STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
Charleston Development Company, LLC, Charleston Housing Company, LLC and NotSo Hostel, LLC, Plaintiffs, vs. Younesse Alam, *et al.*, Defendants.	)	Case No.: 2015-CP-10-5415 **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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JULIE J. ARMSTRONG
CLERK OF COURT
FILED

Defendants' Motion for Summary Judgment was heard by the Court on June 7, 2018. Present at the hearing were Counsel for the Plaintiff Sean Trundy and the following counsel for Defendants: Nancy Bloodgood, Mary Lee Briggs, Dan Boles, David Marvel, Christopher Murphy, Lucy Sanders, and Greg Voigt. Based on filed pleadings and documents, State statutes and City Ordinances, memoranda and oral argument of counsel, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This is an action arising out of Plaintiffs' allegations of violations of the City of Charleston Zoning Ordinance.

2. Plaintiffs filed this lawsuit in 2015 regarding Defendants' use of popular Internet websites such as Home Away, Vacation Rental By Owner and Airbnb. These Internet websites provide a platform for renters (also known as "guests") and landlords (also known as "hosts") to meet and arrange for rental of real property. Rentals can be for any period of time agreed upon

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by the parties including periods less than thirty days. Users can rent a room in their house or rent an entire house to anyone seeking a rental unit.

3. This Court initially granted summary judgment on November 4, 2016 to the defendants in four (4) previous cases with similar facts and then granted Plaintiffs leave to amend. (2015-CP-10-5415; 2015-CP-10-5900; 2016-CP-10-1117; and 2016-CP-10-1118) (hereafter "previous cases"). In all four (4) of these cases, the Plaintiff was a trust named Global Real Property Trust.

4. Here, the three (3) named Plaintiffs are LLC's and each LLC Plaintiff in this case is owned by Global Real Property Trust. (Bob Holt Depo., pp. 9, 13, 80.)

5. In the previous cases, Defendants' Motion for Summary Judgment was granted from the bench on October 19, 2016; an Order was signed on November 4, 2016 and filed on November 17, 2016. Subsequently, an Order filed December 16, 2016 consolidated the cases as one case, 2015-CP-10-5415, and granted Plaintiffs' Motion to Amend and vacated the previously filed Order granting summary judgment to the Defendants.

6. Bob Holt's deposition was taken on May 16, 2018. (Bob Holt Depo., p. 5.)

7. Bob Holt is the Trustee of Global Real Property Trust and the Chairman of each of the three (3) LLC Plaintiffs. (*Id.* at 9, 12.)

8. Mr. Holt testified he is the person most knowledgeable about the allegations in this lawsuit. (*Id.* at 61.)

9. Plaintiffs are involved in the short-term rental business.

10. The Plaintiffs own short-term rental property in the City of Charleston. Specifically, Plaintiff Charleston Development Company, LLC owns 106 A and B Cannon

Street; Plaintiff Charleston Housing Company, LLC owns 5 and 6 Tulley Alley and 179 D and E St. Philip Street; and Plaintiff NotSoHostel, LLC owns 156 Spring Street and 33 Cannon Street. (Am. Compl.¶¶ 3-6.)

11. The City of Charleston Zoning Ordinance regulates the use of real property and provides a definition of short-term rentals as a lease in duration between 1 and 29 days. A thirty-day or longer lease is not a short-term rental.

12. In 2012, the City created a special overlay zone district to allow short-term rentals. Most other areas of the City prohibit short-term rentals.

13. Plaintiffs allege Defendants are engaged in short-term renting in violation of the City's zoning ordinance.

14. Plaintiffs' Amended Complaint has four (4) causes of action: Nuisance, Violation of City Zoning Ordinance; Unfair Trade Practices Act, and Unjust Enrichment.

15. Plaintiffs have not appealed any decision of the City of Charleston Zoning Administrator to the City of Charleston Board of Zoning Appeals. (*Id.* at 128, 158.)

16. There is no contractual relationship between the parties. (*Id.* at 198-199.)

17. Mr. Holt testified there is no sum certain amount of money owed to Plaintiffs as damages for their South Carolina Unfair Trade Practices Act (SCUTPA). (*Id.* at 140.) [1]

18. Mr. Holt testified none of the properties Plaintiffs own have decreased in value because they are all located in downtown Charleston. (*Id.* at 220-221.)

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[1] This Court is not relying on an Affidavit filed by Mr. Bob Holt after his deposition was taken regarding money damages as the Affidavit contains Mr. Holt's opinions but he was not identified as an expert witness. Additionally, Mr. Holt's Affidavit fails to indicate any nexus between Defendants' actions and Plaintiffs' damages, fails to state any evidence that Defendants' actions were the proximate cause of Plaintiffs' damages, and fails to offer any evidence that any damage any of the three Plaintiffs contend they suffered was caused by any specific Defendant.

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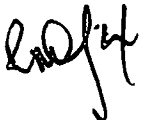
19. Mr. Holt testified that the basis for Plaintiffs' unjust enrichment claim is that when anyone makes money from an illegal act is a party who is unjustly enriched. (*Id.* at 141, 197.)

20. There is no evidence in the record of probable cause; specifically, Plaintiffs have produced no evidence that any of the Defendant's actions were the proximate cause of any damage to any of the three (3) named Plaintiffs.

STANDARD OF REVIEW

A party is entitled to a grant of summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. Rule 56(c), SCRCP. "The purpose of summary judgment is to obviate delay where there is no material issue of fact involved." *Manley v. Manley*, 291 S.C. 325, 329, 353 S.E.2d 312, 314 (Ct. App. 1987). "The trial court should grant summary judgment against a party who has failed to make a showing sufficient to establish the existence of an essential element of that party's case." *Harris v. Rose's Stores, Inc.*, 315 S.C. 344, 433 S.E.2d 905, 906 (Ct. App. 1993). "Summary judgment is proper where plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Adamson v. Richland County School Dist. One*, 332 S.C. 121, 124, 503 S.E.2d 752, 753-754 (Ct. App. 1998). In determining whether any triable issues of fact exist, the evidence and all inferences, which can be reasonably drawn from the evidence, must be viewed in the light most favorable to the nonmoving party. *Hancock v. Mid-South Mgt. Co.*, 381 S.C. 326, 329-330, 673 S.E.2d 801, 802 (2009). However, "[a] conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue



of fact for purposes of resisting summary judgment." *Shupe v. Settle*, 315 S.C. 510, 516-517, 445 S.E.2d 651, 655 (Ct. App. 1994).

CONCLUSIONS OF LAW

I. Zoning Ordinance Violation

Plaintiffs' Amended Complaint includes a cause of action alleging a zoning violation, specifically, as explained in their Response to Defendant's Motion for Summary Judgment, Plaintiffs allege they have standing and are entitled to injunctive relief pursuant to City Ordinance 54-905.

Pertinent Zoning Laws

The City's Zoning Ordinance is developed pursuant to state law. *S.C. Code § 6-29-340.* The South Carolina Local Government Comprehensive Planning Enabling Act (the "Planning Act") states in pertinent part:

> In case a building, structure, or land is or is proposed to be used in violation of any ordinance adopted pursuant to this chapter, the zoning administrator or other appropriate administrative officer, municipal or county attorney, or other appropriate authority of the municipality or county *or an adjacent or neighboring property owner who would be specially damaged by the violation may in addition to other remedies, institute injunction, mandamus, or other appropriate action* or proceeding to prevent the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate the violation, or to prevent the occupancy of the building, structure, or land. *S.C. Code Ann. § 6-29-950* (emphasis added.)

There are two sections of the City of Charleston Zoning Ordinance that reflect and implement this state statute, Ordinance No. 54-904 and Ord. No. 54-905. Ordinance 54-904, entitled "Procedure when enforcement or interpretation questioned; appeals to court" states:

> It is the intent of this Chapter that all questions arising in connection with the enforcement or interpretation of this Chapter, except as otherwise provided, shall be presented to the Board of Zoning Appeals, and, that from decisions of the Board of Zoning Appeals, recourse shall be to the courts as provided by law. (*Id.*)

A second City Ordinance addresses City officials and property owners obtaining an injunction in Court to remedy violations. Ordinance 54-905 states:

> Whenever a building or structure is demolished, erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this Chapter, the city engineer or any other appropriate authority, or any property owner, who would be damaged by such violations, in addition to other remedies, may institute injunction, mandamus, or other appropriate action in proceeding to prevent the violation in case of such building, structure or land.

The Plaintiffs lack standing.

The case of Carnival *Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E. 2d 846 (2014), is on point with the facts in this case, as it was in the previous cases, and makes clear the requirements for standing to sue under the theory of a zoning violation. In *Carnival*, the Plaintiffs brought several causes of action, including unfair trade practices and private nuisance claims, based on alleged zoning violations. 407 S.C. at 78, 753 S.E. 2d at 852. Plaintiffs included citizens groups complaining of cruise line activities. The *Carnival* Plaintiffs' claims were all based on alleged violations of the City of Charleston ordinances, including violations of the City's noise ordinance, sign ordinance, height limitations as well as violations of the South Carolina Pollution Control Act. (*Id.*) The South Carolina Supreme Court, in its original jurisdiction, unanimously dismissed Plaintiffs' Complaint in its entirety. 407 S.C. at 81, 753 S.E. 2d at 853. The Court ruled that the Plaintiffs lacked standing to sue because Plaintiffs,

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including two nearby historic neighborhood associations and a non-profit organization leasing property near Defendant's conduct, were not "specially damaged" nor were they "adjacent or neighboring property owner[s]." 407 S.C. at 78-81, 753 S.E. 2d. at 850-852.

The Supreme Court, interpreting S.C. Code §6-29-950, enunciated a two-part test to determine standing in the context of claims based on alleged zoning violations. 407 S.C. at 76, 753 S.E. 2d at 851. First, a Plaintiff must be "specially damaged" and second, a Plaintiff must be "an adjacent or neighboring property owner." A Plaintiff is "specially damaged" when it has suffered a particularized harm separate and apart from the harm that the public at large may experience. (*Id.*) A particularized harm occurs when the allegations "affect the Plaintiff in a personal and individual way." 407 S.C. at 75, 753 S.E. 2d at 850; *see also Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992).

In this case, Bob Holt testified:

> "A. ... I'm not the only aggrieved party -- or not me, but the entities are not the only aggrieved parties. There are a lot of aggrieved parties. They simply haven't sued the Defendants operating illegally." (Bob Holt Depo., p. 56.)

Clearly, Plaintiffs are not affected in any personal and individual manner; they are damaged as any other property owner is who is renting their property out legally on a short term basis.

Plaintiffs also lack standing to sue because none of them are adjacent or neighboring property owners. Plaintiffs have admitted they are not adjacent property owners to Defendants. (*Id.* at 100.) Plaintiffs contend they are "neighboring properties" but this argument fails as a matter of law. Plaintiffs did not allege in their Amended Complaint that any of their short term rental property was "neighboring" to any Defendant's property. However, in his deposition Mr.

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Holt testified that everyone who lives on the peninsula of Charleston are neighbors,[2] and then Mr. Holt testified he had no idea if any Defendant's property is located within 100 yards of any Plaintiff's property. (*Id.* at 160-161, 227.)

The term "neighboring property" is not defined in the City of Charleston Zoning Ordinance. The Ordinance clearly states, "It is the intent of this Chapter that *all questions* arising in connection with the enforcement *or interpretation* of this Chapter, except as otherwise expressly provided, shall be presented to the Board of Zoning Appeals... "*City of Charleston Zoning Ordinance* § 54-904 (emphasis added). Mr. Holt testified in his deposition he has not appealed to the City Board of Zoning Appeals. (Bob Holt Depo., p. 158.) Therefore, Mr. Holt's personal belief as to what the term "neighboring property" means is irrelevant. There is no evidence in the record that any of Plaintiffs' property is a neighboring property to any Defendant's property.

Plaintiffs fail both parts of the two-part test set forth in *Carnival*. First, Plaintiffs are not "specially damaged" because the damages alleged in the Complaint are not particular to the Plaintiffs. There is no evidence Plaintiffs have suffered damages separate and apart from the public. No facts have been produced by Plaintiffs to support the contention that they have been damaged differently from any other short-term rental businesses, including hotels and bed & breakfasts, or property owners in general, that may be affected by the alleged conduct of the Defendants.

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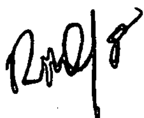
[2] Black's Law Dictionary defines a neighbor as "one who lives in close proximity to another" and Webster's II New Riverside University Dictionary defines a neighbor as "one who lives or is located near or next to another." The City of Charleston Zoning Ordinance does not define "neighboring properties."



In fact, there is no evidence in the record of any damages at all. Mr. Holt testified he has not yet hired an expert to determine damages and he does not know how an expert would determine damages. (Bob Holt Dep., p. 62.) Further, Mr. Holt has not had any recent appraisals done of Plaintiffs' property. (*Id.* at 109.) At the time Plaintiffs filed suit, during the last three (3) years, and currently, Plaintiffs cannot ascertain their damages other than Mr. Holt's belief that it is "reasonable" to assume Defendants' actions have caused Plaintiffs damages. (*Id.* at 196.) Mr. Holt's conjecture is insufficient as a matter of law to establish damages. There is simply no evidence in the record of any nexus between Plaintiffs' allegations of damages and any act on the part of any named Defendant.

As in *Carnival*, Plaintiffs are the only ones to bring suit but that fact does not set the alleged damages apart from the public in any way. A Court cannot possibly provide complete relief to these parties if the Defendants would be subject to suits for damages by neighboring property owners, bed and breakfasts businesses, other short term rental businesses or hotels even after the termination of the present litigation. Therefore, the damages alleged to have been suffered by Plaintiffs (assuming *arguendo* they could ever be proven with any specificity) are not particular to these Plaintiffs and are not separate and apart from generalized damages that affect the community at large so Plaintiffs have no standing.

There is no issue of public importance in this case.

The public importance exception to standing does not apply in this case to grant standing as Bob Holt testified as follows regarding the issue of public importance:

"Q. Do you contend that this case involves a matter of public importance?
A. I think so.
Q. What is it? What is that matter of public importance?

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A. I think that the wholesale ignoring of the zoning ordinance is not good for society. I think we try to be a nation of laws. And I think that once people are aware, become aware, that they are doing something that is not what they should be doing that they stop.
Q. Anything else?
A. Not off the top of my head, no." (Bob Holt Depo., pp. 105-106.)

As the Court held in *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337 (2008):

> For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance. There is nothing *public* about ATC's concern with a competing cell-phone tower. Here, a local government followed proper procedure and rezoned a single piece of property for a narrow purpose and the only complaint comes from a nonadjoining landowner which just happens to be a competitor." 380 S.C. at 199-200, 669 S.E.2d at 341.

Mr. Holt testified he believes he has standing to file suit due to Defendants' illegal competition. (Bob Holt Dep., p. 101.) Mr. Holt testified that the value of the property Plaintiffs own was diminished by increased competition and it is the illegal competition that harms him. (*Id.* at 114.) However, "An owner of commercial property generally does not have standing in a zoning enforcement action if special damages amount to a loss of business due to the position of the violating use as a competing business, but a commercial property owner may be specially damaged if he alleges adverse impact on his business *other than by increased competition.*" *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 83, 644 S.E.2d 58, 59 (2007) (emphasis added.)

As was the case of *ATC South, Inc. v. Charleston County,* 380 S.C. 191, 669 S.E. 2d 337 (2008), there is nothing of public importance about Plaintiffs' contention that they are damaged by illegal short term renters unfairly competing with them. The Supreme Court held in *ATC South*:

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> The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of "future guidance" that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance.
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> 380 S.C. at 199, 669 S.E. 2d at 341, citing *Baird v. Charleston County,* 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999)

The Supreme Court further noted in *Baird* that although zoning is a matter of public importance, the same may be said of most legislative and executive actions. (*Id.*) Here, Plaintiffs do not allege, and have offered no evidence, indicating the Court's decision regarding the City of Charleston's failure to enforce its short term rental ordinance is matter that must be decided in order to provide future guidance to the Court.

The Plaintiffs have not exhausted their administrative remedies.

Persons disagreeing with zoning matters of interpretation and enforcement must first exhaust administrative remedies before appealing to the Circuit Courts. *See, e.g., Moore v. Sumter County Council*, 387 S.E. 2d 455 (1990). In the previous cases, Plaintiffs focused on City Ordinance No. 54-904 which requires a person aggrieved to seek enforcement of a zoning ordinance first through the Zoning Administrator, with an appeal to the Board of Zoning Appeals and then to Circuit Court. Plaintiffs failed to exhaust their administrative remedies in the previous cases, which was one reason they were initially summarily dismissed by Order of this Court. Plaintiffs here admit they have also not appealed any decision of the Zoning Administrator to the Board of Zoning Appeals. (Bob Holt Dep., p. 128.) Therefore, all of the

reasons the previous cases were dismissed for failure to exhaust their administrative remedies pursuant to City Ordinance No. 54-904, apply here.[3]

In Plaintiffs' Memorandum in Support of their Response to Defendants' Motion for Summary Judgment, Plaintiffs assert that in this case they are relying on a different section of the City Ordinance, Section 54-905, which permits persons damaged by another person's use of their property to seek injunctive relief. Plaintiffs cannot rely on this section of the City's Ordinance to address enforcement of a zoning violation as enforcement of the zoning ordinance is governed by Ordinance No. 54-904, not Ordinance 54-905. Plaintiffs admit that in their zoning cause of action they are asking a court to enforce the short term rental ordinance because the City is not enforcing it. (Bob Holt Dep., pp. 114-115, 131, 174.) The enforcement of a zoning ordinance is addressed in Ordinance No. 54-904 and requires the exhaustion of administrative remedies prior to seeking relief in circuit court, which Plaintiffs admit they have not done. Plaintiffs cannot circumvent the exhaustion of administrative remedies requirement by seeking to challenge the enforcement of a zoning ordinance under Ordinance 54-905 rather than Ordinance 54-904 which is the ordinance that addresses enforcement.

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[3] In short, the legislative intent of the State Planning Act was that an administrative agency such as a local zoning department and its Board of Zoning Appeals, interpret, apply and administer land use regulations within their local jurisdictions. S.C. Code Ann. § 6-29-720. The *City of Charleston Zoning Ordinance* states: "It is the intent of this Chapter that ***all questions*** arising in connection with the enforcement or interpretation of this Chapter, except as otherwise expressly provided, shall be presented to the Board of Zoning Appeals, and, that from decisions of the Board of Zoning Appeals, recourse shall be to the courts as provided by law." *City of Charleston Zoning Ordinance* § 54-904 (emphasis added). Plaintiffs in the previous cases submitted a FOIA response from the City of Charleston demonstrating the Plaintiff's complaints to the City zoning officials. The Zoning Administrator considered the Plaintiff's complaints and made decisions regarding the dozens of property owners Plaintiff submitted complaints about. The Plaintiff could have appealed the Zoning Administrator's decision to the Board of Zoning Appeals and then to the Circuit Court per the ordinance's administrative remedies but failed to do so. *City of Charleston Zoning Ordinance* §54-904; 54-926; 54-930.

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Even assuming *arguendo* that Ordinance 54-905 of the City Ordinance could be used by Plaintiffs to challenge the enforcement of the short term rental ordinance, the only relief afforded to them by this section is injunctive relief[4] and a necessary element of injunctive relief is irreparable harm. Mr. Holt testified in his deposition that he was not sure if any irreparable injury was suffered by Plaintiffs (Bob Holt Dep., pp. 131-132) and he also asserted Plaintiffs were entitled to monetary damages. (*Id.* at 150.) As Plaintiffs admit they are not sure they have irreparable damages and that they are seeking monetary damages, they are not entitled to injunctive relief and they cannot prevail under City Ordinance No. 54-905. For all of these reasons, Plaintiffs' zoning cause of action fails.

II. SCUTPA Violations.

Plaintiffs also allege a cause of action pursuant to the South Carolina Unfair Trade Practices Act (SCUTPA.) SCUTPA §39-5-40 (a) exempts conduct already regulated by law. This regulatory exception provides:

> Nothing in this Article shall apply to (a) Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State Law.

There have been a series of cases in which the Supreme Court and the Appellate Court of South Carolina have interpreted the regulatory exception provision of the UTPA. In 1980, the South Carolina Supreme Court ruled that conduct regarding the sale of securities is regulated by

[4] Ordinance 54-905 allows a property owner to seek injunctive relief "to prevent the violation." To the extent the Ordinance states "other remedies" are available in addition to injunctive relief, the term "other remedies" is also modified by the term "to prevent the violation." The other remedies that are available in the City's Zoning Ordinance are enforcement through Ordinance 54-904, which requires an appeal to the Board of Zoning Appeals. There is no indication in Ordinance 54-905 that the term "other remedies" includes monetary relief as Plaintiffs contend.

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the South Carolina Uniform Securities Act and the Securities and Exchange Commission. *State ex rel. McLeod v. Rhoades*, 275 S.C. 104, 107, 267 S.E.2d 539, 541 (1980). The Court noted that "[V]iolation of these regulations subjects an offender to liability" and, therefore, the regulatory exception of UTPA applied and the UTPA claim was dismissed. *Id.*

In 1987, the Court of Appeals applied the Supreme Court's ruling from *McLeod* to the case of *Scott v. Mid Carolina Homes, Inc.*, 293 S.C. 191, 359 S.E. 2d 251 (Ct. App. 1987). In *Scott*, the plaintiff brought a breach of contract claim for the sale of a mobile home complaining that the defendant's conduct was a violation of the regulations governing the sale of mobile homes. (*Id.*) The defendant argued that the regulatory exemption barred the plaintiff's SCUTPA claim. 293 S.C. at 199, 359 S.E. 2d at 296. The Court of Appeals agreed and noted the Supreme Court's ruling from *McLeod*. The Court of Appeals concluded, "... the sale of mobile homes is an activity exempt from the Act because it is subject to regulatory control and the imposition of penalties by the Manufactured Housing Board." 293 S.C. at 200, 359 S.E. 2d at 296-97.

In 1991, the South Carolina Supreme Court modified the rule regarding the regulatory exception under the SCUTPA in a consumer versus retailer case. *Ward v. Dick Dyer and Associates Inc.*, 304 S.C. 152, 403 S.E.2d 310 (1991). *Ward* involved a consumer complaint regarding the sale of a used car. 304 S.C. at 154, 403 S.E.2d at 311. The defendant argued, relying on the *McLeod* and *Scott* cases that the regulatory exemption of the SCUTPA claim applied because of the licensing requirements for a car sales lot are regulated by the State. (*Id.*) The Supreme Court modified its previous interpretation of the regulatory exemption and allowed a consumer complaint regarding the sale of a car because the regulatory scheme relied upon by the defendant did not regulate the specific conduct complained of, the sale of a car. 304 S.C. at

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155, 403 S.E.2d at 311-12. The regulating agency referred to by the defendant merely provided review and approval of the licensing requirements for car sales lots and did not provide regulations for the actual sale of cars. 304 S.C. at 156, 403 S.E.2d at 313; *see also InMed Diagnostic Services, LLC v. Medquest Associates, Inc.*, 358 S.C. 270, 594 S.E.2d 592 (Ct. App. 2004). The *Ward* Court concluded that the standard to be applied is a more exacting one stating "[W]e believe that the exemption is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes." 304 S.C. at 155, 403 S.E.2d at 312.

InMed Diagnostic Services, LLC v. Medquest Associates, Inc., 358 S.C. 270, 594 S.E.2d 552 (Ct. App. 2004) is a competitor versus competitor case. In *InMed*, the plaintiff brought numerous claims including a SCUTPA claim regarding defendant's purchase of medical equipment regulated by DHEC. 358 S.C. at 272, 594 S.E.2d at 553. The SCUTPA claim was tried by a jury that found in favor of the plaintiff. 358 S.C. at 274, 594 S.E.2d at 554. However, the Court of Appeals reversed the jury verdict and dismissed the SCUTPA claims based on the regulatory exception of the Act. 358 S.C. at 275, 594 S.E. 2d at 554. The Court of Appeals provides the progeny of relevant case law and a precise analysis of when the regulatory exception of the SCUTPA applies.

The plaintiff in *InMed*, argued that the regulatory exemption should not apply to the defendant because defendant's conduct was not an activity permitted under the DHEC regulations. (*Id.*) Plaintiff alleged that the defendant engaged in illegal conduct in its presentation to the regulatory body, in violation of the regulations. However, the Court of Appeals concluded that plaintiff's argument was "an unduly narrow interpretation of the law" because there were

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administrative procedures available to the Plaintiff regarding the conduct complained of. 358 S.C. 278-79, 594 S.E.2d 556. The Court pointed out that DHEC is the agency responsible for regulating the conduct complained of (sale of medical equipment), that the purpose of the ConAct regulating the sale of medical products promotes cost containment, prevents unnecessary duplication of health care services, guides the industry, and serves the public needs for quality services and facilities. 358 S.C. at 277, 594 S.E. 2d at 555. The Court pointed to regulations adopted by the administrative agency regarding the same conduct complained of by the plaintiff. (*Id.*) The Court also distinguished the *InMed* case from the *Ward* case, noting among other things that the consumer complaint in *Ward* regarding the sale of a car was not conduct regulated by the state licensing agency whereas the complaint in *InMed*, regarding the purchase of medical equipment, was conduct regulated by DHEC. (*Id.*) The Court held that the issue of whether the defendant's conduct was a violation of the DHEC regulations was an issue the plaintiff should have taken up through the administrative process available to him and not through a SCUTPA claim. 358 S.C. at 278-79, 594 S.E.2d at 556. The Court of Appeals held:

> We agree with MedQuest that the regulatory exemption in Section 39-5-40(a) is based on the concept that the Legislature has determined certain matters are appropriate for resolution by administrative agencies with particular expertise, rather than by the general jurisdiction of a trial court. This concept is consistent with the Supreme Court's reasoning in *Ward* that the exemption "is intended to exclude those actions or transactions which are... authorized by regulatory agencies.... 358 S.C. 277, 594 S.E.2d 555-56.

The Court concluded: "To allow a jury in the court of common pleas to make the determination that MedQuest had submitted misleading information in support of its application" and in violation of the regulations, would undermine the purpose of the regulatory exception in the SCUTPA. *Id.*

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Similarly, here the Plaintiffs allege that Defendants are competitors. Plaintiffs complain that rental of Defendants' properties is a regulatory violation similar to the claim in *InMed.* Am. Compl. ¶¶ 162, 165. The conduct complained of by the Plaintiffs (short-term rentals) is regulated by the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 and the City of Charleston Zoning Ordinance. *S.C. Code Ann. § 6-29-310 et seq.* (1994); *City of Charleston Zoning Ordinance* §54-120; 54-202; 54-208; 54-208.1; 54-220; 54-904; Part 3 Table of Permitted Uses; 54-901 *et seq.*; Appendix C to the *City of Charleston Zoning Ordinance*.

Finally, it appears based on Plaintiffs' Motion for Partial Summary Judgment that Plaintiffs contend this Court can on its own initiative make zoning enforcement decisions; it cannot. First, this Court cannot legislate or act as the enforcement arm of any political subdivision. Second, the enforcement of laws is discretionary and that discretion belongs to the political entity that enacted the law, not the judiciary. When the Comprehensive Planning and Zoning Act establishes who has standing to question a zoning decision or interpretation, and the process for doing has been codified, individuals cannot ignore or circumvent state law by asking the judiciary to act on behalf of or in the place of any political subdivision. As the regulatory exemption to the SCUTPA applies, Plaintiffs' SCUTPA cause of action fails as a matter of law.

III. Unjust Enrichment

Plaintiffs' cause of action for unjust enrichment also fails as unjust enrichment requires a contractual or quasi-contractual relationship between the parties as a matter of law. The elements of an unjust enrichment claim are a benefit conferred on the defendant by the plaintiff, the realization of that benefit, and the retention of the benefit by the defendant under

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circumstances that make it unjust to retain the benefit without paying for its value. *Columbia Wholesale Co., Inc. v. Scudder May N.V.*, 312 S.C. 259, 440 S.E.2d 129 (1994). The absence of any legal duty between the parties is fatal to Plaintiffs' unjust enrichment claim. *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 338, 574 S.E.2d 502, 511 (Ct. App. 2002). Here, Mr. Holt admits there is no contractual relationship between the parties and, as a matter of law, Plaintiffs have conferred no benefit on Defendants.

Mr. Holt testified Plaintiffs have no contractual relationship with any Defendant other than a contract with two (2) former Defendants regarding the sale of parking spaces. (Bob Holt Depo. at 198-199.) However, Mr. Holt testified that Plaintiffs have conferred the benefit of "cover" on Defendants and explained that by "cover" he meant that the City's passage of a short-term rental ordinance resulted in some properties being legal and some illegal and that such a situation makes enforcement by the City more difficult which provides "cover" to Defendants from enforcement. (*Id.* at 169-171.) This strained attempt to turn enforcement of a zoning ordinance by the City into a benefit conferred by Plaintiffs on Defendants fails as a matter of law. First, the decision whether or not to enforce an ordinance is a discretionary decision that belongs to the City, not to Plaintiffs. Second, there is no evidence in the record that the reason the City is not enforcing its zoning ordinance against the named Defendants has anything to do with Plaintiffs. In fact, Bob Holt testified as follows:

"Q. Have you gotten any reassurances from the City that they are going to enforce their zoning ordinance?
A. Yeah. At public meetings the mayor before our -- at our neighborhood meeting six months ago. Yeah, a lot.
Q. But -- but you never followed up to determine whether any of these Defendants were subject to a city enforcement action?
A. No. I have nothing to do with the city's enforcement action." (Bob Holt Depo., p. 159.)

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Plaintiffs did not pass the short term rental ordinance; the City did. Plaintiff's argument that when an ordinance is difficult to enforce, a benefit is conferred on those against whom it is not enforced, makes no sense. Even if it did, the person is conferring a benefit on Defendants from failing to enforce the short term rental ordinance, it is the City, not Plaintiffs. As no facts exist to support the first element of unjust enrichment, Plaintiffs' unjust enrichment cause of action fails and Defendants are entitled to summary judgment on this cause of action.

IV. Public Nuisance

Plaintiffs' Amended Complaint contains a cause of action captioned "common law nuisance." Although Plaintiffs allege in Paragraph 143 of their Amended Complaint that Defendants' illegal activities "*affect the public*..... ") (emphasis added), in their Response to Defendants' Motion for Summary Judgment, Plaintiffs clarify their nuisance cause of action is only for a private nuisance.[5]

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[5] Although Plaintiffs now only bring a private nuisance claim, a public nuisance cause of action also fails as a matter of law. "[A] public nuisance affects the public at large, while a private nuisance affects one or a limited number of individuals only. In other words, to be considered public, the nuisance must affect an interest common to the general public." 58 Am. Jur. 2d *Nuisances* § 32 (2002). A plaintiff alleging a public nuisance must prove damages different in kind, not degree, from the damage the general public shares. *See generally Huggin v. Gaffney Dev. Co.*, 229 S.C. 340, 92 S.E.2d 883 (1956); *Brown v. Hendricks*, 211 S.C. 395, 45 S.E.2d 603 (1947); 66 C.J.S. Nuisances §§ 2, 76, 78-79 (1998); Restatement (Second) of Torts, § 821C (1979). Plaintiffs allege in Paragraph 137 of their Amended Complaint that they "suffered damages which only they can claim and are individual to them, including decreased rental income and diminution of property values." This type of damage is insufficient as a matter of law to establish damages due to a public nuisance as decreased rental income and diminution of property values attributable to Defendants' actions are not an injury unique to these Plaintiffs. In fact, when Bob Holt was asked what injury he suffered distinct from the public's interest, he testified he was not the only aggrieved party and that there are a lot of aggrieved parties, they just didn't file a law suit. "***I'm not the only aggrieved party -- or not me, but the entities are not the only aggrieved parties. There are a lot of aggrieved parties.***" (Bob Holt Depo., p. 56) (emphasis added.) Plaintiffs admit "there are a lot of aggrieved parties" injured in the same

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"A private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another." *Deason v. Southern R. Co.*, 142 S.C. 328, 334, 140 S.E. 575, 577 (1927). Tenements are buildings and hereditaments are physical objects that are inherited along with land and buildings. Here, Mr. Holt testified that Plaintiffs' ability as LLC's to make money is the damage they have suffered under their nuisance cause of action. Again, there are no facts in the record to support any nexus between Defendants' actions and Plaintiffs' argument that their land would be worth more today than it is were it not for Defendants' actions. There is no evidence of any nexus between Defendants' actions and Plaintiffs' belief regarding damages.

Specifically, Mr. Holt testified when asked if he contended that Defendants' use of their property invaded the Plaintiffs' right of enjoyment of their property, "The ability to earn income is an enjoyment of property and very clearly the Defendants have affected the income of ... of the Plaintiffs." (Bob Holt Dep., p. 112.) Loss of income is not the type of damage encompassed in a private nuisance claim.[6]

CONCLUSION

Plaintiffs do not have standing to challenge the City's zoning enforcement decisions because they are not adjacent or neighboring property owners. Further, the conduct complained of, short-term rentals, is regulated by the State Planning Act, the City of Charleston Zoning Ordinance, the City Zoning Administrator, and the Board of Zoning Appeals. Plaintiffs have failed to pursue any appeal to the Board of Zoning Appeals so they have failed to exhaust their

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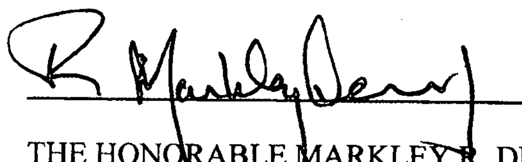
manner as they are, so as a matter of law Plaintiffs have suffered no specialized injury and a public nuisance cause of action would also fail.

[6] Further, the *Carnival* case is dispositive as to this cause of action as *Carnival* involved a cause of action for a private nuisance.

administrative remedies, and have failed to set forth any facts of irreparable harm which would entitle them to injunctive relief. Further, the regulatory exception of the SCUTPA applies so there is no viable SCUTPA cause of action. Plaintiffs' unjust enrichment cause of action fails as there is no contractual relationship between the parties and as a matter of law the City of Charleston's failure to enforce a zoning ordinance is not a benefit Plaintiffs have conferred on Defendants. Plaintiffs' private nuisance claim fails as Plaintiffs allege the injury they have suffered is their ability to make income, not any injury to their land.

Therefore, Defendants are entitled to summary judgment on all of Plaintiffs' causes of action and Defendants' Motion for Summary Judgment is GRANTED in full. I order that all of Plaintiffs' causes of action be dismissed with prejudice as to all Defendants.

AND IT IS SO ORDERED!



THE HONORABLE MARKLEY R. DENNIS, JR.
CIRCUIT COURT JUDGE
NINTH JUDICIAL CIRCUIT

Charleston, South Carolina

Date: August 6, 2018