

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Civil Action No.: 2017-CP-10-05493
	)	
Shem Creek Development Group, LLC	)	
	)	
Plaintiff,	)	
	)	<b>ORDER</b>
v.	)	
	)	<b>RECEIVED</b>
The Town of Mount Pleasant, South	)	<b>Oct 16 2020</b>
Carolina,	)	<b>SC Court of Appeals</b>
	)	
Defendant.	)	
_____	)	

Plaintiff Shem Creek Development Group, LLC (“SCDG”) initiated this action against Defendant the Town of Mount Pleasant, South Carolina (“the Town”) on October 23, 2017. A nonjury trial was held before the undersigned on February 3, 2020 through February 6, 2020 wherein each party presented evidence. After careful consideration of the record, law, evidence presented at trial, arguments of counsel, and all matters submitted, this Court makes the following findings of fact and conclusions of law in favor of SCDG:

**FINDINGS OF FACT**

1. SCDG is a company that was formed around 2013 to build and operate a parking garage and office building on the corner of Mill Street and Coleman Boulevard in the Shem Creek area of Mount Pleasant, South Carolina. Plaintiff’s operations were primarily managed by two of its members, Tex Small and Tyler Flesch, both of whom testified at trial.

2. The parking garage site neighbors Shem Creek and several restaurants on the creek that serve as a destination for tourists and residents. Prior to being developed with an office building and parking garage, the site consisted of a gravel parking lot and two older buildings that housed a strip mall and car repair shop. (Pl.’s Exs. 59-60.)

3. In 2008, the Town adopted a plan to revitalize the Coleman Boulevard corridor in Mount Pleasant. In that plan, the Town identified the corner of Mill Street and Coleman Boulevard as a potential site for a parking garage. (Pl.'s Ex. 1.) At that time and in subsequent years, the Town was experiencing parking congestion from visitors to Shem Creek and its restaurants that was spilling into the nearby residential neighborhood. The Town recognized that additional on-site parking would help alleviate those parking issues, as well as revitalize the Coleman Boulevard corridor.

4. As part of the plan to revitalize the Coleman Boulevard corridor, the Town also created an urban corridor overlay district to implement certain zoning requirements intended to foster redevelopment. The corner of Mill Street and Coleman Boulevard was located in this urban corridor zoning district, and the development of the site was consistent with the Town's efforts to revitalize the Coleman Boulevard corridor. At trial, the Town's administrator, Eric DeMoura, testified that the development of the parking garage project was "necessary" for the revitalization.

5. Mr. Flesch, through another business in which he was involved, controlled the lease of the site, and Mr. Small had experience and relationships with the Town's elected officials and planning staff through his involvement with another commercial development in Mount Pleasant. Based on the Town's recognition of the site as potential location for a parking garage, Mr. Flesch and Mr. Small collaborated to develop a concept for a parking garage to be developed on the site to present to the Town.

6. In 2011, Mr. Small approached the Town about the concept, and they agreed to jointly fund a study of the economic feasibility of a parking garage on the site, which was conducted by Desman & Associates ("Desman"). The Desman feasibility study considered the projected parking demand and revenue for a 250-space stand-alone parking garage and concluded

that the parking garage would run deficits for its first seven years of operations for a total projected loss of over \$800,000. (Pl.'s Ex. 2.)

7. Based on the Desman study, neither the Town nor the principals of SCDG were interested in pursuing the project. However, Mr. Flesch and Mr. Small recognized that the projected lack of profitability was largely driven by the lack of weekday parking demand. They then developed a concept of a dual-purpose structure consisting of separate office and parking garage components. The office component was intended to produce revenue through commercial rents and increased weekday parking demand to help make the development economically feasible. The addition of the office component was consistent with the Town's plan to redevelop the Coleman Boulevard corridor to increase economic development in the area.

8. In 2012, Mr. Small and Mr. Flesch approached the Town about the modified parking garage concept which included an office component. After receiving positive feedback from the Town regarding its possible involvement in the project, Mr. Small engaged Ken Betsch, an architect, to prepare conceptual schemes for various designs of the project.

9. Mr. Small and Mr. Flesch settled on a conceptual design which included two stories of garage parking underneath two stories of office space. Mr. Betsch also prepared a proposed parking layout for this concept of the structure, which included 276 parking spaces. Mr. Betsch's plan and parking layout was conceptual in nature and did not necessarily reflect compliance with applicable zoning requirements, such as setback requirements. The trial testimony regarding the dimensions of the parking spaces in Mr. Betsch's conceptual layout was inconsistent. Mr. Betsch testified that the parking spaces he drew were 9' wide; however, Jeff Johnston, the architect who prepared the final design of the garage, testified that Mr. Betsch's parking layout contained spaces that were 8 ½' wide.

10. Mr. Small and Mr. Flesch presented Mr. Betsch's conceptual plans for the structure to the Town in 2013, and SCDG and the Town agreed to create a public-private partnership to develop the parking garage/office building concept. Under this public-private partnership, SCDG would construct, own, and operate the office building and parking garage, and the Town would rent spaces to be reserved for public parking. To establish this public-private partnership, the parties began negotiating a parking license agreement to establish the parties' respective rights and obligations. Mr. Small was primarily responsible for negotiating the terms of the agreement on behalf of SCDG, and Eric DeMoura, the Town's administrator, was responsible for negotiating on behalf of the Town. Grey Taylor, SCDG's attorney, and David Pagliarini, the Town's attorney, were responsible for drafting the agreement.

11. The principle terms of the parking license agreement included the following: (a) SCDG would construct the structure in a form substantially similar to Mr. Betsch's conceptual rendering, including 276 total spaces; (b) the Town would pay rent to reserve 132 of those 276 total spaces for public parking on weekdays from 6 AM to 5 PM; (c) the remaining 144 spaces would be reserved for office tenants on weekdays from 6 AM to 5 PM and reserved for public parking at all other times; (d) the license term was 30 years; (e) the Town would pay annual rent to SCDG in the amount of \$185,000 for a period of 15 years; (f) SCDG would be responsible for financing, constructing, operating, and maintaining the structure; and (g) the Town would have no obligations or risks with respect to the parking spaces beyond paying annual rent.

12. The Town concluded that the parking license agreement was in its best interest and provided the following benefits: (a) additional parking for visitors and businesses, to promote tourism and economic development; (b) solved short-term parking congestion on residential streets, to increase public safety; (c) supported revitalization and redevelopment of the Coleman

Boulevard corridor; (d) a private developer, instead of the Town, was incurring the risk of financing, constructing, and maintaining the garage, saving the Town millions of dollars by not having to pay to construct its own garage; (e) the possibility of rent reduction if the garage was profitable; and (f) the Town's rent would be funded through accommodation taxes paid by tourists. (Pl.'s Exs. 3, 35, 37, and 38.)

13. Just as the parties' public-private partnership presented the Town with benefits, it also presented SCDG with benefits. The primary benefit of the proposed license agreement to SCDG was having a stable revenue stream from the rent paid by a municipality with a AAA credit rating, with rent secured by the general obligation of the Town. Because parking revenue is variable and dependent on various factors such as weather and the desirability of neighboring businesses, having a highly-rated tenant in the Town, which would pay fixed rent for a period of 15 years, improved the likelihood that the development would be profitable and could obtain the necessary financing to make the project a reality.

14. According to trial testimony of Mr. Small, Mr. Flesch, and Mr. DeMoura, the negotiations of the license agreement were not contentious. The only terms that were subject of substantive negotiation were the financial terms relating to rent and the duration of the license.

15. Neither the total number of spaces included in the garage nor the number of spaces reserved for public use were a subject of negotiation. These numbers were proposed solely by SCDG based on Mr. Betsch's conceptual plan, and they were approved by the Town without objection. The undisputed testimony was that the Town conducted no analysis to determine the number of spaces needed to meet parking demand in the area, and the Town never insisted that 276 total spaces and 132 public spaces be a minimum requirement.

16. As the parties negotiated the agreement in the summer of 2013, SCDG also sought changes to the Town's zoning code to allow for the development of the office building and parking garage as depicted in Mr. Betsch's rendering. These changes consisted of (a) increasing the allowable height to 55' to permit two stories of parking and two stories of office space, and (b) eliminating flood proofing and retail requirements on the first floor to increase the area that could be used for parking. Mr. Small informed the Town that the changes were needed to ensure that the development would be economically feasible and maximize the number of spaces provided in the garage component of the project. (Pl.'s Ex. 58; Def.'s Ex. 2 and 20.)

17. In response to SCDG's request for zoning amendments, the Town's planning staff drafted a proposed ordinance to effectuate the requested changes. The Town's planning staff understood that the changes were needed to make the project economically feasible and that SCDG needed to maximize usable space in the structure to produce as many parking spaces as possible.

18. As the proposed amendments to the zoning code progressed through the legislative process, SCDG and the Town finalized the terms of the parking license agreement. Ultimately, the Town, by unanimous vote of Town Council, adopted the parking license agreement in October of 2013, and the parties executed the agreement that same month. (Pl.'s Exs. 6-7.)

19. The relevant provisions of the parking license agreement are:

- § 1.05: Project. The Project consists of a multi-level structured parking garage, comprised of 276 total parking spaces, and a proposed office complex. A conceptual rendering of the Project is attached hereto as Exhibit "A".
- § 1.06: Premises. That portion of the Property comprising 132 of the 276 total parking spaces planned for the Project (the "Public Spaces"; the remaining 144 spaces are referred to herein as the "Reserved Spaces", and the Public Spaces and Reserved Spaces are collectively herein the "Parking Spaces"). The Parking Spaces, along with the parking garage building in which they are located, and all ancillary and/or associated structures, shall comprise the "Parking Garage", as more particularly described and identified on Exhibit "A".

- § 1.07(a): Fixed Minimum Rent: During the first fifteen years of the License Term (the “Rent Period,”) Licensee covenants and agrees to pay Licensor, in legal tender of the United States of America, without any prior demand and without any deduction or setoff whatsoever, the Fixed Minimum Rent, subject only to the adjustments set forth herein. During each year of the Rent Period, Fixed Minimum Rent shall be One Hundred Eighty-five Thousand and no/100 (\$185,000.00) Dollars. Fixed Minimum Rent for each License Year of the Rent Period shall be paid on or before the commencement of each License Year during the Rent Period. Payment for the first License Year of the Rent Period shall be paid into escrow upon the commencement of construction by Licensor, with payment being released from escrow upon the Rent Commencement Date. Following the Rent Period and for all remaining years of the License Term, Licensee covenants and agrees to pay Licensor, in legal tender of the United States of America, without any prior demand and without any deduction or setoff whatsoever, Fixed Minimum Rent in the amount of One Dollar per year.
- § 1.10: License Term; Rental Commencement Date. The term of the License (the “License Term”) shall begin on the Rent Commencement Date, and shall end upon the earlier of (i) thirty (30) License Years thereafter or (ii) a Major Capital Event (as defined hereinafter), unless extended or sooner terminated in accordance with the terms and provisions of this License. The rental commencement date (“Rental Commencement Date”) shall be date of issuance of certificate of occupancy by the Town.
- § 2.01(b): The Premises shall include only the Public Spaces and necessary appurtenances specifically granted in this License, and shall not include any adjacent buildings, docks, or surface parking areas.
- § 2.02: Licensor’s Work. Licensor, at its sole cost and expense, shall construct the proposed Project, in a form substantially similar to the conception drawings attached hereto as Exhibit “B”.
- § 2.06: Excuse of Performance. Anything in this License to the contrary notwithstanding, providing such cause is not due to the willful act or neglect of a party, that party shall not be deemed in default with respect to the performance of any of the terms, covenants and conditions of this License if same shall be due to any strike, lockout, civil commotion, war-like operation, invasion, rebellion, hostilities, military or usurped power, sabotage, governmental regulation or controls, inability to obtain any material, service or financing, through Act of God or other cause beyond the control of the Licensor; provided, however, that nothing herein shall delay or excuse payment of rent or any other sum due under this License.

20. The parking license agreement contains a default clause that liquidates damages and eliminates SCDG’s ability to seek consequential and punitive damages. That clause (§ 6.01)

provides that the “sole and exclusive remedy” for default is the rent payments due under the license and that “both parties waive any claims that either may have to consequential or punitive damages.” The parking license agreement also contains a survival clause (§ 8.17), which provides that “any obligation of [the Town] to pay any sum owing or to perform any act after expiration or other termination of this License shall survive the expiration or other termination of this License.” The survival clause does not provide for the survival of any rights of the Town, including the right to reduce rent.

21. Based on the Town’s commitment to pay rent for spaces in the parking garage, the landlord of the project site bought out the existing lease on the property and entered into a new lease with SCDG, with the landlord’s considerable cost of buying out the previous lease passed on to SCDG.

22. Around the time that the parties executed the parking license agreement, SCDG retained the architectural firm of Stubbs Muldrow & Herrin Architects (“SMHa”) to serve as the architect on the project. Mr. Johnston served as the primary architect, and the firm began working on the design after it was engaged.

23. As the design was in progress, Town Council overwhelmingly approved the amendment to the zoning ordinance requested by SCDG in December of 2013. (Pl.’s Ex. 8.) During the same council meeting where the Town approved the zoning amendment for SCDG’s project, the Town also approved a review of the zoning regulations governing the Coleman-Ben Sawyer Boulevards urban corridor zoning district that applied to the site. (Def.’s Ex. 8.) This review was a response to resident complaints primarily about a residential development called Earl’s Court, which was not far from SCDG’s project site.

24. Around this time in December of 2013 and into the winter and spring of 2014, public opposition to the development of the office building and parking garage arose. This opposition was led by a group called Save Shem Creek, which was organized to stop the garage from being constructed. Save Shem Creek spearheaded oppositional activities that included lobbying Town Council members and planning staff to prevent the completion of the project and to stop the Town's financial participation in it. Later, after the Town's planning staff approved the design of the project as required under the zoning code, Save Shem Creek unsuccessfully sued to stop the project from being constructed. Although Mount Pleasant has seen several controversial real estate developments in recent years, Mr. DeMoura testified that SCDG's garage project was the most controversial during his tenure.

25. As public opposition to the garage project intensified, the Town's review of the urban corridor zoning district continued. At the behest of Town Council, the Town's planning staff drafted a proposed ordinance that amended many of the zoning requirements applicable to that zoning district. Among those amendments drafted were changes to the applicable setbacks, which is the minimum distance between a structure on a particular parcel and the adjacent parcel or right-of-way. (Pl.'s Ex. 20 & 27.)

26. Under the Town's zoning ordinance, parcels in the urban corridor zoning district are subdivided into groupings of parcels and each group is given an area designation. For example, the group of parcels where the project site is located was designated as "C1" during the relevant time period. The Town's zoning ordinance includes a chart that establishes the applicable height limitation and minimum setbacks for each area. Following the Town's adoption of the zoning amendment in December of 2013, discussed above, and prior to a subsequent amendment adopted

in April of 2014, discussed further below, area C1 had the following height and setback requirements:

UC-CBS- DEVELOPMENT GUIDELINES CHART					
Area	<i>Maximum Building Height Allowed (1)</i>	<i>Front Setback or Build-to on Coleman or Ben Sawyer (2)</i>	<i>Front or Side Setback or Build-to on Other Streets (5)</i>	<i>Rear Building Setback (3)</i>	<i>Internal Side and Rear (Non-street) Buffers (4)</i>
C1	55'	20'- 30' BT	20' SB (5)	5'	5'

1 In all cases, the maximum height for buildings in the UC-CBS that are located within 50 feet of an abutting residential property line, or an abutting street right-of-way adjoining residential property; provided such residential property is located outside of the UC-CBS, shall be 40 feet, measured from grade to roof ridge, and further provided that no such building shall exceed a maximum of three stories.
2 Build-to lines are measured from back of curb to face of building; if no curb is present, measure from edge of pavement. Awnings and canopies are not included. Setbacks are measured from the right-of-way line.
3 <b><i>In all cases</i></b> where rear or side property lines abut residential properties lying outside of the UC-CBS, a minimum 15-foot setback, with a minimum 10-foot type "C" bufferyard with an F3 fence, is required.
4 Common wall construction to adjacent properties spanning property lines may be utilized in accordance with applicable building and fire code requirements. Buffers are not required where interconnectivity between parcels is provided or shown on the plan for future connection, or when common wall construction to adjacent properties spanning property lines is utilized. Where interconnectivity or common wall construction is not provided, a minimum type "A" bufferyard plant unit material is required.
5 Setbacks may be reduced to less than five feet only when:
a) A minimum five-foot sidewalk is provided; and
b) Street plantings are in accordance with §156.318(P)(5)(e)1.b. and c.ii. ; and
c) The required line of sight is provided.

Significantly, footnote 5, cited above, allowed for a reduction of the setback to 5' if certain conditions were met.

27. While the Town was reviewing potential changes to the urban corridor zoning district, SMHa was designing the project in accordance with the above-referenced setback requirements. Specifically, SMHa designed the project with a 5' setback on the side fronting Mill

Street by utilizing the ability to reduce the setback under footnote 5 and with a 5' rear setback on the rear of the building that backed up to Church Street.

28. In addition, SMHa was designing the parking garage with parking spaces with 8 ½' wide stalls to maximize the number of parking spaces that the structure could yield. Mr. Johnston testified that he shared this information with an official in the Town's planning department in January of 2014. (Pl.'s Ex. 48.) According to Mr. Johnston, 8 ½' wide parking spaces were not unusual under ordinances of other municipalities in South Carolina, including the neighboring City of Charleston. Mr. Johnston also testified that the Town did not have a separate zoning ordinance that applied to parking structures like other municipalities did.

29. Unbeknownst to SCDG and SMHa, the zoning amendments to the urban corridor zoning district being considered by the Town included deleting the footnote that allowed for the reduction in the side street setback to 5' for the project site. In addition, the zoning amendment included replacing the language in footnote 5 with new language that required a build-to line, which created an activity zone on Mill Street.<sup>1</sup> Christiane Farrell, the Town's Planning Director, testified that the footnote was changed specifically because of SCDG's planned parking garage. The effect of this change—eliminating the possibility of the side setback reduction to 5' and creating a build-to line on the Mill Street side of the project—reduced the buildable area on the project site.

30. The Town did not notify SCDG that Town Council was considering an amendment drafted by its planning staff that was specifically intended to apply to the garage project. During trial, the Town presented testimony and evidence showing that the Town followed the lawful

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<sup>1</sup> As the Town's Planning Director, Christiane Farrell, testified, an "activity zone" is a parcel with a build-to line that is intended to create pedestrian activity in the area between the building and street.

process for providing notice of zoning amendments; however, the Town's witnesses admitted that they did not directly provide SCDG notice or seek SCDG's input about the proposed zoning amendment specifically intended to apply to the project. Although the Town understood from its prior cooperation in enacting SCDG's requested zoning amendment that SCDG needed to maximize the usable area of the project site to maximize the number of parking spaces, the Town drafted and pursued an amendment to the zoning code that intentionally reduced the usable area of the project site, without providing any direct notice to SCDG.

31. At Town Council's meeting on April 8, 2014, the Town adopted the zoning amendments to the urban corridor zoning district, including those that specifically changed the applicable setbacks for the project site. (Pl.'s Ex. 20.) As a result of the zoning amendment, the chart governing setbacks for area C1 and the project site was amended to read as following:

UC-CBS - DEVELOPMENT GUIDELINES CHART					
Area	Maximum Building Height Allowed <sup>1</sup>	Front Setback or Build-to on Coleman or Ben Sawyer <sup>2</sup>	Front or Side Setback or Build-to on Other Streets	Rear Building Setback <sup>3</sup>	Internal Side and Rear (Non-street) Buffers <sup>4</sup>
C1	55'	20-30' BT	20' SB <sup>5</sup>	5'	5'

<sup>1</sup> In all cases, the maximum height for buildings in the UC-CBS that are located within 50 feet of an abutting residential property line, or an abutting street right-of-way adjoining residential property; provided such residential property is located outside of the UC-CBS, shall be 40 feet, measured from grade to roof ridge, and further provided that no such building shall exceed a maximum of three stories.
<sup>2</sup> Build-to lines are measured from back of curb to face of building; if no curb is present, measure from edge of pavement. Awnings and canopies are not included. Setbacks are measured from the right-of-way line.
<sup>3</sup> In all cases where rear or side property lines abut residential properties lying outside of the UC-CBS, a minimum 15-foot setback is required, within which a minimum 10-foot type "C" bufferyard with an F3 fence, is also required.
<sup>4</sup> Common wall construction to adjacent properties spanning property lines may be utilized in accordance with applicable building and fire code requirements. Buffers are not required where interconnectivity between parcels is provided or shown on the plan for future connection, or when common wall construction to adjacent properties spanning property lines is utilized. Where interconnectivity or common wall construction is not provided, a minimum type "A" bufferyard plant material is required.
<sup>5</sup> The 20' setback applies to all side streets except Mill Street, where a 20-30' build-to is required.
<sup>6</sup> The 20' setback applies to all side streets except Simmons Street, where a 20-30' build-to is required.

32. At that same meeting, Town Council was presented with a petition signed by over 1,100 individuals opposing SCDG's development of the parking garage and office building. (Def.'s Ex. 11.) Mr. Small attended that meeting and addressed the opposition to the development. (*Id.*) However, he did not speak about the zoning amendments that applied to the project because he did not know that the setbacks were being changed.

33. During the same week that the Town adopted the zoning amendment to the urban corridor zoning district, SMHa scheduled a pre-submittal meeting with the Town's planning staff to present the preliminary design of the project. That meeting was held on April 11, 2014, and SMHa presented the preliminary design that included 266 total parking spaces. SMHa's design utilized 5' setbacks on the side of the building on Mill Street and on the rear of the building on Church Street and 8 ½' wide parking spaces. During the meeting, the Town's planning staff in attendance informed SMHa that its proposed design did not comply with the Town's newly enacted zoning amendments which required 20' setbacks on Mill Street and Church Street. Also, the Town informed SMHa that the design did not comply with the Town's requirements of 9' wide parking spaces. Based on the information provided by the Town's planning staff, SMHa concluded that compliance with the new zoning amendments relating to setbacks as interpreted by

the Town and incorporation of 9' wide parking spaces would result in the loss of a significant number of parking spaces in the parking garage. (Pl.'s Ex. 47.)

34. Upon learning this information, over the next few months SCDG sought from the Town various accommodations and applications of the zoning code that would enable SCDG to maximize the total number of spaces. As explained below, those attempts were uniformly rejected by the Town. SCDG presented testimony and argument that the Town's resistance to SCDG's attempts to provide additional parking were intended to kill the project, and that this was in response to the public opposition which arose after the Town entered into the parking license agreement.

35. Initially, Mr. Johnston inquired with the Town's zoning administrator, Kent Prause, whether a 5' rear setback could apply to the back of the building on Church Street, but Mr. Prause rejected that interpretation. Instead, Mr. Prause stated that a side-street setback must apply to the rear of the building, which meant that SMHa would have to use a 20' setback on Church Street. This application of a 20' setback on Church Street resulted in the elimination of a row of 16 parking spaces on the second floor of the parking garage.

36. Later, SCDG's attorney requested that the parking garage be deemed a "civic use" under the Town's zoning code. (Pl.'s Ex. 44.) This request was made because the Town's zoning code contained an exemption for civic uses, which provided that "build-to lines, setbacks, and other design elements for civic uses" shall be determined in the Town's design review process. (Town Zoning Ordinance § 156.329(N)(5).)<sup>2</sup> At the time, the Town's zoning ordinance defined "civic use" to mean:

Utility, educational, recreational, cultural, medical, protective, governmental, and other uses that provide public or quasi-public

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<sup>2</sup> This citation refers to the zoning ordinance section in effect at the time of the request.

services and are strongly vested with social importance. Examples may include, but are not limited to the following: city halls; post offices; police and fire stations; schools; museums; universities; public parks; meeting halls; libraries; transit centers; and parking structures.

(Town Zoning Ordinance § 156.007) (emphasis added). If the parking garage would have been considered a “civic use,” the Town’s planning staff could have approved reduced setbacks on Mill Street and Church Street and 8 ½’ wide stalls, which would have increased the number of spaces in the parking garage.

37. The Town rejected SCDG’s request for the parking garage to be considered a civic use. Although “civic use” was defined in the Town’s zoning code to expressly include “parking structures” as an example, the Town’s attorney wrote to SCDG’s attorney that “civic use” was not defined by the zoning code. (Pl.’s Ex. 32.) He further opined that the parking garage “does not appear to meet any reasonable definition of the term.” (*Id.*)

38. Also, SCDG, through its attorney, requested that Church Street not be considered a street because the Town had failed to maintain the right-of-way after it was removed from the state highway system. (Pl.’s Ex. 24 & 44.) This interpretation would have allowed a 5’ setback to be applied to the rear of the building on Church Street, thereby preventing the elimination of a row of parking from SMHa’s preliminary design. Again, the Town rejected this request. (Pl.’s Ex. 32.)

39. Later, SCDG presented the Town with a modified design that included ten on-street parking spaces on Mill Street which could be used to increase the number of spaces available for public use in the parking garage. (Pl.’s Ex. 45.) The Town rejected this design element.

40. In addition to reducing the number of parking spaces the site could yield, the zoning amendment adopted by the Town in April of 2014 also threatened the viability of the entire project.

As Mr. Flesch explained during trial, the creation of an activity zone on Mill Street forced the footprint of the building to shift from its designed location. However, the boundary of SCDG's leased parcel could not accommodate the shift, and SCDG had to lease more land from the landlord at a considerable expense to make the project work.

41. Despite the obstacles and lack of cooperation from the Town, SCDG persisted in its efforts to develop the project. SMHa designed the garage under the new zoning requirements as interpreted by the Town's staff, which resulted in 234 total parking spaces and 117 public spaces. The design presented by SMHa also included a surface parking lot on the adjacent property that included additional parking spaces. The Town approved the modified design in September of 2014.

42. After the Town approved the design of the project, SCDG requested that the Town confirm that construction of the garage in conformance with the approved design would satisfy SCDG's obligations under the parking license agreement. In a letter from SCDG's attorney in October of 2014, SCDG requested the Town deliver an estoppel certificate that the approved design complied with the parking license agreement as required by Section 7.04 of the parking license agreement. (Pl.'s Ex. 43.) Mr. Small and Mr. Flesch testified that the estoppel certificate was important to potential lenders who desired assurances that the Town, backed by its highly rated credit, would pay rent as required by the parking license agreement. They also testified that the Town's failure to provide an estoppel certificate had an adverse impact on SCDG's ability to obtain more favorable borrowing terms.

43. The Town did not provide an estoppel certificate as requested by SCDG. Instead, Mr. DeMoura responded to SCDG's request in a November 2014 letter, stating that the design did not include sufficient parking spaces to comply with the parking license agreement. (Pl.'s Ex. 13.)

Mr. DeMoura's analysis did not focus solely on the number of parking spaces included in the garage but also analyzed whether neighboring restaurants had sufficient parking. The parking license agreement contains no provisions that required SCDG to provide parking for these restaurants.

44. After SCDG received Mr. DeMoura's letter, Mr. Small approached the Town about resolving the dispute regarding whether SCDG's approved design satisfied the requirements of the parking license agreement. The parties then negotiated a proposed amendment under which the parking garage would consist of 234 total spaces and 117 public spaces and annual rent would be reduced from \$185,000 to \$163,800. (Pl.'s Ex. 14.)

45. The proposed amendment to the parking license agreement was considered by Town Council at its meeting in February of 2015. Prior to considering the proposed amendment, Mr. DeMoura gave a presentation of the history of the parking garage project and the Town's involvement. He also presented his analysis of whether SCDG's approved design satisfied the requirements of the parking license agreement consistent with his November 2014 letter. (Pl.'s Exs. 15 & 18.)

46. After Mr. DeMoura gave his presentation, Town Council unanimously voted to "endorse" Mr. DeMoura's letter, thereby adopting his conclusion that the approved design did not comply with the parking license agreement. (*Id.*) After adopting Mr. DeMoura's letter, council unanimously decided to deny any new proposal that may be put forward or submitted by the SCDG pertaining to the parking license agreement. (*Id.*) In discussing this action, Town council members explained that the purpose of the motion was to make it clear that no government money should be spent on this project regardless of the number of spaces. (*Id.*)

47. At no time prior to Town Council's action in February of 2015 or since has the Town conducted any analysis to determine if 234 total spaces and 117 public spaces would be inadequate to help address the parking issues around Shem Creek.

48. Despite the Town's actions, SCDG remained committed to building the parking deck and providing publicly available spaces. To complete the project without the Town's guaranteed rental payments, SCDG partnered with an equity investor to create a joint venture to own, build, and operate the office building and parking garage. Under the terms of the joint venture, SCDG relinquished its sole ownership of the project and retained only a 15% membership interest in the new venture.

49. As SCDG and its successor joint venture worked to complete the project, it continued to face resistance from the Town and the project's opponents. In the spring and summer of 2015, the Town's zoning administrator, Mr. Prause, attempted to condition the issuance of a foundation building permit on SCDG agreeing to provide free parking to patrons of the neighboring restaurants. At trial, Mr. Prause admitted that there was nothing in the Town's zoning code that expressly required SCDG to provide free parking. Instead, Mr. Prause stated that his interpretation reflected the "obvious implication" of the Town's zoning code. (Pl.'s Ex. 23.) Ultimately, the Town withdrew this condition to issuing the permit after SCDG's attorney challenged the legal basis of the Town's position. (Pl.'s Ex. 40.)

50. Save Shem Creek sued the Town and SCDG to stop the project, alleging that the Town erred in allowing the project to intrude into the neighboring maritime zoning district. The Town argued at trial in this case that its interpretation of the zoning code in this instance was favorable to SCDG and evidenced its cooperation with SCDG in the project despite public

opposition. However, Mr. Prause admitted during his testimony that the Town's challenged interpretation was not discretionary and was mandated by law.

51. In June of 2016, SCDG's attorney provided notice to the Town that it was in breach of the parking license agreement by anticipatorily refusing to pay rent, refusing to provide an estoppel certificate, and violating the covenant of good faith and fair dealing by taking actions to interfere with SCDG's performance under the parking license agreement. (Pl.'s Ex. 42.) As a result, SCDG terminated the parking license agreement pursuant to that same letter. (*Id.*)

52. The successor to SCDG's interest the parking garage project completed the project and received a certificate of occupancy for the garage in July of 2017. The date of the issuance of certificate of occupancy served as the Rental Commencement Date under the parking license agreement, which is when the first annual rental payment from the Town should have been released from escrow pursuant to Sections 1.07 and 1.10 of the parking license agreement.

53. Mr. Flesch and Mr. Small testified that the parking garage and office building has provided the benefits that the Town sought when the parties entered into the parking license agreement. It has helped revitalize the Coleman Boulevard corridor by replacing old, dilapidated buildings on a lot with first-class office space and parking. Businesses have relocated their operations to Mount Pleasant, thereby bringing jobs to Mount Pleasant, creating increased tax and business license revenue for the Town, and increasing commercial activity in the area. Also, new restaurants, whose patrons and employees utilize the parking garage, have opened since the garage was completed. In addition, the parking deck has helped alleviate the parking congestion in the Shem Creek area. Although the parking garage was completed with fewer spaces than originally contemplated, there is no evidence that 234 total and 117 public spaces have proved inadequate in

meeting the parking demands of the area. In fact, Mr. Flesch testified that the parking garage routinely has excess capacity and that it has only been fully occupied on a few occasions.

54. As a result of the Town's repudiation of the agreement and failure to pay rent, SCDG filed this action against the Town in October of 2017, asserting a claim for breach of contract based on the Town's failure to provide an estoppel certificate, accept the garage, and pay rent as required under the parking license agreement.<sup>3</sup>

55. Because the parking license agreement limits SCDG's remedies for a breach of the parking license agreement to rent, SCDG has only sought damages for (1) unpaid past rent from the Rental Commencement Date through the approximate date of trial, plus statutory prejudgment interest, and (2) future rent through the remainder of the rental term discounted to net present value as of the approximate date of trial. Mr. Flesch, who has performed similar present value calculations during his career in the real estate development business, performed the damages analysis and calculation and testified about his calculation at trial. Mr. Flesch utilized a discount rate of 2.03% to conduct the present value calculation. This rate reflects the average interest rate paid during the relevant time period on the Town's most recent bond issuance in 2019. Mr. Flesch testified that he believed that this was an appropriate discount rate based the American Institute of Certified Public Accountants' guidance that an appropriate discount rate is a risk-free rate of return and that the interest rate on Town's most recent bond issuance most accurately reflected the low risk of the Town defaulting on its payments obligations under the parking license agreement. Based on this methodology, Mr. Flesch calculated that SCDG's damages resulting from the Town's breach of the parking license agreement are \$2,604,316. (Pl.'s Ex. 53.)

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<sup>3</sup> SCDG's complaint also included a claim for unjust enrichment; however, SCDG did not pursue that claim at trial.

56. At trial, the Town did not contest Mr. Flesch's method of calculating damages; nor did the Town dispute the appropriateness of the discount rate that he used. Instead, the Town challenged whether those damages were recoverable under the parking license agreement based on its interpretation that is discussed below in Paragraphs 102-103 of this order. As a result, the Court finds that \$2,604,316 is a reasonably certain calculation of the present value of unpaid rent due under the parking license agreement.

### **CONCLUSIONS OF LAW**

#### **A. Burden of Proof**

57. SCDG, as the plaintiff in this action, bears the burden of proof by a preponderance of the evidence standard. *Menne v. Keowee Key Prop. Owners' Ass'n*, 368 S.C. 557, 564, 629 S.E.2d 690, 694 (Ct. App. 2006).

58. The Town has asserted several affirmative defenses to SCDG's claim for breach of contract. "When a defendant interposes an affirmative defense, he becomes as to that matter the actor in the suit, and the burden of proof rests upon him to establish his affirmative defenses by the preponderance of the evidence." *Cole v. S.C. Elec. & Gas, Inc.*, 355 S.C. 183, 195, 584 S.E.2d 405, 412 (Ct. App. 2003)(quoting *Lorick & Lowrance, Inc. v. Julius H. Walker & Co.*, 153 S.C. 309, 318, 150 S.E. 789, 792 (1929)). Similarly, South Carolina law holds that a defendant who asserts that its non-performance under a contract is excusable or justified bears the burden of proving its excuse for the breach. *Cox v. First Provident Corp.*, 240 S.C. 130, 135, 125 S.E.2d 1, 3 (1962).

**B. SCDG's Breach of Contract Claim**

59. SCDG asserts a cause of action against the Town for breach of contract under the parking license agreement. “The elements for breach of contract are the existence of a contract, its breach, and damages caused by such breach.” *Johnson v. Little*, 426 S.C. 423, 428, 827 S.E.2d 207, 210 (Ct. App. 2019). “The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and proximate result of such breach.” *Id.* “Parties to a contract may stipulate as to the amount of liquidated damages owed in the event of nonperformance.” *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002).

60. In this case, SCDG claims that the Town breached the parking license agreement by refusing to provide an estoppel certificate, anticipatorily breaching the contract by repudiating the agreement, and failing to pay rent as required thereunder. Based on the facts set forth herein, and the Town's admission that it has not performed its obligations under the parking license agreement, including by failing to provide an estoppel certificate as requested by SCDG and failing to pay rent, the Court concludes the parking license agreement is a contract, and SCDG has proved that the Town breached the agreement by a preponderance of the evidence.

61. Section 7.04 of the parking license agreement provides that within ten days after request of a party, “the other party agrees to deliver in recordable form, a certificate to any proposed mortgagee or purchaser, or to the other party, certifying that the License is unmodified and in full force and effect . . . , that there are no defenses or offsets thereto (or stating those claimed, and the dates to which Fixed Minimum Rent and Additional Rent have been paid.” On October 20, 2014, SCDG's attorney sent the Town a formal request for an estoppel certificate under Section 7.04. It is undisputed that the Town failed to provide an estoppel certificate.

62. Also, SCDG asserts that the Town committed an anticipatory breach by repudiating the parking license agreement. “In general, an anticipatory breach of contract is one committed before the time has come when there is a present duty of performance, and is the outcome of words or acts evincing an intention to refuse the performance in the future.” 30 S.C. Jur. *Contracts* § 66 (1999). In November of 2014, Mr. DeMoura issued a letter to SCDG’s attorney, stating that SCDG’s approved design did not satisfy SCDG’s obligations under the parking license agreement. Town Council subsequently endorsed Mr. DeMoura’s letter in its meeting in February of 2015, and then it unanimously approved a subsequent motion that “Town government should not be involved with assisting this project with government money and this Parking License Agreement should be ended and put to bed.” (Pl.’s Exs. 15 & 18.) The Town’s actions “ending” the parking license agreement and prohibiting any government funds being paid under the agreement constitutes a repudiation of the agreement. [See *Ackerman v. McMillian*, 314 S.C. 268, 271, 442 S.E.2d 618, 620 (Ct. App. 1994) (“[T]o warrant a repudiation, a breach must be so fundamental and substantial as to defeat the purpose of the contract.”)(citing *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 427 S.E.2d 701 (Ct.App.1993))].

63. Last, SCDG contends that the Town breached the parking license agreement by failing to pay rent as required by Section 1.07(a). This section provides that Fixed Minimum Rent of \$185,000 shall be paid annually. It is undisputed that the Town has not made any rental payments under the parking license agreement.

64. SCDG’s breach of contract claim also asserts that the Town breached the implied covenant of good faith and fair dealing in the parking license agreement. “[U]nder South Carolina law, there exists in every contract an implied covenant of good faith and fair dealing.” *Boddie-Noell Props. v. 42 Magnolia P’ship*, 344 S.C. 474, 484, 544 S.E.2d 279, 284 (Ct. App. 2000). The

implied covenant of good faith and fair dealing requires “the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made.” *Id.* at 485, 544 S.E.2d at 284 (quoting 17A C.J.S. *Contracts* § 328, pp. 282-284). Similarly, the covenant of good faith and fair dealing requires that “neither party will do anything to impair the other’s rights to receive benefits under the contract.” *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996).

65. Here, SCDG alleges that the covenant of good faith and fair dealing required the Town to avoid doing anything to impair SCDG’s rights to receive benefits under the parking license agreement. The Court concludes that the SCDG has proved by a preponderance of the evidence that Town breached the implied covenant of good faith and fair dealing by taking actions that prevented SCDG from developing the parking garage as envisioned under the parking license agreement and receiving rent thereunder, including (a) adopting zoning amendments that forced SCDG to redesign the parking deck and provide fewer spaces than originally planned; and (b) adopting unfavorable interpretations of zoning ordinances that hindered SCDG’s ability to develop the project with as many spaces as possible.

66. As interpreted by the Town’s planning staff, the zoning amendments to the urban corridor zoning district approved by the Town in April of 2014 effectively increased the setbacks on the property by eliminating the provision allowing the setbacks to be reduced to 5’ on side streets. This change reduced the buildable area on the project site, which resulted in the elimination of an entire row of parking spaces. If that row of spaces had not been eliminated, then SCDG could have produced all 132 public spaces, which constituted the Premises rented by the Town under the parking license agreement. The Town could have avoided the elimination of these spaces from the design by not adopting the zoning change or rescinding the zoning changes as they related

to SCDG's property. Thus, the adoption of the zoning amendments was a discretionary act of the Town that interfered with SCDG's performance under the parking license agreement.

67. The Town also breached the covenant of good faith and fair dealing by failing to apply reasonable interpretations of the zoning code that would have increased the number of spaces in the garage.<sup>4</sup> Mr. Prause rejected SCDG's request for the setback on the rear of the building on Church Street to be considered a rear setback. Under the Town's zoning code in effect at the time of the request, a rear setback had a minimum 5' requirement. Mr. Prause explained that he rejected that request because a rear setback would have only applied if there was a lot between the project site and Church Street. (Pl.'s Ex. 21.) According to Mr. Prause, his interpretation of "rear setback," which is not defined in the Town's zoning code, was based on what the zoning code "ostensibly contemplated." (*Id.*) He further testified at trial that his interpretation was supported by the zoning code's definition of a "rear yard." However, the definition a "rear yard" does not preclude a determination that a rear setback can adjoin a right-of-way. In fact, "rear yard" is defined as a "yard situated between the rear building line and the rear lot line and extending the

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<sup>4</sup>The Town objected to the admissibility of evidence relating to its zoning interpretations discussed below on the ground that it was irrelevant because SCDG failed to exhaust its administrative remedies by appealing such interpretations to the Town's Board of Zoning Appeals (the "BZA") or seeking variances from the BZA. The Court overrules that objection because the defense of exhaustion of administrative remedies does not apply to SCDG's breach of contract claim. The facts surrounding these interpretations are direct evidence of whether the Town breached the implied covenant of fair dealing, whether SCDG is excused for any alleged breach of the parking license agreement, and whether SCDG's alleged breach was material enough to excuse the Town's breach. Put simply, there are no administrative remedies for SCDG's breach of contract claim. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 102-03, 674 S.E.2d 524, 530 (Ct. App. 2009)(holding a breach of contract is "not based on a statute for which the legislature mandates the pursuit of an administrative remedy" and is "not [a] wrong[] for which the administrative scheme was designed to redress.") Furthermore, the Town waived the defense by failing to plead exhaustion of administrative remedies as an affirmative defense. See *Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002)("The failure to plead an affirmative defense is deemed a waiver of the right to assert it.").

full width of the lot” with no prohibition on the lot adjoining a right-of-way or street. (Town Zoning Ordinance § 156.007.) As such, it would have been entirely reasonable for Mr. Prause to exercise his discretion as the zoning administrator to apply a rear setback of 5’ on Church Street. This interpretation alone would have increased the total number of parking spaces in the garage by 16, thereby allowing SCDG to deliver more than 132 public spaces. This fact is especially significant because the parking license agreement defined “Premises” to only include the public spaces. However, the Town refused to exercise its discretion in this reasonable manner, thereby reducing the amount of spaces SCDG could provide.

68. The Town refused to reasonably exercise its discretion and deem the parking garage a “civic use” as the term is used in the Town’s zoning ordinance. This change would have allowed the Town’s staff to determine the setbacks and approve smaller parking spaces in the garage. The Town’s zoning ordinance requires parking spaces to be 9’ wide, and the Town’s planning staff interpreted the zoning ordinance to require a 20’ setback on the rear of the building. Furthermore, the Town interpreted the activity zone requirements on Mill Street to preclude the use of on-street parking. However, the Town’s zoning ordinance provides an exemption which states “build-to lines, setbacks, and other design elements for civic uses” shall be determined in the Town’s design review process. “Civic use” is defined in the Town’s zoning ordinance as:

Utility, educational, recreational, cultural, medical, protective, governmental, and other uses that provide public or quasi-public services and are strongly vested with social importance. Examples may include, but are not limited to the following: city halls; post offices; police and fire stations; schools; museums; universities; public parks; meeting halls; libraries; transit centers; and parking structures.

(Town Zoning Ordinance § 156.007)(emphasis added). SCDG requested the Town deem the garage a “civic use” and the Town admits that it had discretion to make such a determination; however, the Town refused to do so.

69. The Court concludes that it would have been a reasonable exercise of the Town’s discretion to deem the parking garage a civic use and that the implied covenant of good faith and fair dealing required it to do so. The definition of “civic use” expressly states that parking structures may be designated as civic uses, and SCDG’s proposed parking garage was specifically contemplated as a public-private-partnership which would provide quasi-public services in the form of publicly available parking reserved through the Town’s payment of public funds. Had the Town deemed the parking garage a “civic use” and utilized its discretion to reduce the setback on Church Street to 5’ feet, allow for on-street parking, and allow for 8 ½’ wide parking spaces, SCDG definitely could have provided more than 132 public spaces and quite possibly could have provided 276 total spaces. By failing to do so, the Town breached the implied covenant of good faith and fair dealing and interfered with SCDG’s performance and benefits under the parking license agreement.

70. The Town does not contest that it took these actions or that such actions negatively affected the number of spaces which could have been provided in the parking garage. Instead, the Town argues that, as a governmental entity, it had the inherent authority to adopt legislation and to interpret the zoning code without regard to its effect on SCDG’s project. While this is true in the sense that the Town’s actions were lawful, the exercise of legitimate governmental authority does not immunize the Town from liability for a breach of contract, including for breach of the implied duty of good faith and fair dealing, if it exercises that authority to interfere with the purpose

and performance of a contract. To hold otherwise would empower governmental entities to engage in bad faith to destroy or interfere with agreements to which they are parties at their convenience.

71. As courts in other jurisdictions have ruled, the implied duty of good faith and fair dealing applies equally to discretionary acts of government as it does to the acts of private parties. *See, e.g., Guidiville Rancheria of Cal. v. United States*, 704 Fed. Appx. 655 (9th Cir. 2017) (stating that developer alleged a plausible claim for breach of implied covenant of good faith and fair dealing against a city for actions taken to interfere with gaming approval); *Reserve at Woodstock, LLC v. City of Woodstock*, 958 N.E.2d 1100 (Ill. Ct. App. 2011) (affirming trial court’s ruling that city violated duty of good faith and fair dealing under an annexation agreement by denying plat and rezoning property); *City of Golden v. Parker*, 138 P.3d 285, 292-93 (Colo. 2006) (recognizing that implied duty of good faith and fair dealing applied to city council’s discretionary budget decisions). “In the case of a discretionary power, it has been suggested that the covenant requires the party holding such power to exercise it for any purpose within the reasonable contemplation of the parties at the time of formation – to capture opportunities that were preserved upon entering the contract, interpreted objectively.” *Guidiville Rancheria of Cal.*, 704 Fed. Appx. at 657.

72. These principles apply to this case. When the parties entered into the parking license agreement, it was understood by both SCDG and the Town that the Town would have to comply with the implied duty of good faith and fair dealing by making changes to certain zoning requirements in order to make the project feasible. For example, the parties understood that the Town would have to increase the allowable height and eliminate certain requirements for the first floor of the building. Just as the duty of good faith and fair dealing required the Town to take certain discretionary actions to fulfill the purpose of the parking license agreement, that same duty required the Town to avoid taking other discretionary actions to interfere with the purpose of the

parking license agreement. By failing to utilize its discretion to fulfill the purpose of the parking license agreement and maximize the number of parking spaces in the garage, the Town breached its implied duty of good faith and fair dealing.

**C. The Town's Affirmative Defenses**

73. To avoid liability for breaching the parking license agreement, the Town asserts numerous affirmative defenses intended to justify its breach. These defenses are considered in turn below, and the Court finds the Town has failed to establish any of these defenses by a preponderance of the evidence.

74. First, the Town contends it was justified in not performing its obligations under the parking license agreement because SCDG breached the parking license agreement by failing to design the parking garage with 276 total and 132 public spaces, as required by the agreement. According to the Town, the requirement to produce the minimum number of spaces was a clear and unambiguous obligation under the plain terms of the agreement. Contrary to the Town's assertions, the express provisions of the parking license agreement did not require that SCDG design the parking garage with a specific number of spaces. In response to the Town's assertions, SCDG, citing various sections of the agreement, argued that it was only required to design and construct a structure which contained a substantially similar number of spaces. To further support this argument, SCDG presented evidence to demonstrate the parties understood that the number of spaces included in the agreement were only an approximation based on the conceptual plans prepared by Mr. Betsch. The Town objected to this evidence on the basis that it was parol evidence

which should not be considered because the relevant terms of the agreement were clear and unambiguous.<sup>5</sup>

75. Even if the parking license agreement required SCDG to provide 276 total and 132 public spaces, the language of the agreement did not make strict compliance with those terms essential to the Town's performance of its obligations under the agreement. "The doctrine of substantial performance was conceived for the case where a plaintiff's partial performance has already given to a defendant substantially all that he bargained for and is of such a nature that it cannot be returned." *Clardy v. Bodolosky*, 383 S.C. 418, 427, 679 S.E.2d 527, 531 (Ct. App. 2009)(quoting *Coastal Seafood Co., Inc. v. Alcoa S.C., Inc.*, 298 S.C. 466, 467-68, 381 S.E.2d 502, 503 (Ct.App.1989)). Only where a contract, by its express provisions, makes strict compliance essential, will substantial performance be insufficient. *Id.* At 427, 679 S.E.2d at 531-32. SCDG has substantially performed its obligations under the agreement by designing the parking garage with 89% and 85% of the respective public and total spaces contemplated thereunder. Although SCDG's final design of the parking garage created fewer spaces than initially contemplated, the approved parking garage design gave the Town all it had bargained for, satisfying the need for additional parking in the Shem Creek area and providing other benefits discussed below.

76. The Court concludes that it is unnecessary to determine whether the parking license agreement required SCDG to design the parking garage with no less than 276 total and 132 public

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<sup>5</sup> Because the case was tried non-jury, the Court permitted SCDG to present this evidence subject to the objections of the Town. *See Brown v. Allstate Ins. Co.*, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001)("A trial judge's role in a bench trial is to admit all evidence and then evaluate in a non-jury setting.") As explained below, it is not necessary for the Court to determine whether the parking license agreement required SCDG to design the parking garage with no less than 276 total and 132 public spaces; therefore, the Court did not rely on such evidence in its findings of fact and conclusions of law stated herein.

spaces or whether SCDG breached the parking license agreement by designing the parking garage with only 234 total and 117 public spaces. Regardless of whether SCDG breached the parking license agreement in such manner, any purported breach was not sufficiently material to excuse the Town's complete failure to perform its obligations thereunder.

77. For the Town to be relieved of its contractual obligations under the parking license agreement by virtue of SCDG's alleged breach, that breach must constitute a material breach of the agreement. *See Palmetto Mortuary Transp., Inc. v. Knight Sys.*, 424 S.C. 444, 463, 818 S.E.2d 724, 735 (2018) (stating that "only a material breach" by plaintiff would relieve defendant from its contractual obligations) (citing *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275-76, 440 S.E.2d 364, 366-67 (1994)).

78. In *Kiriakides*, the South Carolina Supreme Court held that a forfeiture of a commercial lease should not be based on a trivial or immaterial breach. *Id.* at 276, 440 S.E.2d at 366. The court then adopted an analysis for deciding whether a breach is material based on the following factors:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated by damages for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all of the circumstances including any reasonable assurances; and (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

*Id.*

79. The court's materiality analysis in *Kiriakides* directly applies to this case because it is derived from general principles of contract law, recognized in the *Restatement (Second) of*

*Contracts*, and there is no reason to limit its analysis exclusively to commercial leases. In fact, the South Carolina Supreme Court has expressly approved the application of the *Kiriakides* analysis to contractual matters not involving commercial leases. See *Palmetto Mortuary Transp.*, 424 S.C. at 462-63, 818 S.E.2d at 734-35, fn. 5; see also, *Restatement (Second) of Contracts* § 241 (stating that the “standard of materiality applies to contracts of all types”).

80. The *Kiriakides* factors applied to this case demonstrate that any breach resulting from SCDG’s failure to provide all spaces required under the parking license agreement was not material enough to totally relieve the Town of its contractual duty to pay rent and perform other obligations.

81. Under the first factor, the Town would not have been deprived the benefits of the parking license agreement based on SCDG’s design of 234 total and 117 public spaces. The Town identified a need for additional parking in the Shem Creek area and entered into the parking license agreement to obtain the benefit of additional parking which would address that need. SCDG originally proposed the number of spaces to be included in the parking garage, and the Town has never conducted an analysis demonstrating all of the 276 total and 132 public spaces were necessary to satisfy parking demand, as confirmed by Mr. DeMoura. Although the final design ultimately created fewer spaces than the parties originally contemplated, there is no evidence indicating 234 total spaces and 117 public spaces are inadequate to address the parking demands of the Shem Creek area. In fact, the only testimony presented at trial on this point demonstrated the parking garage is more than adequate to meet parking demands in the Shem Creek area. Thus, the Town has not been deprived the benefit it expected under the parking license agreement.

82. Nevertheless, the Town argues that it has been deprived of the benefits of the parking license agreement based on the mere numerical deficiency between what was

contemplated in the parking license agreement and what was actually designed. Notwithstanding the fact that deficiency amounts to only around 11% of the public spaces and 15% of the total spaces, the Town's narrow view disregards the fact that the parking license agreement offered many benefits to the Town beyond the number of parking spaces. As testified by Mr. DeMoura, the development of the parking garage and office building was "necessary" to the Town's efforts to revitalize the Coleman Boulevard corridor and encourage economic development in that area of Mount Pleasant. Furthermore, Mr. Flesch and Mr. Small testified that the office building and parking garage resulted in several new businesses relocating and bringing new jobs to Mount Pleasant, which helped service new restaurants around Shem Creek and contributed to increased tax and business license revenues for the Town. Beyond providing additional parking which alleviated parking congestion near Shem Creek, the manner in which it was provided under the parking license agreement created benefits for the Town as well. Specifically, the parking license agreement provided the Town with additional benefits of public parking without having the financial obligations of constructing, managing, and maintaining that parking. The Town also enjoyed the potential benefit of rent reduction if the parking operations were profitable, without obligating the general fund of the Town, because rent was to be funded through accommodation taxes paid by tourists. SCDG's inability to provide all 276 total and 132 public spaces in no way deprived the Town of these benefits of the parking license agreement.

83. Moreover, the Town's argument that it has been deprived of the benefits of the parking license agreement based on the numerical deficiency alone is belied by its own actions. If the benefits of the additional 16 public and 42 total spaces were as significant as the Town posits, one could certainly have expected the Town to have worked with SCDG to explore additional options concerting how to achieve those additional spaces. However, the Town presented no

evidence that it undertook these effort, and Mr. DeMoura could not identify to any action the Town took to cooperate with SCDG beyond December of 2013.

84. The second *Kiriakides* factor also favors SCDG because the Town could have been compensated for any injury caused by the design of the parking garage with less than 276 total and 132 public spaces. To the extent that any injury has occurred, the Town could have sought and obtained a reduction in rent or damages based on overpayment of rent. In fact, SCDG presented the Town with an amendment to the parking license agreement that reduced rent; however, the Town rejected the amendment and took the extreme position that it had no obligation to pay any rent or perform any obligations under the agreement. Although the Town argued that the parking license agreement precludes it from seeking rent reduction based on the deficiency in the number of spaces designed, that interpretation has no contractual support because the default clause contains no such limitation. In fact, the Town could have sought an offset of SCDG's damages in this case based on the purported deficiency of spaces, but it failed to do so.

85. The third *Kiriakides* factor favors SCDG because it has suffered a complete forfeiture of the parking license agreement as a result of the Town's repudiation of its obligations, which the Town admits. Despite incurring significant expenses in pursuing the project, SCDG has received no rent from the Town, which was the primary benefit SCDG expected to receive under the parking license agreement. Moreover, the Town's repudiation of the agreement and failure to pay rent caused SCDG to surrender its sole ownership in the development.

86. The fourth *Kiriakides* factor favors SCDG because it could have cured any contractual deficiency in the number of spaces designed but the Town refused those attempts. As explained above, SCDG presented the Town with numerous options which would have increased the number of spaces in the garage, such as reducing the setback on Church Street to 5', utilizing

8 ½' wide parking spaces, and creating on-street parking. Either of those first two options alone would have ensured the delivery of at least 132 public spaces, which comprised the Premises for which the Town agreed to pay rent. All of the proposed options combined could have allowed SCDG to create all or nearly all of the 276 total spaces. When those efforts failed, SCDG then agreed to reduce rent to cure any alleged deficiency in the number of spaces.

87. Although the Town argued that SCDG refused to cure the purported deficiency by creating another level of parking and reducing the amount of office space in the building, the Town failed to establish that this option was feasible. Mr. Betsch's drawings indicated creating a third story of parking would have created clearance issues, and Mr. Small testified those clearance issues were exacerbated by the Town's increase of the setbacks. Moreover, Mr. Johnston testified it was not feasible to design a third story of parking due to engineering limitations. Regardless of whether such an option was technically feasible, SCDG was not contractually obligated to design a third story of parking, and doing so would have likely rendered the project economically unfeasible by replacing rent-generating office space with unneeded excess parking which would have produced little revenue. Put simply, the Town did not establish that a third story of parking was a feasible or reasonable option to cure any alleged contractual deficiency in the number of parking spaces.

88. The fifth *Kiriakides* factor favors SCDG because it engaged in good faith efforts to perform under the parking license agreement. The Town's witnesses admitted that they found Mr. Small to be forthright, honest, and a gentleman, and Mr. DeMoura agreed that he was a good partner. Moreover, it was undisputed that SCDG and its architect at all times endeavored to maximize the number of spaces in the garage. Further, despite being under no obligation to do so, SCDG agreed to reduce the rent to be paid by the Town when the dispute about the number of spaces arose.

89. Because each of the *Kiriakides* factors favor SCDG, the Town cannot establish that SCDG's design of the parking garage with 89% and 85% of the respective public and total spaces contemplated under the parking license agreement was a material breach which would allow the Town to escape its duty to pay rent and perform other contractual obligations.

90. Even if SCDG materially breached the parking license agreement by failing to design all 276 and 132 total and public spaces, the Court would find such breach is excused by the Town's actions that prevented SCDG from designing all such spaces.

91. “[A] party who prevents a condition of a contract cannot seek relief by relying on the other party's resulting nonperformance.” *Dixon v. Dixon*, 362 S.C. 388, 397, 608 S.E.2d 849, 853 (2005)(citing *Champion v. Whaley*, 280 S.C. 116, 311 S.E.2d 404 (1984)); *see also*, 17B C.J.S. *Contracts* § 528 (“A party to a contract cannot force a breach of contract by withholding the means of performance or take advantage of his or her own act or omission to escape liability thereon.”). “There is no breach of a contract on the part of one whose performance is prevented, or rendered impossible, by the conduct of the other party, and the party prevented from performing may be treated, or considered, as though he or she had performed.” 17B C.J.S. *Contracts* § 528.

92. In addition to this well-established principle of contract law, the parties agreed that a party's failure to perform would be excused if such failure was the result of government regulation or controls. Specifically, Section 2.06, which governs excuse of performance, expressly provides that a “party shall not be deemed in default with respect to the performance of any terms, covenants, and conditions of this License if same shall be due to . . . governmental regulation or controls . . .”

93. SCDG was willing and attempted to design and construct the parking garage with 276 total and 132 public spaces. However, the Town's adoption of zoning amendments changed

the setbacks on the property and application of unfavorable zoning interpretations directly limited SCDG's ability to maximize the number of spaces. Because the Town's own actions caused any purported breach related to the number of spaces in the garage, the Town cannot rely on such breach to excuse its non-performance.

94. As an additional affirmative defense, the Town claims it is excused from performing its obligations under the parking license agreement because SCDG failed to satisfy a condition precedent to the contract. According to the Town, SCDG's provision of 276 total and 132 public spaces was a condition precedent to the performance of Town's obligations under the parking license agreement. Thus, the Town argues it had no duty to perform its obligations because SCDG failed to satisfy this condition precedent. This defense fails because the provision of 276 total and 132 public spaces was not a condition precedent to the parking license agreement.

95. A condition precedent to a contract is "any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises." *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994)(citing *Ballenger Corp. v. City of Columbia*, 286 S.C. 1, 331 S.E.2d 365 (Ct.App.1985)). "The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." *Id.* "Where the parties' intentions are in doubt regarding whether a stipulation in a contract is a condition or a promise, the courts resolve any doubt in favor of finding a promise rather than a condition. . . . [C]onditions are not lightly to be presumed, and the rule of strict construction is applicable in determining whether a clause is a condition." 17A C.J.S. *Contracts* § 355. "Words and phrases such as 'if,' 'provided that,' 'when,' 'after,' 'as soon as,' and 'subject to' frequently are used to indicate that performance expressly has been made conditional." *Springs & Davenport, Inc. v. AAG, Inc.*, 385 S.C. 320, 326,

683 S.E.2d 814, 817 (Ct. App. 2009)(quoting *Cobb v. Gross*, 291 S.C. 550, 552, 354 S.E.2d 573, 574 (Ct.App.1987)). “[A] condition precedent may not be implied when it might have been provided for by express agreement.” *Worley*, 317 S.C. at 210, 452 S.E.2d at 625 (quoting 17A C.J.S. *Contracts* § 338 (1963); 17A Am.Jur.2d *Contracts* § 471 (1991)).

96. In this case, the parties used no language in the parking license agreement indicating SCDG’s provision of 276 total and 132 public spaces was a condition precedent to the Town’s contractual obligation to pay rent and perform other duties. The only language relating to the number of spaces is found in Sections 1.05 and 1.06, which provides:

- **Section 1.05:** “Project. The Project consists of a multi-level structured parking garage, comprised of 276 total parking spaces, and a proposed office complex.”
- **Section 1.06:** “Premises. That portion of the Property comprising 132 of the 276 total parking spaces planned for the Project (the “Public Spaces”; the remaining 144 spaces are referred to herein as the “Reserved Spaces”, and the Public Spaces and Reserved Spaces are collectively herein the “Parking Spaces”).

Significantly, neither of these provisions contain any words, such as “if,” “provided that,” “when,” “after,” “as soon as,” and “subject to,” and the lack of such words indicates that providing 276 total and 132 public spaces was not a condition precedent to the Town’s contractual obligations. Furthermore, there is nothing in the agreement that expressly disclaims the Town’s obligations to perform under the contract if SCDG failed to deliver 276 total and 132 public spaces.

97. The Town does not contend that those provisions constitute a condition precedent. Instead, it asserts that the condition precedent to the performance of its obligations is contained in Section 2.03, which provides:

**Section 2.03:** Licensor’s Contingency. Licensor’s obligations under this License Agreement, including but not limited to the obligation to construct the Project, are contingent upon all necessary approvals for construction being issued by the appropriate Town of Mount Pleasant department or entity. Licensor, in its sole and absolute discretion, may elect to terminate

this License Agreement at any time prior to the earlier of (i) twenty-four (24) months from the Effective Date, or (ii) Licensor's commencement of construction of the Parking Garage.

While the Town is correct that this section establishes a condition precedent, it applies only to the performance of SCDG's contractual obligations – not to the Town's. The clear import of this section is that SCDG's performance under the parking license agreement is conditioned upon obtaining the necessary approvals from the Town to complete construction. By its clear and unambiguous terms, it does not condition the Town's obligations on the occurrence of any event. In any case, the section does not apply because the Town issued the necessary approvals to complete construction, thus, the condition precedent to SCDG's performance was satisfied.

98. If the Town wanted to ensure it only had to pay rent to SCDG if a minimum number of spaces was provided, it could have used express language providing no payment was due unless all spaces were provided. It did not do so; therefore, there is no condition precedent. *See Springs & Davenport*, 385 S.C. at 328, 683 S.E.2d at 817-18 (ruling that parties did not create a condition precedent where the contract did not expressly provide for such condition); *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 208, 687 S.E.2d 714, 719 (Ct. App. 2009) (ruling conditions could not be implied where the contract did not expressly state them).

99. Moreover, there is no evidence outside of the contract indicating the Town considered 276 total and 132 public spaces to be a condition precedent. In fact, SCDG – not the Town – proposed the number of spaces to be included in the garage, and the Town never conducted an analysis to determine the number of spaces it desired to achieve the goal of alleviating parking issues around the Shem Creek area and helping revitalize the Coleman Boulevard corridor. Because the Town did not propose or insist on language conditioning its obligations on SCDG's provision of all 276 total and 132 public spaces in the parking license agreement, it cannot credibly

argue that such provision was a condition precedent to the performance of its contractual obligations under the parking license agreement.

100. Lastly, the Town asserts an alternative affirmative defense that the parking license agreement is void for vagueness in the event that Court determines the agreement does not require SCDG to deliver 276 total and 132 public spaces. As the South Carolina Court of Appeals ruled in *Aperm of South Carolina v. Roof*, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct. App. 1986), “absolute certainty” of material terms of the contract is not required; instead, only “reasonable certainty” is required. Because the parking license agreement defines the number of spaces to be provided with reasonable certainty, this defense has no merit and is rejected.

#### **D. Damages**

101. Having found SCDG proved that the Town breached the parking license agreement by a preponderance of the evidence and the Town failed to prove its affirmative defenses excusing its breach by a preponderance of the evidence, the Court now concludes SCDG has proven damages in the amount of \$2,604,316. As stated above, the default provision in the parking license agreement provides SCDG’s sole remedy in the event of the Town’s default is rent due thereunder. Because the Town has paid no rent and not contested SCDG’s methodology of calculating past rent, prejudgment interest, and the present value of future rent, the Court finds \$2,604,316 reflects the present value of unpaid rent with reasonable certainty.

102. Instead of contesting SCDG’s methodology of calculating rent, the Town argues SCDG is not entitled to rent after the date SCDG terminated the parking license agreement. This argument misconstrues the default and survival clauses in the parking license agreement. Section 6.01 provides in the event of default by the Town, SCDG “shall be entitled to bring an action for .

. . breach of contract against [the Town], but agrees that its sole and exclusive remedy shall be the Rent Payments due under this Agreement.” And Section 8.17 provides “any obligation of [the Town] to pay any sum owing or to perform any act after expiration or other termination of this License shall survive the expiration or termination of this License.” When considered together, as they must, these two provisions evidence the parties’ clear intention that the Town’s obligation to pay rent for the entirety of the rental term survives the termination of the parking license agreement. *See Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 570, 772 S.E.2d 882, 891 (Ct. App. 2014) (ruling when reading the lease as a whole it was clear the parties intended, upon tenant’s default, that tenant would be liable to landlord for the rents due during the full term of the lease).

103. Moreover, SCDG’s method of calculating rent accords with South Carolina law. “In a breach of contract action, the ‘measure of damages is the loss actually suffered by the contractee as the result of the breach. And profits that have been prevented or lost as the natural consequence of a breach of contract are recoverable as an item of damages in an action for such breach.’” *Collins Holding Corp. v. Landrum*, 360 S.C. 346, 350, 601 S.E.2d 332, 333–34 (2004)(citing *South Carolina Finance Corp. of Anderson v. West Side Finance Co.*, 236 S.C. 109, 114, 113 S.E.2d 329, 335–36 (1960)). “The law does not require absolute certainty of data upon which lost profits are to be estimated, but all that is required is such reasonable certainty that damages may not be based wholly upon speculation or conjecture, and it is sufficient if there is a certain standard or fixed method by which profits sought to be recovered may be estimated and determined with a fair degree of accuracy.” *Id.*

104. Finally, Section 6.01 of the parking license agreement provides “the prevailing party in any dispute shall be entitled to an award of costs and attorney’s fees, including the cost of

trial and any appeals.” Because SCDG is the prevailing party in this action, it is entitled to an award of all costs and attorney’s fees associated with this dispute, including the cost of trial.

**ORDER**

**THEREFORE**, it is ordered that judgment be entered in the favor of Plaintiff Shem Creek Development Group, LLC on its cause of action for breach of contract in the amount of \$2,604,316.

And it is further ordered that Plaintiff Shem Creek Development Group, LLC submit an affidavit of all costs and attorneys’ fees it seeks to be awarded in this action in accordance with Paragraph 102, above, within fifteen days of this Order and Defendant shall have an opportunity to object to any such costs and fees by submitting an objection thereto within fifteen days of Plaintiff’s submittal of said affidavit.

AND IT IS SO ORDERED.

\_\_\_\_\_  
The Honorable Maite Murphy

Charleston, South Carolina

\_\_\_\_\_, 2020

Oct 16 2020

SC Court of Appeals

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017- CP-10-05493

SHEM CREEK DEVELOPMENT GROUP, LLC

THE TOWN OF MOUNT PLEASANT, SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: THE HONORABLE MAITE MURPHY
Attorney for : [ ] Plaintiff [ ] Defendant
or
[ ] Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- [ ] JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
X [X] DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. [ ] See Page 2 for additional information.
[ ] ACTION DISMISSED (CHECK REASON): [ ] Rule 12(b), SCRCPP; [ ] Rule 41(a), SCRCPP (Vol. Nonsuit); [ ] Rule 43(k), SCRCPP (Settled); [ ] Other
[ ] ACTION STRICKEN (CHECK REASON): [ ] Rule 40(j), SCRCPP; [ ] Bankruptcy; [ ] Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; [ ] Other
[ ] STAYED DUE TO BANKRUPTCY
[ ] DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): [ ] Affirmed; [ ] Reversed; [ ] Remanded; [ ] Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

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

ORDER INFORMATION

This order X ends [ ] does not end the case.

Additional Information for the Clerk :

Table with 3 columns: Judgment in Favor of, Judgment Against, Judgment Amount To be Enrolled. Row 1: SHEM CREEK DEVELOPMENT GROUP, LLC vs THE TOWN OF MOUNT PLEASANT, SOUTH CAROLINA, \$2,604,316. Row 2: \$, Row 3: \$.

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







Charleston Common Pleas

**Case Caption:** Shem Creek Development Group LLC VS Mount Pleasant South  
Carolina Town of  
**Case Number:** 2017CP1005493  
**Type:** Order/Other

So Ordered

s/ Maite Murphy 2166