

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S C Supreme Court

R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-3723

Dunes West Golf Club, LLC,

Appellant,

v

Town of Mount Pleasant,

Respondent

APPELLANT'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I Did the lower court err in granting summary judgment and determining there is no proof of a compensable taking under the state and federal constitutions where the Town of Mount Pleasant in 2006 changed the zoning of 256 acres owned by Appellant from a PDD allowing single family residential to park, recreation, and open space, despite facts in the record that support all elements of a takings claim including that the Appellant's purchase of the property was primarily for residential development of the substantial acreage around the golf course and that this acreage was rendered essentially valueless?
- II Did the lower court err in granting summary judgment and determining there is no evidence of a violation of Appellant's right to substantive due process under the state and federal constitutions where Appellant had a cognizable property interest under state law and there was proof that the ordinance creating the new conservation, recreation, and open space zoning district as well as the rezoning of Appellant's 256 acres in 2006 would not substantially advance the purported objectives recited for the zoning district?
- III Did the lower court err in granting summary judgment and determining there is no evidence of a violation of Appellants' right to equal protection under the state and federal constitutions where, after the rezoning of Appellant's land in 2006, the Town relieved another similarly situated property owner of the conservation, recreation, and open space zoning district to allow it roughly 50 residential housing units but applied a different standard to deny Appellant's 2009 application for similar relief asking to re-zone portions of its land to allow residential use?

STATEMENT OF THE CASE

This appeal arises from the downzoning by the Town of Mount Pleasant (“Town”) on June 14, 2006, of 256 acres owned by Appellant that converted land then zoned as part of a planned development district, or PDD, allowing residential uses as a matter of right into park, recreation, and open space. The Town accomplished this re-zoning by adopting an ordinance establishing a new zoning district known as the Conservation Recreation – Open Space District (“CRO Ordinance”) Town of Mount Pleasant, Ordinance No. 06031, Town of Mount Pleasant, Zoning Code § 156.331. At the same meeting Town Council immediately rezoned Appellant’s 256 acres from PDD allowing residential uses, to CRO (the “Dunes West Ordinance”) Town of Mount Pleasant Ordinance No. 06035.

Appellant contends that the Dunes West Ordinance was unconstitutional, constituted an unlawful taking of Appellant’s land without just compensation under the state and federal constitutions, and violated Appellant’s rights to substantive due process under the state and federal constitutions. Appellant further asserts that the Town’s refusal to rezone a small portion of this land to allow residential use in June of 2009 violated its state and federal rights to equal protection.

On June 12, 2009, Appellant, Dunes West Golf Club, LLC (“DWGC” or Appellant), filed this action against the Town for declaratory relief and damages. The Complaint includes causes of action for an unconstitutional exaction (first cause of action), for an unconstitutional taking without just compensation (second cause of action), for inverse condemnation (third cause of action), for a declaration that the Dunes West Ordinance is invalid since it accomplishes an unconstitutional taking of Appellant’s land without just compensation (fourth cause of action), for deprivation of Appellant’s constitutional rights to substantive due process (fifth cause of

action), for a declaration that the Dunes West Ordinance is invalid since it violates Appellant's rights to substantive due process (sixth cause of action) and for deprivation of Appellant's constitutional rights to equal protection (seventh cause of action) **(Compl R pp 20-30)**

The Town filed its Answer on July 15, 2009, denying liability. The Town's affirmative defenses include failure to exhaust administrative remedies, ripeness, limitations, and waiver **(Answer R pp 31-37)**

The Town filed its Motion for Summary Judgment on April 6, 2011 **(Def's Mot for Summ J, R pp 656-57)**. On April 13, 2011, the Town served a Supplement to Motion for Summary Judgment that stated the particular legal grounds for the motion that had been omitted from the initial motion **(Def's Supplement to Mot for Summ J, R pp 658-59)**

The Honorable R. Markley Dennis, Jr., Circuit Court Judge, conducted a hearing on the Town's motion on May 9, 2011 **(Order, R pp 1-19)**. After considering the record, arguments, and briefs by the parties, the circuit court granted summary judgment in favor of the Town. The lower court entered its order on May 23, 2011 **(Order, R pp 1-19)**

DWGC received written notice of entry of the judgment on May 27, 2011. Dunes West filed and served its Notice of Appeal on June 24, 2011. Because DWGC's Complaint included a challenge to the constitutionality of a municipal ordinance, this appeal was filed in this Court pursuant to Rule 203(d)(1)(A)(ii), SCACR.

STATEMENT OF FACTS

This Court has addressed the constitutional principles applicable to this case many times. Never before, however, have the evolving constitutional doctrines applicable to takings and due process claims been presented in the context of facts such as these. The foremost fact differentiating this case is the sheer volume of land rendered valueless by the rezoning - 60

acres

What also distinguishes this case is its timing. In its last several cases interpreting the application of the takings and due process clauses of the Fifth Amendment to the United States Constitution, the Supreme Court of the United States has clarified the proper constitutional analyses. This Court has not had the opportunity to consider and apply all these developing clarifications. This emerging precedent from the United States Supreme Court questions the mechanical application of the “parcel as a whole” doctrine under the takings clause and rejects courts blindly giving deference to legislative findings in a substantive due process challenge.

As is evident from a reading of the Order below, the lower court weighed facts and made the equivalent of factual findings. It is improper for a court to render findings in ruling on a motion for summary judgment. Shirley's Iron Works, Inc v City of Union, 387 S C 389, 397, 693 S E 2d 1, 4 (S C Ct App 2010). Instead, all factual inferences are taken in the light most favorable to the party opposing summary judgment. Rule 56, S C R Civ P, Foreign Academic & Cultural Exch Servs., Inc v Tripon, 2011 WL 3804832, at *2 (S C Aug 29, 2011). Applying the settled standard for summary judgment and the governing principles for assessing the constitutional questions raised by this case, this Court should reverse and remand for trial.

Dunes West and the Property in Question

The land at issue is within a planned community in Mount Pleasant known as Dunes West. In 1990, the Mount Pleasant Town Council annexed Dunes West and adopted as the project's zoning the Dunes West PDD, a mixed use planned development on 4518 acres (**Farrell Dep Exs 1, 2, R pp 992-1051**). The Dunes West PDD included R-1, Low-Density Residential District, R-3, Medium-Density Residential District, RTH, Townhouse Residential District, MF, Multi-Family Residential District, OP, Office Professional District, TC, Town

Center District, C, Commercial District, and CO, Conservation-Open Space District (**Farrell Dep Ex 2, R pp 993-1051**)

The subject property consists of six tax map parcels identified by Charleston tax records as TMS Nos 540-00-00-38, 039, 040, 041 and 594-03-00-154 and 161 (**Deed dated Mar 5, 2005, R pp 122-124**) The six parcels encompass approximately 256 acres (**Ex A to Deed dated Mar 5, 2005, R p 124**) A golf course, clubhouse, and related facilities occupy approximately 196 acres (**Popson Dep Ex 10 at p 12, R p 828**) The remaining 60 acres were available for any of the uses as a matter of right permitted under the Dunes West PDD Those available, permitted uses for the land included two residential uses, R-1(low density residential) and R-3 (medium density residential)

In 2002 John Wieland Homes & Neighborhoods, Inc and John Wieland Homes and Neighborhoods of the Carolinas, Inc (jointly referred to as “John Wieland Homes”) purchased most of the remaining developable land at Dunes West and became the master developer of Dunes West (**Popson Dep R p 725, line 19, Wieland Dep R p 705, line 25–p 706, line 4**) John Wieland Homes is primarily engaged in homebuilding, including developing residential communities (**Wieland Dep R p 707, lines 6-7**) Appellant, Dunes West Golf Club, LLC (“DWGC”), is affiliated with John Wieland Homes, the entities are under the common ownership and control of John Wieland (**Pl’s Answers to Def’s First Set of Interrogs , No 5, R pp 1302-1303, Wieland Dep R p 704, lines 2-19**)

John Wieland Homes Enters a Contract to Purchase the Property Because the Dunes West PDD Allows the Subdivision and Residential Development of the Extensive Land Adjacent to the Golf Course

At the time of John Wieland Homes’ acquisition in 2002, an entity known as Scratch Golf owned the six parcels that included the golf course In 2004 Scratch Golf put the property

on the market

John Wieland Homes decided to purchase the property but did so only in expectation of subdividing lots and building houses on portions of the sixty acres adjacent to the golf course. John Wieland Homes' core business is residential development, not golf courses and hospitality services.

John Wieland, the founder and owner of John Wieland Homes, considers himself a developer and a homebuilder by trade, he testified he hates golf courses (**Compl ¶ 2, R p 20, Wieland Dep R p 704, lines 3-6, p 707, lines 6-8**) "You know, I don't play golf and they all lose money" (**Wieland Dep R p 707, lines 8-9**) Notwithstanding his disdain for golf courses, John Wieland was willing to proceed with the purchase only because of the residential development potential of portions of the 60 acres of this property arrayed in locations around the golf course (**Wieland Dep R p 707, lines 6-9, Popson Dep R p 733, line 25-p 734, line 8, p 738, lines 5-6**) "[I]t was a nice opportunity for us, if anything, to just sell, develop lots to people to be on the golf course" (**Popson Dep R p 734, lines 21-23**) The entire property including the non-golf 60 acres was zoned for residential use as a matter of right under the Dunes West PDD (**Popson Dep R p 741, lines 5-11**)

The record includes abundant proof that John Wieland Homes proceeded to purchase the property in full reliance on the PDD zoning, confirmed by the Town's planning department, that permitted it to subdivide and build residential units on portions of the acreage arrayed in different locations around the golf course. Wieland testified he identified the developable dirt outside the golf course play area and that he purchased the course for that developable dirt (**Wieland Dep R p 707, lines 14-23, p 710, lines 9-10**) He further testified he wouldn't pay \$4 million to lose money on a golf course operation alone (**Wieland Dep R p 711, lines 17-18**)

Rather, he was willing to pay \$4 million for the 256 acres for “the residual land around – the play – the out-of-bounds markers, if you would, of the golf course There was residual land that we, as a developer and a homebuilder, could go in there and cut out and either create lots to sell to individuals or build homes to sell to individuals ” **(Popson Dep R p 733, line 25-p 734, line 8, p 738, lines 5-6)**

John Wieland testified that “we purchased the big tract so that what we were calling the clubhouse and the 18 things with the flags and – you know, could operate, you know, over here, and then we could take the good dirt and use our floating zoning to develop the good dirt ” **(Wieland Dep R p 707, lines 14-19)** When asked whether he identified the 57 or so acres of good dirt before he purchased the property, he testified, “absolutely” **(Wieland Dep R p 707, lines 20-23)** and that he purchased the course “[f]or the 57 acres” **(Wieland Dep R p 710, lines 9-10)**

As part of John Wieland Homes’ due diligence, on November 23, 2004, only one day after entering the contract to purchase the property, its Charleston division president, Kevin Popson, and its civil engineer and planner, Stuart Whiteside, met with the then-Town Planning Director, Joel Ford, to confirm that those 60 acres outside the golf course were developable **(Popson Dep R p 740, line 19-p 742, line 25, Ex 2, pp 798 – 801, Whiteside Dep p 831, lines 13-18, p 834, lines 10-23, p 836, lines 9-17)** Ford confirmed to Popson and Whiteside that the Dunes West PDD allowed residential development on the property **(Popson Dep R p 741, lines 11-24, Whiteside Dep R p 833, line 11-p 834, line 1)** Christiane Farrell, the current planning director for the Town, agreed that the PDD zoning at the time of purchase allowed residential use on the property **(Farrell Dep R p 918, line 3-p 919, line 2, p 990, line 25-p 991, line 17)**

Popson frequently dealt with Town Planning staff when preparing to develop a new section of Dunes West (**Popson Dep R p 726, line 24-p 728, line 10**) Before presenting subdivision plats for approval, he would “always try to meet and just make sure we weren’t doing anything wrong, we were abiding by the ordinances And maybe a quick review with [Town planning staff] Christiane and/or Joel saying here is what we want to do, is there anything we are missing, whatever Sort of try to get their thoughts so as we progressed through construction drawings or whatever, we kind of eliminated any possible mistakes or errors that we would have to deal with later ” (**Popson Dep R p 726, line 24-p 728, line 10**) These meetings in advance of submitting a development application were no different from the meeting Popson had with Ford as part of the purchaser’s due diligence before agreeing to close on the 256 acres, which included approximately 196 11 acres of golf course and 60 4 acres of developable land outside the golf course play areas (**See Compl ¶¶ 5-7, R p 21,, Popson Dep p 740, line 19-p 742, line 13**)

John Wieland Homes enlisted Whiteside to assist with development concepts for the undeveloped land around the golf course when Wieland put the land under contract (**Whiteside Dep R p 834, lines 2-15**) Well before the closing on the purchase, Whiteside worked with John Wieland Homes’ team to determine “where residential development could occur” “on the undeveloped portion” of the property (**Whiteside Dep R p 834, lines 2-20**) Under the Dunes West PDD, staff approval was all that was required to subdivide lots for the residential development of the land (**Popson Dep R p 741, lines 8-15, Whiteside Dep p 833, line 11-p 834, line 1, Ford Dep p 857, line 10-p 861, line 11, Farrell Dep Ex 7, pp 1069-1072**) Master plans for developing the acreage surrounding the golf course were created and in late 2004 Whiteside began showing conceptual layouts to the Town (**Whiteside Dep R p 834, line**

21-p 835, line 5)

On December 3, 2004, three months before closing, Popson ordered surveying of possible lots around the golf course **(Popson Dep Ex 2, R pp 798-801)** On December 28, 2004, Southeastern Surveying surveyed potential lots around the golf course **(Popson Dep Ex 2, R pp 798-801)**

DWGC Purchases the Property and Continues with its Plans for Residential Development of Portions of the Land Around the Golf Course

John Wieland formed DWGC to buy the property In March 2005, DWGC closed on the property paying \$4 million to Scratch Golf **(Deed dated Mar 5, 2005, R pp 122-124)**

“[Whiteside and Popson] started showing some conceptual layouts to the Town And then for the following year-and-a-half or so, we did a lot of varying different lay-outs” **(Whiteside Dep R p 834, line 21-p 835, line 5)** These varying lay-outs were done pursuant to Ford’s recommendation “When we met with Joel Ford originally, he said he didn’t have a problem with coming back with the additional lots, but we need to go through the process – the sketch plan process And he advised before we came back with the sketch plan to get – for Wieland to get support of the homeowners association ” **(Whiteside Dep R p 835, lines 6-14)** Whiteside testified that Ford said that an impact assessment was not required to move ahead with the residential development of portions of the acreage surrounding the golf course **(Whiteside Dep R p 835, line 24-p 836, line 4)**

Although sketch plans existed and evolved from the time Whiteside and Popson met with Ford in November of 2004, DWGC refrained from formally submitting a development application to the Town because “[Whiteside and Popson] were advised that – by the Town to proceed with getting the homeowners’ approval or support before we made the formal submittal ” **(Whiteside Dep R p 839, lines 18-22)** Pursuant to the Town’s directive, “for a year

and a half or so, Kevin Popson with Wieland was working with the HOA to negotiate or to review the different lots So during that process as issues arose, we would revise the layout” (Whiteside Dep R p 835, lines 14-18, p 837, line 11-p 838, line 24, p 839, lines 6-22, Exs 2-6, pp 845-849)

The Town Rezones the Property, Over the Objection of the Owner, Without Studies or Analyses to Determine Whether Rezoning this Property to CRO was Necessary or Reasonably Related to Accomplishing the Purported Objectives Recited in the CRO Ordinance

Around February 2006, a directive came down to Town Planning Staff from Town Council about golf courses within the Town As explained by Ford, “Plain and simple It was, more or less, a directive from Council that staff investigate and prepare the classification to protect golf course facilities from being turned into dwelling units, just plain and simple” (Ford Dep R p 861, lines 16-21) “[T]he intent was to make sure that these golf courses and facilities were protected from being developed into housing” with the “specific purpose” of preventing “undesirable development ” (Ford Dep R p 863, lines 20-25, p 868, lines 18-19)

Although it issued this directive, Town Council neither requested nor conducted any studies to substantiate Council’s fear that golf courses might be converted to residential use (Ford Dep R p 871, line 25-p 872, line 23, p 880, lines 21-25, p 881, lines 1-5, p 882, line 23-p 883, line 16) Ford testified that prior to the Town’s rezoning of DWGC’s parcels as well as those of other owners of lands containing golf courses in the Town, not one of those owners had communicated to the Town the slightest intent to close down the golf course and convert it to residential use – no imminent threat was posed on the Town by any owner of a Mount Pleasant golf course (Ford Dep R p 884, lines 13-22) The record is devoid of any facts before Council that golf courses within the Town were in danger of being forever closed, that all golf courses within the Town were necessary to handle the volume of golf play, that the golf courses within

the Town were vital to containing possible flood waters within the Town, or what constituted so-called “undesirable development,” much less that golf courses in the Town were in imminent peril of this undefined “undesirable development ” (Ford Dep R p 870, line 14-p 871, line 2, p 871, line 25-p 873, line 23, p 874, lines 4-14, p 875, lines 10-25, p 877, lines 3-21, p 880, line 21,p 883, line 16, p 884, lines 13-22)

The Dunes West PDD, the zoning then in place, virtually assured that the Dunes West golf course would remain open space and would not be converted to residential use In its provision addressing open space, the Dunes West PDD specified that the Town would accept title to 59 acres, reserved for park and recreation space, and that “the Phase I golf course fulfills the other open space requirements [for the project]” (Farrell Dep Ex 2 §10, R p 1015) Despite this protection against conversion in the Dunes West PDD, the Town persisted in its effort to rezone all 256 acres to park and recreation area (Farrell Dep R p 925, line 4-p 926, line 3)¹

In its haste to rezone the five courses in the Town to CRO, Town Council failed to direct planning staff to investigate whether or not the TMS parcels in the Town that included golf courses included significant acreage outside the areas occupied by the golf courses that were available for other uses and possible future development without closure of the golf course (Farrell Dep R p 47, line 20-p 948, line 4) Town staff neither investigated nor walked around the Town’s courses to see how much land beyond the golf courses exceeded the golf course

¹ Since it did not have any expectation of converting the golf course to residential use and always intended to have a golf course at Dunes West, DWGC does not make a claim for the downzoning of the golf course itself that could have been converted to residential use under the Dunes West PDD DWGC’s claims and damages relate only to the inclusion of the considerable surrounding acreage in the down zoning of the property

footprint (**Farrell Dep R p 965, line 25-p 966, line 12**)² No one examined the properties which would be subject to the new CRO designation to determine whether the amount of acreage in each was comparable to what would normally be expected for a golf course (**Farrell Dep R p 940, lines 3-8**) The current planning director testified that the amount of acreage of the DWGC property that was later rezoned was not adjudged by its play area but rather by the tax map parcels – which went well beyond what was necessary to preserve the golf course (**Farrell Dep R p 915, line 22-p 916, line 19**)

The owners of the parcels with golf courses within the Town expressed their concerns and objections to the anticipated downzoning of their lands to CRO in the months leading up to the rezoning of these lands on June 13, 2006 (**Farrell Dep Exs 6, 7, 10, 13, 17, R pp 1060-1072, pp 1085-1094, pp 1097-1099, pp 1106-1107**) The questionable legality of rezoning the TMS parcels that included the golf courses had been brought to Town Council’s attention at least two months before, in April of 2006 (**Farrell Dep Ex 6, R pp 1060-1068**) Despite the expression of concerns and objections by the owners and notice of its questionable legality, the Town did not conduct any studies or investigate further the numerous issues implicated by the CRO Ordinance or the rezoning of DWGC’s property before using its zoning power to convert private developable lands outside the golf courses to parks

The Town rejects DWGC’s Later Applications to Rezone Portions of the Property to Permit the Residential Uses Previously Allowed under the Dunes West PDD

In January of 2008, Dunes West applied to rezone some of its developable acreage around the golf course, but then withdrew its application after it was rejected by the Town’s

² However, Town Planning staff would have driven out by the golf course “to try to take pictures to include in our presentations And it would have been just right here at the clubhouse and that sort of stuff And when we posted the signs for the rezoning, I would have been out there for that ” (**Farrell Dep R p 966, lines 16-21**)

Planning Commission (**Popson Dep R p 773, lines 8-19, Exs 26 and 27 to Farrell Dep pp 1184-1192**) The reason for withdrawal was that “[t]he planning commission voted to not recommend, that we felt the council probably wasn’t going to vote for it, so we thought, let’s step back, let’s go back to the homeowners and see if we can’t win their support” (**Popson Dep R p 774, lines 4-8**) Upon this withdrawal, Dunes West was required to wait one year before reapplying to Town Council (**Popson Dep Ex 2, R pp 798-801**)

On April 1, 2009, DWGC submitted two applications to the Town to rezone 17 86 acres of the property One requested rezoning of 10 73 acres to R-3, the other requested rezoning of 6 56 acres to R-1 (**Applications attached as Ex 18 to Def’s Mem in Supp R pp 143-144**) The Dunes West PDD that had been in effect since 1990 until abrogated by the CRO rezoning of the property allowed for both the R-3 and R-1 uses that were requested in the 2009 application DWGC presented to the Planning Commission, Council, and others a conceptual layout of the lots around the golf course if the application were granted, these were six large single family lots (R-1) and 26 smaller lots (R-2) (**Ex 19 to Def’s Mem in Supp R pp 823-826**)

On April 22, 2009, the Planning Commission voted not to recommend Dunes West’s rezoning request for the 17 86 acres (**Pospon Dep Ex 2, R pp 798-801**) On May 12, 2009, counsel for Dunes West provided a detailed powerpoint to the Town Council before its final decision, which made clear that even with the proposed development (by then whittled down to 17 86 acres), there would be 676 acres of green and open space 400 acres of wetlands and buffer, 196 acres of golf course, and 20 acres of developable land Dunes West would donate as open space (**Popson Dep Ex 10 at p 3, 5, R pp 819, 821, Ex 19 to Def’s Mem in Supp R pp 817-829**) On June 9, 2009, Town Council voted to deny the applications for rezoning (**Exs, 28, 30, and 33 to Farrell Dep R pp 1193-1199, pp 1203-1217**)

The Town Acknowledges the 60 Acres Surrounding the Golf Course No Longer Have Any Material Economic Value to DWGC and that the Loss as of the Date of the Downzoning was Around \$6,000,000

DWGC's appraiser, Christopher Donato, testified that, applying a valuation date of June 15, 2006, the value of the non-golf course land prior to the re-zoning that eliminated residential uses was \$6,642,000 (Donato Dep R p 58, lines 2-4) The Town's appraisers estimated the loss of value of the non-golf course land for residential use as of the time of the 2006 rezoning at a similar amount The Town stripped out this value when it adopted zoning requiring all 256 acres to remain as open space and golf course

The Town acknowledged in the following exchange at the hearing that the downzoning of the outside acreage to CR-O rendered it valueless and that the loss to DWGC was in the neighborhood of \$6,000,000

14 (Ms Cantwell) Granted, I would be the first to admit
15 that they could develop these twenty-five acres
16 -- it's not sixty acres , it 's twenty- five
17 acres The 30(b) (6) witness says, 'That's all
18 that we've got , twenty-five acres It isn't
19 sixty ' That's why it's been a moving target
20 But I would admit to you that if they
21 -- yeah, you could probably get up to six
22 million dollars, I think is what their
23 appraiser said, in 2006, that those properties
24 were worth My appraiser says something close
25 to that

23 THE COURT Let me ask you a
24 question From your example, -- if we had to
25 take it as a whole, I would agree with you

1 But if you don't, then isn't that example that
2 there is something that is lost?

3 MS CANTWELL If you accept that
4 ---

5 THE COURT I mean, isn't that the
6 crux of this

7 MS CANTWELL Yeah I think that

8 if you accept that the
9 THE COURT Because, I mean,
10 everybody would agree -- just based on your
11 argument and his argument that if I am twenty-
12 five -- twenty- five or sixty, whatever it is
13 the value of that property itself can't be
14 recovered, it's lost
15 MS CANTWELL Yes , sir,
16 THE COURT They've lost that
17 property
18 MS CANTWELL --- if you consider
19 it separate and apart

(Tr R p 91, lines 14-25, p 92, line 23-p 93, line 19)

The Lower Court's Ruling

The lower court granted summary judgment in the Town's favor on all claims In so doing, the trial court relied heavily on precedent that zoning ordinances are presumptively valid **(Order, R p 8)** The lower court deferred entirely to the recitals and findings in the ordinances at issue and found them legitimate on their face irrespective of any other evidence

Relying on the "the parcel as a whole" doctrine, the lower court found the 256 acres still had economic value as a golf course regardless of the elimination of value for the surrounding acreage and held there could be no categorical or partial taking as a matter of law **(Order, R pp 16-17)** In so ruling, the lower court questioned whether DWGC's primary expectation concerning the use of the parcels was affected at all **(Order, R pp 18-19)** The lower court relied on the facts that the property was used as a golf course at the time of purchase, no land had been subdivided out of the parcels for residential development, DWGC never intended to develop the golf course itself, and all the property had been mortgaged based on an appraisal that valued it as a golf course **(Order, R pp 18-19)**

In denying the substantive due process claims, the lower court held that DWGC did not have a vested interest in the residential development of the property **(Order, R p 11)** The

lower court also held that DWGC cannot complain of a denial of substantive due process since it could have applied for residential development for portions of the property up until June 30, 2007, when a possible vested right to pursue residential development expired, but did not do so **(Order, R pp 11-13)**

As for the claim for denial of equal protection based on the Town's rejection of its request for rezoning in 2009, the lower court held that the application for rezoning from CRO to residential approved by Town Council for the owner of the Snee Farm golf course was distinguishable because it was supported by a segment of owners at Snee Farm and did not alter the golf course very much. The lower court also found there was no proof of any intent to discriminate against DWGC **(Order, R pp 9-10)**

STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" S C R Civ P 56(c). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law Carolina Chloride, Inc v S C Dept of Transp., 391 S C 429, 434, 706 S E 2d 501, 504 (2011). Further, summary judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusions to be drawn therefrom MacFarlane v Manly, 274 S C 392, 264 S E 2d 838 (1980).

In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party Carolina Chloride, Inc., 391 S C at 434, 706 S E 2d at 504. All

ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant Staubes v City of Folly Beach, 331 S C 192, 197, 500 S E 2d 160, 163 (S C Ct App 1998)

“Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues ” Murphy v Tyndall, 384 S C 50, 54, 681 S E 2d 28, 30 (S C Ct App 2009) 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-S Mgmt Co., 381 S C 326, 330-31, 673 S E 2d 801, 803 (2009)

“In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right ” Sloan v S C Bd of Physical Therapy Exam'rs, 370 S C 452, 466-67, 636 S E 2d 598, 605-06 (2006)(internal citations omitted) “The question of a taking is one of law ” Ex Parte Brown, 393 S C 214, 711 S E 2d 899, 904 (2011)

ARGUMENT

The Town invoked its police power to zone to compel the landowner in this case to provide a park on its private property for the benefit of the public without compensating the landowner The purported aim of the ordinance, putting aside the window dressing of stated objectives, was to preserve the golf course and related facilities that cover approximately 196 11 acres The downzoning was not necessary to preserve the golf course The Dunes West PDD's specific reference to the golf course as satisfying the project's open space requirements virtually

assured the golf course's preservation. Even so, the legislative preservation of the golf course could easily have been accomplished without eliminating all economic productivity from the adjoining 60 acres. The downzoning of this property to CRO does not rationally advance the stated objectives of the ordinance that in themselves lack factual underpinning.

In the Order the lower court remarked that the developable land was less than 60 acres, focusing on the acreage that was subject to the 2009 rezoning request (17 acres) and that was used in DWGC's damages calculation (25 acres). Although DWCG never filed a request to rezone all 60 acres and did not calculate its damages based on the residential development of all 60 acres, all 60 acres were in fact rezoned to park space and rendered economically valueless under the Dunes West Ordinance.

The lower court committed reversible error for the following reasons:

First, the lower court failed to consider the relevant portions of the property in its analysis of whether a categorical regulatory taking occurred under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). The lower court also misapplied the factual balancing test set forth in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

Genuine issues of material fact preclude summary judgment on the takings claim. The record establishes both a compensable categorical taking under Lucas and a compensable partial taking under Penn Central.

The record also establishes that the CRO district as applied to this property denies DWGC substantive due process. The Dunes West PDD already required the preservation of the golf course as open space and DWGC had no intent to convert the golf course to residential use. The record shows the Dunes West Ordinance's other purported purposes are without factual basis.

Finally, the lower court failed to compare the Town's decision to deny Dunes West its request to rezone with the Town's decision to grant Snee Farm's request to rezone against the backdrop of the purposes of the CRO zoning district. There was no difference between the two residential rezoning requests vis a vis the purposes of the CRO district. There is also evidence to support the reasonable inference that the Town intended to discriminate against DWGC by imposing a more stringent standard on it. These genuine issues of material fact prevent the granting of summary judgment on DWGC's equal protection cause of action.

I There is evidence that the Town's downzoning of sixty acres from residential use to park space constitutes a compensable taking under the takings clauses of the state and federal constitutions

" [N]or shall private property be taken for public use without just compensation " U S Const amend V

"Except as otherwise provided in this Constitution private property shall not be taken for private use without the consent of the owner nor for public use without just compensation being first made for the property " S C Const art I, § 13(A)

"Both the United States Constitution and the South Carolina Constitution provide that if the government takes private property for public use, then it must compensate the owner for the value." Byrd v City of Hartsville, 365 S C 650, 656, 620 S E 2d 76, 79 (2005) "[W]hen the government interferes with a private citizen's property rights and this interference is not related to any legitimate public interest, the government has acted beyond the scope of its authority." Id. at 663, 620 S E 2 at 83 (Toal, J, dissenting) (citing Lucas v S C Coastal Council, 505 U S 1003, 1016, 112 S Ct 2886, 120 L Ed 2d 798 (1992))

To establish an unconstitutional taking via inverse condemnation, this Court requires the proof of two elements (1) affirmative conduct of a government entity, and (2) the conduct effects a taking, *i e*, damage Byrd, 365 S C at 657, 620 S E 2d at 79. Inverse condemnation

exists where, as here, the government takes property without just compensation by imposing limitations which amount to a taking Id. at 656, 620 S E 2d at 79

The first element, affirmative conduct, requires the Town to enact and rule upon a zoning ordinance which restricts the use of land Id. at 657, 620 S E 2d at 79 “The determination that an act is affirmative, positive, and aggressive depends on the facts and circumstances of the particular case ” White v County of Newberry, S C , 985 F 2d 168, 173 (4th Cir 1993) It is undisputed the first element is met in this case

This Court has adopted the tests applied by the United States Supreme Court when evaluating the second element – whether the government conduct effects a taking If the regulation deprives the owner of all viable economic use of the land, then the analysis is under Lucas v South Carolina Coastal Council, 505 U S 1003, 112 S Ct 2886 (1992) If the owner is left with some economically viable use, then the analysis is guided by the principles enumerated in Penn Central Transportation Co v City of New York, 438 U S 104 (1978) “If Lucas does not apply, then Penn Central does ” Byrd v City of Hartsville, 365 S C 650, 660, 620 S E 2d 76, 81 (2005)

The lower court committed reversible error when it held that the Dunes West Ordinance constituted neither a categorical total taking nor a partial taking of DWGC’s land as a matter of law

The Supreme Court of the United States has held that “the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question ” City of Monterey v Del Monte Dunes at Monterey, Ltd., 526 U S 687, 721, 119 S Ct 1624, 1644, 143 L Ed 2d 882 (2005) It is undisputed that the downzoning eliminated all material economic value of the sixty acres surrounding the golf course There is abundant

evidence the owner had reasonable, economic-backed expectations that it could proceed with the residential development of portions of the land next to the course when it purchased the property

a The parcel as a whole doctrine does not bar DWGC's claim for a categorical taking

The lower court incorrectly decided there was no evidence the Dunes West Ordinance constituted a categorical taking under Lucas v South Carolina Coastal Council, 505 U S 1003, 112 S Ct 2886 (1992). The court premised its decision on (1) a legal determination that the relevant parcel to evaluate in a takings analysis is the parcel as a whole, and (2) a factual determination that the entire 256 acres within the 6 tax map parcels purchased by DWGC constitute the parcel as a whole.

The United States Supreme Court has questioned the parcel as a whole doctrine, insinuating that by no means must it apply in every instance of an alleged categorical taking. Indeed, courts from around the nation have rejected the parcel as a whole doctrine in instances where the affected acreage is substantial and there is evidence that the affected acreage could have been subdivided for separate economic use from the remainder of the parcel. The few cases relied upon by the lower court as its basis for applying the doctrine involve instances where the land attempted to be segregated was small or *de minimus*. Those cases where this Court has employed the doctrine have also involved instances where the portion of the parcel that the owner sought to have separately considered was small – nothing even remotely close to 60 acres.

As the United States Supreme Court has noted, “[r]egrettably, the rhetorical force of our ‘deprivation of all economically feasible use’ rule is greater than its precision, since the rule does not make clear the ‘property interest’ against which the loss of value is to be measured.” Lucas, 505 U S at 1016 n 7, 112 S Ct at 2894. “When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the

situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole” Id. In other words, the Supreme Court stated in Lucas that there are instances where application of the parcel as a whole doctrine may be unreasonable and unfair and therefore inapplicable. This is just such a case.

Nine years later in Palazzolo v Rhode Island, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001), the United States Supreme Court again expressed skepticism about the parcel as a whole approach. Palazzolo owned 22 acres of coastal land. 18 of these were wetlands that he asserted the state was taking from him if it would not allow him to fill them. On appeal, Palazzolo raised for the first time the argument that the upland parcel was distinct from the wetlands portions and should not be considered in determining whether a categorical taking occurred as to the 18 wetland acres. Palazzolo asserted that the deprivation analysis should focus on the wetlands acreage without regard to his usable upland acreage. The Court responded

[t]his contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators. Whatever the merits of these criticisms, we will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari. The case comes to us on the premise that petitioner's entire parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails.

Palazzolo, 533 U.S. at 631-32, 121 S. Ct. at 2465. The Supreme Court went as far as the facts of the case would allow in expressing its “discomfort with the logic of the rule.” If the parcel as a whole doctrine were a hard and fast rule, then the Supreme Court could easily have said so.

In determining the “predominantly factual question” of whether an owner has been deprived “of all economically viable use of his property,” numerous courts applying United

States Supreme Court precedent have allowed less than all the land to be considered as a separate parcel under some circumstances or have pronounced examples of where land could be considered as a separate parcel. Like the rest of regulatory takings law, courts engage in a fact specific inquiry when defining the relevant parcel in evaluating a categorical Lucas takings claim. Giovanella v Conservation Comm'n of Ashland, 447 Mass. 720, 726, 857 N.E.2d 451, 456 (2006).

For example, in Loveladies Harbor, Inc. v United States, 28 F.3d 1171 (Fed. Cir. 1994), the Federal Circuit severed the land for the purposes of a categorical, Lucas takings analysis. The court rejected the government's contention that the "relevant parcel" was all 250 acres. The court instead looked to the 12.5 acres the landowner was prevented from developing under laws passed after the landowner purchased the property and developed parts of it.

Invoking the Lucas observation that "the rhetorical force of [the] deprivation of all economically feasible use' rule is greater than its precision" (Lucas, 505 U.S. at 1016 n.7, 112 S.Ct. at 2894), the court modeled itself after the "flexible approach" proffered by precedent that, by design, would account for factual nuances. Loveladies, 28 F.3d at 1181. Evaluating the 12.5 acres for which the landowner sought a permit, the court held that its remaining value was *de minimis*. Id. The court expressly held that "[t]his is not, then, a case of a partial taking, involving linedrawing between noncompensable 'mere diminution' and compensable partial taking. Rather this is a case in which the owner of the relevant parcel was deprived of all economically feasible use." Id. at 1181-82. The court upheld the trial court decision that the permit denial for those 12.5 acres "was effectively a total taking of the property owner's interest." Id. at 1182.

Other examples are in accord. In Nectow v City of Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928), the United States Supreme Court severed the smaller, 29,000 square-

foot tract from the larger, 140,000 square-foot tract for the purposes of its takings analysis. There, no less than the United States Supreme Court held that the government invasion on the smaller tract was an abuse of its police power. See also Am Sav & Loan Ass'n v Marin County, 653 F.2d 364, 366 (9th Cir. 1981) (stating adjacent parcels under a common owner may be considered separately if it can be shown the owner treated the parcels separately), Florida Rock Indus. v. United States, 791 F.2d 893, 904 (C.A. Fed. 1986) (finding a taking where the government's refusal to allow limestone mining on a proposed 98-acre tract was only part of the owner's original 1560-acre purchase), Giovanella v. Conservation Comm'n of Ashland, 447 Mass. 720, 728, 857 N.E.2d 451, 458 (2006) (identifying whether the land is put to the same use or different uses as a factor in determining the relevant parcel), Twain Harte Assocs. v. County of Tuolumne, 217 Cal. App. 3d 71, 85, 265 Cal. Rptr. 737 (Cal. Ct. App. 1990) (holding the nature of the particular land use regulation has been recognized as potentially creating separate parcels for "taking" purposes), John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535 (1994) (stating that where the total restrictions on development affect a significant enough segment of land that it could be independently developed for a profit, the principles of fairness and justice underlying the Fifth Amendment require that the owner be compensated for this loss).

As this substantial judicial precedent shows, the law does not demand that the entire 256 acres be treated as a "whole" in an "as applied" inverse condemnation suit for purposes of the Lucas analysis. The 60 acres, or more precisely the 25 acres of land where subdivision and development were feasible and legally permissible before the downzoning, is the relevant parcel for the categorical takings analysis.

Prior South Carolina inverse condemnation cases discussing the parcel as a whole approach involved relatively insignificant acreage in comparison to the acreage at issue in this case. In Beard v South Carolina Coastal Council, 304 S C 205, 207-08, 403 S E 2d 620, 622 (1991) cited by the lower court, the landowners sought a permit to construct a bulkhead that was approximately 205 feet in length across four lots of beachfront property. The land allegedly taken was a mere 18.5 feet on two lots and 23.9 feet on a 3rd lot. The owner in Beard was not deprived of developing 32 residential lots, as occurred here.

The quantity of affected land in this case is in no manner comparable to that involved in the other case relied upon by the lower court, Quirk v Town of New Boston, 140 N H 124, 663 A2d 1328 (NH 1995). Quirk involved the application of the town's zoning ordinance to the landowner's campground. The town enacted a buffer zone requirement for the recreational campground which prevented certain land development within a minimum distance of campground perimeters. Id. at 128, 663 A 2d at 1330-31. The ordinance prohibited buildings, recreational facilities, trailer spaces, campsites, and tent sites in the 200-foot buffer zone. Id. at 128, 663 A 2d at 1331. The inner 100 feet could be used for any other purpose, including underground utilities and the outer 100 feet had to contain natural vegetation. Id. The campground owner sued on the grounds that the buffer zone requirement effected an unconstitutional taking of his property. Id.

The New Hampshire Supreme Court recognized that "Focusing on a discrete portion of a larger tract may be appropriate where the land owner has fragmented the property for distinct development or uses. A narrower focus may also be proper where portions of the larger tract have already been dedicated to benefit the public." Id. at 131, 663 A 2d at 1332-33. However, in upholding the trial court's finding that there was no taking, the court held that "[i]n the present

case, we find no compelling reason to view the perimeter as a discrete segment of campground ” It is clear from the court’s opinion that had the campground owner possessed a “compelling reason”, *i e*, facts that demonstrated the land owner intended to fragment the property for distinct development and uses, the court would likely have reached a different outcome The 32 residential lots that were taken in this case bear no reasonable relationship to the unusable 100’ buffer around the campground allegedly taken in Quirk The acreage in the present case qualifies for severance under the rationale of Quirk, DWGC fully intended to fragment the non-golf course acreage for residential use

The regulatory limitations imposed by the rezoning in the present case bear an eerie and uncanny resemblance to the restrictive regulatory effect in Lucas The nature of the deprivation of use is identical There the Supreme Court of the United States flatly rejected the state’s argument that the land retained economic value as a picnic area and recreational site once residential use was prohibited The Town’s downzoning of the sixty acres to a park in this case meets the standard for a *per se* taking applied by the United States Supreme Court in Lucas as a matter of law

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking

505 U S 1019

Case closed

The categorical rule set forth in Lucas has been reiterated several times by the United States Supreme Court – and remains largely unchanged Compensation is required when a regulation deprives an owner of *all* economically viable uses of his land Tahoe-Sierra Pres Council, Inc v Tahoe Reg’l Planning Agency, 535 U S 302, 330, 122 S Ct 1465, 1483, 152 L

Ed 2d 517 (2002) Lucas applies in the extraordinary circumstance, such as the present case, where no productive or economically beneficial use of land is permitted under the Dunes West Ordinance Id. The government “must pay just compensation for such ‘total regulatory takings,’ except to the extent that background principles of nuisance and property law’ independently restrict the owner’s intended use of the property ” Lingle v Chevron U S A Inc., 544 U S 528, 538, 125 S Ct 2074, 2081, 161 L Ed 2d 876 (2005) (quoting Lucas, 505 U S at 1026-1032, 112 S Ct at 2886) The determinative factor in a Lucas analysis continues to be “the complete elimination of a property’s value ” Id at 539-40, 125 S Ct at 2082 The Lingle Court reiterated “that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation ” Id (quoting Lucas, 505 U S at 1017, 112 S Ct at 2894) The Palazzolo Court held that

[t]he determination whether an existing general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed A law does not become a background principle for subsequent owners by enactment itself Lucas did not overrule our holding in Nollan, which, as we have noted, is based on essential Takings Clause principles

Palazzolo v Rhode Island, 533 U S 606, 630, 121 S Ct 2448, 2464, 150 L Ed 2d 592 (2001)

The proof in the record goes well beyond establishing a genuine issue of material fact as to whether the Dunes West Ordinance amounted to a Lucas taking It establishes it as a matter of law The rezoning converted the sixty acres surrounding the golf course to park and open space and destroyed \$6,000,000± in its development value The Town concedes that DWGC is permanently deprived of all viable economic use of the surrounding acreage separate and apart from the golf course (Tr R pp 91-93) For the foregoing reasons, summary judgment as to the Lucas takings analysis should be reversed The downzoning constituted a *per se* takings under Lucas as a matter of law

b There is ample evidence to support a compensable taking under the fact intensive inquiry mandated by Penn Central Transportation Co v City of New York, 438 U S 104 (1978)

In the addition to a Lucas taking, there is evidence of a taking under the *ad hoc*, fact-sensitive balancing test set forth in Penn Central Transportation Co v City of New York, 438 U S 104, 98 S Ct 2646, 57 L Ed 2d 631 (1978)

Three factors are typically balanced to decide whether the public benefit from a regulation or law outweighs the private harm to the landowner (1) the character of the government action, (2) the economic impact of the regulation on claimant, and (3) the degree to which the regulation/law has interfered with distinct investment-backed expectations. If the public benefit outweighs the harm to the landowner, there is no taking and the government need not pay compensation.

Sea Cabins on Ocean IV Homeowners Ass'n v City of North Myrtle Beach, 345 S C 418, 430 548 S E 2d 595, 601 (2001) (citing Penn Cent., 438 U S 104, 98 S Ct 2646)

As this Court held in Byrd v City of Hartsville, *supra*, if Lucas does not apply, then Penn Central does Byrd, 620 S E 2d at 81. In Byrd, this Court also “overrule[d] our prior suggestions that a property owner cannot demonstrate a taking unless he has been denied all economically viable use of his property.” 620 S E 2d at 81 n. 11.

The Penn Central analysis is fact driven. “Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by ‘essentially ad hoc, factual inquiries,’ designed to allow ‘careful examination and weighing of all the relevant circumstances.’” Tahoe-Sierra Pres Council, Inc v Tahoe Reg'l Planning Agency, 535 U S 302, 322, 122 S Ct 1465, 1478, 152 L Ed 2d 517 (2002) (quoting Penn Central, 438 U S at 124, 98 S Ct at 2646). “The general rule is that regulatory-takings cases require ‘essentially ad hoc, factual inquiries,’ balancing all relevant circumstances to determine whether the government has taken property.” Byrd, 365 S C at 658-59, 620 S E 2d at 80 (quoting Penn Central, 438 U S at 124, 98 S Ct at 2569).

Because the Penn Central analysis is fact intensive, it is inherently unsuitable for determination on summary judgment if there is proof to support the claim “At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact” S C Prop & Cas Guar Ass'n v Yensen, 345 S C 512, 518, 548 S E 2d 880, 883 (S C Ct App 2001)

In this instance the lower court handpicked certain proof and ignored other proof and came up with findings. Examples include “The Bank of America appraisals, each rendered post-zoning, identified a golf course as the highest and best use for the parcels and attributed significant value to the parcels when so used” (**Order, R p 18**), “The evidence demonstrates significant value in the parcels, as currently zoned and used” (**Order, R p 19**), “And, because the Golf Club never intended to develop the whole course, the Rezoning Ordinance does not interfere with the Golf Club’s anticipated future use of the parcels, all of which brings into question whether the primary expectation concerning the use of parcels has been affected at all” (**Order, R p 19**). A court has this prerogative in deciding a matter after a merits trial. But, at the summary judgment stage, the circuit court is required to view the evidence in the light most favorable to the party opposing the motion, which it did not do.

Further the lower court erred in holding that DWGC cannot establish a taking under Penn Central if there is some value remaining in the property “If, after application of the regulation, the claimant is left with beneficial use of his property, there is no regulatory taking” (**Order, R p 17**). The lower court also mistakenly concluded that the beneficial use of the property taken remains because “[a]ll evidence reveals that the application of the CRO and Zoning Ordinances to the six parcels has not rendered them valueless or without beneficial use” (**Order, R p 18**).

As stated earlier, this Court in Byrd overruled its prior suggestions there could be no taking unless the owner was denied all economically viable use of his property Byrd, 620 S E 2d at 81 n 11. A Penn Central taking always involves something less than a total deprivation of the value of the property. See Tahoe-Sierra, 535 U S at 330, 122 S Ct at 1483 (quoting Lucas, 505 U S at 1019-1020 n 8, 112 S Ct 2886) (stating that “[a]nything less than a ‘complete elimination of value,’ or a ‘total loss,’” requires the Penn Central analysis)

In 2005, the United States Supreme Court clarified the Penn Central test by holding that two factors, the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate investment-backed expectations, are now the primary factors to be considered. Lingle v. Chevron U S A , Inc., 544 U S 528, 548 (2005). The character of the government action, while still relevant, is a secondary consideration. Id. at 539. This Court is in accord in attributing the most weight to these two factors.

The general rule is that regulatory-takings cases require “essentially ad hoc, factual inquiries,” balancing all relevant circumstances to determine whether the government has taken property. **Two circumstances are especially important (1) “the economic impact on the claimant, and, particularly, the extent to which the [government] has interfered with distinct investment-backed expectations,” and (2) “the character of the governmental action.”**

Byrd, 365 S C at 658-9, 620 S E 2d at 80 (quoting Penn Central, 438 U S at 124, 98 S Ct at 2659) (emphasis added)

Voluminous evidence in favor of the owner, some of which is recited in the Statement of Facts, supports these two primary factors.

As to the regulation’s economic impact, it is undisputed the downzoning permanently deprived the owner of all viable economic use of the surrounding acreage separate and apart from the golf course. In the light most favorable to DWGC, the non-moving party DWGC easily puts forth proof to meet the first Penn Central factor.

The circuit court found that DWGC did not have any distinct investment-backed expectations because it did not intend to develop the golf course. In so ruling, the lower court ignored the flood of proof that DWGC purchased the land only because of the surrounding land's potential for residential development and made a factual finding completely at odds with the testimony of Wieland, Popson, Whiteside, and Ford when viewed in the light most favorable to DWGC.

As recited in the Statement of Facts, the owner met with the Town's planning director, engaged its engineer-planner, and came up with a conceptual layout of lots before closing. After closing but before the downzoning was on the horizon, DWGC put together an extensive 13-page pro-forma that identified in detail the anticipated revenues, expenses, and profits of this residential development of the property (**Popson Dep Ex 3, R pp 802-814**). DWGC expected to develop 32 lots for, roughly, a \$10 million profit (**Popson Dep R p 755, line 23-756, line 22, Ex 3, R pp 802-814**). Although more of the land could have been developed, Dunes West was satisfied with "dialing down to that" (**Popson Dep R p 755, line 23-p 756, line 22, Ex 3 R pp 802-814**).

As to the remaining factor, the character of the government action, the circuit court paid no attention to the confiscatory nature of the Town's rezoning. The trial court incorrectly looked to the recitals of the ordinances and their stated purposes instead of focusing on the character of the *effect* of rezoning, what is now required by takings jurisprudence.³

The character of the government action is simple. The Town's downzoning of PDD to park deprived the owner of any viable economic development within the sixty acres adjacent to the golf course. The legislative findings have nothing to do with the effect of the rezoning. These findings may explain the Town's motive but do nothing to mitigate the knock-out punch

of the rezoning

The trial court made legal errors in its Penn Central analysis. In addition, the overwhelming evidence presents plenty of proof that a taking under Penn Central occurred. The lower court's order granting summary judgment to the Town as to a compensable taking under Penn Central should be reversed.

II There are genuine issues of material fact that DWGC had a protected property interest and that the CRO Ordinance and the Dunes West Ordinance deprived DWGC of its rights to substantive due process under the state and federal constitutions

No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. V

'The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.' S.C. Const. art. I, § 3

The Due Process guarantee of the Fifth Amendment to the United States Constitution resides in a separate clause from its takings prohibition. The substantive due process analysis is different from the takings analysis. The Due Process Clause of the Fifth Amendment requires that, to be valid, a law or regulation must substantially advance a legitimate state interest sought to be achieved. See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540, 125 S. Ct. 2074, 2083, 161 L. Ed. 2d 876 (2005). The standard is no longer that the government could rationally have decided that the measure adopted might achieve the government's objective. Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 836 n. 3, 107 S. Ct. 3141, 3148, 97 L. Ed. 2d 677 (1987).

The lower court granted summary judgment on the substantive due process claim, holding that DWGC had to hold a vested right to develop the land and that the recitals of purpose in the Ordinances express legitimate government land use interests and, therefore, are beyond challenge and further inquiry. The lower court never considered whether the rezoning

“substantially advanced” the stated objectives in the Ordinances. Both grounds for the ruling are contrary to the applicable law.

A substantive due process claim requires only a protected property interest, not a vested right to proceed with a particular development. DWCG, as owner, has a protected property interest.

Under recent takings jurisprudence, government regulations are no longer shielded from substantive due process challenges simply because they recite legitimate government objectives. The new standard of review, not applied by the lower court, dissolves the “fairly debatable” presumption governments have been accustomed to enjoy. The United States Supreme Court now calls on judicial bodies to take a closer look at the legislative enactment and decide (1) whether there is a legitimate factual basis supporting blanket recitals of stated purposes, and (2) if those stated purposes are factually legitimate, whether there is a rational relationship between those stated purposes and the application of the law to a particular piece of property.

A Due Process violations under the Fifth Amendment only require deprivation of a property interest, not a vested property interest

The Fifth Amendment protects property rights. A property right does not have to be “vested” to be protected by the Constitution. Property rights are legally distinct from vested rights, which are by definition benefits conferred to property owners from the government. See Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 833 n. 2, 107 S. Ct. 3141, 3147, 97 L. Ed. 2d 677 (1987) (“But the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements - cannot remotely be described as a ‘governmental benefit.’”) The type of property interest protected by the Constitution is “any significant property interest.” Fuentes v. Shevin, 407 U.S. 67, 86, 92 S. Ct. 1983, 1997, 32 L. Ed. 2d 556 (1972).

In this case, when DWGC acquired the 256 acres of land, it possessed a cognizable property right in its land that was subject to reasonable regulation. As to the sixty acres of land not included in the golf course, DWGC had a sufficient property interest

[A] ban on potential uses not yet established may destroy market value as effectively as does a ban on activity already in progress. The ban does not shed its retrospective quality simply because it affects only prospective uses. What explains, then, the universal understanding that only those nonconforming uses are protected which were demonstrably afoot by the time the regulation was adopted? The answer seems to be that actual establishment of the use demonstrates that the prospect of continuing it is a discrete twig out of his fee simple bundle to which the owner makes explicit reference in his own thinking, so that enforcement of the restriction would, as he looks at the matter, totally defeat a distinctly crystallized expectation.

Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV L REV 1165, 1233 (1967)

There can be no question that the development rights which have been totally abrogated by the local law are, standing alone, valuable components of the "bundle of rights" making up their fee interests. [D]evelopment rights "are an essential component of the value of the underlying property" and that "they are a potentially valuable and even a transferable commodity and may not be disregarded in determining whether the ordinance has destroyed the economic value of the underlying property."

Seawall Assocs v City of New York, 74 N Y 2d 92, 109, 542 N E 2d 1059 (1989). Whether or not that right was vested, which DWGC contends it was (*see infra*), is irrelevant to a substantive due process analysis. All that is required by the Fifth Amendment is a property right. It also bears pointing out that the United States Supreme Court has held that the one of the inherent rights of ownership is the right to develop land in some manner. See Palazzolo v Rhode Island, 533 U S 606, 626-27, 121 S Ct 2448, 2462, 150 L Ed 2d 592 (2001) (rejecting the idea that the right to develop property is a right created by the state and holding "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle")

B The question of whether an ordinance substantially advances the legitimate state interest sought to be achieved is inherently factual

“Whether a land-use decision substantially advances legitimate public interests within the meaning of our regulatory takings doctrine involves an essential factual component,” City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 721, 119 S.Ct. 1624, 1644, 143 L.Ed.2d 882 (2005)

The “fairly debatable”³ presumption of validity no longer applies for federal due process analysis. To determine whether a stated objective is legitimate, courts must look beyond the facial recitals of legitimacy proffered in an ordinance. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1025 n.12, 112 S.Ct. 2886, 2898, 120 L.Ed.2d 798 (1992).⁴ Here the circuit court erred in refusing to look beyond the facial recitals of legitimacy to determine whether they substantially advance the stated objectives, especially here where there is evidence that the facial recitals are unsupported by the facts.

a The United States Supreme Court does not give validity to facial findings created by law-making bodies such as the Town. The United States Supreme Court demands a heightened factual inquiry that goes beyond recitals of stated purposes of the legislative enactment in question.

In recent decisions, the United States Supreme Court has abandoned its deferential approach to government land use decisions. See First English Evangelical Lutheran Church of

³“If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.” Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926)

⁴ Moreover, because the Town has a financial interest in enacting these regulations (as opposed to having condemned the property, and paid for the property, outright via eminent domain proceedings), “complete deference to a legislative assessment of reasonableness and necessity is not appropriate.” U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 26, 97 S.Ct. 1505, 1519, 52 L.Ed.2d 92 (1977). After all, “[a] governmental entity can always find a use for extra money.” Id.

Glendale v Los Angeles County, Cal., 482 U S 304, 107 S Ct 2378, 96 L Ed 2d 250 (1987), Nollan v Cal Coastal Comm'n, 483 U S 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987), Lucas v S C Coastal Council, 505 U S 1003, 112 S Ct 2886, 120 L Ed 2d 798 (1992)

The United States Supreme Court has cautioned against viewing justifications pontificated by a law-making body at face value “Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations ” Id at 1025 n 12, 112 S Ct at 2898

The Lucas Court emphasized that legislative findings are less important than the facts which support the justification for the government action The Court remanded the case and articulated the state’s burden

We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas* As we have said, a “State, by *ipse dixit* may not transform private property into public property without compensation ”

Id at 1031, 112 S Ct at 2901 (internal citation omitted)

The law requires a factual inquiry into the validity of the legislative findings when those findings accomplish a taking In this case the lower court refused to make the factual determinations mandated by Lucas and Lingle and simply accepted the Town’s declaration of the reasons for the Ordinances Accordingly, the lower court erred in rejecting DWGC’s substantive due process challenge on the ground the recitals set forth legitimate governmental concerns

b The United States Supreme Court further requires that there be a sufficient nexus between application of the ordinance to the particular parcel of property and the legislative objectives for which the ordinance was designed to achieve

A critical component of the standard set forth in Nollan v California Coastal Commission applies in regulatory takings cases as well as physical takings cases to determine “whether there is a sufficient nexus between the effect of the ordinance and the objectives it was supposed to advance ” Yee v City of Escondido, Cal., 503 U S 519, 530, 112 S Ct 1522, 1530, 118 L Ed 2d 153 (1992) (citing Nollan, 483 U S at 834–35, 107 S Ct at 3147–48) (stating that in the context of a regulatory taking, which was not properly before the court, the effect of the rent control ordinance at issue “may shed some light may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance”)

In Nollan, the United States Supreme Court recognized the inherent power of states to exert police power on private developments Nollan, 483 U S at 843, 107 S Ct at 3151 However, the Court also recognized that government action may be a valid exercise of the police power and still violate specific provisions of the Constitution Id at 845 n 1, 107 S Ct at 3153 The Court noted that while constitutional challenges are reviewed under varying standards depending on the challenge at issue, a separate standard of review must be applied when addressing “the threshold issue of rationality of government action ” Id

In Nollan, the court formulated the following example of the nexus required in the exaction context

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was The purpose then becomes, quite simply, the

obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of “legitimate state interests” in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but “an out-and-out plan of extortion.”

Id. at 837, 107 S. Ct. at 3148-49 (internal citations omitted). For the Town’s actions to withstand a substantive due process challenge, there must be a nexus between the stated purposes of the ordinance and its application to the 257 acres of land downzoned from PDD to CRO. In this case DWGC put forward proof that there was no required nexus between the rezoning of the entire property and the accomplishment of the purposes stated in the recitals of the Ordinances. This proof creates a genuine issue of material fact preventing summary judgment.

c. South Carolina precedent maintains that the police power is not without limits

The lower court held that the Dunes West Ordinance is bottomed on legitimate, land use considerations. Putting aside the proof the rezoning was not legitimate regulatory land use, even where police power is grounded on legitimate land use considerations, it is not without limits.

The standard by which the validity of an ordinance enacted under the exercise of police power is tested is that the exercise of the power should extend only to reasonable and necessary measures. On this point we quote from 11 Am. Jur., at page 1074: “*** Too much significance cannot be given to the word ‘reasonable’ in considering the scope of the police power in a constitutional sense, for the test used to determine the constitutionality of the means employed by the Legislature is to inquire whether the restrictions it imposes on rights secured to individuals by the Bill of Rights are unreasonable, and not whether it imposes any restrictions on such rights. It has been said that the only limitation upon the exercise of the police power is that such exercise must be reasonable. The validity of a police regulation therefore primarily depends on whether under all the existing circumstances the regulation is reasonable or arbitrary and whether it is really designed to accomplish a purpose properly falling within the scope of the police power.”

McCoy v. Town of York, 193 S. C. 390, 8 S. E. 2d 905, 907 (1940). A classification of property is unconstitutional where such classification is unnecessary or confiscatory. Bear Enter. v. County of Greenville, 319 S. C. 137, 141, 459 S. E. 2d 883, 886 (S. C. Ct. App. 1995). See also Ewing v.

City of Springfield, 449 S W 2d 681, 684 (Mo Ct App 1970) (“It is well established that a valid general zoning ordinance may be so arbitrary and unreasonable in its application to a particular tract as to tend toward confiscation, and when that is true the ordinance infringes the rights of the owners under the due process provisions of both the federal and state constitutions)

Even if the applicable ordinances were grounded on fact-based objectives, which Appellant contends – and the evidence shows – they were not, there is evidence the exercise of police power in this instance was excessive and lacks the essential nexus required to withstand constitutional scrutiny

C There is an abundance of proof in this case that the rezoning of all 257 acres was not in furtherance of the recited purposes of the applicable ordinances

The circuit court ignored the plethora of evidence covered in the Statement of Facts when it found that “[t]he Record contains no evidence of a due process violation” (**Order, R p 14**) DWGC put forward evidence the overly broad Dunes West Ordinance does not substantially advance the stated legislative objectives There is proof that the downzoning does not bear a rational relationship to the public health, safety, morals or welfare, as intimated by the trial court (**Order, R p 10**)

First, DWGC put forward proof of an inadequate factual basis to support the findings in the Ordinances The stated purposes of the Dunes West Ordinance are

- (1) To provide for, and permit, an appropriate valuation by the tax assessor and/or land appraiser that reflects the conservation, recreation, and/or open space use of land
- (2) To ensure the preservation of conservation, recreation and/or open space use of land against undesirable development,
- (3) To lessen the hazards and loss of property, life, and reduction of health and safety due to the periodic inundation of flood waters, by restricting or prohibiting uses in these areas
- (4) To provide opportunities for improved public and/or private recreation activities
- (5) To provide for a community-wide network of open space, buffer zones,

and recreation spaces

With respect to the first stated purpose, allowing for tax assessors and land appraisers to appropriately value the land, then-Town Planner Joel Ford stated, “I have no idea where that came from When you handed me this ordinance, I looked at it, and I was like, what in the hell does that mean? So that’s my answer ” **(Ford Dep R p 877, lines 10-13)**

As to the second stated purpose, protecting the land from undesirable development, then-Town Planner Joel Ford recognized that, for the most part, “undesirable” is entirely subjective and, if he could go back in time, he would probably have eliminated this purpose altogether **(Ford Dep R p 874, line 24-p 875, line 1, p 876, lines 21-24)**

Notably, there is no proof of any study or assessment conducted to link the third, fourth, and fifth stated purposes of the Ordinance to evidence a need to draft the Ordinance No particular study was referred to by planning staff dealing with the “inundation of floodwaters” when drafting the Ordinance **(Ford Dep R p 880, line 21-p 881, line 5)** Nor were specific studies conducted regarding the volume of golf course play, and there was no determination as to whether or not there were sufficient or insufficient facilities for playing golf in the Town **(Ford Dep R p 871, line 25-p 872, line 23)** Nor was a study or analysis conducted concluding that golf courses needed to remain golf courses for there to be an adequate community-wide network of open space, buffer zones, and recreation space **(Ford Dep R p 882, line 23-p 883, line 16)**

Absent from these stated purposes is the actual purpose of the ordinance to prevent the conversion of golf courses to residential development within the Town **(Ford Dep R p 881, lines 6-10)** Yet, the record establishes that no golf course owner within the Town, including DWGC, was considering such conversion **(Ford Dep R p 870, line 24-p 871, line 2, p 884, lines 13-22)**, and that the Dunes West PDD adequately preserved the golf course as open space

There was also proof that there was much more open space at Dunes West than required by the PDD. Even with the proposed development in select areas around the golf course, there would be 400 acres of wetlands and buffer in addition to the golf course and 20 acres of developable land Dunes West would donate as open space **(Popson Dep Exh 10, at 3,5, R p 819, p 821)**

There were multiple genuine issues of material fact whether the Ordinances application to this property substantially advanced legitimate interests of the Town

D Although a vested right is not required for the purposes of due process analysis, the circuit court legally erred in its interpretation of the South Carolina Vested Rights Act⁵ under the plain meaning rule

The circuit court's Order suggests Dunes West had a duty to act in contravention of (1) the instructions of Town Planning staff, and (2) the Town's ordinances which affirmatively downzoned the subject property from Dunes West PDD to CRO on June 13, 2006. The lower court ruled that DWGC cannot complain of a denial of substantive due process since it did not pursue a zoning change before July 1, 2007. In so doing, the lower court implied that the Town might have been compelled to grant the zoning change if DWGC had a vested right under S C Code Ann §§ 6-29-1510 *et seq* at that time. All the proof in the record, however, supports the opposite conclusion – that an application for a zoning change made before July 1, 2007, would have been rejected just the same as the applications for a change in the zoning to allow limited residential use in January 2008 and April 2009.

Passed in 2004, the Vested Rights Act (the Act) became effective on July 1, 2005. S C Code Ann §§ 6-29-1510 *et seq*. The Act compelled local governments to adopt ordinances in conformity with the Act by July 1, 2005. S C Code Ann § 6-29-1530. The Act defines a “vested right” for its purposes as, **“the right to undertake and complete the development of**

⁵ Notably, the Vested Rights Act does not affect the Takings analyses or the Due Process

property under the terms and conditions of a site specific development plan or a phased development plan as provided in this article and in the local land development ordinances or regulations adopted pursuant to this chapter” S C Code Ann § 6-29-1520(10) (emphasis added)

The Act specifies that a planned unit development is a “site specific development plan ” S C Code Ann § 6-29-1520 (emphasis added) and specifically established in an owner a two-year vested right effective upon its adoption for all approved site specific development plans

(A)(1) A vested right is established for two years upon the approval of a site specific development plan

(2) On or before July 1, 2005, in the local land development ordinances or regulations adopted pursuant to this chapter, **a local governing body must provide for**

(a) the establishment of a two-year vested right in an approved site specific development plan,

S C Code Ann § 6-29-1530(A)(1) and (2)(a)(emphasis added) See Town of Mount Pleasant, Zoning Code § 156 049(C)(1) (“Approved site specific development plans shall be vested for a period of two years from the date of final approval by the local governing body ”)

The Dunes West PDD was an approved Site Specific Development Plan on the effective date of the Act, July 1, 2005 Per the express terms of the Act, the lower court reasoned DWGC had a *statutory* vested right to proceed with the residential development authorized by the Dunes West PD for two years, until July 1, 2007 Before July 1, 2007, DWGC did approach the Town about developing some of the land around the golf course **(Farrell Dep Exs 6, 7, 9, 10, R pp 1060-1094)**Up to and at the time of the adoption of the ordinances, DWGC pointed out to council that it had the right to develop land around the golf course and that downzoning this surrounding acreage was unnecessary **(Farrell Dep Exs 6, 7, 10, R pp 1060-1072, pp 1085-1094)** The Town ignored DWGC’s assertion of its rights and went full speed ahead in passing

the ordinance (**Farrell Dep Exs 6, 7, 9, 10, R pp 1060-1094**), downzoning all the property

There is no proof that the Town would have granted a request by DWGC to change the zoning if the application had been made before July 1, 2007. The proof is to the contrary. The Planning Commission rejected DWGC's request in January 2008. Town Council rejected DWGC's 2009 application. A landowner is not required to submit futile applications for permission to develop as a prerequisite to its constitutional claims. Palazzolo v Rhode Island, 533 U.S. 606, 626, 121 S.Ct. 2448, 2462, 150 L.Ed.2d 592 (2001) (in context of takings claim)

In addition, and more importantly, whether an owner applies for a change in zoning and when is irrelevant to the substantive due process analysis. Substantive due process focuses on what the legislative body did, not what the owner may have done in response.

III DWGC presented evidence that Snee Farm was substantially similar to DWGC, that there was no rational basis for the Town's granting its rezoning request and denying DWGC's, and that the Town imposed a more stringent standard on DWGC, creating an inference of intent to discriminate

There are factual issues that prevent the entry of summary judgment on Appellant's claim for denial of its right to equal protection.

"The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." Grant v S.C. Coastal Council, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995). For example, in Weaver v South Carolina Coastal Council, 309 S.C. 368, 423 S.E.2d 340 (1992), the property owner applied for a permit to construct a recreational dock which encroached upon the river. The state Coastal Council denied the property owner's permit but granted permits to similarly situated persons. The Court found that the existence of the property owner's dock "would create no effect distinguishable from that occasioned by the other three existing docks." Id. at 375, 423 S.E.2d at 344. The property owner was "entitled to be treated in the same manner as the other applicants." Id. For these reasons, the Court held that

the Coastal Council denied the property owner's equal protection rights by conferring benefits on others and denying the same benefit to the property owner

The Town rezoned the golf courses at Snee Farm and Dunes West to CRO at the Council meeting on June 13, 2006 Town of Mount Pleasant Ordinance Nos 06033 & 06035 Appellant's equal protection claim is based on the Town's granting Snee Farm's later request for rezoning from CRO to allow residential development on portions of the land adjacent to the golf course (**Farrell Dep Exs, 22, 23, R pp 1133-1161**) but denying DWGC's similar request (**Farrell Dep Ex 30, R pp 1203-1215**) even though there was no difference between the two when measured against the so-called legitimate objectives of the CRO zoning district See Town of Mount Pleasant Ordinance No 07008

The lower court held that there was a reasonable basis for distinguishing between the two applications for rezoning (**Order, R p 10**) The facts the circuit court looked to primarily dealt with the extent of alteration of the golf course and other specifics of the Snee Farm plan (**Order, R p 9**)

The pertinent inquiry, however, is not the differences in these two owners' respective plans for residential use The focus is whether granting Snee Farm's rezoning request to allow residential use carried out the stated objectives of the CRO District while granting DWGC's request would have violated those objectives The test is to measure both applications against the CRO District's objectives The distinctions relied upon by the lower court had nothing to do with these purposes⁶ (**Order, R p 9**)

⁶ The stated purposes of the Conservation – Recreation Open Space District are (1) To provide for, and permit, an appropriate valuation by the tax assessor and/or land appraiser that reflects the conservation, recreation, and/or open space use of land, (2) To ensure the preservation of conservation, recreation and/or open space use of land against undesirable development, (3) To lessen the hazards and loss of property, life, and reduction of health and safety due to the

The lower court justified the Town's decision granting Snee Farm's application because the rezoning applied to 20 contiguous acres, to allow for the development of 58 units, monies generated from sales were to be applied to razing the clubhouse and reconstructing a new one, making improvements to tennis courts, and constructing a new pavilion, pool, and practice green with an expanded driving range, the rezoning would have resulted in minimal alterations to area of play of the course, politically, the Snee Farm community was essentially split as to the merits of the proposal **(Order, R p 9)**

By contrast, the lower court found that DWGC's 2009 application for rezoning was dissimilar to Snee Farms' because the DWCG's proposal was to rezone approximately 18 acres and develop 32 units, the acreage was not contiguous, the rezoning would have resulted in alterations to the 10th hole fairway, the relocation of cart paths, the shortening of a hole from a par four to a par three and moving tee boxes⁷, the monies generated from the sales were to have been applied to unspecified on-course improvements, and to off-course improvements, politically, the rezoning proposal was not embraced by the Dunes West community **(Order, R p 9)**

The lower court failed to point out any distinction, though, on the effect of the two applications on the purposes of the CRO district. When measuring both applications against the CRO District's objectives, it is clear that similarly situated property owners were disparately

periodic inundation of flood waters, by restricting or prohibiting uses in these areas, (4) To provide opportunities for improved public and/or private recreation activities, and (5) To provide for a community-wide network of open space, buffer zones, and recreation spaces **(Farrell Dep Ex 12, R pp 1095-1096)**

⁷ Indeed, there is proof that the final development plan involved minimal changes to the golf course. These minimal changes to the golf course would not change its Arthur Hills designation, in fact, Arthur Hills endorsed the Dunes West plan. "We wish you success with the renovation. We are, of course, delighted to hear that the course is in great shape and that remarkable things are happening. Sounds like your group is the savior!" **(Popson Dep Ex 10, R p 827)**

treated in violation of the state and federal equal protection clause Granting the limited residential use requested by DWGC, just like that of Snee Farms', would have had no adverse effect on the stated purposes for the CRO district The limited residential use would have had no adverse bearing on tax assessor valuations, on lessening the hazards and loss of property, life, and the reduction of health and safety due to the periodic inundation of flood waters, on the preservation of the golf course (The ordinance's objectives did not required that the golf course never be altered, only that the golf remain as golf, contrary to what the lower court implied), on the opportunities for improved public and/or private activities, or, on a "community-wide network of open space, buffer zones, and recreation spaces "

The effect of granting the DWGC application on the stated purposes to be accomplished by the CRO district is indistinguishable from the effect of granting the Snee Farm application In fact, the Dunes West proposal involved fewer units than the Snee Farm proposal (**Farrell Dep Exs 20, 30, R pp 1120-1132, pp 1203-1214**) There are therefore genuine issues of material fact that the two applications for rezoning were similarly situated

Moreover, there was proof that gives rise to a reasonable inference that the Town intended to discriminate against DWGC when it denied the DWGC application but granted the similarly situated Snee Farm application (**Farrell Dep Ex 24, R pp 1162-1167**) The Planning Commission and Town Council rejected the Dunes West 2009 Application based on a Town Ordinance that supposedly pertains to all requests to change zoning that the Town neither considered nor applied to the Snee Farm application (**Farrell Dep , Exs 23, 30, R pp 1140-1161, pp 1203-1214**)

In its application, DWGC sought to amend the Dunes West Planned Development District Ordinance to allow for 32 lots 6 R1 lots and 26 R3 lots (**Farrell Dep Ex 30,**

R pp 1203-1214) “The Planning Commission held a public hearing on this and recommended denial based on the declaration of policy found within the zoning code and specifically referenced 156031D ” **(Farrell Dep Ex 30, R pp 1203-1214)** The text of the zoning ordinance referred to by Council states

(D) *Declaration of policy* As a matter of policy no request to change the text of the ordinance or the map shall be acted upon favorably, except

- (1) Where necessary to implement the Comprehensive Plan, or
- (2) To correct an original mistake, a manifest error in the regulations or map, or
- (3) To recognize substantial change or changing conditions or circumstances in a particular locality, or
- (4) To recognize changes in technology, the style of living, or manner of doing business

Section 156 031(D) of the Town of Mount Pleasant Zoning Ordinances

The testimony establishes the Town invoked this policy to deny the DWGC application, but did not even mention it when approving the Snee Farm application **(Farrell Dep Exs 22, 23, R pp 1133-1161)** This disparate treatment of similar applications creates a reasonable inference of intent to discriminate, contrary to the lower court’s ruling

Questions of intent should not be decided on summary judgment See Wallace v Day, 390 S C 69, 76, 700 S E 2d 446, 450 (S C Ct App 2010) (holding that the determination of the parties’ intent at the time they executed a contract was a question of fact that should not have been decided on summary judgment) Such questions of state of mind and intent are “preeminently factual issues for the triers of the facts ” Starkey v Bell, 281 S C 308, 315 S E 2d 153 at 156 (S C Ct App 1984) The lower court committed reversible error when it stepped in as the fact-finder Moreover, the lower court erred by misapplying the standard of review, which requires that all inferences being drawn from the facts be viewed in the light most favorable to the non-moving party

CONCLUSION

This Court need look no further than the United States Supreme Court's ruling in Lucas to decide this appeal. The Town downzoned 60 acres of DWGC's land, much of which was available for residential development, to a park. The downzoning had the identical effect as the state's statutes and regulations in Lucas. If this Court were to invoke the parcel as a whole doctrine despite its undermining by the Supreme Court in Lucas and Palazzolo and its rejection by courts where the parcel has separate development potential and is capable of severance, then DWGC satisfies the requirements for a compensable taking under the fact intensive analysis of Penn Central.

DWGC also put forward proof that established the elements for its separate claim for denial of substantive due process. In granting summary judgment as to this claim, the lower court committed legal errors and disregarded DWGC's factual showing.

Finally, as to the Town's rejection of DWGC's application in 2009 to rezone 17 acres from CRO to allow residential use, taken in the light most favorable to DWGC, the record contains proof to support the elements of its claim for denial of due process.

Based on the foregoing, Dunes West respectfully requests the South Carolina Supreme Court REVERSE the circuit court's order granting summary judgment on these causes of action.

Respectfully submitted,



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Certificate of Counsel

The undersigned certifies that this Brief complies with Rule 211(b), SCACR

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STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-3723

Dunes West Golf Club, LLC,

Appellant,

vs

Town of Mount Pleasant,

Respondent

PROOF OF SERVICE

I, Nancy Jane D Murphy, an employee of Pratt-Thomas Walker, P A , hereby certify that I have placed this 17th of January, 2012, one copy of the **Appellant's Brief and Reply Brief** to counsel of record by placing the same in the United States mail, first-class postage pre-paid, to

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Record On Appeal, Appellant's Brief, and Appellant's Reply Brief are in compliance with the Supreme Court's Order of August 13, 2007

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