STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Cole Towing and Recovery, LLC,

Plaintiff,

vs.

City of Spartanburg and Spartanburg City Council,

Defendants.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Civil Action No. 2017-CP-42-01468

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This case came before the Court on August 2, 2017, for a hearing on cross motions of the Plaintiff Cole Towing and Recovery, LLC, ("Cole") and the Defendants City of Spartanburg and Spartanburg City Council (the "City") seeking summary judgment pursuant to Rule 56, SCRCP. After careful consideration of the evidence, law, memoranda, affidavits, exhibits and oral arguments, the Court issued a Form 4C Order, filed on October 16, 2017, denying Cole's motion for summary judgment and granting the City's motion for summary judgment.

The Court now issues this more formal final Order setting out the basis for those rulings. For the reasons set forth below, the Court finds and concludes that there are no genuine issues of material fact and that the City is entitled to judgment as a matter of law. The Court, accordingly, denies Cole's motion for summary judgment and grants the City's motion for summary judgment.

NATURE OF THE CASE AND PROCEDURAL BACKGROUND

By Complaint filed on April 27, 2017, Cole, a towing company operating within the geographical limits of the City, challenged the constitutionality and legality of an Ordinance, enacted by the City Council on April 10, 2017, that regulated aspects of the nonconsensual towing of motor vehicles from privately-owned property. The Complaint prays for a declaration by the Court that the Ordinance is invalid on the grounds that it (1) conflicts with and is preempted by

S.C. Code §16-11-760, (2) violates the Contracts Clause of the United States Constitution, (3) violates 49 U.S.C. §14501(c)(1), and (4) deals with subject matter beyond its authority and police power by imposing price controls, burdening interstate commerce, and violating Cole's equal protection and due process rights. The Complaint further seeks a declaration that the Ordinance, by its language, does not apply to multi-family residential property. In addition to this declaratory relief, the Complaint also asserts causes of action for monetary damages for (1) interference with contractual relations, (2) gross negligence, and (3) inverse condemnation.

Concurrent with its Complaint, Cole moved for temporary injunctive relief with regard to enforcement of the Ordinance. Cole's motion for temporary relief was denied, after hearing, by Order of Circuit Court Judge R. Keith Kelly, filed on June 23, 2017. In that Order, the Court determined that Cole failed to make a showing of irreparable harm or of lack of adequate remedy sufficient to justify a temporary injunction. The Court also concluded that it was unnecessary to decide, for purposes of the motion, whether Cole was or was not likely to succeed on the merits.

On June 29, 2017, Cole filed a motion for summary judgment "on the invalidity of the Defendant's Ordinance." The City, on July 18, 2017, filed a motion for summary judgment in its favor on all of Cole's causes of action for declaratory and monetary relief.

THE ORDINANCE AND ADDITIONAL FACTUAL BACKGROUND

The Ordinance at issue in this case regulates certain aspects of, and predatory practices related to, nonconsensual booting and towing of motor vehicles on privately-owned commercial property within the City limits. A copy of the Ordinance is attached to the Complaint, to the Affidavit of Cole's principal, Christopher M. Cole, filed on July 25, 2017, and to the Affidavit of City Manager Ed Memmott, filed on May 26, 2017. The Ordinance received the first of two required readings by the City Council on March 20, 2017, and the second and final reading on

April 10, 2017. By its terms, the Ordinance became effective thirty days after enactment by the second and final reading.

The Ordinance amends the City Code chapter on "Wreckers and Wrecking Services" by adding Sections 23-14 through 23-19 concerning "Nonconsensual Booting and Towing." Importantly, nonconsensual towing is not prohibited in its entirety by the Ordinance, and nonconsensual towing, within the framework of the Ordinance, is permitted. A detailed summary of the entire Ordinance is not necessary; however, the pertinent provisions can be briefly summarized as follows:

- The WHEREAS provisions refer to the City's previous setting of maximum rate schedules for towing from public rights-of-way, relate that the City Police Department has become aware of incidents of towing from privately-owned commercial property in which vehicle owners were charged significantly higher rates than those permitted for towing from public rights-of way, and provide that "a modification of the Code is desired to protect the public and reasonably balance the property rights and interests associated with" towing from privately- owned commercial property.

- Section 23-14 begins with an acknowledgement of the rights of property owners and of the misdemeanor created by S.C. Code § 16-11-760 of parking on privately-owned commercial property without the property owner's consent if the owner has posted notice at a conspicuous place. Section 23-14 then sets out twelve legislative findings that detail the perceived imbalance between the rights of property owners and the existence of circumstances of notice issues, predatory practices involving towing from private property (particularly, on "lots associated with residential properties, primarily apartment complexes"), and excessive charges.

- Section 23-15 provides definitions of ten words or terms, including the definition of "Nonconsensual towing" as "the towing of a vehicle from property other than a public right-of-way which is authorized or directed by a person other than the vehicle owner, its authorized operator or an authorized agent of the owner."

- Section 23-16 provides that it is unlawful to charge "for the nonconsensual towing of any motor vehicle from any parking lot located upon privately-owned commercial property without authorization from the owner of the motor vehicle or of the city" unless certain specified requirements are met. The requirements relate to the size, location and approval of notice signs. The Section further provides that the requirements "are in addition to, and not in lieu of, the provisions of S.C. Code 1976, § 16-11-760(A) . . ."

- Section 23-17 sets certain procedures for towing and payment of towing charges. A towing company may not tow without prior written authorization from the property owner (although the authorization may be a written agreement for a specific property and term). The towing company must report all tows to the City police department within 60 minutes. If the vehicle owner arrives prior to vehicle removal, the towing operator must accept tendered payment (of no more than one-half of the maximum towing fee set by §23-19) and release the vehicle immediately.

- Section 23-18 requires a City permit in order for towing companies to tow from privately-owned commercial property. The Section further requires the City Manager to develop permit application forms containing certain information specified in the Section. The Section also requires certain insurance coverage for towing companies and subjects books and records of towing companies to inspection and audit.

- Section 23-19 sets maximum charges for towing and storage. The fees are subject to revision over time by the City Manager and should be high enough to allow for timely service from competent providers but should not be so high as to be punitive. The Section also requires towing companies to provide invoices and receipts for services. Finally, the Section provides that violations of the Ordinance are punishable by fines up to $500 and/or 30 days in jail or revocation of business license.

The May 2017 Affidavit of City Manager Ed Memmott included minutes from the two Council meetings at which the ordinance was read. The Supplemental Affidavit of the City Manager, filed with the City's Motion on July 18, 2017, included a transcription of the "Public Comments" section of the City Council meeting on April 10, 2017, at which the Ordinance was given second reading. These items reflect comments to the Council from members of the public related to the subject matter of the Ordinance. These comments fully support the statement in the City Manager's first Affidavit that the Ordinance was adopted against a background of citizen complaints about predatory nonconsensual towing practices.

The Affidavit of Christopher M. Cole, and its Exhibits, set out, among other things, certain allegations concerning Cole's claimed lost income and certain allegations concerning the conduct of the City. The Affidavit of the City's Paul Smith, filed on May 26, 2017, includes, as Exhibits,

copies of the three nonconsensual towing permit applications (including that of Cole) then received by the City.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; Etheredge v. Richland School District One, 341 S.C. 307, 311, 534 S.E. 2d 275, 277 (2000). "For purposes of summary judgment, an issue is 'material' if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action." Nelson v. Piggly Wiggly Central, Inc., 390 S.C. 382, 388, 701 S.E.2d 776, 779 (Ct. App. 2010).

The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E. 2d 537 (1991). "The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." Carolina Alliance for Fair Employment v. S.C. Department of Labor, Licensing and Regulation, 337 S.C. 476, 485, 523 S.E. 2d 795, 800 (Ct. App. 1999).

A party opposing summary judgment may not rest on the mere allegations of the pleadings, but must set forth or point to specific facts in the record showing that there is a genuine issue of material fact. Rule 56(e), SCRCP. In cases applying the preponderance of the evidence burden of proof, 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., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). It is well established that the Court, in considering a motion for summary judgment, must view the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment is warranted. Ellis v. Davidson, 358 S.C. 509, 517-518, 595 S.E.2d 817, 821 (Ct. App. 2004).

Cross motions for summary judgment "authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties." Alltel Communications. Inc. v. S.C. Department of Revenue, 399 S.C. 313, 319 n.2, 731 S.E. 2d 869, 872 n.2 (2012). "Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." Wiegand v. U.S. Auto Association, 391 S.C. 159, 163, 705 S.E. 2d 432; 434 (2011).

LEGAL DISCUSSION AND ANALYSIS

I. The Ordinance is within the City's power and authority.

"A municipal ordinance is a legislative enactment and is presumed to be constitutional." Foothills Brewing Concern. Inc. v. City of Greenville, 377 S.C. 355, 366, 660 S.E.2d 264, 270 (2008). Under the Constitution of this State, "all laws concerning local government shall be liberally construed in their favor." S.C. Const. art. VIII, §17. Municipalities have broad powers under State law and may enact regulations, and ordinances, not inconsistent with the Constitution and general law of this State. S.C. Code Ann. §5-7-30. Determining the validity of a local ordinance is a two-step test: (1) Did the municipality have the power to enact the ordinance? (2) Is the ordinance inconsistent with the Constitution or general law of the State? Hospitality Association of S.C. v. County of Charleston, 320 S.C. 219, 224, 464 S.E.2d 113, 116 (1995).

Cole argues that the City can cite to no law that allows for price controls for nonconsensual towing; however, Cole offers no authority for the placing of such a requirement on the City. This argument by Cole is particularly misplaced here when South Carolina courts consistently declare that the *attacking* party bears the burden of proving the invalidity of a challenged ordinance. See Whaley v. Dorchester County Zoning Board of Appeals, 337 S.C. 568, 524 S.E.2d 404 (1999); Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230, 489 S.E.2d 630 (1997).

Cole's reliance on R.L. Jordan Co. v. Boardman Petroleum, 338 S.C. 475, 527 S.E.2d 763 (2000), is also misplaced. R.L. Jordan holds that economic or social welfare legislation "is not overturned unless the law has no rational relationship to any legitimate interest of government." R.L. Jordan, 338 S.C. at 477, 527 S.E.2d at 765. R.L. Jordan also squarely supports the position of the City that "great deference" is given to legislative judgment on what is reasonable to promote the public welfare. Id. Appropriately, the City relies upon the affidavits, and meeting minutes and transcript in the record reflecting the statements by community members voicing a concern for their own health and safety or the health and safety of loved ones, and concern for the welfare of vehicle owners and their families. See the Affidavit of City Manager Ed Memmott and the Supplemental Affidavit of City Manager Ed Memmott (Ex. 5, April 10, 2017, City Council meeting transcript). The Court concludes, based on the evidence, that the activity of towing of motor vehicles from privately-owned commercial property over public roads has a rational relationship to a legitimate governmental interest. This conclusion satisfies the R.L. Jordan standard and also disposes of Cole's substantive due process claim.

A municipality is within its authority to enact an ordinance if it is consistent with State law. "In order for there to be a conflict between a State statute and municipal ordinance, both must contain either express or implied conditions which are inconsistent and irreconcilable with each

other. If either is silent where the other speaks, there is no conflict." Bugsy's, Inc. v. The City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000), quoting Barnhill v. City of North Myrtle Beach, 333 S.C. 482, 511 S.E.2d 361 (1999)); Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. at 553, 397 S.E.2d at 664 (1990), quoting McAbee v. Southern Rwy. Co., 166 S.C. 166, 169-70, 164 S.E. 444, 445 (1932)) (where no conflict exists, both laws stand).

The City correctly urges that the South Carolina Supreme Court previously has analyzed these questions of municipal authority and ordinance consistency with State law in the context of a nonconsensual towing ordinance. In Quality Towing v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000), the Court held that municipal regulation of aspects of nonconsensual towing from private property did not conflict with State law. The Court rejected the argument of the towing company that Myrtle Beach lacked the authority to regulate nonconsensual towing permits, sign content, price controls and records on the grounds that such regulations conflicted with S.C. Code Ann. §16-11-760. Here, Cole employs the rejected Quality Towing argument using the same State statute.

Cole has pointed to no State law calling into question the power of the City to adopt the Ordinance and Cole has pointed to no State law inconsistent or irreconcilable with the provisions of the Ordinance. The circumstance that the City legislated in subject matter areas in which State law was silent does not establish inconsistency or irreconcilability with State law. As in Quality Towing, the Spartanburg Ordinance establishes certain requirements for property owners and towing operators for nonconsensual booting and towing. Similar ordinances have been enacted in a number of jurisdictions throughout the State as referenced in the Supplemental Affidavit of City Manager Ed Memmott, including Greenville, Myrtle Beach, Florence and Charleston. This Court concludes that the Ordinance is a valid exercise of power and authority by the City.

II. The Ordinance is not preempted by State law.

Under our case law, a municipality can be preempted from enacting an ordinance in three ways. First, "express preemption" occurs when the General Assembly declares in express terms its intention to preclude local action in a given area. South Carolina State Ports Authority v. Jasper County, 368 S.C. 388, 629 S.E.2d 624 (2006). Second, "implied preemption" exists when an ordinance hinders the accomplishment of the statute's purpose such that compliance with both is impossible. Peoples Program for Endangered Species v. Sexton, 323 S.C. 526, 530, 476 S.E.2d 477, 480 (1996). Third, "field preemption" occurs when a statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity. Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002); Bugsy's v. City of Myrtle Beach, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000).

Cole first argues the Ordinance is expressly preempted because several State statutes regulate the towing of vehicles from private property. On this issue, Cole relies on Diamonds v. Greenville County, 352 S.C. 154, 480 S.E.2d 718 (1997), which involved State statutes that criminalized public nudity and a County ordinance that deemed all nude or semi-nude dancing unlawful. However, the ordinance declared invalid in Diamonds was expressly preempted by the state criminal statute because the ordinance imposed inconsistent penalties on the person committing the nudity. Here, while the State has indeed imposed criminal penalties through a statute on drivers/owners for improper parking under §16-11-760, the Spartanburg Ordinance does **not** impose penalties on the person committing the parking. See Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000) (an ordinance criminalizing the failure to follow the requirements of an ordinance to operate video game machines does not criminalize the same conduct addressed by state law and is not preempted). The Spartanburg Ordinance addresses the

conduct of tow operators, a conduct that is not otherwise addressed by State law. Accordingly, the express preemption analysis does not apply. Town of Hilton Head Island v. Fine Liquors, 302 S.C. 550, 397 S.E.2d 662 (1990) (mere differences in detail do not render a conflict with state law and an ordinance will be upheld if either is silent where the other speaks).

Cole presented no argument in its pleadings or motion that the Ordinance is impliedly preempted. Nevertheless, it is clear to the Court that the Ordinance does not hinder, or render impossible, compliance with §16-11-760 as is required. See Peoples, 323 S.C. at 530, 476 S.E.2d at 480.

Cole does allege State field preemption by §16-11-760, a statute that, again, makes it a criminal offense for the driver/owner of a vehicle to park on commercial property without the property owner's consent. Cole's position is that the requirements in the Ordinance related to signage, signage placement, permits and unhooking are invalid on the ground that the State has "pre-empted the field of regulation of motor carriers and more particularly non-consensual tows from commercial property." (Complaint, paragraphs 12-22). Counsel for Cole made this identical argument previously in the case of Quality Towing and the argument was expressly rejected. The Court determined that there was no preemption or conflict with state law when the "focus of the state statute [§16-11-760] is on the conduct of the vehicle owner, whereas the focus of the city ordinance is on the conduct of the property owner and towing company." Quality Towing, 340 S.C. at 37, 530 S.E.2d at 372. Here, the Spartanburg Ordinance is identical in subject matter to the Myrtle Beach ordinance scrutinized by the Quality Towing court. As with the Myrtle Beach ordinance, the Spartanburg Ordinance is not preempted by § 16-11-760.

III. The Ordinance is not preempted by Federal law.

Cole argues that Federal statutory law preempts the Ordinance. The Federal statute cited

by Cole for this argument is 49 U.S.C. §14501 entitled "Federal authority over intrastate transportation" which provides in its subsection (c) in pertinent part:

> (1) **General Rule**. -Except as provided in paragraphs (2) and (3), a State, political subdivision of a State or political authority of 2 or more States may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of any motor carrier... or any motor private carrier, broker, or freight forwarder with respect to the transportation of property".
>
> (2)(C) **Matters Not Covered**. –Paragraph (1) ... does **not** apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation or other provision relating to the regulation of **tow truck operations performed without the prior consent or authorization of the owner or operator of the motor vehicle.** (Emphasis added).

This Federal statute does not preempt the Ordinance for two reasons. First, there is no expressed legislative intent to preempt the entire field of nonconsensual towing as is required for preemption. Second, the language of subsection (2)(C) plainly provides that this statute does not abrogate the power and authority of a State or a "political subdivision of a State" to enact or enforce a law to regulate tow truck operations that are "performed without the prior consent or authorization of the owner or operator of the motor vehicle." If anything can be gleaned from this Federal statute for purposes of this analysis, it is that there is a manifest legislative intent to **allow** political subdivisions of a state, such as the City, to enact laws such as the Ordinance. The City is not preempted by the Federal law relied upon by Cole from regulating tow operators performing nonconsensual towing.

IV. The Ordinance is not an unlawful criminalization of lawful conduct.

Cole argues the Ordinance is in conflict with State law by criminalizing conduct that is otherwise legal under statewide criminal law. It is undisputed that the Ordinance contains a provision (§23-19(e)) that "[a]ny violation of this Ordinance may subject the offender" to criminal

penalties. However, this language is not sufficient to establish unlawful criminalization.

Cole relies on Connor v. Town of Hilton Head for the principle that an ordinance will be invalidated for criminalizing conduct deemed valid by state law. Connor v. Town of Hilton Head, 314 S.C. 251, 256, 442 S.E.2d 608, 610 (1994) (holding an ordinance criminalizing nude dancing invalid). The Connor holding creates a useful distinction but undercuts Cole's position. The Connor court held that an ordinance is invalid when it criminalizes the totality of the conduct. In that case, the conduct subjecting someone to criminal penalties was nude dancing. It is not the existence of a criminal penalty that invalidated the Connor ordinance; rather, the ordinance was invalid because it was a complete prohibition of the conduct.

State law expressly provides that municipal governments may "fix fines and penalties for the violation of municipal ordinances or regulations not exceeding five hundred dollars or imprisonment exceeding thirty days, or both". S.C. Code Ann. §5-7-30. The South Carolina Supreme Court has upheld ordinances containing criminal penalties for violations of an ordinance pertaining to lawful conduct. In Bugsy's, the Court held that an ordinance regulating the operation of video game machines is valid if "[s]o long as businesses comply with the zoning ordinance, they can operate video game machines." Bugsy's, 340 S.C. at 97, 530 S.E.2d at 895. The Bugsy's court explicitly rejected the Connor analysis relied upon by Cole because the Bugsy's ordinance did not criminalize the totality of the conduct. Criminal penalties in an ordinance do not, by their presence alone, render the ordinance invalid so long as the conduct can continue to occur through compliance with the ordinance.

As in Bugsy's, the Ordinance involved here does not criminalize the totality of the conduct of nonconsensual towing. Rather, the Ordinance criminalizes the failure by a property owner or towing company to comply with its requirements related to nonconsensual towing. So long as Cole

complies with the provisions of the Ordinance, it is permitted to operate its tow trucks. The Ordinance is valid since it imposes penalties consistent with statutory law and does not criminalize the entirety of nonconsensual towing.

V. The Ordinance does not violate Equal Protection.

To satisfy the Equal Protection Clause, a classification must 1) bear a reasonable relation to the legislative purpose sought to be achieved, 2) members of the class must be treated alike under similar circumstances, and 3) the classification must rest on some rational basis. Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 593 S.E.2d 462 (2004), citing R.L. Jordan Co. v. Boardman Petroleum, Inc., 338 S.C. 475, 477, 527 S.E.2d 763, 765 (2000). The Court must give great deference to a legislative body's classification decisions. Foster v. S.C. Dept. of Highways and Public Transportation, 306 S.C. 519, 526, 413 S.E.2d 31, 36 (1992).

Under South Carolina law, simply treating members of a similar class differently does not violate Equal Protection rights, so long as there is a rational basis to make the distinction between the classes. Jenkins v. Mears, 302 S.C. 142, 394 S.E.2d 317 (1990). In Jenkins, a statute treating claims for medical malpractice differently depending on the type of malpractice alleged (foreign object vs. negligent conduct) withstood constitutional challenge. The Court determined that a direct causal connection existed when the shortened statute of limitations for foreign object claims was directly related to the ability of a plaintiff to discover the harm.

The express legislative purpose of the Ordinance in this case is to regulate nonconsensual towing to protect the public from predatory towing practices. See the Affidavit of City Manager Ed Memmott and Supplemental Affidavit of City Manager Ed Memmott. The City specifically created the Ordinance requirements in order to address citizen complaints brought to the City and City Council related to nonconsensual towing. Id. Some of the many citizen complaints brought

to the City raised serious concerns of price gouging, questionable towing, failure to return vehicles to citizens, failure to provide receipts, and failure to allow retrieval of personal items from towed vehicles. See the Supplemental Affidavit of City Manager Ed Memmott. As a result, the Ordinance specifies price controls, towing guidelines, signage, procedure for return of vehicles, record keeping and permit requirements. The Ordinance is based on the City of Greenville Ordinance and is similar to other nonconsensual towing ordinances in the State. Id.

The Ordinance applies to all nonconsensual towing companies operating within the City and, plainly, is intended for the protection of that portion of the public that is subjected to the towing of their vehicles without their consent. Clearly, towing companies that provide voluntary or requested (consensual) tows for vehicle owners provide a completely different kind of towing service and have a completely different relationship with the vehicle owners. This different relationship is illustrated by the circumstance that there were no comments related to consensual towing at the April 10, 2017, "Public Comment" portion of the City Council meeting. See the Supplemental Affidavit of City Manager Ed Memmott (Ex. 5, April 10, 2017, City Council meeting transcript).

Just as the Jenkins court observed, it is not a violation of Equal Protection to treat different groups of the same class differently when a rational basis exists. Here, the Ordinance was narrowly tailored to address predatory nonconsensual towing practices by property owners and towing operators for the protection of citizens and visitors to the City.

VI. The Ordinance is not an unconstitutional market regulation.

Cole's assertion of unconstitutional market regulation by price control is set out in the Complaint at paragraph 44. In its motion for summary judgment and supporting memoranda on this issue, Cole relies on Retail Services & Systems, Inc. v. South Carolina Department of

Revenue, 419 S.C. 469, 799 S.E.2d 665 (2017). This reliance is misplaced. The Spartanburg Ordinance plainly does not present a situation of "economic protectionism for a certain class of retailers" as the Supreme Court determined was involved in Retail Services. 799 S.E.2d at 667. Additionally, Quality Towing, supra, stands as solid on-point authority for the validity of the Ordinance at issue here.

VII. The Ordinance does not constitute an inverse condemnation or result in an unconstitutional impairment of contract.

a. Inverse Condemnation

Cole's eighth cause of action is denominated as one for "inverse condemnation" and alleges a taking of Cole's private property. (Complaint, paragraphs 57-61). Cole's supporting evidence is the Affidavit of its principal that it has suffered money damages due to alleged restrictions on business activities arising from the Ordinance. However, Cole presented no evidence that any real (or personal) property has been physically appropriated or that Cole has been deprived of the ordinary beneficial use and enjoyment of any property. Sea Cabin on the Ocean IV Homeowners Association v. City of North Myrtle Beach, 828 F. Supp. 1241 (D.S.C. 1993); Hill v. The City of Hanahan, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984); South Carolina State Highway Department v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970). See also, Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 38, 530 S.E.2d 369, 373-374 (2000). The Ordinance does not constitute an inverse condemnation.

b. Impairment of Contract

Cole's second cause of action alleges that the Ordinance operates as "a substantial impairment to contractual relationships of the Plaintiff" by affecting pre-existing contracts between private parties, altering "the reasonable expectations of these private parties," and,

therefore, violating the Contract Clause of the United States Constitution. (Complaint, paragraphs 23-27). Article I, §10 of the United States Constitution provides in relevant part: "No state shall... pass any... law impairing the obligation of contracts...". Although the South Carolina Constitution contains a similar provision, Cole, in its Complaint, does not assert a violation of the State Constitution.

As explained by the United States Supreme Court in Allied Structural Steel Company v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978), the Contract Clause, despite the absolute appearance of its language, is not "the Draconian provision that its words seem to imply," and "the Contract Clause does not operate to obliterate the police power of the States." 98 S.Ct. at 2720 and 2721. Quoting previous authority, the Supreme Court stated that:

> It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected . . . One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.
> Id. (Internal citations omitted).

Rather, according to the Spannaus court, the initial inquiry is whether the law under challenge operated as a "substantial impairment" of a contractual relationship:

> The severity of the impairment measures the height of the hurdle the State legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.
>
> Spannaus, 98 S.Ct. at 2722-2723.

If a law substantially impairs a contractual relationship, the State must have a significant and legitimate public purpose behind the regulation. Once a legitimate public purpose has been

identified, the next inquiry for a claim under the Contracts Clause is whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. Unless the State itself is a contracting party, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure. Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-413, 103 S.Ct. 697, 704, 74 L.Ed.2d 596 (1983). (Quotes and internal cites omitted).

Here, Cole has presented no evidence of substantial contractual impairment. Indeed, no towing contracts between Cole and any commercial properties were provided to the Court. Cole has failed to establish its claim that the Ordinance impairs any of its contracts in violation of the United States Constitution.

Similarly, Cole's sixth cause of action for inference with contractual relations (Complaint, paragraphs 46-51) fails for want of proof of the particular contracts claimed, and the want of evidence of any intentional procurement by the City of the breach of any contact. Intentional procurement of a breach is a necessary element of this cause of action. See Edens & Avant Investment Properties, Inc. v. Amerada Hess Corporation, 318 S.C. 134, 456 S.E.2d 406 (Ct. App. 1995).

VIII. The South Carolina Tort Claims Act bars Cole's claim for gross negligence.

The gravamen of Cole's seventh cause of action for gross negligence is that the City enacted an "invalid and unlawful ordinance" and its "effects" result in past, present and future economic damage to Cole. (Complaint, paragraphs 52-56). Pursuant to S.C. Code Ann. §15-78-60 of the Tort Claims Act, a governmental entity is not liable for loss resulting from (1) legislative, judicial, or quasi-judicial action or inaction; and/or (4) adoption, enforcement, or compliance with

any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation or written policies. See Health Promotion Specialists, LLC v. South Carolina Board of Dentistry, 403 S.C. 623, 743 S.E.2d 808 (2013).

Cole's cause of action for gross negligence and its claimed damages related to the enactment, adoption or enforcement of an ordinance are precisely the type of situation contemplated by § 15-78-60(1) and (4). The enactment of an ordinance is a legislative or quasi-legislative act and the City (and its legislative component, the City Council) are entitled to immunity from liability and suit as provided in the Tort Claims Act.

IX. The City Council is the governing/legislative body of the City and is not separate from the City for purposes of suit.

The Spartanburg City Council is the governing/legislative body of the City by operation of S.C. Code §5-7-160 and City of Spartanburg Code of Ordinances §2-21 through §2-65. In its Complaint, Cole acknowledges that the two defendants are the same entity, setting forth that the City is a body politic governed by the City Council. (Complaint, paragraph 2*)*. In the Answer, the defendants admit such allegations but deny that the City Council is a proper party to this action. (Answer, paragraph 3). Accordingly, there seems to be no genuine issue as to whether or not the City Council is a separate legal entity amenable to suit.

X. The Ordinance applies to multi-family dwellings.

Cole's third cause of action requests a declaration that the Ordinance does not apply to multi-family residential properties. (Complaint, paragraphs 28-31). Cole argues that the Ordinance's reference to "privately-owned commercial property" necessitates the exclusion of "limited commercial general business or heavy commercial districts" as defined by the zoning

portion of the City's code. The legal basis for this grafting of zoning provisions into the towing provisions of the City Code is not provided or indicated by Cole.

Cole is correct that the Ordinance specifically references "privately-owned commercial property" in §23-14(a). However, a less cursory reading of the entire Ordinance provides context. Section 23-14(b)(5) illustrates the clear intent to address predatory towing problems particular to multi-family dwellings such as apartment complexes. The "Definitions" subdivision of §23-15 also is instructive in defining "[n]onconsensual towing" as "the towing of a vehicle from property other than the public right-of-way." Clearly, when the Ordinance is read as a whole, multi-family dwellings are included in its scope.

DECISION AND ORDER

The Ordinance at issue in this case was enacted pursuant to the lawful power and authority of the City, is not preempted by or in conflict with State or Federal law, and is constitutional. Plaintiff's claims for inverse condemnation, impairment of contract, and gross negligence, as well as all claims against the Spartanburg City Council as a separate entity from the City, are not supported by the facts and law.

For the reasons discussed above, the Court finds and concludes that there are no genuine issues of material fact and the City is entitled to judgment as a matter of law. Additionally, further inquiry into the facts at trial is not necessary to clarify the application of the law or to determine the conclusions to be drawn from the facts. Summary judgment in favor of the City is appropriate on all causes of action in the Complaint.

Accordingly, **IT IS ORDERED** that the motion for summary judgment of the Plaintiff Cole Towing is **DENIED** and that the motion for summary judgment by the City of Spartanburg and Spartanburg City Council is **GRANTED.**

AND IT IS SO ORDERED.

J. Derham Cole, Circuit Court Judge

November _____, 2017

Spartanburg Common Pleas

Case Caption: Cole Towing And Recovery, Llc VS City Of Spartanburg , defendant, et al

Case Number: 2017CP4201468

Type: Order/Summary Judgment

IT IS SO ORDERED !

s/ J. Derham Cole