (990)</li> <li><input type="checkbox"/> Employment Security Comm (991)</li> <li><input type="checkbox"/> Other (999)</li> </ul> |
| <p><b>Special/Complex /Other</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Environmental (600)</li> <li><input type="checkbox"/> Automobile Arb. (610)</li> <li><input type="checkbox"/> Medical (620)</li> <li><input type="checkbox"/> Other (699)</li> <li><input type="checkbox"/> Pharmaceuticals (630)</li> <li><input type="checkbox"/> Unfair Trade Practices (640)</li> <li><input type="checkbox"/> Out-of State Depositions (650)</li> <li><input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660)</li> <li><input type="checkbox"/> Sexual Predator (610)</li> </ul> |  |   |  |

FILED  
Horry County  
2015 NOV 13 PM 3  
CLERK OF COURT  
MCLAIN JUDGE

Submitting Party Signature:



Date: November 13, 2015

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

**FOR MANDATED ADR COUNTIES ONLY**

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Robert DeCiero, a resident of Long Bay  
Estates Subdivision, Myrtle Beach, South  
Carolina,

Plaintiff,

v.

Horry County, State of South Carolina,

Defendant.

) IN THE COURT OF COMMON PLEAS

)

) FIFTEENTH JUDICIAL CIRCUIT

)

) C/A No.: 15-CP-26-8179

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**SUMMONS**  
(Non-Jury Trial Demanded)

FILED  
HORRY COUNTY  
2015 NOV 13 PM 1:38  
MELANIE HIGGINS-WARD  
CLERK OF COURT

TO: THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the Plaintiff's attorney, Thomas C. Brittain, at The Brittain Law Firm, P.A., 4614 Oleander Drive, Myrtle Beach, South Carolina 29577, within thirty (30) days after the service hereof, exclusive of the date of such service and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

Dated at Myrtle Beach, South Carolina on the 12<sup>th</sup> day of November, 2015.

THE BRITTAIN LAW FIRM, P.A.



Thomas C. Brittain, Esquire  
4614 Oleander Drive  
Myrtle Beach, SC 29577  
(843) 449.8562  
(843) 497.6124 (Fax)  
Attorney for Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Robert DeCiero, a resident of Long Bay Estates Subdivision, Myrtle Beach, South Carolina,

Plaintiff,

v.

Horry County, State of South Carolina,

Defendant.

) IN THE COURT OF COMMON PLEAS

)

) FIFTEENTH JUDICIAL CIRCUIT

)

) C/A No.: 15-CP-26-8179

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COMPLAINT  
(Non-Jury Trial Demanded)

FILED  
HORRY COUNTY  
2015 NOV 13 PM 1:18  
MELANIE HUGGINS-WARD  
CLERK OF COURT

NOW COMES the Plaintiff, by and through his undersigned attorney, Thomas C. Brittain, hereby complaining of the Defendant, would allege and show unto this Court as follows:

1. That Plaintiff, Robert DeCiero, a resident of Long Bay Estates Subdivision, Myrtle Beach, South Carolina (hereinafter referred to as "Plaintiff") is a long-time citizen and resident of the State of South Carolina, County of Horry.

2. That Defendant Horry County, State of South Carolina (hereinafter referred to as "Defendant") is a governmental entity, operated as a political subdivision of the State of South Carolina, with its principal place of business in Horry County.

3. That Long Bay Estates Subdivision, a once sleepy little neighborhood, is tucked away close to the ocean between the King's Highway and the Atlantic.

4. That it contains many retirees and wonderful family groups.

5. During its creation as a subdivision over fifty years ago residential restrictions were placed on the subdivision and, for many years now, the viability of those restrictive covenants has been litigated and has been resolved in the favor of the legitimacy and validity of those covenants.

6. That Defendant is a body politic of long, great standing in South Carolina famously known as the Independent Republic of Horry operating under a council-manager form of

government that each and every council member is duly elected and functions under the constitution of the State of South Carolina.

7. That throughout the years and with increasing impact on the neighborhood setting of Long Bay Estates new property owners have constructed larger homes and began to rent on a weekly basis to large numbers of individuals, thereby creating traffic nightmares, late-night parties, congestion, excessive noise levels, etc., all detrimental to the peace and quiet of the neighborhood.

8. Upon information and belief, each and every home in the Long Bay Subdivision is currently zoned as a SF6 residential district and, as such, is to be comprised of single family and duplex family dwellings. That scores of owners support this Complaint and Plaintiff as their representative.

9. Furthermore, that according to Article IV Section 431 of the Horry County Zoning Ordinance, a family is defined as "an individual or two or more persons related by blood, marriage or adoption living together as a single household unit, or, a group of not more than 5 persons not related by blood, marriage, or adoption, living together as a single family household unit". It is clear that the single family and duplex family homes located in Long Bay Estates that are currently being rented on a weekly basis are renting to large groups of people, many unrelated, certainly in excess of 5 (some of the homes have 7 bedrooms) that greatly exceed the number of occupants allowed by this ordinance. These large groups bring with them to this subdivision excessive traffic, excessive noise and excessive trash all of which is a nuisance to the homeowners in the area and all of which is to be prevented by the enforcement of the Horry County Zoning Ordinances.

10. Further, under Article XIII Section 1300 of the Horry County Zoning Ordinance it clearly states that "The Horry County Council shall fund sufficient personnel to administer and enforce the provisions of this ordinance. If the Zoning Administrator shall find that any of the

provisions of this ordinance are being violated, he shall notify in writing the person responsible for such violations, indicating the nature of the violation and ordering the action necessary to correct it. He shall order discontinuance of illegal use of land, buildings or structures; removal of illegal buildings or structures or of illegal additions, alter alterations, or structural changes, discontinuance of any illegal work being done: or shall take any other action authorized by this ordinance to ensure compliance with or to prevent violation of its provision.”

11. Furthermore, based on numerous complaints, County personnel have been aware of the violations of these ordinances for quite some time in the Long Bay Estates area.

12. That on numerous occasions the Plaintiff and others have presented to the very fine and responsible administrative staff of Defendant hard evidence and proof of the violations of these zoning ordinance provisions and asked for enforcement of the same. These violations continue unabated.

13. Further, this Plaintiff is prepared to show that there have been repeated violations in the past and that they continue on a weekly basis at the following residences located within Long Bay Estates Subdivision: 4903 Southern Exposure, LLC, Black Magic Beach Property, LLC, Edward J. Edelen, III, Gibson Long Bay, LLC, James and Patricia Turek, Long Bay Investments, LLC, No Egrets, LLC, Reginald Brasington, et al, Timothy and Amy Wilson, Anil Om, et al, Danny Perdue, et al, Frank and Sandra Holley, Glenmark Holding Limited Liability Company d/b/a Glenmark Holding, LLC, Janet Nease, Kevin and Deborah Riddett, Mariposa, LLC, Orders, LLC, Saleema S. Cobb, Ann B. Engles, Demetrio Katsudas, et al, Geneva Johnston, Heather Hall Martin Swift, et al, Long Bay Investment Properties, LLC, Merrill E. Gershwin, et al, Paul and Barbara Lewis and Susan Martin.

14. Further, that such action includes renting to more than 1 family unit within the terms of the ordinance, also on a repetitive basis, all in violation of the applicable ordinances.

15. Further, that this Plaintiff seeks enforcement by the Defendant pursuant to Article XIII Section 1300 of the zoning ordinance.



Thomas C. Brittain, Esq.  
THE BRITTAIN LAW FIRM, P.A.  
4614 Oleander Dr.  
Myrtle Beach, SC 29577  
(843) 449-8562 (Telephone)  
(843) 449-6148 (Fax)  
Attorney for the Plaintiffs

November 12, 2015  
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
 )  
 Robert DeCiero, a resident of Long Bay )  
 Estates Subdivision, Myrtle Beach, )  
 South Carolina, )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 Horry County, State of South Carolina, )  
 Defendants. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOR THE FIFTEENTH JUDICIAL CIRCUIT  
 CIVIL ACTION NO.: 2015-CP-26-8179

**ANSWER OF DEFENDANT**

FILED  
 HORRY COUNTY  
 2015 DEC 16 PM 4:38  
 MELANIE HUGGINS-WARD  
 CLERK OF COURT

TO: THOMAS C. BRITTAIN, ATTORNEY FOR THE PLAINTIFF:

Defendant Horry County, State of South Carolina ("Horry County"), answering the Complaint of Plaintiffs, states and alleges as follows:

**FOR A FIRST DEFENSE**  
 (Failure to State a Claim)

1. The Complaint fails to state facts sufficient to constitute a cause of action against this Defendant and should be dismissed, or judgment entered on the pleadings or such additional material as submitted and allowed. The Complaint states no cause of action recognized in law or equity, and contains no prayer for relief.

**FOR A SECOND DEFENSE**  
 (Qualified General Denial)

2. Each and every allegation of Plaintiff's Complaint not specifically admitted is denied.
3. Defendant is informed and believes the allegations contained in paragraph one (1) are true, and demands strict proof thereof. To the extent a response to Plaintiff's subjective description "long-time" is required, Defendant denies same.
4. Defendant ADMITS the allegations of paragraphs two (2), six (6), and ten (10).
5. Defendant is without sufficient information to ADMIT or DENY the allegations in paragraphs four (4), five (5), and seven (7), and demands strict proof thereof.
6. Defendant DENIES the allegations in paragraphs eleven (11), twelve (12), thirteen (13), and fourteen (14).

**copy**

7. Defendant ADMITS the allegations of paragraph three (3) only as to location of Long Bay Estates. Defendant is without sufficient information to admit or deny Plaintiff's subjective description of it as "once sleepy" and "little."

8. Defendant is informed and believes the allegations of paragraph eight (8) are true in part, that Long Bay Estates is zoned SF6 residential. Defendant is without sufficient information to admit or deny the remaining allegations and craves reference to the caption for the allegation "scores of owners support...Plaintiff as their representative" and moves to strike same.

9. Defendant ADMITS the recitation of Article IV, Section 431 of the Zoning Ordinance in paragraph nine (9), but DENIES the remaining allegations and demands strict proof thereof.

10. To the extent a response is required to paragraph fifteen (15), Defendant DENIES.

**FOR A THIRD DEFENSE**

(Public Duty Rule)

11. Each and every allegation or defense set forth hereinabove is incorporated.

12. Plaintiff's claims against Defendant are barred by the public duty rule.

**FOR A FOURTH DEFENSE**

(Sovereign Immunity)

13. Each and every allegation or defense set forth hereinabove is incorporated.

14. To the extent necessary, Defendant asserts the defense of sovereign immunity as a complete bar on the Plaintiff's claim. The General Assembly has not waived sovereign immunity for equitable claims seeking monetary relief.

**FOR A FIFTH DEFENSE**

(S.C.T.C.A.)

15. Each and every allegation or defense set forth hereinabove is incorporated.

16. To the extent the Court finds the claim is governed by the South Carolina Tort Claims Act, the Defendant is entitled to immunity under the Tort Claims Act, S.C. Code §15-78-10, *et. seq.*

**FOR A SIXTH DEFENSE**

(Standing)

17. Each and every allegation or defense set forth hereinabove is incorporated.

18. Plaintiff does not have standing to bring this action against this defendant.

**FOR A SEVENTH DEFENSE**  
(Failure to Name Necessary Parties)

19. Each and every allegation or defense set forth hereinabove is incorporated.
20. Plaintiff failed to name necessary and indispensable parties he references in the Complaint.

**FOR AN EIGHTH DEFENSE**  
(Waiver)

20. Each and every allegation or defense set forth hereinabove is incorporated.
21. Plaintiff's claim, if such can be determined, is barred by waiver.

**FOR A NINTH DEFENSE**  
(Laches)

22. Each and every allegation or defense set forth hereinabove is incorporated.
23. Plaintiff's claim, if such can be determined, is barred by the equitable doctrine of laches.

**FOR A TENTH DEFENSE**  
(Statute of Limitations)

24. Each and every allegation or defense set forth hereinabove is incorporated.
25. Plaintiff's claim, if such can be determined, is barred by the applicable statute of limitations.

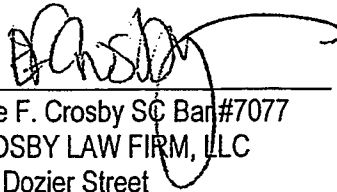
**FOR AN ELEVENTH DEFENSE**  
(Ripeness / Failure to Exhaust)

26. Each and every allegation or defense set forth hereinabove is incorporated.
27. Plaintiff does not have a ripe case or controversy against the defendant.
28. Plaintiff has failed to exhaust all available administrative remedies.

WHEREFORE, Horry County prays for an Order:

- A. Dismissing Plaintiff's Claim;
- B. Awarding the Defendant its costs and attorney's fees associated with defending this action; and
- C. That this Court inquire into the matters presented herein and issue such Order as it shall deem just and proper.

Respectfully submitted,



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Attorney for Defendant Horry County

Georgetown, South Carolina  
December 12, 2015

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY ) 2015-CP-26-8179

Robert DeCiero, et al., )  
 )  
 Plaintiffs, ) Transcript of Record  
 )  
 vs. ) June 1, 2016  
 )  
 Horry County, et al., )  
 )  
 Defendants. )

B E F O R E:

Honorable Benjamin H. Culbertson  
Horry County Courthouse  
Conway, South Carolina

A P P E A R A N C E S:

Thomas C. Brittain, Esquire  
Attorney for Plaintiffs

Elise F. Crosby, Esquire  
Attorney for Defendants

Grace L. Hurley, CVR-CM-M  
Circuit Court Reporter

1 (There were no exhibits marked during the hearing.)

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1 (On the record, June 1, 2016.)

2 THE COURT: All right. Next I have 2015-CP-26-8179,  
3 thank you, is Robert --

4 MS. CROSBY: DeCiero, Your Honor.

5 THE COURT: DeCiero.

6 MR. BRITTAIN: DeCiero.

7 THE COURT: I knew I was going to pronounce it wrong,  
8 Robert DeCiero --

9 MR. BRITTAIN: Robert DeCiero.

10 THE COURT: versus Horry County. All right. Please give  
11 the court reporter your names and who you represent.

12 MS. CROSBY: Elise Crosby, Your Honor, on behalf of Horry  
13 County.

14 MR. BRITTAIN: I'm Tommy Brittain on behalf of Robert  
15 DeCiero.

16 THE COURT: All right. Ms. Crosby, this is your motion  
17 to dismiss?

18 MS. CROSBY: Yes, sir, Your Honor.

19 THE COURT: All right. Let me hear from you.

20 MS. CROSBY: Thank you, Your Honor. May it please the  
21 Court. This is sort of a dual motion, and I, I don't know  
22 that I've ever done it this way before, but it's a motion to  
23 dismiss under 12(b)(6) and it's also a summary judgment  
24 motion.

25 A little bit of, I guess, procedural history, this case

1 was brought in the end of, end of November.

2 MR. BRITTAIN: That's about right.

3 MS. CROSBY: 2015.

4 MR. BRITTAIN: Yeah.

5 MS. CROSBY: It was served. It was answered. In  
6 answering the case, the pleadings are clearly in the Court's  
7 file, I realized raising the affirmative defenses nothing was  
8 pled. It's my understanding South Carolina is not a notice  
9 pleading state. There are zero causes of action, and there is  
10 no prayer for relief. I did answer what I deduced or maybe  
11 helped the Plaintiff come to what his prayer for relief might  
12 be or what his causes of action might be. I even went so far  
13 as to look at the cover sheet that was filed, and it was  
14 identified as a real estate action handwritten zoning  
15 enforcement. So I went with the handwritten zoning  
16 enforcement on the cover sheet, quite honestly, in trying to  
17 deduce what exactly the Plaintiff wanted. It's a fairly long  
18 complaint, and it sort of brought to mind Pat Conroy who I  
19 loved, but he would go on and on for pages before he would  
20 sort of make a plot shift. There is, again, Your Honor, no  
21 cause of action. Mr. DeCiero apparently resides, this is  
22 undisputed fact, in Long Bay Estates, a neighborhood in Horry  
23 County, and it is completely undisputed that it is zoned SF6,  
24 which is a single family zoning in Horry County. It does not  
25 permit mobile homes. It does permit duplexes, churches,

1 daycares and the like. A building permit will not issue an  
2 SF6 for anything but a single family home or a duplex. There  
3 is a provision where you can have a mother-in-law apartment or  
4 an appurtenant structure with a separate kitchen, but other  
5 than that it's single family homes and duplexes. He goes on  
6 and characterizes it as a sleepy community and so forth, but  
7 he says there is noise, there's traffic and there's trash  
8 associated because some of his neighbors rent out their homes,  
9 but he doesn't even really say some of the neighbors rent out  
10 their homes. I think he, he says, for the Court's attention,  
11 page two of the complaint, [as read], "It is clear that the  
12 single family and duplex family homes located in Long Bay  
13 Estates are currently being rented on a weekly basis," and he  
14 goes on with the groups of people that they're being rented  
15 to. Horry County, Your Honor, if it is a zoning enforcement  
16 case, which I do not concede that it is because I don't know  
17 what it is, but if it is, Horry County does not have a short-  
18 term rental ordinance. The City of Myrtle Beach does, and I  
19 think the affidavits reflect that Mr. DeCiero has been many  
20 times, actually he's been I think a couple of times, Mr.  
21 Brittain has been several other times, to talk about this  
22 issue, handing Horry County Zoning Administrator, Janet  
23 Carter, and Arrigo Carotti, the attorney, copies of Myrtle  
24 Beach's ordinance, and as an officer of the court there are  
25 cities and counties all across the state and other states that

1 are facing short-term rental issues with B & B and so forth.  
2 Horry County has specifically and expressly determined that  
3 they are not addressing short-term rentals. The last time  
4 they did so was quite some time ago. It was 2004 and that  
5 material is in here. It's an attachment, I think, to Janet  
6 Carter's affidavit at E. It's minutes of the infrastructure  
7 and regulation committee meeting, again, Your Honor, from  
8 2004. Mr. DeCiero was present and there was a motion in that  
9 subcommittee regarding consideration of a short-term rental  
10 prohibition or ordinance addressing it, and the motion died  
11 for a second. It didn't even make it out of committee. For  
12 whatever reason politically, Horry County Council does not  
13 wish to address short-term rental in this area, and at the  
14 risk of kind of starting at the end, I would direct the  
15 Court's attention to Exhibit F to the affidavit of Janet  
16 Carter filed with my memorandum and motion in this case.  
17 Exhibit F is a map.

18 THE COURT: All right.

19 MS. CROSBY: It's a two-page map of some zoning  
20 designations. It's not the full county, but the, the zoning,  
21 the SF6 zoning is sort of the gold or tan color, and on the  
22 second page of Exhibit F, Long Bay Estates is down there.  
23 It's situated, Your Honor, it's oceanfront neighborhood. It's  
24 next to those campgrounds kind of, I guess, close to the old  
25 air base. It's got zoning for mobile homes across the street.

1 It's down there on Business 17, and if Your Honor could look  
2 at the first page of Exhibit F you'll see there's single  
3 family zoning throughout, sort of the south beach, as well as  
4 the rest of the county, and it includes the whole of Garden  
5 Beach City is zoned SF6.

6 Whether or not those homeowners have chosen to rent out  
7 their homes to beach renters on a weekly basis, I have no  
8 idea, and no facts have been presented whatsoever by affidavit  
9 or otherwise to show that any houses have been rented to  
10 beachgoers, but I think that everyone in this courtroom  
11 probably realizes that, that houses on Garden City Beach  
12 sometimes are rented through the process of short-term rental.  
13 Horry County, again, politically has not elected to restrict  
14 homeowners renting their property out. It's just -- it's  
15 simply as a matter of fact not an ordinance on the books.

16 So I guess going back to the 12(b)(6) there are no causes  
17 of action. There is no prayer for relief, and Mr. DeCiero  
18 does not have standing to bring, to bring this case. The  
19 reason I argue that is because that's actually precedent. In  
20 the Carnival Corporation Cruise Line case, which is fairly  
21 recently, 2014, Supreme Court took original jurisdiction on  
22 that case, and I've cited it in the memorandum, Your Honor,  
23 was authored by Justice Hearn. It was a unanimous opinion.  
24 She was joined by all of the justices at that time, Pleicones,  
25 Beatty, Toal and Kittredge, and in that case homeowners in

1 Ansonborough, the neighborhood in Charleston, were suing the  
2 Carnival Corporation. They cited a host of problems with the  
3 Carnival Cruise Line, pollution, noise, impeding the view,  
4 traffic, terrible problems, and what the Court, what the  
5 Supreme Court said is Mr. or the Ansonborough Historic  
6 Association, none of those homeowners had standing because the  
7 test for standing is a three-part test including  
8 particularized injury and that was a 12(b)(6) motion. That's  
9 why I'm adding the, I guess the standing argument to that part  
10 of it. Statute 6-29-950 requires a private party seeking to  
11 enjoin a zoning violation must be specifically especially  
12 damaged, and the Court, let's see, injury in fact, was there  
13 an injury in fact, and the Supreme Court in the Carnival case  
14 said there was no injury in fact particular to any of the  
15 individuals that weren't suffered by anybody in the  
16 neighborhood or going through the neighborhood, and they  
17 specifically cited noise and trash among many other things.  
18 In this case in the pleadings there is a reference to, because  
19 I really looked hard for what injuries might be, excessive  
20 traffic, excessive noise and excessive trash. He claims that  
21 this is a nuisance. Again, it wasn't brought as a nuisance  
22 action. It wasn't brought as an abatement action. It wasn't  
23 brought against the other homeowners. Mr. DeCiero is familiar  
24 with how to do that. He has sued the other homeowners. I  
25 think he brought an action against the HOA to enforce their

1 ordinances or to add new deed restrictions or something of the  
2 like, which would be completely appropriate.

3         So the -- he doesn't have standing to bring this case.  
4 He's brought it against the County, which is a little bit  
5 unusual because he's saying that it's the County that is  
6 causing him some kind of damage and there's no ordinance for  
7 the County to enforce, which then brings me to summary  
8 judgment, but I would submit to the Court that this case is  
9 entirely appropriate for dismissal under 12(b)(6) for failure  
10 to state a claim for relief and lack of Plaintiff's standing,  
11 and again, Your Honor, those -- I did brief the law and the  
12 facts --

13         THE COURT: All right.

14         MS. CROSBY: -- for the Court when I filed the motion.

15         As far as summary judgment, I don't know if we want to  
16 address -- I have not been served with any motion regarding  
17 that, but I guess at some point yesterday by e-mail I got a  
18 motion that Mr. DeCiero wanted to continue that. I would --

19         MR. BRITTAIN: Yeah. Let me address that, if I could.  
20 What my practice has always been to have a motion to dismiss  
21 heard, if I prevail then begin the discovery process. These  
22 motions were filed in April, and so we filed a motion  
23 yesterday. You know, 26(f) says if the case isn't old enough,  
24 there hasn't been enough discovery, summary judgment has  
25 become the worst thing that we can do in this courtroom.

1 THE COURT: Okay.

2 MR. BRITTAIN: A lot of the facts --

3 THE COURT: So this was started when?

4 MR. BRITTAIN: Huh?

5 THE COURT: When was this lawsuit filed?

6 MR. BRITTAIN: Well, the motion to dismiss and a motion  
7 for summary judgment were filed in April of this year.

8 THE COURT: Okay. All right.

9 MR. BRITTAIN: But my point is what I was thinking, and I  
10 talked with Ms. Crosby about this, and let me tell you  
11 something, I like her. She, she and I go way back. She's a  
12 great lady, wonderful lawyer. There's no hard feelings here.  
13 I thought we would hear the motion to dismiss today. If we  
14 prevailed on that, then we would take discovery, do some  
15 depositions. She has sent me some documents. I intend to  
16 take some depositions because I think there are issues of fact  
17 here, but, but certainly if the Court's not going to continue  
18 the summary judgment motion, we can go ahead and hear that  
19 today, too, but I have asked because I don't believe the facts  
20 have been properly corralled for the Court to make a decision  
21 in the case.

22 THE COURT: All right. Well, I'll -- let me see.

23 MS. CROSBY: Your Honor, if I --

24 THE COURT: What -- I've got --

25 MS. CROSBY: I might address the timeline. We have --

1 - we've provided all the discovery responses sought by Mr.  
2 DeCiero. He did request discovery in March, and we provided  
3 it all in April.

4 MR. BRITTAIN: I need to take several depositions, Your  
5 Honor.

6 MS. CROSBY: And the --

7 THE COURT: Well, I mean, did you file two separate  
8 motions because I only see a motion to dismiss on my roster.

9 MS. CROSBY: I joined them. The motion is --

10 THE COURT: They're all in one motion?

11 MS. CROSBY: They are. They're a joint motion.

12 THE COURT: Okay.

13 MS. CROSBY: I styled it -- what did I call it?

14 MR. BRITTAIN: I've never seen that happen to be honest  
15 with you.

16 MS. CROSBY: To dismiss under 12(b)(6) and for summary  
17 judgment under Rule 56.

18 THE COURT: All right. Well, let's go ahead and let me,  
19 let me hear his arguments on the motion to dismiss on that.

20 MR. BRITTAIN: Okay. Your Honor, here again, a little  
21 background, I've been representing various individuals at Long  
22 Bay for 20 years. There has been litigation over this  
23 subdivision in this state and in this county for 20 years, and  
24 what you have there is a neighborhood, old Mr. Burroughs, the  
25 old, old Mr. Burroughs set up the restrictive covenants and

1 the development back in the old days, and there's been a lot  
2 of litigation over people trying to shorten, change the, the,  
3 the lot lines, put a lot more houses in there, this sort of  
4 thing, that has been litigated. It's circuit Court of Appeals  
5 twice and the Supreme Court once, all of it substantiating the  
6 restrictive covenants that Mr. Burroughs brought.

7       What we put forth in this case, once all that was  
8 resolved was that your zoning ordinance and this is and Ms.  
9 Crosby figured it out, so the pleading must have been  
10 successful, your zoning ordinance says you cannot -- only have  
11 two families living in a house, one or two, which is exactly  
12 what the restrictive covenants at Long Bay say, and what Mr.  
13 DeCiero says and what Janet Carter admits in her affidavit is  
14 that he's been over there numerous times, shown them evidence  
15 of ten or 15 cars at a residence, told them that numerous  
16 families are there, that it's violating the ordinance, that  
17 they have a duty to enforce their ordinance. We're not  
18 looking to change it to get a short-term rental addition.  
19 That's what they want me to do, go through the legislative  
20 process and try to change the ordinance. What we're saying is  
21 your ordinance is being violated on a consistent basis.  
22 They've gone down there and built gigantic homes that have  
23 seven and eight bedrooms in them, and they are consistently  
24 renting them to multi-family units. We've told them this,  
25 and, Ms. Crosby -- not, not her, there's no reason to be

1 disingenuous about it. That is what is occurring.

2 Now, this matter needs to be litigated with facts. Let's  
3 say for example the Court agreed to dismiss this case today.  
4 We get nowhere. He's one resident. I mean, what we need to  
5 do is agree to bind everybody in that subdivision, Ms. Crosby  
6 and I, take some discovery and complete it. It's a non-jury  
7 matter, didn't bring it under the jury, and let a judge rule  
8 based on a preponderance standard as opposed to dismissing it  
9 out of hand with no facts. We've given her the information we  
10 want. Now, this is a valid question. If the County's going  
11 to pass an ordinance that says you can have one or two  
12 families in a residence and we have gone and showed them that  
13 they're having seven and eight with testimony and photographs,  
14 and Mr. DeCiero says that in his affidavit and --

15 THE COURT: But I mean, and excuse me for interrupting --

16 MR. BRITTAIN: Yeah.

17 THE COURT: -- is it a violation of the ordinance if I  
18 live there to have my son come visit and bring his family and  
19 have my other son come and bring his family and have my  
20 daughter come and bring her family and we spend Christmas  
21 together, is that violating the ordinance?

22 MR. BRITTAIN: That's not, but if you rent it out from  
23 Garden City Realty to six families from Pennsylvania over,  
24 over and over where the owner's not even present, that does  
25 violate it. That's our position at least.

1 THE COURT: All right.

2 MR. BRITTAIN: And, and we have enough information. I've  
3 met with the County. Mr. DeCiero's met with the County.  
4 Don't get me wrong. I mean, you know, the Court has to do  
5 what it has to do. This is an issue that's got to be  
6 litigated somewhere. If it's not litigated with Bob DeCiero,  
7 I mean, if, if we get rid of this case today on some sort of  
8 procedural argument, it just it doesn't do anybody any good.  
9 Now, we may lose overall, but it looks to me like the way to  
10 do that, and the Supreme Court has said they don't want  
11 motions to dismiss. They don't want summary judgments. They  
12 want the Court to have the benefit of the information and then  
13 make the decision. I've been doing this a long time. Every  
14 time there's summary judgment granted anymore against me or  
15 for me, I go up there and it comes back because the standard  
16 is a scintilla of evidence, and in both of these affidavits  
17 they're present. There's a scintilla of evidence that would  
18 give the Court pause in dismissing the case with, with two  
19 affidavits having been filed. So we think we have, and  
20 finally, Ms. Crosby says, "Hey, look it's a failure to enforce  
21 the zoning ordinance." That's exactly right. This is not a  
22 money case. We're not asking the County to pay us any money.  
23 We're simply asking the County, and I point out to you this,  
24 this is part of their ordinance. Now, I want to make sure the  
25 Court because I didn't realize it was this direct, this

1 ordinance in Section 300 provides in part this, [as read],  
2 "The Horry County Council shall find sufficient personnel and  
3 fund them to administer and enforce the provisions of this  
4 ordinance." So part of this discussion here, it's hard to  
5 tell whether they're in there or not, and you know, what we  
6 say is, no, when, when it's clear that there are 10 cars in  
7 there one week from Pennsylvania and ten cars in there the  
8 next week from Arkansas that you've got multi-family dwelling  
9 going on as part of a commercial enterprise.

10 THE COURT: So why hasn't he brought the suit against the  
11 property owner that's doing the renting?

12 MR. BRITTAIN: Well, that, that -- we have. We have  
13 brought it against some and we have won against some, but it  
14 gets expensive to bring it against seven or eight property  
15 owners. So what we're asking the County to do is enforce  
16 their ordinance, which seems to be a fair -- I mean, look  
17 let's say that happened in any other neighborhood and you're  
18 living there, you've been living there, you know, with your  
19 neighbor in a duplex down the street and all of a sudden a  
20 four-story house goes up and you've got 27 motorcycles out  
21 there during bike week, you can't ask the County to come in  
22 and enforce its zoning ordinance against the, the use of that  
23 property, and the case she cites from the Supreme Court, with  
24 all due respect to her, and like I said I admire her, admire  
25 her legal thinking, too, but this is wrong. This is -- this

1 was a cruise ship. They didn't have any improper use from the  
2 land. They weren't even on the land. They came up and, and  
3 docked and the people couldn't see what they wanted to see  
4 while they were docking. So the Supreme Court said, of  
5 course, that's not a zoning ordinance issue, but here we're  
6 talking about people that are building houses for a commercial  
7 purpose in direct violation of the zoning ordinance, and, and  
8 the time has come. We have discussed Myrtle Beach with them  
9 because Myrtle Beach took this issue on on what they call the  
10 golden mile up there where they had all these single family  
11 resident homes and people that bought them and lived in  
12 Pennsylvania they started renting them out to weddings and,  
13 and big weekend parties where there'd be 40 or 50 people  
14 there, and so the City of Myrtle Beach went back to a 1987  
15 ordinance which provided the same thing this one does, single  
16 family, duplex, and they enforced it. They enforced it  
17 against the people that were misusing those homes in violation  
18 of the zoning ordinance. We're not telling them that we want  
19 them to do it exactly like Myrtle Beach. What we've been  
20 telling them is that, you know, just like Myrtle Beach took  
21 this on you can take it on, and unlike Myrtle Beach that had  
22 40 or 50 of these, we're talking about seven or eight homes  
23 right down there at the bottom end of Long Bay.

24 THE COURT: Yeah, but I mean, for the purposes of this,  
25 this motion hearing Horry County hasn't taken it on; is that

1 correct?

2 MR. BRITTAIN: That's exactly right.

3 THE COURT: Okay.

4 MR. BRITTAIN: That's, that's part of -- that's what this  
5 hearing is about is we are asking the County to investigate,  
6 which it is their duty to do, find the facts and enforce the  
7 zoning.

8 Now, that's been clearly set out. This is not a money  
9 case. This is a case requesting that the County take that  
10 action. Now, there's one thing in here I want to --

11 THE COURT: But I mean, when you're saying enforce it,  
12 what are you asking the County to do?

13 MR. BRITTAIN: To let no more than two families --

14 THE COURT: I mean, how do they do that? Tell me what  
15 you want the County, send a police officer out there and evict  
16 them or --

17 MR. BRITTAIN: Well, I --

18 THE COURT: -- what?

19 MR. BRITTAIN: -- I think the County, I think the County  
20 would and we would help them, provide this, we would get the  
21 rental records from the companies that, that are renting those  
22 homes, who they're renting them to and on what basis, provide  
23 that information to the County. If the County can't get it,  
24 we can get it, and then based on those facts, which we've  
25 already given them that information. I haven't given it to

1 them maybe in the, in the form that, that the Court would  
2 require it, but I can subpoena those records and get that  
3 information, give it to the County and then issue a letter to  
4 the owners of those homes that it is illegal to commercially  
5 rent these units on a weekly basis to numerous families, and  
6 to do so is in violation of the zoning ordinance and it will  
7 be enforced, then go down there and see if that's happening,  
8 and just like any other governmental requirement, I mean, it  
9 takes a little work, you know, to enforce it, but they've told  
10 you, they've told us all the citizens they're going to fund  
11 it, they're going to, to enforce it. What's happened over the  
12 years it's because of what happened over in Garden City, and  
13 they've just let this go. Now, we have a manageable situation  
14 in Long Bay, but for purposes of today here's my point to you,  
15 Your Honor, this argument should be made at the tail end of  
16 testimony and evidence. We've given them the basis for what  
17 this lawsuit is about. If you rule today on a procedural  
18 issue then Jane Doe who lives in Long Bay would bring the --  
19 could bring the action and, and fit into the various  
20 procedural issues. The one point Ms. Crosby makes that I  
21 think is valid but it's different than what I have ever heard  
22 before until I read her brief was that we should go to the  
23 zoning board first. When talking to Janet Carter and, and --  
24 the lawyer for the County we were led to believe that was not  
25 anything that they could or would do, that they would change

1 zonings. We're not asking for a zoning to be changed. We say  
2 there are obvious violations of the zoning ordinance for great  
3 money-making propositions, that these wealthy people are doing  
4 it flagrantly and the County's ignoring it to the detriment of  
5 the neighborhood. Now, that's all in the pleading. It  
6 deserves a fair hearing. We may lose, but we should not be --  
7 this case should not be dismissed at this stage, and we  
8 shouldn't have a summary judgment decision where the Court's  
9 going to decide on a scintilla of evidence with two  
10 affidavits. Let's work together, speed it up, I've got no  
11 problem with hurrying it up, give us a period of time to take  
12 depositions, get a solid record and have a hearing in front of  
13 a court where they're making a preponderance decision so it  
14 has a good chance of resolving the issue between all the  
15 parties.

16 THE COURT: All right. Anything in reply?

17 MS. CROSBY: Well, I don't know that it's reply. I  
18 thought that Mr. Brittain was actually addressing the 12(b)(6)  
19 part of the motion prior to my arguing my summary judgment  
20 motion. It seems like he kind of argued them both. I do,  
21 yes, sir, want to start with his reference a couple of times  
22 to two different affidavits. There's only one, and it's the  
23 affidavit from Janet Carter. If the Court entertains the  
24 submission of Mr. DeCiero's affidavit which don't even know if  
25 it's filed. It was e-mailed yesterday to me. I would ask

1 that it be stricken not because it's prejudicial but because  
2 it's not, but because it wasn't served and filed under the new  
3 rule with the reply memorandum, but even if I'm not going to  
4 be picky about that because I would never want anybody to do  
5 that to me, it wasn't even served and filed two days prior to.  
6 It was just e-mailed yesterday.

7 I would point out that that is the only affidavit, if the  
8 Court does consider it. There is no, no, no evidence of any  
9 of those facts in this Court's record that Mr. Brittain just  
10 stated. The term ten cars, today's the first time I have ever  
11 heard it. Motorcycles, Pennsylvania, Ohio, nothing is in this  
12 Court's record about any of those details whatsoever. The  
13 affidavit in fact, the only specific violation or, I guess  
14 alleged violation he refers to in the affidavit that is my  
15 position should be stricken is from 2004. He references he  
16 saw a bus in 2004. There's nothing from anybody about cars or  
17 motorcycles or anything else, and in the complaint there's  
18 just an allegation scores of owners support this complaint and  
19 Plaintiff as their representative. Well, we know that the HOA  
20 has determined not to form itself and add deed restrictions  
21 along the lines of what he wants, and we also know that there  
22 are zero affidavits from any neighbors or any other residents  
23 alleging any of these things, but more importantly and I guess  
24 most importantly and critically to the summary judgment is  
25 there's not even any evidence, a scintilla of evidence from

1 Mr. DeCiero, the Plaintiff, that there's any violation going  
2 on and I use the term violation loosely, because there is no,  
3 there is no, and this is in Janet Carter's affidavit clearly,  
4 there is no prohibition on short-term rentals. The zoning  
5 regulations are clear that it's for single-family homes and  
6 duplexes. There are setbacks. There are height restrictions.  
7 Whatever your lot size is you have to build within what the  
8 County has in that zoning. Zoning can be amended. It can be  
9 amended by the County. It can be initiated by the citizens  
10 and residents or the property owners. That hasn't been done  
11 in this case. Apparently the permits that have been issued,  
12 and that hasn't been challenged, have been compliant with  
13 county zoning in every way. There have been no allegations of  
14 this two-family thing, and I tell you what that is because  
15 interestingly it's not cited in his memorandum on the summary  
16 judgment motion. The two-family thing is a definition of  
17 family when it says single-family or duplex. Definition of  
18 family is for building permit purposes you're going to issue a  
19 building permit for one kitchen in the place or two kitchens  
20 in the duplex or three if you have an appurtenant structure.  
21 That's what the single-family thing is, designed for up to two  
22 families is what it, is what it says, actually it's two  
23 families and then the definition of family goes on, but again,  
24 it's -- this is definitely --

25 THE COURT: So you're saying that the ordinance that says

1 single family or duplex does not restrict the number of people  
2 that can stay there?

3 MS. CROSBY: Correct. Yes, Your Honor, and if that is a  
4 problem, just like in the Carnival case the court said, [as  
5 read], "Courts are not bodies for the resolution of public  
6 policy. Harms suffered by the public at large are to be  
7 remedied by the legislative and executive branches. If  
8 existing laws and regulations or their enforcement fail to  
9 protect the public from harm, it's incumbent upon the public  
10 to seek reform through their elected officials or failing  
11 that, at the ballot box," and I submit to the Court that Mr.  
12 DeCiero like many people throughout I guess zoning history is  
13 not happy with what his neighbors are doing, but the remedy  
14 for that is not to come to this court, a, and b, not to come  
15 to this court improperly and I would go back to my motion. I  
16 did address as a defense and in my motion for summary judgment  
17 and motion for dismissal the failure to exhaust administrative  
18 remedies. That isn't even an easy or ripe, and I address  
19 ripeness, too, because the case is simply not ripe because  
20 there's no zoning violation. If he says there are ten cars  
21 and a basketball team and so forth, go to Janet Carter. If  
22 she makes the decision and he disagrees with it, he goes to  
23 the zoning board, but he's never even brought Janet Carter the  
24 evidence of it. There's no evidence in this Court's record  
25 that he has ever done that, and Janet Carter wrote a detailed

1 affidavit about all of her interactions with Mr. Brittain and  
2 with him and she's never received any notice of a specific  
3 zoning violation.

4 As far as summary judgment, the facts I think are mostly  
5 stipulated to. Everything raised in that or, in fact, 100  
6 percent stipulated to. There's nothing raised in the  
7 memorandum by the Plaintiff that we do not agree with. The  
8 ordinance says what the ordinances says. Let's see -- the --  
9 he says it's zoned F6. Yes. It's zoned F6. He says that the  
10 ordinance discourages high multi-family -- there's one  
11 ordinance, discourages high multi-family residential,  
12 commercial, industrial or other uses incompatible with  
13 residential character. We agree. We stipulate to that. The  
14 thing that we disagree with is his assertion, and I included  
15 this in my reply brief to his memorandum, the Defendant, which  
16 is the County, asserts it would be difficult to enforce the  
17 rentals and that enforcement of the ordinance requirements  
18 would require substantial expense. That is not anything that  
19 has ever been said, and the County disagrees with that. What  
20 Janet Carter, in fact, said that's a mis-, I guess  
21 misconception of what her testimony is, is she said, "I  
22 further explained past concerns preventing the adoption of  
23 such an ordinance, included the County's inability to monitor  
24 rentals and enforce such an ordinance," which basically, Your  
25 Honor, I think is what the Court alluded to earlier when

1 asking about the Christmas scenario. I would just submit that  
2 there is, there is no evidence. Summary judgment is  
3 appropriate in this case. It is timely filed. Discovery has  
4 been conducted by the Plaintiff. We're seven months into the  
5 case, and a party against whom a claim is asserted may at any  
6 time with or without supporting affidavits move for summary  
7 judgment in his favor as to all or any part thereof. That's  
8 Rule 56(b), and I would submit to the Court that if this Court  
9 reaches summary judgment it is wholly and entirely appropriate  
10 in this case based on the affidavits submitted to the Court,  
11 the facts and the law, but I would first ask, I guess, as a  
12 threshold matter that the case be dismissed for failure to  
13 state a claim for relief and that Mr. DeCiero does not have  
14 standing. Thank you, Your Honor.

15 THE COURT: All right.

16 MR. BRITTAIN: Your Honor, briefly since Ms. Crosby's  
17 trying to get me in trouble with my clients, let me, let me  
18 respond to this issue about the affidavit. I had this down as  
19 a motion to dismiss which I think is what it should be. I've  
20 never in 38 years of practicing law argued a motion to dismiss  
21 and a summary judgment motion on the same day, and it's not  
22 fair under the rules and it's not proper. A motion to dismiss  
23 is an issue that's very different than summary judgment  
24 motion. In an abundance of caution we prepared an affidavit.  
25 Now, there's everything in Janet Carter's, Carter's deposition

1 it's so convoluted and has different positions that even if  
2 you don't take my client's affidavit, which remember now we  
3 filed a memorandum 30 days ago. Even if you didn't take that  
4 affidavit, which was, was provided by e-mail yesterday,  
5 yesterday, day one, today, day two, even if you don't take it,  
6 there is conflicting testimony under Janet Carter's affidavit  
7 enough to create a scintilla of evidence. Ms. Crosby's just  
8 set it out for you. Ms. Carter's affidavit keeps talking  
9 about there being no violation and here's why, and this is  
10 where the great disconnect is, they claim in order to prevail  
11 or even file a lawsuit we have to have a violation that's  
12 based on short-term rental. No. We, we don't accept that  
13 position. She admits that she has met with DeCiero. He has  
14 informed her what's going on down there, that the families are  
15 --

16 MS. CROSBY: That's what I disagree with, Your Honor.

17 THE COURT: All right.

18 MR. BRITTAIN: Yeah. You disagree with it, but that's in  
19 his affidavit and it's in hers.

20 THE COURT: But I mean, do you -- so you disagree that  
21 the ordinance when it says single family and duplex that that  
22 deals only with the construction and not -- and does not -- so  
23 you're saying it only limits two, two families in a home.

24 MR. BRITTAIN: That's right. All zoning --

25 THE COURT: So what is the exception for a vacation where

1 you invite son, daughter, parents, let's get to our house for  
2 Christmas? What distinguishes that from this?

3 MR. BRITTAIN: Well, what distinguishes that from this is  
4 that's not a commercial enterprise on a, on a significant --

5 THE COURT: Well, where does the ordinance say a  
6 commercial enterprise?

7 MR. BRITTAIN: Well, I mean, what I'm prepared to do,  
8 that technically would violate it, but I'm not -- I don't want  
9 to address that. I -- technically that's more than two  
10 families staying there, living there, but I don't want to get  
11 over there because that is an unnatural interpretation of  
12 what's intended. Here's what the zoning ordinance is trying  
13 to do, Judge. It's trying to protect a neighborhood so that  
14 there'll be similar circumstances, similar densities. We know  
15 what zoning is all about.

16 THE COURT: But if you follow that argument then why  
17 don't they adopt the short-term rental?

18 MR. BRITTAIN: Well, that would certainly clarify other  
19 conduct in the neighborhood. This one happens to flagrantly  
20 violate the number of family issues. Seven and eight, now,  
21 here again, that's been shown to the county. I mean, they,  
22 they, they no question about that. Now, here again, if we got  
23 a situation where the next resident needs to come show Ms.  
24 Crosby more stuff I don't think it's, I don't think it's a  
25 real part of this case. I think they know exactly what's

1 going on down there. Her affidavit admits that there is.  
2 When she gives you the opinions in the affidavit it's based on  
3 this short-term rental issue. Now, here's my point to you,  
4 Your Honor.

5 THE COURT: Well, I mean, but isn't your client's  
6 argument based on his opinion?

7 MR. BRITTAIN: No. My client --

8 THE COURT: I mean, you've got, you've got somebody with  
9 the County who interprets the ordinance.

10 MR. BRITTAIN: Right.

11 THE COURT: And you've got your client who's interpreting  
12 it differently.

13 MR. BRITTAIN: Right.

14 THE COURT: But they're both based on opinions as to  
15 whether or not it's a violation.

16 MR. BRITTAIN: Well, they're based -- but what the Court  
17 needs to do is have a full presentation of the facts and then  
18 the Court can interpret it. You don't have that today. What  
19 you have today are one affidavit, which I would say Ms.  
20 Carter's still creates a, a scintilla of evidence for us, even  
21 hers. Then you have mine which has been challenged based on  
22 the date it was submitted, which creates an issue of fact.  
23 Now, what we're talking about with motions to dismiss and  
24 scintilla of evidence are when you've got the wrong person.  
25 We're not talking about a situation where you and I have had a

1 15-minute conversation about what should or shouldn't happen  
2 and that results in a motion to dismiss or a motion for  
3 summary judgment. Those, those, those vehicles are here and  
4 that's why the motion to continue the summary judgment motion  
5 is valid. 26(F) says when there hasn't been sufficient  
6 development of the facts and this is a six-week old motion,  
7 then it shouldn't be heard because it needs to be something  
8 that everybody's comfortable with exactly what the underlying  
9 facts are so the Court can apply the law to it. We don't have  
10 that situation here, and I would submit to the Court that six  
11 weeks is not enough time for me to have taken the depositions  
12 I need to take.

13 THE COURT: All right. I understand your argument. I'm  
14 going to take it under advisement. I'll let you all know my  
15 decision.

16 MR. BRITTAIN: All right.

17 THE COURT: All right.

18 MR. BRITTAIN: Thank you.

19 MS. CROSBY: Thank you, Your Honor.

20 THE COURT: Thank you.

21 (Adjourned.)

22

23

24

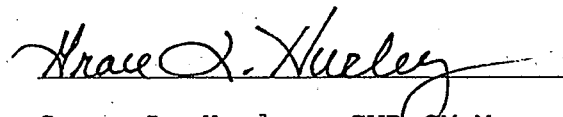
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C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the Hearing held in the case of Robert DeCiero, et al. versus Horry County, et al., held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on June 1, 2016.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Grace L. Hurley, CVR-CM-M  
Official Reporter

July 20, 2016.

STATE OF SOUTH CAROLINA )

COUNTY OF HORRY )

Robert Deciero, a resident of Long Bay Estates Subdivision, Myrtle Beach, South Carolina, )

Plaintiff, )

vs. )

Horry County, State of South Carolina, )

Defendant. )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NO.: 2015-CP-26-8179

Defendant's Notice of Motion and  
Motion to Dismiss under Rule 12(b)(6)  
and for Summary Judgment under Rule 56

HORRY COUNTY  
2015 APR 14 PM 12:06  
CLERK OF COURT

TO: THOMAS C. BRITTAIN, ESQUIRE, attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE THAT the Defendant in this action, Horry County, South Carolina ("the County"), by and through its undersigned attorney, will move before the Presiding Judge of the Fifteenth Judicial Circuit at the Horry County Courthouse, Horry County, South Carolina, at such time and place as may be set by the Court, for an Order dismissing the Complaint under Rule 12(b)(6) SCRCF for failure to state facts sufficient to constitute a cause of action and/or for an Order pursuant to Rule 56, SCRCF, granting summary judgment and dismissing with prejudice the Plaintiff's Complaint against the Defendant.

This motion is based upon the following grounds, supported by memorandum1:

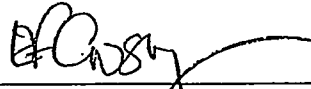
1. Plaintiff fails to allege facts to support a cause of action;
2. Plaintiff lacks standing; and
3. The claim is not ripe, and so there is no justiciable claim for this Court to adjudicate.

1 in compliance with the Order of the South Carolina Supreme Court 2015-09-10-01

COPY

This motion is based upon the pleadings filed in this case; the rules of court, affidavits, and such other matters as may be properly presented to the Court at the time of the hearing.

Therefore, the defendant Horry County respectfully requests that this court dismiss the complaint against with prejudice and award it costs.



---

Elise F. Crosby #077  
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(843) 546-3103  
(843) 546-0747 (facsimile)

Attorney for Defendant Horry County

Georgetown, South Carolina  
April 14 2016

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
 )  
 Robert Deciero, a resident of Long Bay )  
 Estates Subdivision, Myrtle Beach, )  
 South Carolina, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Horry County, State of South Carolina, )  
 Defendant )

IN THE COURT OF COMMON PLEAS  
 FIFTEENTH JUDICIAL CIRCUIT  
 CASE NO.: 2015-CP-26-8179

Memorandum in Support of  
 Defendant's Motion to Dismiss/  
 Motion for Summary Judgment

2016 APR 14 PM 12:06  
 HORRY COUNTY  
 COURT CLERK

NOW COMES the Defendant, by and through undersigned counsel, and respectfully submit this memorandum in support of its motion for an order granting summary judgment in this case.

PROCEDURAL HISTORY

On November 13, 2015, Plaintiff filed his Complaint. The County timely served its Answer, asserting affirmative defenses, including—relevant to the instant motion-- failure to state a claim for relief, standing, failure to name necessary parties, and ripeness/ failure to exhaust administrative remedies.

ANALYSIS

The Complaint raises no ripe, justiciable claim, summary judgment should be granted for the County, and the case should be dismissed. 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. *Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531 (2005)

I. The plaintiff fails to state a claim for relief

Under Rule 12(b)(6), a Complaint will be dismissed if it fails "to state facts sufficient to constitute a cause of action." *Carnival Corp. v. Historic Ansonborough Ass'n*, 753 S.E.2d 846 (S.C. 2014.) In considering a motion to dismiss under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint. *Id.*, citing *Doe v. Marion*, 373 S.C. 390 (2007).

COPY

The plaintiff makes numerous allegations but no prayer for relief. The County submits the only content in the Plaintiff's Complaint by which a prayer for relief could be reasonably deduced is where he "seeks enforcement...of the Zoning Ordinance." (para. 15.) He does not seek a writ of mandamus or declaratory judgment, and on the Coversheet, he identifies "Real Estate" "zoning violation" as the nature of his action. Nor is this a zoning appeal, addressed *infra*. The Complaint is more than just inartfully pled; its failure to state a claim for relief is fatal.

## II. The plaintiff lacks standing

For a plaintiff to possess standing three elements must be satisfied. First, the plaintiff must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. *Id.* citing *Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res.*, 345 S.C. 594 (2001). Second, a causal connection must exist between the injury and the challenged conduct. Third, it must be likely that a favorable decision will redress the injury. *Id.* In *Carnival*, downtown Charleston residents sought an injunction, among other remedies, against large cruise ships docking on the peninsula, citing a host of negative effects. The court upheld the dismissal of the Complaint on the ground the residents lacked standing to bring their claims under the three-pronged test. *Id.* at 850.

In order for an injury to be particularized, it must affect the plaintiff in a personal way. *Carnival* at 851, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). "§6-29-950's requirement that a private party seeking to enjoin a zoning violation must be specially damaged incorporates the particularized injury requirement of general standing doctrine as a requirement." *Carnival* at 852. Even reviewing his complaint in the light most favorable to him, Mr. Deciero alleges no injuries particular to him. No other Long Bay Estates owner joins him in this case. The only claim that could be construed as injury is reference to traffic, noise, and trash, "a nuisance to the homeowners in the area..." (para. 7, 9.) This is a smidgen of what the Charleston residents together claimed in *Carnival*, where the South Carolina Supreme Court found pollution, traffic, noise and a host of other horrors would not support standing:

"Lacking from these allegations is any claim that Plaintiffs themselves...have suffered a particularized harm. All members of the public suffer from and are inconvenienced by traffic congestion, pollution, noises, and obstructed views, and Plaintiffs have not alleged they suffer these harms in any personal, individual way. In short, these allegations are simply complaints about inconveniences suffered broadly by all persons residing in or passing through the [the affected area] and therefore, Plaintiffs fail to establish the first element of standing." *Id.* at 852.

The second element for standing is a causal connection to the claimant's injury. In this case, the plaintiff challenges no conduct and cites no injury. Because of the failure of the first two, even reaching the third element is nonsensical.

Mr. Deciero cites no injury, alleges no causation, and no "favorable decision" can redress any injury. Similarly to the Charlestonians, he alleges "only generalized grievances...and fail(s) to allege any particularized harm." *Carnival* at 582. His case fails to meet the requirements for standing under the law.

### III. No justiciable controversy exists

"The existence of an actual, justiciable controversy is essential to jurisdiction to render a declaratory judgment. A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination..." *Eagle Container v. County of Newberry* 666 S.E.2d 892 (2008) citing *Orr v. Clyburn*, 277 S.C. 536, 542 (1982). "Justiciability encompasses the doctrines of ripeness, mootness, and standing." *Holden v. Cribb*, 349 S.C. 132, 136 (Ct.App.2002).

Mr. Deciero claims his subdivision is a "once sleepy little neighborhood" between King's Highway and the Atlantic Ocean (Complaint p. 1). He acknowledges the neighborhood is subject to its own valid restrictive covenants. (Complaint para. 6.)<sup>1</sup> Yet, he has chosen to sue the County, not his HOA, "prepared to show that there have been repeated violations..." (Complaint para. 13, emphasis added). The County does not enforce private covenants. If he's referencing the Zoning Ordinance, his argument is the very essence of why this case should be summarily dismissed as unripe. Being "prepared to show a zoning violation," especially when not actually showing one, does not start in circuit court.

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<sup>1</sup> See *Deciero et al. v. Long Bay Property Owners*, 1998-CP-22-4275

A. Plaintiff has not exhausted administrative remedies

"The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to...the general rule." *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, (1994). Under Horry County's Zoning Ordinance §1306, "Whenever a violation of this ordinance...is alleged to have occurred, any person may file a written complaint...stating fully the causes and basis thereof..." Further, under §1309, "all questions arising in connection with the enforcement of the ordinance shall be presented first to the Zoning Administrator and...shall be presented to the Board of Zoning Appeals (BZA) only on appeal." Under § 6-29-800, S.C. Code, the BZA has the power "to hear and decide appeals where it is alleged there is error in an order, requirement, decision, or determination made by an administrative official in the enforcement of the zoning ordinance." §6-29-800(A)(2). "Appeals to the board may be taken by any person aggrieved...." §6-29-800(A)(2). This would presumably include Plaintiff. "[A] claim challenging application of land-use regulations is not ripe unless the agency charged with implementing the regulations has reached a final decision regarding their application to the property at issue. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U. S. 172, 186 (1985). Not only has Plaintiff failed to appeal, he has failed even to provide any evidence-- much less "stating fully the...basis thereof"-- of a zoning violation, alleging "repeated violations" when there are none. (Aff. of Carter.)

B. There is no zoning violation

"[T]he text of a statute is considered the best evidence of the legislative intent or will." *Eagle Container* at 738. Rental is not prohibited in SF6. (Aff. of Carter). "SF6" is a zoning district in the zoning ordinance characterized as "residential, no mobile homes allowed, minimum lot size 6,000 sf (SF) or 8,000 sf (duplex)." Horry County Zoning Ordinance Art. VIII. "It is the intent of this district to provide for medium-density one and two family residential purposes." §707. Plaintiff has not presented the County with any evidence of any property in Long Bay Estates in violation of this. (Aff. of Carter).

"The first question of statutory interpretation is whether the statute's meaning is clear on its face." *Wade v. Berkeley County*, 348 S.C. 224, 229, (2002). The court need not go to legislative intent if an ordinance's plain meaning can be ascertained. Nowhere in the Horry County zoning ordinance is short term residential rental prohibited (Aff. of Carter.) If the court were to try to determine legislative intent for the purposes of this motion, it "must construe such ordinances to allow people to use their property so as to realize its highest utility....It follows that the terms limiting the use of the property must be liberally construed for the benefit of the property owner. *Eagle Container v. County of Newberry*, 622 S.E.2d 733 (Ct. App 2005, rev'd on other grounds.)

SF6, the zoning classification of Long Bay Estates, permits duplexes, or two-family dwellings, along with single family dwellings. Those terms have a plain ordinary meaning and are also defined: "Dwelling, single-family: a building designed, constructed, and used for one dwelling unit." §430.1 "Dwelling, duplex: a building designed, constructed, or reconstructed and used for two dwelling units that are connected by a common wall." §430.3. Thusly, no permit or certificate of occupancy would issue for construction of an apartment complex, mobile home, hotel, triplex, or the like. SF6 neighborhoods line the Grand Strand with homes and duplexes, and some owners choose to rent their properties. (Aff. of Carter.)

Short-term rental is a common issue in resort or coastal communities. Different communities' elected representatives have made decisions to meet their particular communities' needs. Similarly to Newberry County in the *Eagle Container* case, "[t]he Council is in a better position to make zoning decisions to "promote public health" and "protect general welfare." *Eagle Container* at 738. Despite having had the opportunity to address the issue and make restrictions if they so chose, Horry County Council has explicitly *not* restricted rental in SF6. (Aff. of Carter.)

C. This court is the wrong place for this complaint

Plaintiff is asking the circuit court to do what his councilmembers have not. "It is not the prerogative of the courts to pass upon the wisdom of County Council's decision." *Eagle Container*, citing *Bear Enters. v.*

*County of Greenville*, 319 S.C. 137, 140, (Ct.App.1995). "[T]he governing bodies...clothed with authority to determine residential and industrial districts are better qualified by their knowledge of the situation to act upon such matters than are the courts..." *Id.* "Courts are not bodies for the resolution of public policy and generalized grievances... If existing laws and regulations or their enforcement fail to protect the public from harm, it is incumbent upon the public to seek reform through their elected officials or failing that, at the ballot box." *Carnival* at 853.

If Mr. Deciero wants the zoning ordinance amended, a political solution, his complaint is more properly addressed to County Council. If he wants existing private covenants enforced, which he claims prohibit short term rental<sup>2</sup>, his complaint is properly addressed to his HOA or against individual owners.

#### CONCLUSION

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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), SCRPC; *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334 (2005). Motions to dismiss under Rule 12(b)(6) and for summary judgment are addressed to the sound discretion of the trial court. Summary judgment for the County is appropriate in this case.

Respectfully submitted,



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Elise F. Crosby #7077  
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Georgetown, South Carolina 29440  
(843) 546-3103

Georgetown, South Carolina  
April 14 2016

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<sup>2</sup> The County doesn't dispute this

STATE OF SOUTH CAROLINA )  
 COUNTY OF HORRY ) IN THE COURT OF COMMON PLEAS  
 ) FIFTEENTH JUDICIAL CIRCUIT

FILED  
 HORRY COUNTY  
 2016 MAY 20 AM 11:27  
 MELANIE BUEGINS-WARD  
 CLERK OF COURT

Robert DeCiero, a resident of Long Bay  
 Estates Subdivision, Myrtle Beach, South  
 Carolina

) C/A No. 2015-CP-26-8179

) Plaintiffs,

) v.

) Horry County, State of South Carolina,

) **PLAINTIFF'S MEMORANDUM IN  
 OPPOSITION TO DEFENDANT'S  
 MOTION TO DISMISS / MOTION  
 FOR SUMMARY JUDGMENT**

) Defendants. )

**TO: THIS HONORABLE COURT AND ELISE CROSBY, ESQUIRE, ATTORNEY  
 FOR DEFENDANT:**

The Plaintiff, Robert DeCiero, ("Plaintiff") by and through his undersigned attorney, hereby submits this Memorandum in Opposition to Defendant's Motion to Dismiss / Motion for Summary Judgment, and in support thereof, would show the following:

**STATEMENT OF FACTS**

The facts relevant to the instant motion are established in Plaintiff's Complaint, as well as the testimony, if any, to be presented at the hearing on the Motion.

**PROCEDURAL HISTORY**

On November 13, 2015, Plaintiff filed his Complaint. The Defendant timely served its Answer which was followed by its Motion for Summary Judgment submitted, April 4, 2016. Defendant's claim that this case should be dismissed is baseless and without merit. At all relevant time, the material facts of this case are sufficient and constitute proper adjudication.

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## STANDARD OF REVIEW

### I. Motion for Summary Judgment

To grant a motion for summary judgment, the court must find that “there is no genuine issue as to any material fact.” *Fed.R.Civ.P.* 56(c). Summary Judgment is appropriate “when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed.” *Garvin v. Bi-Lo*, 343 S.C. 625, 541 S.E. 2d (2001). Summary judgment is not appropriate “when further inquiry into the facts of the case is desirable to clarify the application of the law.” *Doe v. Batson*, 338 S.C. 291, 525 S.E. 2d 909 (Ct. App. 1999). Since it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. Further, “the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Vermeer Carolina’s, Inc. v. Wood Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E. 2d 301 (Ct. App. 1999). Further, “the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Management Co., Inc.*, 673 S.E. 2d 801 (S.C. 2009).

## ARGUMENT

### I. **The Defendant is not entitled to summary judgment based upon the fact Plaintiff has shown there to be a genuine issue as to a material fact alleged in his Complaint.**

The merits of this case are sufficient to surviving summary judgment. Plaintiff resides in a residential district zoned by Defendant’s ordinance as SF6. The district is characterized as “residential, no mobile homes allowed, minimum lot size of 6,000 sf (single family) or 8,000 sf (duplex).” Horry County Zoning Ordinance Art. VIII. “It is the intent of this district to provide medium-density one and two family residential purposes. **Encroachment by high-density multi-family residential, commercial, industrial, or other uses incompatible with or capable**

of adversely affecting the residential character of this district shall be discouraged.” §707. “The text of a statute is considered the best evidence of the legislative intent or will.” *Eagle Container v. County of Newberry* 666 S.E.2d 892, 738 (2008). The text of §707 makes apparent the intent of the Defendant’s Code of Ordinance. In other words, the commercial rental schemes being operated are in direct contradiction with the comprehensive plan for SF6 districts. The Defendant fails to discourage or prohibit the encroachment by high-density multi-family short-term commercial rentals. Defendant admittedly states that “short-term rental is a common issue in resort and coastal communities.” (Memorandum, p. 5) The issue here has outgrown a reasonably tolerable condition. Defendant asserts that it would be difficult to police the rentals and that the enforcement of the ordinance requirements would require substantial expense on the part of Horry County. However, Defendant’s ordinance §1300 provides in relevant part, “The Horry County Council shall fund sufficient personnel to administer and enforce the provisions of this ordinance.” Thus, Defendant inability to monitor encroachments or other uses incompatible with or capable of adversely affecting the residential character of Plaintiff’s district fails to be a valid defense to upholding the duties and responsibilities associated with administration and enforcement of its Ordinance.

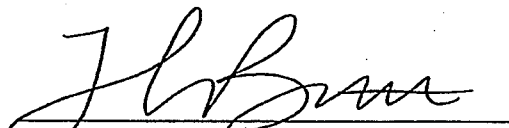
The conduct at issue in this case continues and Defendant is in total disregard even after being repeatedly notified of the unlawful nature of the activity. Defendant’s failure to enforce its own ordinance is a willful and reckless abandonment of the duties and responsibilities owed to its citizens. Plaintiff has suffered and continues to suffer from the conduct which constitutes a concrete, particularized, and actual invasion of the legal interest intended to be protected through Defendant’s zoning ordinance. Plaintiff’s injury and disposition are causally connected to the

conduct being challenged and Defendant's failure to act. A decision favorable to the Plaintiff would redress the issue by way of requiring Defendant to enforce its very own Ordinance.

As such, Plaintiff has more than met their burden to produce a mere scintilla of evidence in order to withstand a motion for summary judgment in this matter.

**CONCLUSION**

Plaintiff, respectfully requests that this Court deny, in full, Defendants' Motion to Dismiss / Motion for Summary Judgment, and in doing so, any further action as this Court deems necessary, just, and proper.



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Myrtle Beach, SC 29577  
(843) 449-8562 (Telephone)  
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Attorney for the Plaintiff

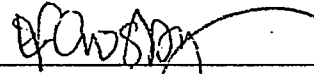
May 19, 2016  
Myrtle Beach, South Carolina



come from Janet Carter's Affidavit at 10 and Exhibit B: "I further explained that past concerns *preventing the adoption of such an ordinance* included the county's inability to monitor rentals and enforce such an ordinance..." The County has repeatedly and unfaithfully said there is no such ordinance. It is misleading and incorrect for Plaintiff to turn this upside down for the Court and argue the County is failing to enforce an ordinance he has been told by the County does not exist. The County has been presented with *no violation* of the ordinance actually in place, and so there is *no "enforcement of the ordinance"* to address. Horry County does not regulate short term rental in SF6. (Affidavit of Janet Carter.)

For the reasons stated in its Memorandum in Support of Motion to Dismiss/ Motion for Summary Judgment, summary judgment for the County is appropriate in this case.

Respectfully submitted,



---

Elise F. Crosby #7077  
CROSBY LAW FIRM, LLC  
405 Dozier Street  
Georgetown, South Carolina 29440  
(843) 546-3103

Georgetown, South Carolina  
May 23 2016

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY  
Robert DeCiero, a resident of Long Bay  
Estates Subdivision, Myrtle Beach, South  
Carolina,

Plaintiff,

v.

Horry County, State of South Carolina,

Defendant.

) IN THE COURT OF COMMON PLEAS  
)  
) FIFTEENTH JUDICIAL CIRCUIT  
)  
) C/A No.: 2015-CP-26-8179

FILED  
HORRY COUNTY  
2016 JUL 27 PM 2:28  
HELLANIE HUGGINS-NEEDS  
CLERK OF COURT

**MOTION TO RECONSIDER  
ORDER OF DISMISSAL**

**TO: THIS HONORABLE COURT AND ELISE F. CROSBY, ESQUIRE, ATTORNEY  
FOR DEFENDANT:**

Now comes attorney for Plaintiff Robert DeCiero, a resident of Long Bay Estates Subdivision, Myrtle Beach, South Carolina (“Plaintiff”) and moves this Court to reconsider its previous Order of Dismissal pursuant to Rule 12(b)(6) S.C.R.C.P.

Defendant Horry County, State of South Carolina’s (“Defendant”) Motion to Dismiss/Motion for Summary Judgment was heard before the Honorable Benjamin H. Culbertson on June 1, 2016 at which time oral arguments were made by attorneys for Plaintiff and Defendant.

Attorney for Defendant argued, in part, that Plaintiff’s Complaint was deficient in that it failed to set forth a short and plain statement of the facts of the case, contained no causes of action and made no prayer for relief under Rule 8(a) and, therefore, Defendant was entitled to relief under Rule 12(b)(6) S.C.R.C.P. with all due respect the Court refused a citizen’s request to require the County to enforce its own zoning ordinance. None other than a citizen could have standing. Furthermore, there are no proof requirements at the dismissal stage.

Attorney for Plaintiff argued that Defendant’s arguments were inaccurate and that there were no Rule 8(a) violations in Plaintiff’s Complaint. The Complaint makes it clear that Plaintiff



believes the applicable zoning ordinance is being violated by the commercial explosion of six to eight families on a regular basis in a residential zone. The relief sought in the Complaint is for Defendant to enforce the appropriate zoning ordinance, as required to by law, and there is no monetary amount associated with this prayer for relief. Therefore, Rule 8(a) is not a basis for dismissal of this action.

Further, attorney for Plaintiff argued that Defendant's Motion is premature in that this case has not been fully litigated. Discovery is required, including the taking of depositions, in order to collect enough information to present before the Court so as to render a decision in this matter with respect to whether or not the zoning ordinance upon which the Plaintiff relies restricts short term rentals or the number of occupants. The Court would have to go outside the pleadings to make such a judgment in this case.

Following this hearing Judge Culbertson notified attorney for Plaintiff that he was granting her Motion to Dismiss thereby making her Motion for Summary Judgment moot and requested that a formal order be drafted for his review.

On July 18, 2016, attorney for Plaintiff received by U.S. mail an unfiled copy of the Order of Dismissal which was signed by The Honorable Benjamin H. Culbertson on June 22, 2016. In response, Plaintiff hereby submits this Motion to Reconsider the Order granting Defendant's Motion to Dismiss for the above-listed reasons. Further, Plaintiff reiterates any and all statements, evidence, case law, etc. contained in his previous memorandums of law and/or affidavits filed in relation to this action.

THE BRITAIN LAW FIRM



---

Thomas C. Brittain  
4614 Oleander Drive  
Myrtle Beach, South Carolina 29577  
843-449-8562 (Telephone)  
843-497-6124 (Facsimile)  
**Attorney for Plaintiff**

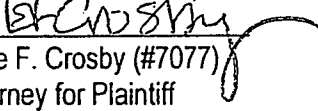
July 26, 2016  
Myrtle Beach, South Carolina



In sum, the court properly dismissed this Complaint under Rule 12(b)(6), and its reasoning was sound and based in fact and law. Defendant respectfully requests the court consider determining this matter without a hearing pursuant to its authority under the Civil Motions Pilot Program,<sup>1</sup> and deny Plaintiff's motion to reconsider.

Respectfully submitted,

CROSBY, LAW FIRM, LLC

  
Elise F. Crosby (#7077)

Attorney for Plaintiff

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Georgetown, S.C. 29440

Telephone (843) 546-3103

Facsimile (843) 546-0747

ecrosby@crosbyfirm.com

Georgetown, South Carolina

August 5, 2016

---

<sup>1</sup> Order of the Supreme Court 2015-09-10-01. (6): Motions pursuant to Rule 59(e) may be decided on briefs without a hearing.

IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

---

Case No. 2015-CP-26-8179

---

Robert DeCiero, a resident of Long Bay Estates Subdivision,  
Myrtle Beach, South Carolina .....Appellant,

v.

Horry County, State of South Carolina.....Respondent.

---

NOTICE OF APPEAL

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Robert DeCiero appeals the Order Denying Motion to Reconsider Order granting Defendant's Motion to Dismiss of the Honorable Benjamin H. Culbertson dated September 16, 2016. Appellant received written notice of entry of this Order on October 14, 2016.

October 18, 2015



Thomas C. Brittain, Esq.  
The Brittain Law Firm, P.A.  
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Myrtle Beach, South Carolina 29577  
843-449-8562  
Attorney for Appellant

Other Counsel of Record:  
Elise F. Crosby, Esquire  
Crosby Law Firm, LLC  
405 Dozier Street  
Georgetown, SC 29440  
843-546-3103  
Attorney for Respondent

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NO.: 2015-CP-26-8179

Robert DeCiero, a resident of Long Bay )  
Estates Subdivision, Myrtle Beach, )  
South Carolina, )  
 )  
Plaintiff, )

AFFIDAVIT OF JANET CARTER

vs. )

Horry County, State of South Carolina, )  
 )  
Defendant. )

HORRY COUNTY  
2016 APR 14 PM 12:06  
MELANIE HARRIS, CLERK OF COURT

PERSONALLY APPEARED BEFORE ME, Janet Carter, who being duly sworn under oath,  
deposes and states as follows:

1. I am a licensed attorney and serve as the Planning Director and I & R Counsel for Horry County, South Carolina.
2. I have served in that capacity for 13 years. Prior to that I served as Division Director over Planning, Zoning and Code Enforcement for two years and Deputy County Attorney for approximately two years.
3. My responsibilities include providing legal advice and counsel to the Infrastructure and Regulation (I&R) Division, including the Planning & Zoning and Code Enforcement Departments. I also supervise the Planning & Zoning Department and staff a variety of board, commission, committee, and county council meetings.
4. Pursuant to S.C. Code § 6-29-950 and § 1308 of the Horry County Zoning Ordinance, a violation of the Zoning Ordinance is a misdemeanor punishable by imprisonment for a period not to exceed thirty (30) days and a fine of not more than five hundred dollars (\$500.00) for each offense. Each day a violation continues constitutes a separate offense.
5. The Code Enforcement Department is responsible for issuing building permits and certificates of occupancy. Planning & Zoning administers and enforces the Zoning Ordinance with the assistance of Code Enforcement.

copy

6. Solicitor Jimmy Richardson has authorized me to prosecute zoning and code violations in magistrate's court.
7. On June 10, 2015, I received a letter from Attorney Thomas Brittain regarding Long Bay Estates. (EX. A) It was addressed to County Attorney Arrigo Carotti and me. The letter stated that it was a "formal complaint" pursuant to Horry County Ordinance No. 51-99 § 31 adopted 12/7/99.
8. I checked Ordinance 51-99 § 31 and found that it was a 1999 ordinance that adopted various amendments to the Zoning Ordinance. Section 31 revised parking regulations. Mr. Brittain's letter did not explain and I do not know why he referenced this ordinance.
9. Attorney Brittain's letter further stated that he represented "certain residents" and alleged "several homeowners" were violating "the substance of the zoning and planning ordinances." He referenced private deed restrictions and said multiple homeowners advertise their homes for weekly beach house rentals, which he asserted was "a direct violation of the law." He did not identify any properties or give any specific facts. He asked that we investigate immediately and enforce Ordinance 51-99 § 31 referenced above or that he would "file an action in the Horry County Court of Common Pleas if he did not hear from us by June 30. (EX. A)
10. County Attorney Carotti requested that I respond. By letter dated June 12, 2015. (EX. B), I responded to Attorney. Brittain's letter advising that the County has no specific ordinance regulating short-term rentals in neighborhoods although there had been previous discussions regarding the matter. I further explained that past concerns preventing the adoption of such an ordinance included the county's inability to monitor rentals and enforce such an ordinance, as well as the fact that there are short term rentals in residentially zoned communities all along the Strand. I stated that many of these properties had been vacation rentals for years and have the same zoning as Long Bay Estates.
11. Long Bay Estates is zoned SF6. SF6 is one of seven SF/MSF or single family districts. They differ in whether they allow mobile homes or duplexes, and of course by lot size and setbacks.
12. In all the SF/MSF districts, Code Enforcement ensures any building permit is for a house

or duplex consistent with the ordinance.

13. On July 13, 2015, County Attorney Arrigo Carotti and I met with Attorney Brittain and Plaintiff DeCiero. Again no specific information regarding any particular property or owner was mentioned. Mr. Brittain talked about how the City of Myrtle Beach was handling short term rentals and provided portions of the City's ordinances that specifically address transient occupancy, permanent homes, and minimum rental, lease, sublet, and timeshare periods in certain zoning districts.

14. I explained to Mr. Brittain and Mr. DeCiero that the county has not adopted any minimum rental periods and does not have any language in its zoning ordinance specifically addressing permanent homes, transient occupancy or timeshare ownership. I also explained that it would be difficult for the Council to adopt such regulations because in Garden City and other unincorporated areas of the County short term rentals have been the norm for a long time. I told them that in one section of Garden City all of the oceanfront, first, second, third, and fourth row beach houses are zoned SF6, the same zoning as Long Bay Estates.

15. During the meeting referenced above, I also explained that it was impossible to prosecute someone for violating the Zoning Ordinance for short term rentals when the ordinance does not address the issue and sets no minimum rental period. I stated that people have a right to know in advance what the law requires or prohibits so that they can conform their conduct.

16. During the same meeting County Attorney Carotti suggested that Mr. Brittain bring an action to enforce the covenants and restrictions Mr. Brittain had mentioned earlier or take the legislative route. Mr. Brittain said he was not interested in going the legislative route.

17. By letter dated September 17, 2015, Zoning Administrator Rennie Mincey and I received a "Memorandum" from Mr. Brittain (EX. C). The Memorandum details the private restrictive covenants and argues their validity.

18. Mr. Brittain's Memorandum cites the Zoning Ordinance's definition of "family" (EX. C p. 2). The Memorandum states "[i]t is clear that the single family and duplex homes located in Long Bay Estates that are currently being rented on a weekly basis are renting to large groups of people, many unrelated, that greatly exceed the number of occupants allowed by this ordinance."

19. Again, the complainant was Mr. Brittain, and there was no complaint to investigate: no address, no homeowner name, and no date or specifics of any kind.
20. I replied by letter dated September 21, 2015, directing his attention to the previous discussions the County has had on the topic, and to the availability of a private action. (EX. D)
21. To date, the County has not elected to address short term rentals. For example: May 6, 2004, six property owners addressed the Horry County Council Infrastructure and Regulation (I&R) Committee on the topic. Councilman Schwartzkopf moved that staff be empowered to make a decision on group housing and enforcement. His motion died for lack of second. (EX. E)
22. Many homeowners up and down the Grand Strand rent their homes as vacation rentals.
23. Oceanside neighborhoods in Garden City are zoned SF and MSF similarly to Long Bay Estates (zoned SF6). (See EX. F).
24. Since I have been with the County, there have never been prohibitions on this.
25. Robert DeCiero is the plaintiff in the lawsuit filed by Attorney Brittain. I do not know where Mr. DeCiero resides, but I have no reason to doubt that he resides in Long Bay Estates. He was one of the people that spoke to the I&R Committee in 2004.
26. At no time during the meeting with Attorney Brittain and Mr. DeCiero on July 15, 2016, or in the letters sent by Mr. Brittain on June 2, 2015, June 19, 2015, and September 17, 2015, did Mr. Brittain or Mr. DeCiero, provide any evidence or information whatsoever that showed or pertained to a violation of the Zoning Ordinance regarding any specific property.
27. Had a specific complaint regarding a zoning violation on a particular property been made, it would have been handled as all such complaints are handled. When a complaint of a zoning violation pertaining to a particular property is received, it is assigned to a zoning inspector who conducts a site visit, photographs the property, and issues a written warning if the violation is verified. The warning advises the person in violation of the nature of the violation and what is required to cure it. In questionable or complex cases, the person believed to be in violation is directed to contact the zoning administrator. A time period for compliance or getting in contact with the zoning administrator is also given. If the violation is not cured within the time given or an appeal to the Zoning Board of Appeals is not filed, a uniform summons is issued.

FURTHER THE AFFIANT SAYETH NOT.

Janet Carter  
Janet Carter

Sworn to before me this 14<sup>th</sup> day  
of April 2016.

[Signature]  
Notary Public for South Carolina

My Commission Expires: 11-3-16

THE BRITTAIN LAW FIRM, P.A.  
ATTORNEYS AT LAW  
4614 OLEANDER DRIVE  
MYRTLE BEACH, SOUTH CAROLINA 29577



THOMAS C. BRITTAIN  
MARY MADISON BRITTAIN LANGWAY  
A. PRESTON BRITTAIN  
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843-449-8562  
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June 2, 2015

Ms. Janet Carter  
Planning and Zoning Department  
1301 Second Avenue Ste. 1D09  
Conway, SC 29526

Arrigo P. Carotti, Esq.  
P.O. Box 1236  
Conway, SC 29528

**RE: Long Bay Estates Zoning Enforcement**

Dear Sir and Madam:

This is to advise you that my office has been retained to represent certain residents of the Long Bay Estates subdivision situated near the south end of Myrtle Beach in Horry County.

Please consider this as a formal complaint regarding violations pursuant to Horry County Code Ord. No. 51-99, § 31, 12-7-99.

After reviewing the relevant zoning district as set forth by your office, we believe that several homeowners are in violation of the substance of the zoning and planning ordinances for that area.

It is believed that Long Bay Estates, a private neighborhood, is zoned as a Residential District (SF 7) suitable for single-family residences. (Ord. No. 84-03, § 2, 10-7-03; Ord. No. 67-07, § 1, 5-1-07).

Moreover, the 1958 deed restrictions placed on each and every lot in Long Bay strictly states that the land use "shall be used only for private residential purposes...and use of not more than one family..." per dwelling. (Plat Book 25, page 22, recorded May 5, 1958).

Multiple homeowners in Long Bay advertise their property as what is commonly referred to as a "beach house" for weekly vacation stays in Myrtle Beach. This is a direct violation of the law.

The continued operation of the above-described severely conflicts with the original intent of the subdivision and is a nuisance to the law abiding residence of the same.

Pursuant to Code, please immediately investigate this matter and enforce the provisions of the ordinances of Horry County in order to assure compliance. (Ord. No. 51-99, § 31, 12-7-99.)


Ms. Janet Carter  
Arrigo P. Carotti, Esq.  
June 2, 2015  
Page 2

Please take notice that we intend to file an action in the Horry County Court of Common Pleas to contest the land use on these grounds and others if I do not heard from you by June 30, 2015.

Thank you for your prompt attention in this matter;

Yours truly,

THE BRITAIN LAW FIRM, P.A.



Thomas C. Britain  
TCB/all



Horry County Government

PLANNING & ZONING DEPARTMENT  
www.horrycounty.org



Horry County Government & Justice Center  
1301 Second Avenue  
Conway, South Carolina 29526  
Phone 843.915.5340 || Fax 843.915.6340

June 12, 2015

Thomas C. Brittain, Esquire  
The Brittain Law Firm, PA  
4614 Oleander Drive  
Myrtle Beach, SC 29577

Re: Your Letter of June 2 re Long Bay Estates

Dear Mr. Brittain:

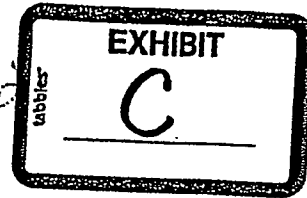
Horry County has no specific ordinance prohibiting short-term rentals in established neighborhoods. There have been previous discussions regarding the matter, but no ordinance was brought forward due to several concerns, including the inability of the county to police rental terms and enforce such an ordinance, as well as the fact that there are short term rentals in residentially zoned communities all along the Strand. Some of these developments were built specifically as resorts and mixed-use communities, while others are oceanfront, second, third and fourth row homes that have been vacation rentals for years. Many of these properties have the same zoning as Long Bay Estates, SF6.

Covenants and Restrictions are the most effective way to deal with his issue. However, that would be a private matter between the HOA and the home owners, and not something the county could enforce.

Sincerely,

Janet Carter  
Planning Director/I&R Counsel

THE BRITAIN LAW FIRM, P.A.  
ATTORNEYS AT LAW  
4614 OLEANDER DRIVE  
MYRTLE BEACH, SOUTH CAROLINA 29577



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A. PRESTON BRITAIN  
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September 17, 2015

Ms. Janet Carter  
Planning and Zoning Department  
1301 Second Avenue Ste. 1D09  
Conway, SC 29526

Ms. Rennie Mincey  
Planning and Zoning Department  
1301 Second Avenue Ste. 1D09  
Conway, SC 29526

**RE: Long Bay Estates Zoning Enforcement**


Dear Madams:

I wanted to follow up with my August 18<sup>th</sup> Memorandum, a copy of which is attached hereto, regarding the Long Bay Estates subdivision located in Horry County. In this Memo we provided both case law and zoning ordinances substantiating our position.

Please contact me at your earliest convenience to discuss where we are on this.

Yours truly,

THE BRITAIN LAW FIRM, P.A.

  
Thomas C. Britain  
TCB/all

cc: Arrigo Carotti, Esq.  
Robert DeCiero

## MEMORANDUM

To: Horry County Zoning

From: Thomas C. Brittain, Esquire, The Brittain Law Firm, P.A.

Date: August 17, 2015

RE: Long Bay Estates Subdivision, Myrtle Beach, Horry County, South Carolina

As our Supreme Court has explained, "restrictive covenants are contractual in nature." Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E. 2d 363, 365 (1974). The cardinal rule of construction in interpreting any contract is to ascertain and give effect to the intention of the parties. Such intent should, as nearly as possible, be gleaned from the instrument itself. Nance v. Waldron, 258 S.C. 69, 187 S.E. (2d) 226 (1972). Thus, "the language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution." Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006) (citation omitted).

Restrictions to be imposed on the Residential Property in the Long Bay Estates were recorded on May 5, 1958. In pertinent part, Paragraph (d) states: "This property shall be used only for private residential purposes and no more than one dwelling containing not more than two apartments or living units each for the occupancy and use of not more than one family..."

In an unrelated matter, on March 14, 2000 the Honorable J. Stanton Cross, Master of Equity for Horry County ruled in favor of the plaintiffs (*numerous* Long Bay Estates Property Owners) concerning the 1958 Restrictive Covenants for Long Bay Estates and makes clear that all lots in the Subdivision are subject to the conditions without exception. Further, the holding makes clear that any attempt to violate these restrictive covenants will result in court action.

These restrictive covenants were intended, among other things, to prohibit the use of a house as a vacation rental home. The use of a house as a vacation rental home is inconsistent with the plain language of the restrictive covenants applicable to the subdivision.

Here, the term "residential purposes" is not expressly defined by the restrictive covenants. "When a term is not defined within a contract, evidence of its usual and customary meaning is competent to aid in determining its meaning." Anderson v. Buonforte, 365 S.C. 482, 490, 617 S.E.2d 750, 754 (Cl. App. 2005). The term "residential" has been defined as "of, relating to, or having residence." The American Heritage College Dictionary 1161 (3d ed. 1997). "Residence" has been defined as "the place in which one lives; a dwelling." Id. Furthermore, the restrictive

covenants in this case expressly provide that the subdivision was intended exclusively for single-family dwellings.

The Supreme Court's decision in Hoffman is particularly instructive with regards to the issue of whether the use of a house as a vacation rental home is permitted in a subdivision with covenants restricting the use of property to residential purposes and single-family dwellings. In that case, the Court addressed whether the respondent's proposed construction of a 62-unit high-rise condominium complex violated the restrictive covenants of the subdivision the property was located in.

It is proper in construing restrictive covenants to consider "the overall plan of the subdivision as conceived and carried out," particularly when a subdivision is fully developed, consisting exclusively of single-family residences. In light of this overall plan of development, the Court found the restrictive covenants were designed to prevent the use of the land in a commercial nature such as for short term rental homes. Such land use is entirely inconsistent with the overall scheme of the subdivision, though rental homes are not strictly speaking a commercial use, it involves congestion and many of the undesirable characteristics incident to renting beachfront residences. The short term rentals in Long Bay have become a commercial-type operation, inconsistent with the whole tenor of the restrictions.

The use of a house as a vacation rental home is inconsistent with the plain language of the restrictive covenants applicable to the subdivision. The restrictions expressly limit the use of property in the subdivision to residential purposes and single-family dwellings. The use of a house as a vacation rental home constitutes a violation of the restrictions and ordinances.

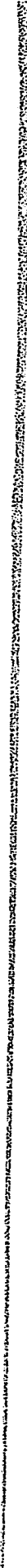
Further, Long Bay is currently zoned as an SF6 Residential District and, as such, is comprised of single family and duplex family dwellings. According to Article IV Section 431 of the Horry County Zoning Ordinance, a family is defined as "an individual or two or more persons related by blood, marriage or adoption living together as a single household unit, or, a group of not more than 5 persons not related by blood, marriage, or adoption, living together as a single family household unit." It is clear that the single family and duplex family homes located in Long Bay Estates that are currently being rented on a weekly basis are renting to large groups of people, many unrelated, that greatly exceed the number of occupants allowed by this ordinance. These large groups bring with them to this subdivision excessive traffic, excessive noise and excessive trash; all of which is a nuisance to the homeowners in this area.

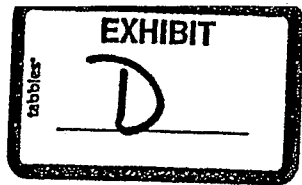
I understand that policing these rental homes to ensure they are complying with all applicable ordinances is a daunting task and one the County would prefer to avoid, however, under Article XIII Section 1300 of the Zoning Ordinance it clearly states that "The Horry County Council shall fund sufficient personnel to administer and enforce the provisions of this ordinance. If the Zoning Administrator shall find that any of the provisions of this ordinance are being violated, he shall notify in writing the person responsible for such violations, indicating the nature of the

violation and ordering the action necessary to correct it. He shall order discontinuance of illegal use of land, buildings or structures; removal of illegal buildings or structures or of illegal additions, alter alterations, or structural changes, discontinuance of any illegal work being done; or shall take any other action authorized by this ordinance to ensure compliance with or to prevent violation of its provision."

Our judicial system has upheld the enforcement of the governing restrictive covenants for Long Bay Estates and the current Ordinances for Horry County also uphold the restrictive use of these residential homes under their definition of family.

I assure you we are not asking the Horry County Zoning Board to exceed the boundaries of their authority as outlined in these Ordinances. We are simply asking the Board to uphold their duties and responsibilities to the citizens of Horry County who are residing in Long Bay Estates and to enforce the ordinances that were put in place for the safety and protection of these homeowners.





Horry County Government  
PLANNING & ZONING DEPARTMENT  
www.horrycounty.org

Horry County Government & Justice Center  
1301 Second Avenue  
Conway, South Carolina 29526  
Phone 843.915.6340 || Fax 843.915.6340

September 21, 2015

Thomas C. Brittain, Esquire  
The Brittain Law Firm, PA  
4614 Oleander Drive  
Myrtle Beach, SC 29577

Re: Your Memorandum of August 17, 2015 re Long Bay Estates

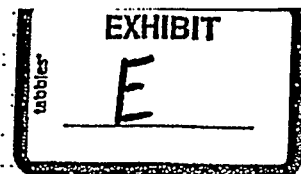
Dear Mr. Brittain:

I have reviewed your memorandum and offer these comments in response. In order to regulate short term rentals and transient accommodations Horry County would need to amend the zoning ordinance to identify the districts where short term rentals are allowed/prohibited and specify the minimum rental period allowed in these districts. There have been previous discussions regarding the matter, but no ordinance was brought forward because this issue can be handled through enforcement of covenants and restrictions if they prohibit such rentals. There were also concerns regarding the county's ability to police rental terms and enforce such an ordinance. There are short term rentals occurring in residentially zoned and mixed use communities all along the Strand. An ordinance of this type would have broad reaching effects and economic impacts to many property owners outside Long Bay Estates.

If activity is occurring in Long Bay Estates that violates the applicable Covenants and Restrictions as your memorandum states, an action to enforce those Covenants and Restrictions is the remedy currently available to your client.

Sincerely,

Janet Carter  
Planning Director/I&R Counsel



**MINUTES**  
**HORRY COUNTY COUNCIL**  
**Infrastructure & Regulation Committee Meeting/Budget**  
**Council Conference Room**  
**May 6, 2004**  
**2:00 p.m.**

**MEMBERS PRESENT:** Gene Smith, Chairman; Carl Schwartzkopf; Kevin Hardee; and Howard Barnard.

**MEMBERS ABSENT:**

**OTHERS PRESENT:** Danny Knight; Pat Hartley; Steve Gosnell; Janet Carter; Tommy Lee; Tom Garigen; Roland Meyer; Michelle Shumpert; and Lisa Bourcier.

In accordance with the FOIA, notices of the meeting were provided to the press stating the time, date, and place of the meeting.

**CALL TO ORDER:** Mr. Smith called the meeting to order at approximately 2:00 p.m.

**CHANGES TO AGENDA:**

Mr. Smith stated staff requested to add an Update on the Home Occupation Ordinance and Discussion on Rental Property- Five Person Limit.

Mr. Smith stated staff requested to defer the report on Waccamaw Medical Park Road & William Finlayson Road Update.

Mr. Smith requested to remove the Resolution to reallocate road fee funds to Long Leaf Drive because the matter was handled at the Council meeting.

Mr. Barnard moved to approve the changes, seconded by Mr. Hardee. The motion passed unanimously.

**APPROVAL OF AGENDA:** Mr. Schwartzkopf moved to approve the agenda as amended, seconded by Mr. Hardee. The motion passed unanimously.

**PUBLIC INPUT:** There was none.

**APPROVAL OF MINUTES:** April 8, 2004. Mr. Hardee moved to approve the minutes as submitted, seconded by Mr. Schwartzkopf. The motion passed unanimously.

**ADMINISTRATION & DEPARTMENT HEAD REPORTS:**

Status of easement acquisition and construction for Years 1-7. Mr. Smith deferred this item to the next meeting.

Update on Home Occupation Ordinance. Mr. Meyer presented the ordinance with the changes. The following people spoke:

1. Renee Jones.
2. Franklin Hughes.
3. Nancy Clark.
4. Jimmy Day.
5. Walt Faulk.
6. Pam Creech.
7. Larry Bratcher.
8. Renee Hughes.
9. Bill Sarvis.
10. Joanne Dollar.

Mr. Hardee moved to defer to the Planning Commission with the members of the I&R Committee meeting with them, seconded by Mr. Barnard. Mr. Schwartzkopf asked that they advertise and have public input. The motion passed unanimously. Chairman Gilland spoke about communication between Council and the community. Ms. Carter stated those interested in being on the mailing list for agendas could sign up in the Planning Department.

Mr. Smith called a recess at 3:20 p.m. The meeting reconvened at 3:30 p.m.

Rental Properties. Mr. Gosnell spoke about group housing and enforcement. The following people spoke:

1. Natasha Hanna, Hearn, Brittain & Martin Law Firm. She requested deferral.
2. John Musik.
3. Walter Sera.
4. John Pelarito, Long Bay Estates.
5. Howell Bellamy.
6. Bob DeCiero.

Mr. Schwartzkopf moved that the committee empower staff to make a decision and act and carry it out. The motion died for lack of a second.

PARTNERS Presentation/ Pine Ridge Business Center Offer. Mr. Woodle stated he had been approached by Western Horry Land & Timber, LLC to purchase 3.3 acres. The purchase price was \$100,000, and upon execution of the contract, Horry County guaranteed in writing that the remaining sites in the Pine Ridge Business Center wouldn't be sold for uses such as vending car wash and/or automotive service type facilities. Mr. Woodle stated the offer was substantially below the appraised value. He had an appraisal dated March 2004 on two acres beside the entrance, which was \$120,000 or \$60,000 per acre. Mr. Barnard moved to decline, seconded by Mr. Schwartzkopf. The motion passed unanimously.

Update on the status of the PDD changes. Ms. Carter presented the proposed amendments and the draft that was being considered by the Planning Commission. The PDD Committee had met several times and still had issues to be discussed such as submittal requirements, 25 ft. perimeter buffer, reversion clause, etc. Mr. Smith stated it may be on the June I&R Committee agenda.

GSW&SA request to purchase. Mr. Hardee recused himself from discussion. The issue was should Horry County negotiate a grant/sale of one (1) acre of land at Carolina Forest Recreation Site #3 to Grand Strand Water & Sewer Authority for an elevated water tank site. Mr. Lee stated they recommended asking GSW&SA to look elsewhere and if they came back and said they absolutely couldn't find anything else then he thought it was worthwhile. Mr. Schwartzkopf moved to accept Mr. Lee's recommendation, seconded by Mr. Barnard. The motion passed unanimously.

#### RESOLUTIONS/ORDINANCES:

A resolution to accept roads and drainage in Avalon Plantation/ID; A resolution to accept roads and drainage in Pebble Creek/ID; A resolution to reallocate road fee funds to Gary Road; and A resolution to remove a section of a road on the approved Year 6 through 11 paving improvement list and substitute certain other roads in District 8. Mr. Hardee moved to approve, seconded by Mr. Barnard. The motion passed unanimously.

An ordinance granting Santee Cooper a utility easement across Spoil Basin 13B. Mr. Smith recused himself from discussion. Mr. Schwartzkopf moved to approve, seconded by Mr. Barnard. The motion passed unanimously.

A resolution to approve the Stormwater Utility Credit Manual as approved by the Stormwater Advisory Board. The issue was the Horry County Stormwater Utility Fees Ordinance (Ord. 44-00) called for the creation of a credit system and adoption of a credit manual. The credit manual had been prepared and the Stormwater Advisory Board had voted in favor of recommending adoption by Horry County Council. Mr. Schwartzkopf moved to approve and to amend regarding the semiannual. The motion as amended passed unanimously.

Resolution regarding beach renourishment. The issue was a change in the Federal Administration's policy regarding cost sharing on-going beach renourishment projects around the nation. Staff recommended the approval of the resolution but no participation in the lawsuit. Mr. Smith requested a small presentation on the impact. Mr. Barnard moved to recommend Option B including the background information of not pursuing the lawsuit, seconded by Mr. Hardee. The motion passed unanimously.

#### BUDGET PRESENTATIONS:

I&R: Engineering: Stormwater: Public Works (470 & 471); Parks & Recreation: and Fund 06. Mr. Gosnell presented a slide presentation and stated all the criteria they asked for was met in the General Fund. They developed a list of things that could be funded out of Fund Balance. They came up with the top ten things they felt should be funded. This would go to full Council at the budget workshop for discussion and voting.

Mr. Schwartzkopf moved to accept the budget as presented at the last meeting and to approve the priority list as presented, seconded by Mr. Barnard. The motion passed unanimously.

Mr. Gosnell gave a brief overview of each department.

Mr. Smith suggested looking at a tax increase of a mil to balance the budget for Fund 06.

Mr. Barnard suggested they go back to Council with what staff had put together with the options and recommendations. Mr. Gosnell stated they would put the information together and provide that to Council.

Mr. Barnard moved to accept staff's recommendations with the changes in recreation, which was combining Parks & Recreation three funds into one fund by project and increasing the city and municipality funding from \$100,000 to \$200,000, seconded by Mr. Smith. The motion passed unanimously.

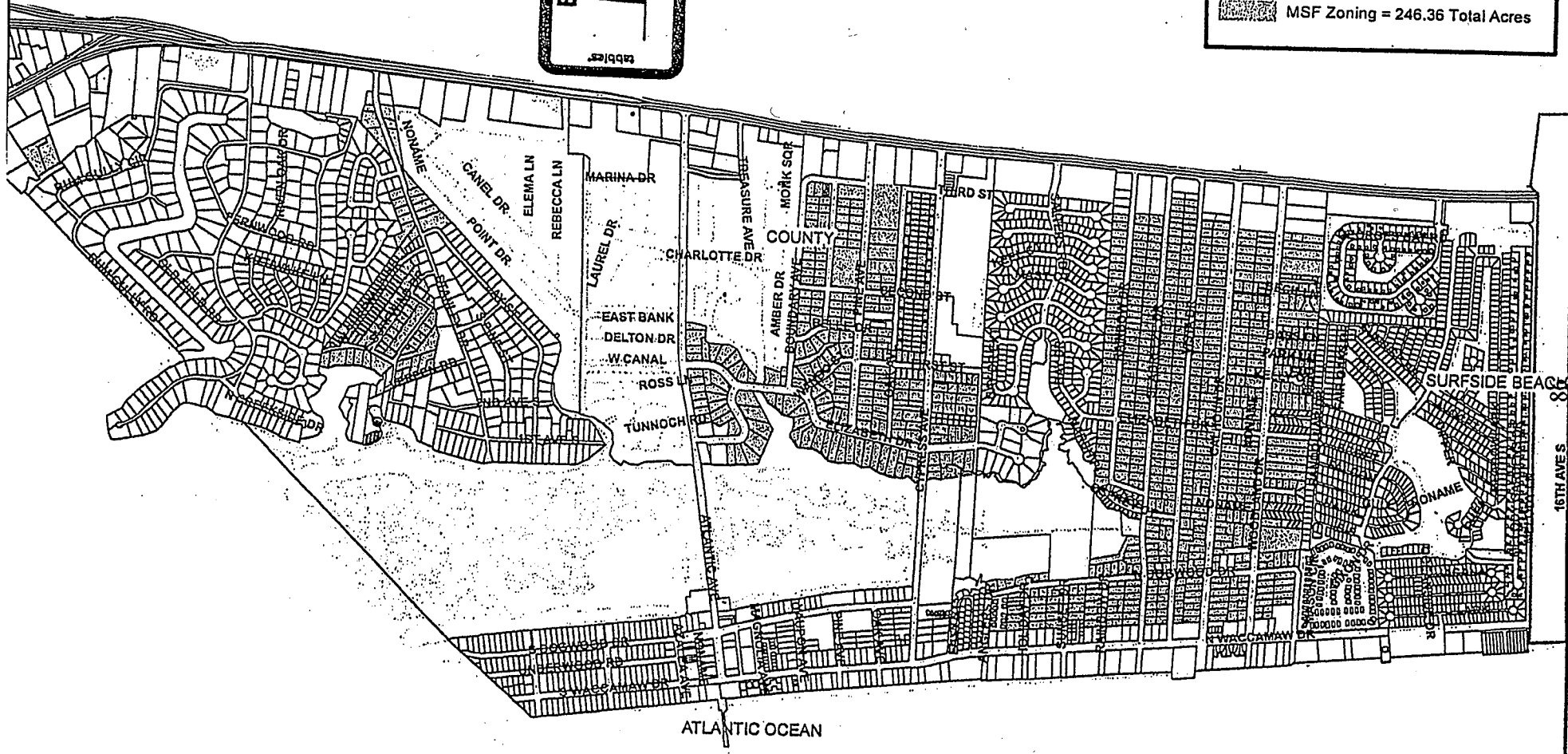
Mr. Gosnell stated regarding Fund 6, staff would present the history of the milage showing the impacts based on Council's direction, the fact that the minimum was two-thirds of a mil and staff recommended one mil and then they would address some of the areas in the County that had no service such as Mr. Lazarus' area and also try to address the cost per ton equity issue.

Mr. Barnard moved to adjourn, seconded by Mr. Smith. The motion passed. The meeting adjourned at 7:10 p.m.

EXHIBIT  
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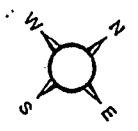
Horry County  
Single Family Residential Zoning  
South of Surfside Beach

SF Zoning = 280.60 Total Acres  
MSF Zoning = 246.36 Total Acres



Garden City Beach

ATLANTIC OCEAN







State of South Carolina  
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson  
Resident Circuit Judge

Mailing: P. O. Box 479 (zip code 29442)  
Location: 401 Cleland St. (zip code 29440)  
Georgetown, South Carolina  
Telephone: (843) 545-3030  
Facsimile: (843) 545-3282  
Email: bculbertsonj@sccourts.org

June 2, 2016

Elise F. Crosby, Esquire  
Crosby Law Firm, LLC  
405 Dozier Street  
Georgetown, SC 29440

Thomas C. Brittain, Esquire  
The Brittain Law Firm, P.A.  
4614 Oleander Drive  
Myrtle Beach, SC 29577

RE: *Deciero v. Horry County* (Case No. 2015-CP-26-8179)

Dear Ms. Crosby and Mr. Brittain:

I ask that Ms. Crosby prepare an order granting the defendant's Motion to Dismiss in the above referenced case pursuant to Rule 12(b)(6), SCRPC. I conclude as a matter of law that the zoning ordinance upon which the plaintiff relies in his claim for relief restricts construction in the Long Bay Estates Subdivision to single family and duplex dwellings, neither of which restricts short term rentals or the number of occupants. Therefore, the plaintiff fails to state a claim upon which relief can be granted. As a result of this ruling, the defendant's Motion for Summary Judgment is "moot."

Additional conclusions of law to support this decision may be included in the proposed order for my consideration provided that the conclusions are limited to the pleadings and no extraneous matters are referenced that would convert this decision to a summary judgment ruling.

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6-6-16

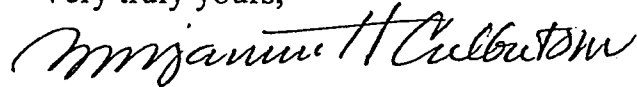
Elise F. Crosby, Esquire  
Thomas C. Brittain, Esquire  
June 2, 2016  
Page Two

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Be sure that the proposed order is provided to Mr. Brittain for review prior to submitting it to me for signature.

I thank you in advance for your prompt attention to this matter and with kindest regards, I remain

Very truly yours,



Benjamin H. Culbertson

BHC/bhc

IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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Case No. 2015-CP-26-8179  
Appellate Case No. 2016-002175

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Robert DeCiero, a resident of Long Bay Estates Subdivision,  
Myrtle Beach, South Carolina .....Appellant,

v.

Horry County, State of South Carolina.....Respondent.

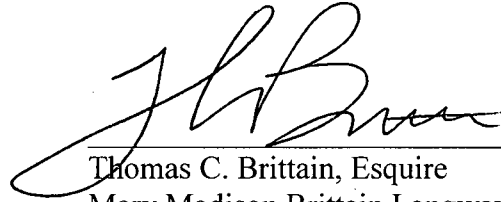
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**CERTIFICATE OF COUNSEL**

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We hereby certify that the Record on Appeal contains all materials designated to be included by any of the parties and not any other material.

**RECEIVED**  
MAY 18 2017  
SC Court of Appeals



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**Attorneys for Appellant**