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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Maite Murphy, Circuit Court Judge

Appellate Case No. 2020-001387
Case No. 2017-CP-10-5493

Shem Creek Development Group, LLC, ... Respondent,

v.

The Town of Mount Pleasant, South Carolina, ... Appellant.

RECORD ON APPEAL - VOLUME 1 OF 4
(pp. 1-444)

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Certificate of Counsel

Certificate of Compliance

STATE OF SOUTH CAROLINA	)	
	)	IN THE CIRCUIT COURT
COUNTY OF CHARLESTON	)	2017-CP-10-5493
	)	
	)	
Shem Creek Development Group, LLC,	)	**ORDER FOR CASE ASSIGNMENT TO THE BUSINESS COURT PILOT PROGRAM**
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Mount Pleasant, South Carolina,	)	
	)	
Defendant.	)	
	)	

2018 MAR -7 AM 11:08
JULIE J. ARMSTRONG
CLERK OF COURT
BY

It is hereby ordered that assignment to the Business Court Pilot Program for Charleston County is **granted**. It is further ordered that exclusive jurisdiction over this case be assigned to the **Honorable Maite Murphy** to hear and handle all pretrial motions and other matters pertaining to this case.

And it is SO ORDERED!

Roger M. Young, Sr., Chief Business Court Judge

March 7, 2018
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2017-CP-10-5493

SHEM CREEK DEVELOPMENT GROUP, LLC,

Plaintiff,

vs.

THE TOWN OF MOUNT PLEASANT SOUTH CAROLINA,

Defendant.

ORDER

FILED
2019 JUN 26 PM 12:20
JULIE J. ARENDALE
CLERK OF COURT

This matter came before this Court on June 11, 2019, for a hearing on Defendant Town of Mount Pleasant, South Carolina's ("Town") Motion for Protective Order to protect all current or former elected members of Mount Pleasant Town Council from being interviewed, deposed, or testify in this case. Based on the Court's consideration of the motion, memoranda submitted by the parties and oral argument at the hearing, the Court holds that South Carolina law protects Defendant's current or former Town Council members from being interviewed or having to testify regarding their decisions or actions relating to Plaintiff's claims.

The Defendants' Motion for Protective Order, therefore, is **GRANTED**.

BACKGROUND

Plaintiff alleges state law claims for breach of contract and quantum meruit/unjust enrichment related to the development, construction, and use of a parking garage on Shem Creek ("Shem Creek Garage" or "Garage.") See Plaintiff's Complaint ¶¶ 30-49. Discussions between Plaintiff and the Town culminated in Town Council adopting a resolution on October 8, 2013, approving the Town's entry into a Parking License Agreement ("PLA") to reserve parking

spaces for the public in the Shem Creek Garage. See Comp. ¶ 11; see also Town of Mount Pleasant Resolution 13102, dated October 8, 2013.

Pursuant to the terms of the PLA, the Shem Creek Garage was to have 276 total parking spaces, including a portion designated for public use. See Parking License Agreement, ¶¶ 1.05 and 1.06, dated October 17, 2013. In consideration for these spaces, the Town was to pay Plaintiff $185,000/year for 15 years. See Parking License Agreement, ¶ 1.07(a).

On April 8, 2014, Town Council enacted amendments to the Urban Corridor Overlay zoning district. See Ordinance Town of Mount Pleasant Ordinance 14022. Plaintiff makes specific allegations that Defendant's Town Council, among other things, improperly enacted these amendments to the Urban Corridor Overlay District zoning ordinance and refused to consider amending the PLA when Plaintiff realized it would be unable to provide 276 spaces in the Garage. See Comp. ¶¶ 15, 16, 24, 39.

Plaintiff's Complaint contains allegations challenging or questioning Town Council's motivations related to the various zoning amendments in question, the Shem Creek Garage, and the PLA. For example:

- Paragraph 15 of Complaint: "As a result of growing opposition to Plaintiff's plans for the parking deck, the Town began exploring ways to escape its contractual obligations under the Parking License Agreement... because the Town feared a potential lawsuit that would follow if it terminated the Parking License Agreement unilaterally, it sought to undermine the economic and practical feasibility of the development rather than terminate the Parking License Agreement directly."
- Paragraph16: "Town Council adopted a zoning ordinance designed to interfere with the development of the parking deck and hinder Plaintiff's ability to design the parking deck

in a manner which would allow it to provide all 276 envisioned under the Parking License Agreement.

- Paragraph 24: "The Town's decision to refuse to honor its contractual obligation in accordance with the [PLA] was based on pretextual grounds. The actual reason for refusing to pay rent was to deny a revenue source to Plaintiff's proposed project, thereby rendering it economically unfeasible and placating the vocal opposition to the project."

The Court finds Plaintiff's plan to interview, depose, or seek the testimony of Town Council members is specifically intended to inquire into their motives for the decisions and actions related to the Urban Corridor Overlay District zoning ordinance, the Shem Creek Garage, and the PLA.

DISCUSSION

South Carolina recognizes a testimonial privilege for members of local governing bodies, and courts consistently hold that it is improper to use individual Council members' trial or deposition testimony to inquire into their subjective intent and impeach their decisions as a governing body. Horry Tel. Co-op., Inc. v. City of Georgetown, 408 S.C. 348, 354, 759 S.E.2d 132, 135 (2014); Greenville County v. Kenwood Enters., 353 S.C. 157, 577 S.E.2d 428 (2003) *overruled on other grounds* by Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76, n.11 (2005); and Bear Enterprises v. County of Greenville, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995). In Bear, the South Carolina Court of Appeals stated:

> We note that Bear deposed Council members and presented their testimony as evidence to support Bear's argument that Council's decision [against rezoning] was arbitrary. We are aware of no authority allowing someone challenging action by Council to interrogate members individually to impeach Council's decision. The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise.

Bear, 319 S.C. at 885, n.1.

In Kenwood, the South Carolina Supreme Court expressly affirmed the Court of Appeals' position above, also, restating the importance of the testimonial privilege in South Carolina. Therein, the Greenville County Council enacted an ordinance restricting the location of sexually oriented businesses. Kenwood, 353 S.C. at 160. The plaintiffs challenged the constitutionality of the ordinance and sought to depose individual council members of county council to determine if the ordinance was enacted for the constitutionally proper purpose of preventing harmful secondary effects or it was enacted for some other improper purpose. Kenwood, 353 S.C. at 174. Greenville County moved to quash the subpoenas. Id. The Court quoted in full the Bear court's discussion of the impropriety of deposing local legislators to determine their motive for making a particular decision. Id. Relying on Bear, the Court held, "[w]hat County Council members' motivations were for passing the Ordinance is simply not a proper inquiry." Id. at 174-175 (citations omitted). Based on this analysis, the Court upheld the lower court's ruling to quash the subpoenas of the county council members. Id.

Similarly, in Horry Tel. Co-op., Inc. v. City of Georgetown, 408 S.C. 348, 354, 759 S.E.2d 132, 135 (2014), in challenging the reasonableness of Georgetown City Council's actions in denying a franchise application under State law, the appellant relied almost exclusively on the trial and deposition testimony of individual city council members concerning their respective motivations for denying appellant's franchise request. Id. The South Carolina Supreme Court held that this testimony was "improperly admitted over Respondents' objection." Id. The Court refused to consider the individual council members' trial testimony and further held that "Testimony of individual council members as to their motivations for denying [the appellant's request] is not competent evidence." Id. In so holding, the South Carolina Supreme Court cited

five state court decisions spanning 125 years for the proposition that it is improper for South Carolina courts to inquire into the motivations of governing bodies. Id.

The Court also finds persuasive the case of Bogan v. Scott-Harris, 523 U.S. 44 (1998), wherein the United States Supreme Court held that a testimonial privilege applies to all actions "in the sphere of legitimate legislative activity." The "sphere of legitimate legislative activity" includes actions that reflect a "discretionary, policy making decision implicating the budget priorities of the city and the services the city provides to constituents." Bogan, 523 U.S. at 54-56.

In the present case, Town Council's actions related to the Urban Corridor Overlay District zoning ordinance, the Shem Creek Garage, and the PLA are of a nature entitling the Town to assert the testimonial privilege. Kenwood, 353 S.C. at 174-175. South Carolina law is clear that Town Council's actions related to the Urban Corridor Overlay District zoning amendments were legislative acts. See Kenwood, 353 S.C. at 174-175; see also Whaley v. Dorchester County Zoning Board of Appeals, 337 S.C. 568, 524 S.E.2d 404 (1999) ("Zoning is a legislative act"). Similarly, Town Council's decisions concerning the Shem Creek Garage and the PLA, including whether to spend millions of dollars for public parking spaces, were "discretionary, policy making decision[s] implicating the budget priorities of the [Town] and the services the [Town] provides to its constituents", Bogan, 523 U.S. at 55-56; and involved decisions on Town Council's "use of land," Pressley v. Lancaster County, 343 S.C. 696, 707, 542 S.E.2d 366 (Ct. App. 2001) (holding "A governmental body's decision on the use of land is a legislative function."). Therefore, Defendant's invocation of the testimonial privilege is proper. Kenwood, 353 S.C. at 174-175.

Based upon the foregoing, decisions made and actions taken by Mount Pleasant Town Council members concerning Plaintiff's claims were of a nature entitling the Town to assert the

testimonial privilege.

IT IS HEREBY ORDERED that Defendants Motion for Protective Order is **GRANTED**.

IT IS SO ORDERED.

The Honorable Maité Murphy

June 20, 2019

Orangeburg, South Carolina

State of South Carolina
The Circuit Court

Maité Murphy
Judge

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June 20, 2019

Charleston County Clerk of Court
100 Broad St., Ste. 106
Charleston, SC 29401

Re: *Shem Creek Development Group, LLC v. The Town of Mount Pleasant, South Carolina*
Case No.: 2017-CP-10-5493

Enclosed for filing is (1) a signed, original Amended Consent Scheduling Order; and (2) a signed, original Order Granting Defendant's Motion for Protective Order. If anything else is needed, please do not hesitate to contact me.

ELECTRONICALLY FILED - 2020 Jan 08 1:12 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1005493

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,	)	
	)	**ORDER GRANTING PLAINTIFF'S**
Plaintiff,	)	**MOTION TO STRIKE DEFENDANT'S**
	)	**EXPERT WITNESS**
v.	)	
	)	
The Town of Mount Pleasant, South Carolina,	)	
	)	
Defendant.	)	
_____	)	

On November 19, 2019, Plaintiff Shem Creek Development Group, LLC ("SCDG") filed a Motion to Strike Defendant's Expert Witness as Defendant's ("the Town") disclosure of this expert was untimely. On December 4, 2019, SCDG submitted a memorandum in support of its motion and the Town submitted a memorandum in opposition to SCDG's motion. By consent, no hearing was held, and the arguments were considered based on the parties' briefs and supporting materials. After considering the law, the briefs filed by the parties, the arguments of counsel, and all matters submitted, SCDG's motion to strike is **GRANTED**.

I. FINDINGS OF FACT

This case, filed in October of 2017, involves a dispute over a parking license agreement concerning a parking garage near Shem Creek in the Town of Mount Pleasant. The Court's initial scheduling order established deadlines for disclosing expert and rebuttal expert witnesses of October 1, 2018 and November 1, 2018, respectively.

In March of 2018, SCDG issued to the Town its first set of interrogatories and requests for productions. The interrogatories included a request that the Town identify its expert witnesses and provide a list of their education, experience, and documents related to their engagement, opinions,

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and expected testimony. The requests for production also included a request for the experts' written reports and other documents related to their engagement, opinions, and expected testimony. The Town responded to SCDG's first sets of discovery requests in June of 2018, but it did not identify any expert witnesses or produce any documents related to expert witnesses.

In October of 2018, the Court issued an amended scheduling order that extended the deadlines for the disclosure of expert and rebuttal expert witnesses to December 31, 2018 and January 30, 2019. Later, SCDG identified Roy Strickland, CPA/CFF, CFE, MAFF of Dixon Hughes Goodman, LLP as an expert witness, and the Town identified Melissa Johnson, CPA, CVA, MAFF of Elliott Davis as its rebuttal expert.

In June of 2019, the Court issued a second amended scheduling order. This scheduling order did not include any deadlines for expert disclosures, as the previous deadlines had expired.

On July 23, 2019, SCDG withdrew Mr. Strickland as its expert witness and issued a subpoena duces tecum and deposition notice to Ms. Johnson. Two days later, the Town withdrew Ms. Johnson as its rebuttal expert and later requested that SCDG withdraw its subpoena and notice of deposition. SCDG agreed and withdrew the subpoena and deposition notice to Ms. Johnson.

In September of 2019, the Town filed a motion to amend the scheduling order with proposed deadlines for disclosing expert and rebuttal expert witnesses of October 15, 2019 and November 15, 2019, respectively, which the Court issued on September 30, 2019. Pursuant to the amended scheduling order, the deadline to complete discovery is December 15, 2019.

Neither SCDG nor the Town disclosed an expert witness prior to the expiration of the October 15, 2019 deadline for the disclosure of expert witnesses. However, on November 13, 2019, the Town disclosed Ms. Johnson as an expert witness. Shortly thereafter, SCDG filed the motion to strike Ms. Johnson as an expert and prevent her from testifying at trial.

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To date, the Town has not answered the interrogatory requesting information about its expert or produced any documents responsive to the request for production of documents about its expert. As a result, the expected testimony of Ms. Johnson has not been disclosed, and no documents relating to her engagement, opinions, or testimony have been produced.

II. LEGAL STANDARD

Because scheduling orders set the expectations of the parties and the court, they "should not be ignored blithely nor trifled with, without some peril or consequence." *U.S. v. Marder*, 318 F.R.D. 186, 190 (S.D. Fla. 2016).[1] As such, "litigants cannot be permitted to treat a scheduling order as a frivolous piece of paper idly entered, which can be cavalierly disregarded without peril." *O'Connell v. Hyatt Hotels of Puerto Rico*, 357 F.3d 152, 155 (1st Cir. 2004). "Adherence to established deadlines is essential if all parties are to have a fair opportunity to present their positions." *Hill v. Porter Mem. Hosp.*, 90 F.3d 220, 224 (7th Cir. 1996).

Under Rule 37(b)(2)(B), SCRCP, if "a party fails to obey an order to permit discovery or fails to obey a scheduling order, the trial court may make an order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting him from introducing designated matters in evidence." *Green v. Hoover*, Op. No. 2007-UP-116, 2007 S.C. App. LEXIS 139, *8 (S.C. Ct. App. Mar. 7, 2007) (summarizing Rule 37(b)(2)(B), SCRCP); *see also Bryson v. Bryson*, 378 S.C. 502, 507, 662 S.E.2d 611, 613 (Ct. App. 2008) ("it is within the trial court's discretion to allow an appropriate sanction when a party fails to strictly comply with a scheduling order"); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511

[1] The authorities cited in this order include decisions from Federal courts and decided under the Federal Rules of Civil Procedure. Because the South Carolina Rules of Civil Procedure are based on the Federal rules, South Carolina courts look to the construction placed on the Federal rules where there is no South Carolina law on point. *Gardner v. Newsome Chevrolet-Buick*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991).

S.E.2d 716, 718 (Ct. App. 1999) ("[i]f a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment.").

The party that fails to timely disclose information bears the burden of establishing that the nondisclosure was substantially justified or harmless. *Wilkins v. Montgomery*, 751 F.3d 214, 222 (4th Cir. 2014).

III. CONCLUSIONS OF LAW

The Court strikes Ms. Johnson as an expert witness and precludes her from testifying at trial because she was not timely disclosed and such untimely disclosure prejudices SCDG. The present action has been pending for over two years, and it is set for a date certain trial beginning February 3, 2020. Nevertheless, the Town did not identify Ms. Johnson as an expert witness until November 13, 2019, which was twenty-nine days after the October 15th deadline for disclosing affirmative experts and two days prior to the November 15th deadline for disclosing rebuttal experts. And despite being less than two months before trial, the Town has not produced any information or documentation relating to Ms. Johnson or her opinions.

In response to the motion to strike, the Town fails to explain why it could not have identified Ms. Johnson as an expert on or before the October 15th deadline. The Town suggests that its untimely disclosure of Ms. Johnson is based on the deposition testimony of Mr. Flesch on August 14, 2019 and 101 Coleman Partners' subpoena objection dated August 26, 2019. Assuming that is true, the Town had no less than 50 days to identify its expert before the deadline. But instead of complying with the affirmative expert deadline—a deadline which the Town itself proposed—the Town waited until just two days prior to this Court's deadline for the identification of rebuttal experts to disclose Ms. Johnson as its expert. Furthermore, the Town has not justified

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its failure to respond to SCDG's discovery requests, which specifically sought information and documents relating to any experts proposed by the Town.

As result of the Town's untimely disclosure and failure to respond to expert discovery, SCDG will be prejudiced by being unable to adequately prepare for and counter Ms. Johnson's testimony at trial. *See Carr v. Deeds*, 453 F.3d 593, 604-05 (4th Cir. 2006), (affirming exclusion of plaintiff's expert witness who was identified but who did not produce information required by Rule 26 because it deprived the defendant of an opportunity to investigate the witness and defend against his opinions). To adequately respond to or rebut her testimony, SCDG would necessarily need to extend the deadline for naming rebuttal experts, engage a rebuttal expert, reopen discovery, and postpone trial in this action, which has already been pending for more than two years.

As a result, the Town cannot carry its burden of proving that its disregard of its own proposed deadline is harmless. The October 15th deadline for affirmative experts with a subsequent deadline for rebuttal experts was intended to provide the opposing party with sufficient time to conduct expert discovery, determine whether rebuttal experts should be engaged, and identify rebuttal experts. By waiting until well after the October 15th deadline for affirmative experts and just two days before the November 15th deadline for rebuttal experts—and by further failing to provide any information relating to Ms. Johnson's engagement and opinions—the Town has effectively precluded SCDG from engaging a rebuttal expert. To avoid this prejudice and ensure that the case is not prolonged any further, Ms. Johnson is struck as an expert based on the Town's untimely disclosure of her and its failure to produce related discovery responses. *See Marder*, 318 F.R.D. at 191 (ruling that reopening discovery at late stage of litigation to accommodate untimely disclosure of expert would reward disclosing party for its indolence and prejudice the opposing party's preparation for trial); *Newkirk v. Enzor*, Civ. Action No. 2:13-1634-RMG, 2017 U.S. Dist.

LEXIS 29333 (D.S.C. Mar. 2, 2017) (stating that court could not cure surprise of party's untimely disclosure of witnesses other than to delay trial, which would have been a substantial disruption to the case).

IV. ORDER

For the reasons stated above, it is therefore **ORDERED** that SCDG's Motion to Strike Defendant's Expert Witness is **GRANTED**.

AND IT IS SO ORDERED.

_____
The Honorable Maite Murphy

Charleston, South Carolina

January __, 2019

ELECTRONICALLY FILED - 2020 Jan 08 1:12 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1005493

ELECTRONICALLY FILED - 2020 Jan 08 1:12 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1005493

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

ELECTRONICALLY FILED - 2020 Jan 22 10:48 AM - CHARLESTON - COMMON PLEAS - CASE#2017CP1005493

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,	)	**ORDER DENYING DEFENDANT'S**
	)	**MOTION TO COMPEL PLAINTIFF TO**
Plaintiff,	)	**PRODUCE DOCUMENTS RESPONSIVE**
	)	**TO DEFENDANT'S SECOND REQUEST**
v.	)	**FOR PRODUCTION AND, IN THE**
	)	**ALTERNATIVE, COMPEL THE**
The Town of Mount Pleasant, South Carolina,	)	**PRODUCTION OF THE SAME**
	)	**DOCUMENTS IN RESPONSE TO**
	)	**DEFENDANT'S SUBPOENA TO RELATED**
Defendant.	)	**ENTITY, 101 COLEMAN PARTNERS, LLC**
_____	)	

On October 22, 2019, Defendant The Town of Mount Pleasant, South Carolina ("the Town") filed a Motion to Compel Plaintiff to Produce Documents Responsive to Defendant's Second Request for Production and, in the Alternative, Compel the Production of the Same Documents in Response to Defendant's Subpoena to Related Entity, 101 Coleman Partners, LLC. Plaintiff Shem Creek Development Group ("SCDG") and 101 Coleman Partners, LLC ("101 Coleman Partners") submitted memoranda in opposition to this motion on November 27, 2019.

On November 15, 2019, while the Town's motion to compel was pending, the Town issued a separate subpoena to 101 Coleman Partners, seeking the same materials that it had previously sought pursuant to the subpoena which was the subject of the Town's motion to compel. The later subpoena also sought the deposition of 101 Coleman Partners' corporate representative under Rule 30(b)(6), SCRCP, on the same subjects of the documents requested. As a result, 101 Coleman Partners filed a motion to quash the subpoena and notice of deposition on November 27, 2019, on the same grounds on which it opposed the Town's motion to compel.

By consent of the parties, no hearing was held, and the arguments were considered based on the parties' briefs and supporting materials. After considering the law, the briefs filed by the

parties, the arguments of counsel, and all matters submitted, the Town's motion to compel is DENIED and 101 Coleman Partners' motion to quash is GRANTED.

I. FINDINGS OF FACT

In 2013, SCDG and the Town negotiated and drafted a parking license agreement to memorialize the terms for SCDG to build an office building and parking garage containing 276 total parking spaces and provide public parking therein near Shem Creek in Mount Pleasant, South Carolina. The parking license agreement requires the Town to pay to SCDG annual minimum rent of $185,000 for the "Rent Period." The parties also included a provision that allows for a pro rata reduction of rent if at "any point in the Rent Period of this License" the operation of the parking garage results in a net operating profit.

The parking license agreement defines the Rent Period as the first fifteen years of the "License Term." The "License Term" begins on the "Rental Commencement Date" and runs for a period of 30 years, "unless extended or sooner terminated in accordance with the terms and provisions of this License." The Rental Commencement Date is defined as the date of the Town's issuance of the certificate of occupancy for the garage.

As originally proposed, the parking license agreement included a default clause that would have allowed SCDG to terminate the license and accelerate all remaining rent payments if the Town defaulted by failing to pay rent. This draft default clause also provided that if SCDG relets the premises then sums paid by a new licensee should be first applied to the expenses that the Town was required to reimburse with any excess applied to the rent payments owed by the Town. The draft default clause, however, contained no limitation on damages available to SCDG if the Town defaulted under the license.

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The Town later drafted and proposed a revised default clause that liquidates damages and eliminates SCDG's ability to seek consequential and punitive damages. The Town's revision specifically 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 Town's revision also eliminated the language establishing the Town's right to have other revenue received from the operations of the garage applied to its remaining rent payments. The Town's revision, however, maintains SCDG's right to terminate the license agreement if the Town defaults. Thus, the Town's revised default clause creates a liquidated damages provision, which ultimately became part of the final parking license agreement approved by the Town and SCDG.

The Section 8.17 of the parking license agreement also contains a survival clause, 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.

After SCDG and the Town entered into the parking license agreement, the present dispute arose about whether SCDG's proposed design for the parking garage complied with the terms of the parking license agreement and whether the Town breached its requirements to pay rent. Regardless of the dispute, SCDG continued its pursuit of the project with a proposed design that included 234 parking spaces, which the Town approved in September 2014.

To complete the project, SCDG partnered with an equity investor to create a joint venture to own, build, and operate the office building and parking garage. This joint venture was formed

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as 101 Coleman Partners, LLC in 2015. Under the terms of the joint venture, SCDG has only a 15% membership interest in 101 Coleman Partners.

After the formation of 101 Coleman Partners but before the Rental Commencement Date, SCDG terminated the parking license agreement in accordance with its rights under the default clause as a result of the Town's failure to honor the agreement. Later, 101 Coleman Partners completed the project and received a certificate of occupancy for the garage in July 2017, which would have been the Rental Commencement Date but for the prior termination. Since then, 101 Coleman Partners has operated the parking garage and office building.

As a result of the Town's alleged repudiation of the agreement and failure to pay rent, SCDG filed this action against the Town in October 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.

During the litigation, SCDG disclosed its damages calculation, which is based on past rent payments plus interest and future rent payments discounted to present value. SCDG's damages calculation includes no reduction for rent based on prospective net operating profits under the rent reduction clause. According to SCDG, the default clause provides solely for fixed minimum rent payments as liquidated damages and the rent reduction clause is inoperable as a result of the termination of the license.

Following SCDG's disclosure of its damages calculation, the Town issued its second requests for production of documents to SCDG and a subpoena for documents to 101 Coleman Partners. The requests for production and subpoena seek the same documents: financial and operational records of 101 Coleman Partners, including documents relating to the profitability of the parking garage owned and operated by 101 Coleman Partners. SCDG and 101 Coleman

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Partners objected to the requests for production and the subpoena because, among other reasons, the documents sought are not relevant to this action. In response, the Town filed the present motion to compel, arguing that the documents sought are relevant under the rent reduction clause of the parking license agreement.

II. STANDARD

According to the South Carolina Supreme Court, a "trial court must make an effort to impose reasonable discovery limits," and "requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution." *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010) (vacating lower court's ruling granting a motion to compel on the grounds that the discovery requests at issue sought information and documents that were not relevant to the resolution of the issues before the court). The proper procedure for resolving a relevancy dispute is for the trial court to first identify "the central issue in the case before it" and then determine if the "discovery requests are . . . relevant to a resolution of the [central] issue . . . ." *Id.* at 388-89, 692 S.E.2d at 925 (internal quotation marks omitted).

III. CONCLUSIONS OF LAW

The Town's motion to compel the production of documents relating to the financial performance and operations of 101 Coleman Partners is denied because that information is not relevant to this litigation and the Town's discovery requests are overly broad. SCDG and the Town agreed to a liquidated damages provision in the parking license agreement, and it fixes damages in the event of a breach. Therefore, the documents requested will not aid in the dispute's resolution and are not relevant to the issue of damages.

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A "claim for damages is 'liquidated' in character if the amount thereof is fixed, has been agreed upon, or is capable of ascertainment by mathematical computation or operation of law." *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 91, 757 S.E.2d 557, 559 (Ct. App. 2014). "When parties agree in advance to a sum certain that represents a reasonable estimate of potential damages, they exchange the opportunity to determine actual damages after a breach, including possible mitigation, for the 'peace of mind and certainty of result' afforded by a liquidated damages clause." *NPS, LLC v. Minihane*, 451 Mass. 417, 423, 886 N.E.2d 670, 675 (2008); *see also, Xerox Corp. v. RP Digital Servs.*, 232 F. Supp. 3d 321, 325 (W.D.N.Y. 2017) ("[W]here, as here, a contract contains a valid liquidated damages provision, 'mitigation of damages is not relevant.'"); *Barrie Sch. v. Patch*, 402 Md. 497, 513-14, 933 A.2d 382 (2007) (holding that a court need not consider mitigation when the parties have agreed to liquidated damages); *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 380, 613 N.E.2d 183 (1993) (stating that mitigation is not proper where there is a valid liquidated damages clause).

Here, the default clause in the parking license agreement contains a liquidated damages provision because it fixes damages based on the rental payments due under the parking license agreement. In exchange for eliminating the availability of consequential and punitive damages, the parties agreed to fix the damages, which meets the definition of liquidated damages. This conclusion holds even if the rent reduction clause applies because liquidated damages include those capable of ascertainment by mathematical computation. *Wells Fargo Bank*, 408 S.C. at 91, 757 S.E.2d at 559. And the rent reduction clause establishes a simple, straight-forward method of reducing rent that is based on a formula of revenue minus expenses multiplied by the percentage of public parking spaces in the garage.

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Also, the documents sought are not relevant because they pertain to the operations of 101 Coleman Partners, which is a separate and distinct entity from SCDG. SCDG has only a 15% interest in 101 Coleman Partners, and 101 Coleman Partners has no interest in the parking license agreement or this litigation. As a result, 101 Coleman Partners' activities and financial information have no relationship to the parking license agreement or this litigation.

To the extent that the Town argues that the documents are relevant under the rent reduction clause of the parking license agreement, that argument fails because the rent reduction clause is not applicable. The clear and unambiguous terms of the parking license agreement demonstrate that the rent reduction clause only applies during the Rent Period. The rent reduction clause states:

> If at any time during the **Rent Period** of this License should the operation of the Garage result in annual net operating profit, the Licensee shall be entitled to reduce its Fixed Minimum Rent Payment for the following License Year of **the Term** by its pro rata share, based upon the percentage of the Parking Spaces comprising the Public Spaces.

(PLA § 1.07(b)) (emphasis added). Thus, for the rent reduction clause to apply, profitability must occur during the "Rent Period," which is defined as "the first fifteen years of the License Term." (*Id.* at § 1.07(a).) And the License Term does not begin until the Rental Commencement Date and it expires upon the termination of the License in accordance with its provisions.

SCDG terminated the parking license agreement in June 2016 before the License Term and Rent Period even began. And to the extent that the License Term and Rent Period ever began, they ended with the termination of the parking license agreement. Either way, the rent reduction clause does not apply because there have been no operations of the garage in the Rent Period.

The interpretation that the Town's rent reduction rights did not survive the termination of the parking license agreement is further supported by the survival clause found in Section 8.17 of the agreement. Under that section, the only obligations and rights that survived the termination of

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the parking license agreement were the Town's obligations to pay rent and perform other acts. (PLA § 8.17.) Significantly, the survival clause is silent as to the survival of any rights the Town possessed under the parking license agreement, including rent reduction rights.

The South Carolina Court of Appeals decision in *Donahue v. Multimedia, Inc.*, 362 S.C. 331, 608 S.E.2d 162 (Ct. App. 2005), supports the conclusion that the termination of the parking license agreement and survival clause jointly operate to terminate the Town's rent reduction rights under the agreement while preserving its obligation to pay minimum rent payments. In *Donahue*, the plaintiff and defendant entered into a contract that gave the plaintiff the right of first refusal to purchase the defendant's rights in a television program hosted by the plaintiff. *Id.* at 335-36, 608 S.E.2d at 164-65. After the contract expired, the defendant assigned its interest to a third party without providing the plaintiff the right of first refusal. *Id.* at 336-47, 608 S.E.2d at 165. The plaintiff then sued the defendant for breach of contract, and the trial court later granted summary judgment to the defendant because the plaintiff's right to first refusal only existed "during the term" of the contract and did not survive the contract's expiration. *Id.*

The Court of Appeals affirmed the trial court, ruling that the contract unambiguously provided that the plaintiff's right of first refusal lasted during the term of the contract and that he had no such right after the contact expired. *Id.* at 339-40, 608 S.E.2d at 166-67. It also rejected that other the plaintiff's argument that provisions which granted the plaintiff rights that survived the term of the contract applied to the right of first refusal:

> [The plaintiff's] right of refusal, as outlined in Section 6, is expressly limited to "the term" of the contract, which expired in August 1996. The fact that the parties expressly agreed certain provisions of the contract would last "in perpetuity" creates no ambiguity in terms expressly limited to the contract's general term. We therefore agree with the trial court that, as a matter of law, the transfer of MEI assets to Universal was in no way precluded by

> Donahue's right of first refusal as agreed upon in Section 6 of the contract.

Id. at 340, 608 S.E.2d at 167.

Under *Donahue*, the Town's right to rent reduction did not survive the termination of the contract. Just as the plaintiff in *Donahue* had a right of first refusal that was expressly limited to the term of the contract, the Town's right to rent reduction is expressly limited to the "Rent Period." And as the contract in *Donahue* granted rights that survived the expiration of the contract that did not include the right of first refusal, the parking license agreement includes a survival clause that requires the Town to pay rent after the termination but does not include language maintaining rent reduction rights beyond the termination of the license. So, just as the plaintiff's right of first refusal was extinguished when the contract expired in *Donahue*, the Town's right to rent reduction was similarly extinguished when the parking license agreement and Rent Period ended in this case. Therefore, the express terms of the parking license agreement render the rent reduction clause inapplicable and of no effect in this litigation.

The parties were free to negotiate a survival of the Town's rent reduction rights following termination of the license agreement. Instead, they expressly eliminated the survival of such rights and limited the Town's right to rent reduction to the Rent Period. The original draft parking license agreement included language that allowed the Town to partially offset its liability for future rent with payments received from subsequent licensees. But the Town rejected that language and instead proposed a liquidated damages provision that fixed damages as the minimum rental payments and eliminated SCDG's ability to recover consequential and punitive damages. The revised default clause drafted by the Town and approved by SCDG shows the parties' intent to eliminate the right to reduce future rent owed after termination of the parking license agreement,

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and the contrary position that the Town now takes is contradicted by its proposed revisions to the parking license agreement.

IV. ORDER

For the reasons stated above, it is therefore **ORDERED** that the Town's Motion to Compel Plaintiff to Produce Documents Responsive to Defendant's Second Request for Production and, in the Alternative, Compel the Production of the Same Documents in Response to Defendant's Subpoena to Related Entity, 101 Coleman Partners, LLC is **DENIED** and 101 Coleman Partners' Motion to Quash is **GRANTED**.

AND IT IS SO ORDERED.

_____
The Honorable Maite Murphy

Charleston, South Carolina

January __, 2020

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Charleston Common Pleas

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

So Ordered

s/ Maite Murphy 2166

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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,	)	
	)	**ORDER**
v.	)	
	)	
The Town of Mount Pleasant, South Carolina,	)	
	)	
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.)

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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

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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.

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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.

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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".

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- § 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)

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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.

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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

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

UC-CBS- DEVELOPMENT GUIDELINES CHART					
Area	***Maximum Building Height Allowed (1)***	***Front Setback or Build-to on Coleman or Ben Sawyer (2)***	***Front or Side Setback or Build-to on Other Streets***	***Rear Building Setback (3)***	***Internal Side and Rear (Non-street) Buffers (4)***
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 ***In all cases*** 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

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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.[1] 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

[1] 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[1]	Front Setback or Build-to on Coleman or Ben Sawyer[2]	Front or Side Setback or Build-to on Other Streets	Rear Building Setback[3]	Internal Side and Rear (Non-street) Buffers[4]
C1	55'	20-30' BT	20' SB[5]	5'	5'

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[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] 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.
[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] The 20' setback applies to all side streets except Mill Street, where a 20-30' build-to is required.
[6] 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

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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).)[2] 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

[2] 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.

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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.*)

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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 brining 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

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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.[3]

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.)

[3] SCDG's complaint also included a claim for unjust enrichment; however, SCDG did not pursue that claim at trial.

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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).

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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.

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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

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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

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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.[4] 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

[4] 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.").

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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.

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(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

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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

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which should not be considered because the relevant terms of the agreement were clear and unambiguous.[5]

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

[5] 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.

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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*

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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

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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

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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.

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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

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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,

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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

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> 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

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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

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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

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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 **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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ 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 :

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
SHEM CREEK DEVELOPMENT GROUP, LLC	THE TOWN OF MOUNT PLEASANT, SOUTH CAROLINA	$2,604,316
		$
		$

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

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The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**
	CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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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

Electronically signed on 2020-07-13 14:14:42 page 46 of 46

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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,	)	**ORDER DENYING DEFENDANT'S MOTIONS FOR NEW TRIAL AND TO RECONSIDER, ALTER OR AMEND ORDER**
	)	
v.	)	
	)	
The Town of Mount Pleasant, South Carolina,	)	
	)	
Defendant.	)	

On July 13, 2020, the Court filed the Order for judgment in favor of Plaintiff Shem Creek Development Group, LLC ("SCDG") in the above-captioned matter. On July 20, 2020, Defendant The Town of Mount Pleasant, South Carolina (the "Town") filed Motions for New Trial and to Reconsider, Alter or Amend Order. On August 4, 2020, SCDG filed its Response in Opposition to Defendant's Motions for New Trial and to Reconsider, Alter or Amend Order. After considering the law, the briefs filed by the parties, and all matters submitted, the Town's Motion for New Trial and to Reconsider, Alter or Amend Order is **DENIED**.

STANDARD

The decision to grant or deny a motion under Rule 59(e), SCRCP, lies within the sound discretion of the trial court. *Pollard v. Cty. Of Florence*, 314 S.C. 397, 402, 444, S.E.2d 534, 536 (Ct. App. 1994). "An abuse of discretion arises where the judge issuing the order was controlled by error of law or where the order is based on factual conclusions that are without evidentiary support." *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E. 2d 501, 502-03 (2006).

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CONCLUSIONS OF LAW

1. The Town objects to Paragraph 7 of the Order[1] on the basis of irrelevance; however, this paragraph correctly reflects the analysis of the Desman study and the testimony of Mr. Flesch and Mr. Small. (See Tr. 339:8-15; 352:21-353:2.) The information in Paragraph 7 establishes the factual background regarding the evolution of the project and demonstrates why the office component of the project was necessary to make the project economically feasible. It has nothing to do with the damages analysis included in the Order. Thus, the information is relevant and supported by the evidence.

2. The Town objects to Paragraphs 8-9 of the Order because it inaccurately characterizes the design of the Project. The Town's objection is invalid because it ignores the obvious fact that a "conceptual design" is conceptual by its very nature and is not intended to depict absolute compliance with applicable zoning requirements. The information in Paragraphs 8-9 correctly states the relevant foundational facts that led to the dispute and is appropriately included in the Order.

3. The Town objects to Paragraph 10 on the basis that it is not supported by the evidence or testimony at trial. Contrary to the Town's argument, Paragraph 10 correctly states the facts about who received the parking layout concept, and it is supported by the exhibits and trial testimony. (See Pl.'s Ex. 7, § 3.04; Tr. 343:1-346:12, 371:24-372:12; 435:14-438:13.) Furthermore, the fact that Mr. Pagliarini was involved in the drafting and revisions to the Agreement are confirmed by § 8.12 of the Agreement, Plaintiff's Exhibit 39, and the trial testimony (Tr. 119:17-21, 123:1-9, 214:20-24, 238:5-239:7, 348:1-8).

[1] Unless otherwise indicated, all references to "Paragraphs" in this order refer to the paragraphs in the Court's Order, dated July 13, 2020.

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4. The Town also objects to Paragraph 10 because it characterizes the parking license agreement as creating a public-private partnership**,** but this characterization is confirmed by multiple trial exhibits and the testimony of multiple witnesses, including Mr. Eric DeMoura, who testified that the garage project was a public-private partnership. (See Pl.'s Ex. 37-38; Tr. 104:10-15, 400:3-11, 401:20-405:7, 621:6-10.)

5. According to the Town, Paragraph 11 incorrectly characterizes the parking license agreement as a construction agreement. The Town's argument is incorrect because Paragraph 11 does not characterize the agreement as a construction agreement. Rather, it merely states that SCDG – as opposed to the Town – was responsible for constructing the project.

6. In response to Paragraph 12 of the Order, the Town complains that the Court has rewritten the parking license agreement. However, Paragraph 12 correctly states that the parking license agreement made rent reduction a possibility. Because the rent was only to be reduced <u>if</u> the garage was profitable and there was <u>no guarantee</u> of profitability, rent reduction was only a possibility.

7. The Town objects to Paragraph 15 of the Order as irrelevant and erroneous. Contrary to the Town's objection, the Court did not rewrite the parking license agreement. The fact that the Town neither conducted any analysis to determine the number of spaces needed to meet the parking demand in the area nor insisted that 276 total spaces and 132 public spaces be a minimum requirement is directly relevant to the materiality analysis in the Order. Therefore, Paragraph 15 is accurate and relevant.

8. The Town objects to Paragraph 16 as irrelevant and misleading. This objection has no merit because Paragraph 16 accurately reflects Mr. Small and Ms. Farrell's testimony and the relevant trial exhibits. (See Tr. 353:22-354:18, 621:11-624:5.)

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9. The Town's objection to Paragraph 17 mischaracterizes the finding and attempts to put words in the Court's mouth that do not exist. Nowhere in that paragraph does the Court state that the ordinance in question was "solely" meant for the economic benefit of Mr. Small. Thus, this objection has no merit.

10. In response to Paragraph 20, the Town complains that the Court has misstated the significance of the survival clause and rewrites its provisions. The Town mischaracterizes the Court's finding in Paragraph 20, which merely states verbatim what § 8.17 provides. Moreover, the Town cites no language that would support an interpretation that any of the Town's rights survive the termination of the parking license agreement. Instead, the Town, in conclusory fashion, states that the Court is "inappropriately rewrite[ing]" the contract, and then argues that the damages provision is an unenforceable penalty, which is an argument that has been repeatedly raised by the Town and rejected by the Court.

11. The Town argues that Paragraph 22 omits important facts. However, the facts allegedly omitted lack evidentiary support. Notably, the Town does not cite to the transcript or any exhibit to support its characterization of the evidence. In fact, no testimony or evidence supports its assertion. Jeff Johnston, the project architect, discussed during his testimony the phases of the design process, and based on his explanation of when he started working, it would have been impossible for SCDG to know prior to December of 2013 that the site could not yield 276 total and 132 public spaces, especially when the Town did not enact the required height and first floor zoning amendments until December of 2013. (Tr. 720:10-724:7.) Furthermore, the initial plan was not finalized for presentation to the Town until April of 2014, and that plan contained more than 132 public spaces and only ten short of 276 total spaces. (Pl.'s Ex. 50; Tr. 735:19-736:24.) Mr. Johnston testified that the site could have yielded approximately 270 total

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spaces (and possibly 276 total spaces) if the Town had approved reasonable measures to increase spaces. (Tr. 758:2-15.) Thus, the evidence does not support a finding that SCDG knew from the beginning that the project could not produce all spaces planned for the garage and had withheld information from the Town. Instead, all relevant evidence demonstrates that SCDG consistently worked in good faith to produce as many spaces as possible.

12. The Town's objection to Paragraph 27 is confusing because Paragraph 27 neither infers a previously submitted plan nor discusses vested rights. Therefore, there is no basis for the Town's objections to this paragraph.

13. The Town objects to Paragraph 28 by incorrectly characterizing what the Court stated about the width of the parking spaces. Contrary to the Town's claim, Paragraph 28 does not state that the "appropriate width of garage parking spaces was 8 ½'." Instead, it provides factual background of why Mr. Johnson's initial design included 8 ½' wide spaces. This information is relevant because it shows that the use of 8 ½' wide spaces is customary and that it would have been reasonable for the Town to accept 8 ½' wide spaces if maximizing the number of spaces in the garage was as important as it would have the Court believe.

14. The Town's characterization of Paragraph 29 is incorrect. Paragraph 29 does not incorrectly presume that the Town "failed in its State-mandated notice requirements." In fact, in Paragraph 30, the Court expressly states that "the Town followed the lawful process for providing notice of zoning amendments." Rather, Paragraph 29 merely states that SCDG and SMHa were not aware of the zoning amendments. Also, by focusing solely on the Mill Street setback change's impact on parking spaces, the Town ignores the more substantial impact on parking spaces caused by the Church Street setback changes and the significant monetary injury resulting from the Mill Street setback change. Furthermore, the Court did not "manufacture" its finding in Paragraph 29,

as the Town contends, because that paragraph is directly supported by Ms. Farrell's testimony. (See Tr. 638:9-643:20.)

15. The Town complains that Paragraphs 30 and 32 are erroneous, but those paragraphs are supported by Ms. Farrell's testimony. (See Tr. 638:9-643:20, 647:15-649:20.)

16. The Town objects to Paragraph 33 as being incorrect. Yet the Town's objection is confusing because Paragraph 33 neither expressly nor implicitly states that a previous plan had been submitted to the Town as it claims. Moreover, there is no discussion of vested rights in Paragraph 33. Nor does Paragraph 33 rewrite the parking license agreement as the Town claims. Paragraph 33 is nothing more than an accurate finding of facts about what was presented to the Town by SMHa in the April 11, 2014 meeting.

17. The Town claims that Paragraphs 34, 40, and 50 mischaracterize or omit facts related to the Town's ruling on the marine zoning district issue, but as explained in Paragraph 50 of the Order and supported by Mr. Prause's testimony, the Town's ruling on the marine zoning district was mandated by law and was not discretionary. (See Tr. 449:18-453:25, 614:1-17.)

18. The Town objects to Paragraphs 35, 37, and 38 of the Order based on arguments related to the exhaustion of administrative remedies defense. The Town's objections to Paragraphs 35, 37, and 38 have no merit because the Court properly rejected the Town's exhaustion of administrative remedies defense in footnote 4 of the Order.

19. The Town complains that Paragraph 39 mischaracterizes the parking license agreement's requirements regarding surface parking. However, the Town's claim that the parking license agreement did not specifically permit the inclusion of surface parking in the number of spaces is belied by the parking license agreement and the testimony at trial. Sections 1.06 and 2.01(b) define the "Premises" as "only the [132] Public Spaces." Although Section 2.01(b) states

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that the Premises does not include surface parking areas, the parking license agreement does not prohibit on-street surface parking to be included in the reserved spaces. (See Pl.'s Ex. 7 §§ 1.06 and 2.01(b); Tr. 309:23-310:19, 324:20-327:24, 528:4-529:19.) Also, the Town's argument that DOT approval was required ignores the fact that DOT approval could not have been sought because the Town rejected SCDG's plan for on-street parking.

20. The Town objects to Paragraph 43, claiming that it incorrectly states the facts. However, Paragraph 43 includes no incorrect statements of fact. In fact, the Town's objection to Paragraph 43 confirms that restaurant parking was not relevant to whether SCDG's approved design complied with the requirements of the parking license agreement. The fact that the Town sought to address this issue in its determination of purported non-compliance by SCDG further demonstrates its bad faith under the parking license agreement.

21. In response to Paragraph 46, the Town asserts that the Court improperly relied on the videos of the relevant Town Council meetings. The Court has previously rejected the basis of the Town's objections to Paragraph 46, and the Town has failed to proffer any persuasive reason for the Court to reverse itself now. In fact, in direct contradiction to the Town's argument here, Mr. DeMoura testified that that he had no reason to contest the accuracy of the YouTube videos. (See Tr. 461:2-5.) And it is disingenuous for the Town to question the authenticity of the videos when it referred SCDG to the Town's YouTube channel in response to SCDG's discovery requests for videos of the relevant council meetings. (See Tr. 460:22-461:1.)

22. The Town alleges that the findings regarding the Town's lack of analysis regarding the adequacy of parking spaces as set forth Paragraph 47 are irrelevant. The fact that the Town conducted no analysis to determine the number of spaces needed to meet the parking demand in

the area is directly relevant to the materiality analysis in Paragraphs 81-83 of the Order. Therefore, Paragraph 47 is relevant.

23. The Town objects to Paragraph 53 as being irrelevant. Contrary to the Town's claim, Paragraph 53 is directly relevant to the Court's materiality analysis in Paragraphs 81-83 because it establishes facts necessary to determine whether and to what extent the Town has been deprived of any benefits under the parking license agreement.

24. In response to Paragraph 62, the Town accuses the Court of being inappropriately influenced by the videos of Town Council meetings. However, the Court's decision was based on the totality of all evidence presented at trial over the course of four days, and the Court would have reached the same result regardless of whether the videos were presented during trial.

25. The Town argues that the Court committed an error of law in Paragraph 65 by holding that the Town cannot exercise its legislative authority to amend its own zoning ordinance. The Town, however, mischaracterizes the conclusions in Paragraph 65. Furthermore, the Town cites no legal support for its argument. Instead, it relies on a red herring about SCDG's lack of vested rights in the project. Paragraph 65, however, does not address vested rights in any manner. Rather, it deals with the implied covenant of good faith and fair dealing, which exists in every contract. *See Parker v. Byrd*, 309 S.C. 189, 194, 420 S.E.2d 850, 853 (1992) ("There exists in every contract an implied covenant of good faith and fair dealing."). The Town has a duty to comply with the duty of good faith and fair dealing in every contract to which it is a party, regardless of the other contracting party's vested rights. In making its novel argument, the Town attempts to limit the duty of good faith and fair dealing in a way that has no precedential or logical support. As a result, the Town's argument is rejected.

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26. In Paragraph 35 of its Motion, the Town contends that the Court reached a "bizarrely inconsistent legal assertion" in its ruling on SCDG's breach of covenant of good faith and fair dealing claim. What the Town characterizes as a "bizarrely inconsistent legal assertion" is nothing more than a fundamental principle of contract law, which is that it is not illegal to breach a contract. *See Taylor Steel, Inc. v. Keeton*, 417 F.3d 598, 608 (6th Cir. 2005) ("Breach of contract might give rise to a civil suit, but it is not illegal."); *United States v. Blankenship*, 382 F.3d 1110, 1133 (11th Cir. 2004) ("It is not illegal for a party to breach a contract; a contract gives a party two equally viable options (perform or pay compensation), between which it is generally at liberty to choose."); *Windsor Secur., Inc. v. Hartford Life Ins. Co.*, 986 F.2d 655, 664 (3rd Cir. 1993) ("Breach of contract is not 'illegal' either under common usage . . ."); *Benderson Dev. Co. v. United States Postal Serv.*, 998 F.2d 959, 962 (Fed. Cir. 1993) ("To breach a contract is not unlawful; the breach only begets a remedy in law or in equity."). The implied covenant of good faith and fair dealing is "merely another term of the contract." *Rotec Servs. v. Encompass Servs.*359 S.C. 467, 472, 597 S.E.2d 881, 884 (Ct. App. 2004). In violating the implied covenant of good faith and fair dealing, the Town did not act unlawfully. Similarly, the Town did not have to commit an unlawful act to breach the implied covenant of good faith and fair dealing. Thus, Paragraph 35 is not inconsistent, and the Town's argument does not warrant reconsideration of the Court's conclusion that the Town breached its duty of good faith and fair dealing in this case.

27. In its objection to Paragraph 67, the Town argues that the Court has committed an error of law by inappropriately acting in an appellate capacity but offers no legal support for its position. The Court clearly was not acting in an appellate capacity in ruling that the Town violated its duty of good faith and fair dealing by failing to apply reasonable interpretations of the zoning code that would have fulfilled the purposes of the parking license agreement.

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28. According to the Town, the Court made improper determinations about Town Council's intent in Paragraph 70. The Town's objection to Paragraph 70 has no merit. Contrary to the Town's argument, the Court did not make any determinations about the individual intent and motivation of each Council member. Instead, the Court makes clear that its conclusions apply to the Town as a whole based on the collective actions of the Town's staff and Council.

29. The Town objects to the citations of decisions from other jurisdictions in Paragraph 71. Yet there is nothing improper with the citation of judicial decisions from other jurisdictions. The Court's order does not indicate that it finds the decisions cited in Paragraph 71 as controlling. Instead, it is clear that these decisions are cited as persuasive authority supporting the proposition that the implied duty of good faith and fair dealing applies to discretionary acts of government. As such, it is entirely appropriate to cite cases from jurisdictions outside of South Carolina. *See State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 837 S.E.2d 910, 917, 837 S.E.2d 910, 917 (Ct. App. 2019) ("When there is no South Carolina case directly on point, our courts may look to persuasive authority from other jurisdictions.").

30. According to the Town, Paragraph 72 incorrectly holds that the Town was required to exercise its legislative authority only in a way to favor a party to a contract. The Town's objection to Paragraph 72 is misguided and overstated. First, Paragraph 72 does not hold that "the Town was required to exercise its legislative authority only in a way to favor a party to a contract." Instead, it states the uncontroversial proposition that the Town had a duty of good faith and fair dealing to take reasonable steps to fulfill the purpose of the parking license agreement and to avoid taking actions that interfered with the purpose of the parking license agreement. Second, Paragraph 72 is not based on any legal principle that interferes or hinders a governmental entity's legislative authority. To be sure, the Court's order in no way invalidates any of the actions

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challenged in this lawsuit. The Court's ruling is simple: If a local government enters into a contract, it can either perform under the contract or not. But if it refuses to perform or takes other actions to interfere with that contract, it is subject to civil liability, just like any private party. This is not an error of law but rather the application of general principles of contract law to a governmental entity.

31. The Town objects to Paragraph 74 as an error of law that disregards material terms of the parking license agreement. The Town's objection to Paragraph 74 has no merit because the Court made clear in Paragraph 76 that it need not determine whether the parking license agreement required SCDG to design the garage with no less than 276 total spaces.

32. In Paragraph 41 of its Motion, the Town contends that the Court committed an error of law by admitting evidence in the record. However, there was no error in the Court's admission of evidence during trial. The Supreme Court's ruling in *Brown v. Allstate Ins. Co.* is clear: "A trial judge's role in a bench trial is to admit all evidence and then evaluate in a non-jury setting." *Id.*, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001). This is exactly what the Court did in this case. Furthermore, the Town's objection is based on a mischaracterization of the Court's ruling. The Court did not conclude "that 276 parking spaces was never a material term of the Agreement" as the Town claims. Instead, the Court ruled that SCDG's design with 234 total spaces and 117 public spaces was not a material breach of the agreement. The distinction between "material term" and "material breach" is important and ultimately dooms the Town's argument.

33. The Town argues that Paragraph 75 incorrectly holds that 276 parking spaces was not a material term of the parking license agreement. But the Court did not rule that 276 parking spaces was not a material term as the Town claims. The Town obviously confuses the concept of "material term" with "material breach." A breach of a "material term" of a contract can be so

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insubstantial that it does not constitute a "material breach." As concluded in Paragraph 75, SCDG's approved design gave the Town substantially all that it bargained for in the parking license agreement.

34. The Town makes numerous objections to the Court's materiality analysis in Paragraphs 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, and 89. The Town's objections to the Court's materiality analysis is unpersuasive. First, the Town incorrectly suggests that the materiality analysis under *Kiriakides* does not apply to this case because *Kiriakides* involved a commercial lease agreement. But, as stated in Paragraph 79 of the order, the materiality factors set forth in *Kiriakides* apply to contracts beyond commercial leases as confirmed by *Palmetto Mortuary Transp., Inc. v. Knight Sys.*, 424 S.C. 444, 462-63, 818 S.E.2d 724, 734-35, fn. 5 (2018). Second, the conclusory arguments presented by the Town to counter the Court's materiality analysis ignores nearly all evidence on which the Court relies. Materiality was the most important issue at trial, and the Court devotes fourteen paragraphs and over five pages to addressing that issue in the Order. Yet the Town has not addressed the specific findings regarding materiality and, instead, summarily dismisses the ruling on this issue in one paragraph by repeating the same conclusory findings that it submitted in its proposed order. This is simply insufficient to warrant reconsideration of the Court's conclusions regarding materiality.

35. According to the Town, Paragraph 81 incorrectly identifies the concept of "adequacy" to inappropriately alter the written, material terms in the Agreement and, inexplicably, attributes more significance to this judicially manufactured term than to an unambiguously stated material term. The Town complains that "adequacy" of spaces is a "judicially manufactured term," but it is actually a common-sense approach to determining whether SCDG's approved design deprived the Town of the benefits it bargained for in the parking license agreement. The Town

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sought additional parking to serve the parking demand for the Shem Creek area, and determining whether the proposed parking spaces would have provided that benefit necessarily involves analyzing the demand for parking that existed and whether SCDG's proposal could adequately satisfy that demand. Because that analysis does not favor the Town, it seeks to limit the analysis of the alleged deprivation of benefits to the percentage of reduction in total spaces. The Town's sole focus on the percentage deficiency in the number of total spaces does not accord with the analysis required under *Kiriakides*. As stated in the *Restatement (2d) of Contracts* § 241, which was adopted under *Kiriakides*, the first factor requires that "all relevant circumstances must be considered" in determining whether the injured party has been deprived of the benefit to which it reasonably expected. *See also, U.S. ex rel. Virginia Beach Merch. Srvs., Inc. v. Samco Constr. Co.*, 39 F. Supp. 2d 661, 671 (E.D. Va. 1999) (declaring that "principles of contract law do not rely on 'percentages alone' to discern between a material and minor breach") (citing *Restatement (2d) of Contracts* § 275). By focusing solely on the total space reduction percentage, the Town disregards the many benefits that the Town expected to receive from the parking license agreement. Thus, the Court appropriately conducted the materiality analysis by reviewing, among other factors, the adequacy of the spaces that SCDG designed.

36. The Town alleges that Paragraph 87 incorrectly states facts regarding the feasibility of a third level of parking in the garage. Contrary to the Town's argument, Paragraph 87 correctly states the facts about the feasibility of another level of parking and its impact on the project, and it is supported by the exhibits and trial testimony. (See Def.'s Ex. 22; Tr. 396:8-397:16, 343:5-16, 755:9-756:2.)

37. The Town claims that Paragraphs 90-93 incorrectly state facts regarding the Town's action that prevented SCDG from performing under the parking license agreement. The Town's

objections have no merit. SCDG's concept plan was based on reasonable assumptions regarding its ability to reduce applicable setbacks and the permitted width of parking spaces. Although those assumptions were upended by the Town's zoning amendments and refusal to accommodate reasonable alternatives proposed by SCDG, SCDG, nevertheless, delivered an approved design with 89% of the initially anticipated number of public spaces. If the Town had cooperated with SCDG and approved reasonable measures to increase space, SCDG could have delivered approximately 270 total spaces (and possibly 276 total spaces), as Mr. Johnston testified. (Tr. 758:2-15.)

38. In response to Paragraphs 94-104, the Town objects to the Court's interpretation of the parking license agreement based on the same arguments that it raised numerous times both prior to and after trial. The Court has carefully considered these arguments on numerous occasions, and the Town has failed to provide any good reason for the Court to reconsider its prior rulings.

For the foregoing reasons, the Town's Motions for New Trial and to Reconsider, Alter or Amend Order is denied.

IT IS SO ORDERED.

_____
The Honorable Maite Murphy

_____, 2020

Charleston, South Carolina

ELECTRONICALLY FILED - 2020 Sep 17 1:38 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1005493

ELECTRONICALLY FILED - 2020 Sep 17 1:38 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1005493

Charleston Common Pleas

Case Caption: Shem Creek Development Group LLC VS Mount Pleasant South Carolina Town of The

Case Number: 2017CP1005493

Type: Order/Other

So Ordered

s/ Maite Murphy 2166

ELECTRONICALLY FILED - 2021 Jan 11 2:32 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1005493

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,	)	**ORDER AWARDING PLAINTIFF ATTORNEY FEES AND COSTS**
	)	
vs.	)	
	)	
The Town of Mount Pleasant, South Carolina,	)	
	)	
Defendant.	)	

This matter comes before the Court upon the submission of affidavits of counsel in support of Plaintiff Shem Creek Development Group, LLC's ("SCDG") requests for an award of attorneys' fees and costs in this action. After careful consideration of the law and evidence presented in the above-mentioned affidavits, this Court hereby GRANTS SCDG's request for attorneys' fees and costs based on the following findings:

1. SCDG and the Town of Mount Pleasant were parties to the parking license agreement, which was the subject of this litigation. Section 6.01 of the parking license agreement provides that "the prevailing party in any dispute shall be entitled to an award of costs and attorney's fees, including the costs of trial and any appeals."

2. On July 13, 2020, this Court issued an order awarding judgment in favor of SCDG on its claim of breach of contract arising under the parking license agreement. In Paragraph 104 of the order, the Court ruled that SCDG, as the prevailing party in this action, was entitled to an award of all costs and attorneys' fees associated with this dispute, including the cost of trial. Thus, SCDG was instructed to submit an affidavit of costs and attorneys' fees it sought to be awarded in this action.

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3. On August 11, 2020, SCDG's counsel, Brandon Gaskins, submitted an affidavit of attorneys' fees and costs, which was supplemented on September 17, 2020 by a supplemental affidavit of Mr. Gaskins and an affidavit of Hamlin O'Kelley of the law firm of Buist Byars & Taylor. Based on these affidavits, the total amount of fees and costs sought by SCDG equals Two Hundred Ninety-Eight Thousand Nine Hundred Sixty-Five and 22/100 Dollars ($298,965.22).

4. Under *Baron Data Systems, Inc. v. Loter*, 297 SC 382, 377 S.E.2d 296 (1989), and *Blumberg v. Nealco*, 310 SC 482, 427 S.E.2d 659 (Ct. App. 1993), there are six factors to be considered in determining the reasonableness of a fee: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor devoted to the case; (3) the professional standing of counsel; (4) contingency of compensation; (5) the fee customarily charged in the location for similar services; and (6) the beneficial results obtained.

5. Upon the analysis of the fees and costs sought by SCDG in this case under the above factors and based on upon my knowledge of and experience with the case, the Court concludes that SCDG's requested costs and fees are reasonable for the following reasons: (1) the matter was highly disputed and involved complex issues of contract and municipal law, a significant amount in controversy, a large volume of documents produced during discovery, and multiple discovery disputes; (2) the matter was litigated through trial and post-trial motions for nearly three years; (3) SCDG's counsel are lawyers in good standing with the South Carolina Bar, have never been involved any disciplinary proceedings, and have good reputations among other lawyers in the area who practice commercial litigation and transactions; (4) the matter was not based on a contingency arrangement, but the amount billed is less than what would be payable under a typical contingency fee arrangement of 33.3% or 40% of the award; (5) the hourly rates of the relevant lawyers were within the range of hourly rates customarily charged by attorneys of

similar experience who practice in the Charleston area; and (6) SCDG obtained the beneficial result of a recovery in the full amount sought at trial.

IS THEREFORE ORDERED that SCDG is awarded attorneys' fees and costs in the amount of Two Hundred Ninety-Eight Thousand Nine Hundred Sixty-Five and 22/100 Dollars ($298,965.22).

AND IT IS SO ORDERED.

_____
The Honorable Maite Murphy

January _____, 2021

_____, South Carolina

ELECTRONICALLY FILED - 2021 Jan 11 2:32 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1005493

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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 — PLAINTIFF(S)

The Town of Mount Pleasant, South Carolina — DEFENDANT(S)

Submitted by: E. Brandon Gaskins	**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.

☒ **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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ 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: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	**Judgment Against (List name(s) below)**	**Judgment Amount To be Enrolled (List amount(s) below)**
Shem Creek Development Group, LLC	The Town of Mount Pleasant, South Carolina	$298,965.22
		$
		$

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

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The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge | **Judge Code** | **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

It is ordered that Plaintiff Shem Creek Development Group, LLC is awarded actual damages in the amount of $2,604,316.00 and attorneys' fees and costs in the amount of $298,965.22. Total judgment amount is $2,903,281.22.

This judgment is effective as of July 13, 2020.

ELECTRONICALLY FILED - 2021 Jan 11 2:32 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1005493

ELECTRONICALLY FILED - 2021 Jan 11 2:32 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1005493

****

FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE

(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.

2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

   The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).

4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.

5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.

6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.

7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.

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8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.

10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.

11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.

12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.

13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.

14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

ELECTRONICALLY FILED - 2021 Jan 11 2:32 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1005493

Charleston Common Pleas

Case Caption:	Shem Creek Development Group LLC VS Mount Pleasant South Carolina Town of The
Case Number:	2017CP1005493
Type:	Order/Judgment and Form 4

So Ordered

s/ Maite Murphy 2166

JULIE J. ARMSTRONG
CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258
RETURN SERVICE REQUESTED

CHARLESTON COUNTY
SOUTH CAROLINA

clerkofcourt.charlestoncounty.org

Andrew F. Lindemann
PO Box 6923
Columbia, SC 29260

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRCP

Order/Judgment for Atty Fees & Costs

CASE NO: 2017CP1005493
Shem Creek Development Group LLC VS Mount Pleasant South Carolina Town of The

This judgment was entered on the 11th day of January, 2021, and notice mailed first class on Monday, January 11, 2021, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at http://clerkofcourt.charlestoncounty.org or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

2017-CP-10-5493

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

SHEM CREEK DEVELOPMENT GROUP, LLC)
)
Plaintiff(s))
)
vs.)
)
TOWN OF MOUNT PLEASANT, SOUTH CAROLINA)
)
Defendant (s))

CIVIL ACTION COVERSHEET

2017 - CP - 10 - 5493

FILED
2017 OCT 23 PM 4:11
CLERK OF COURT
CHARLESTON COUNTY

Submitted By: E. Brandon Gaskins
Charles R. Scarminach
Address: 78 Wentworth Street
Charleston, SC 29401

SC Bar #: 73274
Telephone # (843)579-7000
Fax #: (843)579-7099
Other:
E-mail: brandongaskins@mvalaw.com
charlesscarminach@mvalaw.com

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

DOCKETING INFORMATION *(Check all that apply)*

**If Action is Judgment/Settlement do not complete*

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

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☒ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/ Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199)

Torts – Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____ - NI-_____ - _____
- ☐ Notice/File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture-Consent Order (850)
- ☐ Other (899)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☒ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex/Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Sexual Predator (510)
- ☐ Permanent Restraining Order (680)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of-State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)

Submitting Party Signature: E. B. G. **Date:** 10/23/17

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

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

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

Pursuant to ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

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

2017-CP-10-5493

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
		CIVIL ACTION NO.: 2017-CP-10-5493
Shem Creek Development Group, LLC,	)	
Plaintiff,	)	
v.	)	**SUMMONS**
Town of Mount Pleasant, South Carolina,	)	
Defendant.	)	

FILED
2017 OCT 23 PM 4:11
CHARLESTON COUNTY
CLERK OF COURT

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you and to serve a copy of your Answer to said Complaint on the subscribers at their offices, Moore & Van Allen PLLC, 78 Wentworth Street, Post Office Box 22828, Charleston, SC 29413-2828, or to otherwise appear and defend, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint, or otherwise to appear and defend, within the time aforesaid, the Plaintiff in this action will obtain a judgment by default against you for the relief demanded in the Complaint.

E. Brandon Gaskins

E. Brandon Gaskins (State Bar No. 73274)
Charles Scarminach (State Bar No. 101582)
MOORE & VAN ALLEN, PLLC
78 Wentworth Street
P.O. Box 22828
Charleston, South Carolina 29413-2828
Telephone: (843) 579-7000
brandongaskins@mvalaw.com
charlesscarminach@mvalaw.com
Attorneys for Plaintiff

Dated: October 23, 2017
Charleston, South Carolina

2017-CP-10-5493

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CIVIL ACTION NO.: 2017-CP-10-5493
Shem Creek Development Group, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**COMPLAINT**
	)	
Town of Mount Pleasant, South Carolina,	)	
	)	
Defendant.	)	
	)	
	)	
	)	

FILED
2017 OCT 23 PM 4:11
JULIE J. ARMSTRONG
CLERK OF COURT

Plaintiff Shem Creek Development Group, LLC, complaining of Defendant Town of Mount Pleasant, South Carolina, alleges as follows:

INTRODUCTION

1. This lawsuit arises from the Town of Mount Pleasant's refusal to honor its contractual obligations. In 2013, the Town of Mount Pleasant entered into an agreement to rent public spaces in a parking deck to be developed by Shem Creek Development Group. Soon after the Town committed to support the development of the parking deck, a vocal group of opponents engaged in a deliberate campaign to kill the project through political pressure exerted on Town Council and other means. Rather than staying true to its commitment, the Town buckled to the pressure from the opponents of the parking deck by intentionally attempting to prevent the parking deck from being completed. Despite the efforts of the Town and its Council to kill the project, Shem Creek Development Group completed the parking deck in accordance with its agreement with the Town. However, the Town has refused to honor its contractual commitments and pay rent as it promised.

THE PARTIES

2. Plaintiff Shem Creek Development Group, LLC ("Plaintiff") is a South Carolina limited liability company with its principal place of business in Charleston County, South Carolina.

3. Defendant Town of Mount Pleasant (the "Town") is a municipal corporation organized and existing under the laws of the State of South Carolina with corporate limits within Charleston County, South Carolina.

VENUE AND JURISDICTION

4. Venue in this Court is proper pursuant to S.C. Code Ann. § 15-7-30.

5. This Court has subject matter jurisdiction concerning such matters pursuant to Article 5 of the South Carolina Constitution.

6. This Court has personal jurisdiction over the parties pursuant to S.C. Code Ann. §§ 36-2-802 and 36-2-803.

FACTS

7. In the Town's Comprehensive Plan, the Town recognizes Shem Creek as an important asset to the Town, home to both industrial and commercial activities. Although Shem Creek has been the home to the shrimping industry in Mount Pleasant, it also serves as "a destination for tourists and locals, who enjoy a series of restaurants fronting the creek." To promote Shem Creek as a destination and to increase public access to Shem Creek, the Town developed a public park, which includes approximately 1,000 feet of pier along Shem Creek and is accessible off of Coleman Boulevard, which passes over Shem Creek.

8. To facilitate increased public access to Shem Creek's restaurants and public park, the Town actively promoted improvements along Shem Creek, including additional parking. For

example, the Town's Coleman and Ben Sawyer Boulevards Revitalization Master Plan identifies a site located near Shem Creek on the corner of Coleman Boulevard and Mill Street as a "Parking Deck Opportunity." In the Coleman and Ben Sawyer Boulevards Revitalization Master Plan, the Town declared, "It is highly recommended that developers consider the viability of providing structured parking within their sites or shared between sites. It is further recommended that the Town pursue opportunities to provide parking decks either as sole owner/operator or as some type of private/public partnership."

9. In response to the growing need for parking, Plaintiff pursued the development of a parking deck near Shem Creek on the corner of Coleman Boulevard and Mill Street (the "Site"), which was the same site that had been identified by the Town as a "Parking Deck Opportunity" in the Town's Coleman and Ben Sawyer Boulevards Revitalization Master Plan. Plaintiff's pursuit of the development of the parking deck was supported by the Town because it was consistent with the Town's goal of increasing public access to Shem Creek, improving and increasing parking opportunities, and redeveloping the Coleman and Ben Sawyer Boulevards corridor in accordance with the Coleman and Ben Sawyer Boulevards Revitalization Master Plan.

10. As a result of the Town's and Plaintiff's common interest in developing the Site as a parking deck, Plaintiff and the Town began negotiations in 2013 to enter into a public-private partnership for the development.

11. On October 8, 2013, the Town's Council adopted a resolution approving the Town's entry into a license agreement with Plaintiff to reserve parking spaces in Plaintiff's proposed parking deck.

12. On October 17, 2013, the Town and Plaintiff executed and entered into a parking license agreement (the "Parking License Agreement"), which described the parking deck project

as consisting of "a multi-level structured parking garage, comprised of 276 total parking spaces and a proposed office complex." Under the Parking License Agreement, 132 spaces were designated for public use (the "Public Spaces"), and 144 spaces were reserved for private use (the "Reserved Spaces"). The Public Spaces were intended to foster tourism and economic development along Coleman Boulevard and the Shem Creek waterfront and to provide parking for existing local businesses.

13. In consideration for Plaintiff's provision of the Public Spaces, the Town agreed, pursuant to Section 1.07 of the Parking License Agreement, to pay Plaintiff annual rent in the amount of One Hundred Eighty-Five Thousand Dollars ($185,000) for fifteen (15) years, for a total amount of Two Million Seven Hundred Seventy-Five Thousand Dollars ($2,775,000).

14. Soon after the Town entered into the Parking License Agreement, opposition to Plaintiff's proposed parking deck began to mount from Save Shem Creek, an anti-development political organization, and certain residents of the Old Village in Mount Pleasant. The opponents of the parking garage initiated a campaign to prevent the construction of the parking deck and to stop the Town from providing any funds to Plaintiff under the Parking License Agreement.

15. As a result of growing opposition to Plaintiff's plans for the parking deck, the Town began exploring ways to escape its contractual obligations under the Parking License Agreement. However, because the Town feared a potential lawsuit that would follow if it terminated the Parking License Agreement unilaterally, it sought to undermine the economic and practical feasibility of the development rather than terminate the Parking License Agreement directly.

16. During the Town's Council meeting on April 8, 2014, Town Council adopted a zoning ordinance designed to interfere with the development of the parking deck and hinder Plaintiff's ability to design the parking deck in a manner which would allow it to provide all 276

spaces envisioned under the Parking License Agreement. Specifically, the Town adopted Ordinance No. 14022, which changed the setbacks specifically for Mill Street, where the parking deck was to be located, and eliminated language allowing setbacks to be reduced to no less than five feet if certain conditions were met.

17. Although the Parking License Agreement attached and incorporated Plaintiff's plan for the parking deck, the Town took the position that the changes adopted pursuant to Ordinance No. 14022 after the parties had entered into the Parking License Agreement applied to the development of the parking deck. The Town adopted this interpretation knowing that such interpretation would have a negative impact on Plaintiff's project and ability to provide all 276 spaces envisioned under the Parking License Agreement.

18. In an attempt to accommodate the changes in the design necessitated by the Town's adoption of the zoning changes in Ordinance No. 14022, Plaintiff requested that the Town apply a five foot rear setback for the project based on the fact that it abutted an abandoned street which was being used for a parking lot rather than a public street. Although the Town had not performed maintenance on the street, it claimed that the abandoned street was nevertheless a "street" as defined by the Town's Code of Ordinances because the Town was responsible for maintaining it.

19. As a result of the Town's adoption of Ordinance No. 14022 and its interpretation regarding the application of the zoning changes to the development, Plaintiff was forced, at considerable expense, to redesign the parking deck to comply with the requirements imposed by the Town under its interpretation and application of Ordinance No. 14022. Based on the requirements imposed by the Town, Plaintiff's redesigned parking deck consisted of 234 total parking spaces.

20. On September 24, 2014, Plaintiff's redesigned proposed office building and parking deck received approval from the Town's Design Review Board based on the redesigned plan.

21. On November 11, 2014, Town Administrator Eric DeMoura sent a letter to Plaintiff's legal counsel of his opinion that Plaintiff's plan for the parking deck did not satisfy the obligations under the Parking License Agreement because the plan did not include 276 Public Spaces available during non-business hours and did not include 132 Public Spaces during business hours. In his letter, DeMoura explained that his letter and the positions stated therein "should not be considered binding or final as Town Council has the sole authority to decide policy matters."

22. After receiving Mr. DeMoura's letter, Plaintiff proposed an amendment to the Parking License Agreement to provide for fewer total parking spaces and fewer Public Spaces in the parking deck than initially envisioned under the Parking License Agreement and reduced rent to be paid by the Town. However, the Town refused to consider Plaintiff's proposed amendment to the Parking License Agreement.

23. On February 10, 2015, Town Council voted to approve the opinions stated in Mr. DeMoura's letter to Plaintiff's legal counsel of November 11, 2014 and to refuse to honor the Town's obligations to pay rent to Plaintiff as required under the Parking License Agreement. Although the purported basis for refusing to pay rent in accordance with the Parking License Agreement was that Plaintiff could not provide the number of Public Spaces required under the Parking License Agreement, the Town admitted that Plaintiff's proposed project included 334 total spaces, with 234 spaces in the parking deck and 100 surface parking spaces. Nevertheless, the Town claimed that Plaintiff's plan did not provide sufficient Public Spaces because those spaces were required to be used by the neighboring restaurants located on the Shem Creek waterfront.

This position was contrary to the Town's prior position that the Public Spaces envisioned under Plaintiff's proposed project would be available for use by those same restaurants and would count towards the amount of Public Spaces required by the Parking License Agreement.

24. The Town's decision to refuse to honor its contractual obligation to pay rent to Plaintiff in accordance with the Parking License Agreement was based on pretextual grounds. The Town's actual reason for refusing to pay rent to Plaintiff was to deny a revenue source to Plaintiff's proposed project, thereby rendering it economically unfeasible and placating the vocal opposition to the project.

25. Despite the Town's denial of an anticipated revenue source to support the project, Plaintiff was able to obtain necessary financing to develop the project by entering into a joint venture with a capital partner.

26. On or around October 10, 2014, Plaintiff requested that the Town provide an estoppel certificate as required by Section 7.04 of the Parking License Agreement. The Town, however, refused to honor the requested estoppel certificate.

27. Plaintiff commenced construction on the office building and parking deck on or about November 5, 2015. Although Section 1.07(a) of the Parking License Agreement required the Town to pay rent for the first year upon the commencement of construction, the Town did not make the required rental payment in violation of the Parking License Agreement.

28. During construction of the project, Town Council explored the possibility of condemning the site of the parking deck project through the Town's exercise of eminent domain in an effort to prevent the completion of the project. However, those efforts ultimately failed, and Plaintiff, through its joint venture, completed construction on the office building and parking deck and received its final certificate of occupancy in 2017.

29. The parking deck opened for business on February 8, 2017. Since that date, Plaintiff's project has provided 234 total parking spaces, including 117 Public Spaces in substantial performance of its obligations under the Parking License Agreement. However, the Town has failed to pay any rent to Plaintiff in breach of its obligations under the Parking License Agreement.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

30. Plaintiff realleges and incorporates the allegations contained in the aforementioned paragraphs as if fully and completely set forth herein verbatim.

31. The Parking License Agreement is a valid contract between Plaintiff and the Town.

32. Section 1.07 of the Parking License Agreement requires the Town to pay to Plaintiff annual rent in the amount of One Hundred Eighty-Five Thousand Dollars ($185,000) for fifteen (15) years, for a total amount of Two Million Seven Hundred Seventy-Five Thousand Dollars ($2,775,000).

33. Plaintiff fully or substantially performed its obligation to provide Public Spaces under the Parking License Agreement. Despite Plaintiff's performance, the Town breached Section 1.07 of the Parking License Agreement by failing to pay rent.

34. Section 3.04 of the Parking License Agreement requires the Town to accept the Premises if constructed in a manner substantially similar to Plaintiff's conceptual plan for the Premises.

35. Plaintiff constructed the Premises in a substantially similar manner to its conceptual plan, and the Town breached Section 3.04 by failing to accept the Premises.

36. Section 7.04 of the Parking License Agreement required the Town to provide Plaintiff with an estoppel certificate on request.

37. Plaintiff requested that the Town provide an estoppel certificate, and the Town breached Section 7.04 of the Parking License Agreement by refusing to provide such estoppel certificate as requested by Plaintiff.

38. The Parking License Agreement contains an implied covenant of good faith and fair dealing, which required the Town to avoid doing anything to impair Plaintiff's rights to receive benefits under the Parking License Agreement.

39. The Town breached the implied covenant of good faith and fair dealing by taking actions deliberately designed to prevent Plaintiff from developing the parking deck as envisioned under the Parking License Agreement and receiving rent thereunder, including (a) adopting zoning amendments that forced Plaintiff to redesign the parking deck and provide fewer spaces than originally planned; (b) requiring larger parking spaces than originally proposed by Plaintiff; (c) refusing to agree that Plaintiff's redesigned plan for the parking deck was "substantially similar" to the plan as envisioned under the Parking License Agreement; (d) refusing to consider a proposed amendment to the Parking License Agreement; (e) refusing to provide an estoppel certificate as requested by Plaintiff; (f) making public statements regarding the economic unfeasibility of the parking deck that made it more difficult for Plaintiff to obtain necessary financing to develop the project; (g) receiving and relying on confidential information improperly obtained by opponents of the project without authorization to concoct pretextual grounds for its failure to honor its contractual obligations; (h) adopting unfavorable interpretations of zoning ordinances to hinder Plaintiff's ability to develop the project; and (i) exploring possible condemnation of the project site to prevent its development and completion.

40. To the extent that Plaintiff failed to provide sufficient Public Spaces and fully satisfy its obligations under the Parking License Agreement, Plaintiff's failure to perform is

excused under the doctrines of impossibility and commercial frustration because the Town rendered Plaintiff's performance impossible.

41. To the extent that Plaintiff failed to provide sufficient Public Spaces and fully satisfy its obligations under the Parking License Agreement, Plaintiff's failure to perform is excused under Section 2.06 of the Parking License Agreement, which provides that a party shall not be deemed in default with respect to any terms, covenants, or conditions if such default arises from government regulations or controls.

42. As a result of the Town's breaches of the Parking License Agreement, the Town is in default, and Plaintiff is entitled to the rent owed to it by the Town in accordance with Section 6.01 of the Parking License Agreement.

43. As a result of the Town's breaches of the Parking License Agreement, Plaintiff had to cure such breaches, and Plaintiff is entitled to costs incurred to cure such breaches in accordance with Section 6.02 of the Parking License Agreement.

44. Under Section 6.01 of the Parking License Agreement, Plaintiff is entitled costs and attorneys' fees arising from this litigation.

FOR A SECOND CAUSE OF ACTION
(Quantum Meruit/Unjust Enrichment)

45. Plaintiff realleges and incorporates the allegations contained in the aforementioned paragraphs as if fully and completely set forth herein verbatim.

46. Plaintiff provided a benefit to the Town in the form of increased public parking spaces available for the public park and restaurants along Shem Creek.

47. The Town has realized the benefit of increased public parking by making the public park and restaurants along Shem Creek more accessible, which has consequently increased tax

revenues for the Town and obviated the need for the Town to make improvements and expenditures for more parking opportunities along Shem Creek.

48. The retention by the Town of the benefits of increased public parking conferred upon it by Plaintiff would be unjust because Plaintiff developed the parking deck project under the reasonable expectation that the Town would pay rent for public parking spaces provided in the parking deck.

49. As a result of the Town being unjustly enriched by Plaintiff's provision of increased public parking along Shem Creek, Plaintiff is entitled to be compensated for the value of providing such public spaces.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests the following relief:

1. An award of all rent payments due under the Parking License Agreement, or in the alternative, the value of the spaces provided by Plaintiff to the Town;
2. An award for costs incurred to cure the breaches of the Parking License Agreement by the Town;
3. An award of Plaintiff attorneys' fees and costs associated with this matter pursuant to Section 6.01 of the Parking License Agreement; and/or
4. An award of all other appropriate relief as is just and proper under the circumstances.

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Charles Scarminach (State Bar No. 101582)
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Attorneys for Plaintiff

Dated: October 23, 2017
Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
SHEM CREEK DEVELOPMENT GROUP, LLC, Plaintiffs, vs. TOWN OF MT. PLEASANT, Defendants.	**Case No. 2017-CP-10-5493** **ANSWER**

FILED
2017 DEC 27 AM 9:26
CHARLES LYDON
CLERK OF COURT

TO: E. BRANDON GASKINS, ATTORNEY FOR PLAINTIFF:

The Defendants responding to the **Complaint** of the Plaintiffs, above named, allege, and say as follows:

FIRST DEFENSE

1. **Complaint**: This lawsuit arises from the Town of Mount Pleasant's refusal to honor its contractual obligations. In 2013, the Town of Mount Pleasant entered into an agreement to rent public spaces in a parking deck to be developed by Shem Creek Development Group. Soon after the Town committed to support the development of the parking deck, a vocal group of opponents engaged in a deliberate campaign to kill the project through political pressure exerted on Town Council and other means. Rather than staying true to its commitment, the Town buckled to the pressure from the opponents of the parking deck by intentionally attempting to prevent the parking deck from being completed. Despite the efforts of the Town and its Council to kill the project, Shem Creek Development Group completed the parking deck in accordance with its agreement with the Town. However, the Town has refused to honor its contractual commitments and pay rent as it promised.

ANSWER: The Defendant admits that in 2013 the Town of Mount Pleasant and Shem Creek Development Group entered into an agreement which related to the rental of a specified number of public parking spaces, subject to expressed and implied terms, conditions, and limitations. The Defendant further admits that this lawsuit generally relates to this agreement. The Defendant acknowledges that the parking garage was the object of opposition by town residents. The Defendant further acknowledges that the project appears to have been completed in some measure but denies that it was completed in accord with the agreement. All remaining or inconsistent allegations in paragraph 1 are denied and the Plaintiff is put to its proof thereof.

THE PARTIES

2. **Complaint**: Plaintiff Shem Creek Development Group, LLC ("Plaintiff") is a South Carolina limited liability company with its principal place of business in Charleston County, South Carolina.

ANSWER: The Defendant admits the allegations of paragraph 2.

3. **Complaint**: Defendant Town of Mount Pleasant (the "Town") is a municipal corporation organized and existing under the laws of the State of South Carolina with corporate limits within Charleston County, South Carolina.

ANSWER: The Defendant admits the allegations of paragraph 3.

VENUE AND JURISDICTION

4. **Complaint**: Venue in this Court is proper pursuant to S.C. Code Ann. § 15-7-30.

ANSWER: The Defendant admits that venue is proper in this court.

5. **Complaint**: This Court has subject matter jurisdiction concerning such matters pursuant to Article 5 of the South Carolina Constitution.

ANSWER: The Defendant admits that this court has subject matter jurisdiction.

6. **Complaint**: This Court has personal jurisdiction over the parties pursuant to S.C. Code Ann. §§ 36-2-802 and 36-2-803.

ANSWER: The Defendant admits that this court has personal jurisdiction over the parties.

FACTS

7. **Complaint**: In the Town's Comprehensive Plan, the Town recognizes Shem Creek as an important asset to the Town, home to both industrial and commercial activities. Although Shem Creek has been the home to the shrimping industry in Mount Pleasant, it also serves as "a destination for tourists and locals, who enjoy a series of restaurants fronting the creek." To promote Shem Creek as a destination and to increase public access to Shem Creek, the Town developed a public park, which includes approximately 1,000 feet of pier along Shem Creek and is accessible from Coleman Boulevard, which passes over Shem Creek.

ANSWER: The Defendant admits that the Town recognizes Shem Creek as an asset to the community and that citizens, as well as tourists, frequent restaurants along this waterway. The Defendant further admits that it developed a public park, which includes a pier access to Coleman Boulevard. Upon information and belief, the Coleman Boulevard revitalization efforts promote the public enjoyment of the Creek and compliment the Creek's natural beauty and the health of its businesses, particularly of the shrimp fleet and other commercial fishing vessels. As to the remainder of the allegations in paragraph 7, these are denied, and the Plaintiff is put to its proof thereof.

8. **Complaint**: To facilitate increased public access to Shem Creek's restaurants and public park, the Town actively promoted improvements along Shem Creek, including additional

parking. For example, the Town's Coleman and Ben Sawyer Boulevards Revitalization Master Plan identifies a site located near Shem Creek on the corner of Coleman Boulevard and Mill Street as a "Parking Deck Opportunity." In the Coleman and Ben Sawyer Boulevards Revitalization Master Plan, the Town declared, "It is highly recommended that developers consider the viability of providing structured parking within their sites or shared between sites. It is further recommended that the Town pursue opportunities to provide parking decks either as sole owner/operator or as some type of private/public partnership."

ANSWER: The Defendant admits that it is important for the architectural integrity of the overlay district that these parking decks fit in with the surrounding architecture of the area and not be strictly utilitarian in their design. The design should respect and reflect the unique qualities of Mount Pleasant architecture. Also, where parking decks front the boulevards, retail or other commercial uses shall be required at street level so that the presence of parking decks does not detract from the life and vitality of the street. All other or inconsistent allegations in paragraph 8 are denied and the Plaintiff is put to its proof thereof.

9. **Complaint**: In response to the growing need for parking, Plaintiff pursued the development of a parking deck near Shem Creek on the corner of Coleman Boulevard and Mill Street (the "Site"), which was the same site that had been identified by the Town as a "Parking Deck Opportunity" in the Town's Coleman and Ben Sawyer Boulevards Revitalization Master Plan. Plaintiff's pursuit of the development of the parking deck was supported by the Town because it was consistent with the Town's goal of increasing public access to Shem Creek, improving and increasing parking opportunities, and

redeveloping the Coleman and Ben Sawyer Boulevards corridor in accordance with the Coleman and Ben Sawyer Boulevards Revitalization Master Plan.

ANSWER: The Defendant admits that there may have been a need for parking along Coleman Boulevard and that the Defendant had a goal of increasing access to Shem Creek for the public. The Defendant also admits that it is important for the architectural integrity of the overlay district that these parking decks fit in with the surrounding architecture of the area and not be strictly utilitarian in their design. The design should respect and reflect the unique qualities of Mount Pleasant architecture. Also, where parking decks front the boulevards, retail or other commercial uses shall be required at street level so that the presence of parking decks does not detract from the life and vitality of the street. As to all remaining allegations in paragraph 9, the Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations and does, therefore, deny the same and puts the Plaintiff to its proof thereof.

10. **Complaint**: Because of the Town's and Plaintiffs common interest in developing the Site as a parking deck, Plaintiff and the Town began negotiations in 2013 to enter into a public-private partnership for the development.

ANSWER: The Defendant admits that for a valid public purpose it began negotiating an agreement with the Plaintiff in 2013. The Defendant specifically denies that there was a public-private partnership or that such a partnership was the object of any negotiations. The Defendant specifically denies that there was a public-private partnership or that such a partnership was the object of any negotiations. In fact, section 8.05 of the Agreement specifically provides that not a partnership. As to the remaining allegations in paragraph 10, the Defendant alleges a lack of information and knowledge sufficient to form a belief as

to the truth of the allegations and does, therefore, deny the same and put the Plaintiff to its proof thereof.

11. **Complaint**: On October 8, 2013, the Town's Council adopted a resolution approving the Town's entry into a license agreement with Plaintiff to reserve parking spaces in Plaintiffs proposed parking deck.

ANSWER: The Defendant admits that on or about October 8, 2013, Town Council adopted a resolution concerning a license agreement related to the parking garage. The Defendant denies all remaining or inconsistent allegations in paragraph 11 and puts the Plaintiff to its proof thereof.

12. **Complaint**: On October 17, 2013, the Town and Plaintiff executed and entered into a parking license agreement (the "Parking License Agreement"), which described the parking deck project as consisting of "a multi-level structured parking garage, comprised of 276 total parking spaces and a proposed office complex." Under the Parking License Agreement, 132 spaces were designated for public use (the "Public Spaces"), and 144 spaces were reserved for private use (the "Reserved Spaces"). The Public Spaces were intended to foster tourism and economic development along Coleman Boulevard and the Shem Creek waterfront and to provide parking for existing local businesses.

ANSWER: The Defendant admits that on or about October 14, 2013, the Town and the Plaintiff entered into an agreement, which is in writing, and speaks for itself and contains various terms, conditions, and limitations which more accurately describe its contents. As to the remainder of the allegations contained in paragraph 12, the Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations and does, therefore, deny the same and put the Plaintiff to its proof thereof.

13. **Complaint**: In consideration for Plaintiff's provision of the Public Spaces, the Town agreed, pursuant to Section 1.07 of the Parking License Agreement, to pay Plaintiff annual rent in the amount of One Hundred Eighty-Five Thousand Dollars ($185,000) for fifteen (15) years, for a total amount of Two Million Seven Hundred Seventy-Five Thousand Dollars ($2,775,000).

ANSWER: The Defendant admits that Parking License Agreement is in writing and contains various terms, conditions and limitations which, in combination, determine the potential obligations of the Parties. As to the remaining allegations in paragraph 13, the Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations and does, therefore, deny the same and put the Plaintiff to its proof thereof.

14. **Complaint**: Soon after the Town entered into the Parking License Agreement, opposition to Plaintiff's proposed parking deck began to mount from Save Shem Creek, an anti-development political organization, and certain residents of the Old Village in Mount Pleasant. The opponents of the parking garage initiated a campaign to prevent the construction of the parking deck and to stop the Town from providing any funds to Plaintiff under the Parking License Agreement.

ANSWER: The Defendant admits that there was opposition to the License Agreement. As to the allegations in paragraph 14, the Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations and does, therefore, deny the same and put the Plaintiff to its proof thereof.

15. **Complaint**: Because of growing opposition to Plaintiffs plans for the parking deck, the Town began exploring ways to escape its contractual obligations under the Parking

License Agreement. However, because the Town feared a potential lawsuit that would follow if it terminated the Parking License Agreement unilaterally, it sought to undermine the economic and practical feasibility of the development rather than terminate the Parking License Agreement directly.

ANSWER: The Defendant denies the allegations in paragraph 15 and puts the Plaintiff to its proof thereof.

16. **Complaint**: During the Town's Council meeting on April 8, 2014, Town Council adopted a zoning ordinance designed to interfere with the development of the parking deck and hinder Plaintiffs' ability to design the parking deck in a manner which would allow it to provide all 276 spaces envisioned under the Parking License Agreement. Specifically, the Town adopted Ordinance No. 14022, which changed the setbacks specifically for Mill Street, where the parking deck was to be located, and eliminated language allowing setbacks to be reduced to no less than five feet if certain conditions were met.

ANSWER: The Defendant admits that on or about April 8, 2014 Town Council adopted Ordinance 14022 but denies it was designed to hinder or interfere with the development or design of the parking deck. Defendant further and specifically denies that the Plaintiff submitted to the Defendant any plans, drawing or specifications for the parking deck at any time prior to the adoption of Ordinance 14022. As to the remainder of the allegations contained in paragraph 16, the Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations and does, therefore, deny the same and put the Plaintiff to its proof thereof.

17. **Complaint**: Although the Parking License Agreement attached and incorporated Plaintiff's plan for the parking deck, the Town took the position that the changes adopted

pursuant to Ordinance No. 14022 after the parties had entered into the Parking License Agreement applied to the development of the parking deck. The Town adopted this interpretation knowing that such interpretation would have a negative impact on Plaintiff's project and ability to provide all 276 spaces envisioned under the Parking License Agreement.

ANSWER: Defendant alleges that Plaintiff made a business decision to maximize profit at the expense of the creation of the required parking spaces. The Defendant also alleges that it was not aware that Plaintiff was unable or, more to the point, unwilling to create 276 spaces through design in its zeal to maximize profits. Further, the only attachment to the Parking License Agreement was a conceptual rendering of what the garage might look like from the exterior. As to the remainder of the allegations contained in paragraph 17, the Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations and does, therefore, deny the same and put the Plaintiff to its proof thereof.

18. **Complaint**: In an attempt to accommodate the changes in the design necessitated by the Town's adoption of the zoning changes in Ordinance No. 14022, Plaintiff requested that the Town apply a five foot rear setback for the project based on the fact that it abutted an abandoned street which was being used for a parking lot rather than a public street. Although the Town had not performed maintenance on the street, it claimed that the abandoned street was nevertheless a "street" as defined by the Town's Code of Ordinances because the Town was responsible for maintaining it.

ANSWER: The Defendant admits that the Plaintiff, in some form, applied for a five-foot rear setback. The Defendant alleges that Church Street is, in all relevant respects, a public

street and was never abandoned. As to the remainder of the allegations contained in paragraph 18, the Defendant denies said allegations and puts the Plaintiff to its proof thereof.

19. **Complaint**: As a result of the Town's adoption of Ordinance No. 14022 and its interpretation regarding the application of the zoning changes to the development, Plaintiff was forced, at considerable expense, to redesign the parking deck to comply with the requirements imposed by the Town under its interpretation and application of Ordinance No. 14022. Based on the requirements imposed by the Town, Plaintiff's redesigned parking deck consisted of 234 total parking spaces.

ANSWER: The Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations in paragraph 19 and does, therefore, deny the same and puts the Plaintiff to its proof thereof.

20. **Complaint**: On September 24, 2014, Plaintiff's redesigned proposed office building and parking deck received approval from the Town's Design Review Board based on the redesigned plan.

ANSWER: The Defendant admits that on or about September 24, 2014 the Town's Design Review Board approved a plan for a building and parking garage. As to the remainder of the allegations contained in paragraph 20, the Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations and does, therefore, deny the same and puts the Plaintiff to its proof thereof.

21. **Complaint**: On November 11, 2014, Town Administrator Eric DeMoura sent a letter to Plaintiffs legal counsel of his opinion that Plaintiff's plan for the parking deck did not satisfy the obligations under the Parking License Agreement because the plan did not

include 276 Public Spaces available during non-business hours and did not include 132 Public Spaces during business hours. In his letter, DeMoura explained that his letter and the positions stated therein "should not be considered binding or final as Town Council has the sole authority to decide policy matters."

ANSWER: The Defendant admits that on or about November 11, 2014, Mr. Eric DeMoura sent a letter to counsel for the Plaintiff, and is the best evidence of its contents. As to remainder of the allegations contained in paragraph 21, the Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations and does, therefore, deny the same and puts the Plaintiff to its proof thereof.

22. **Complaint**: After receiving Mr. DeMoura's letter, Plaintiff proposed an amendment to the Parking License Agreement to provide for fewer total parking spaces and fewer Public Spaces in the parking deck than initially envisioned under the Parking License Agreement and reduced rent to be paid by the Town. However, the Town refused to consider Plaintiff's proposed amendment to the Parking License Agreement.

ANSWER: The Defendant admits that the Plaintiff proposed an amendment to the License Agreement which reduced the number of parking spaces and the rent to be paid by the Town. As to the remainder of the allegations contained in paragraph 22, the Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations and does, therefore, deny the same and puts the Plaintiff to its proof thereof.

23. **Complaint**: On February 10, 2015, Town Council voted to approve the opinions stated in Mr. DeMoura's letter to Plaintiffs legal counsel of November 11, 2014 and to refuse to honor the Town's obligations to pay rent to Plaintiff as required under the Parking License Agreement. Although the purported basis for refusing to pay rent in accordance

with the Parking License Agreement was that Plaintiff could not provide the number of Public Spaces required under the Parking License Agreement, the Town admitted that Plaintiff's proposed project included 334 total spaces, with 234 spaces in the parking deck and 100 surface parking spaces. Nevertheless, the Town claimed that Plaintiffs plan did not provide sufficient Public Spaces because those spaces were required to be used by the neighboring restaurants located on the Shem Creek waterfront. This position was contrary to the Town's prior position that the Public Spaces envisioned under Plaintiff's proposed project would be available for use by those same restaurants and would count towards the amount of Public Spaces required by the Parking License Agreement.

ANSWER: The Defendant admits that on or about February 10, 2015, the Town Council voted to support the position taken by Mr. DeMoura in his letter dated November 11, 2014. As stated above, this letter was in writing and is the best and most accurate evidence of its contents. The Defendant alleges that the Plaintiff made a unilateral business decision to maximize its profits and not to design the building as to satisfy its obligations under the License Agreement. The Defendant further alleges that the Town's Ordinances clearly require that the adjacent restaurants supply a specified minimum number of parking spaces. As to the remainder of the allegations contained in paragraph 23, the Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations and does, therefore, deny the same and puts the Plaintiff to its proof thereof.

24. **Complaint**: The Town's decision to refuse to honor its contractual obligation to pay rent to Plaintiff in accordance with the Parking License Agreement was based on pretextual grounds. The Town's actual reason for refusing to pay rent to Plaintiff was to deny a revenue source to Plaintiffs proposed project, thereby rendering it economically

unfeasible and placating the vocal opposition to the project.

ANSWER: The Defendant denies the allegations contained in paragraph 24 and puts the Plaintiff to its proof thereof.

25. **Complaint**: Despite the Town's denial of an anticipated revenue source to support the project, Plaintiff was able to obtain necessary financing to develop the project by entering into a joint venture with a capital partner.

ANSWER: As to the allegations contained in paragraph 25, the Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations and does, therefore, deny the same and put the Plaintiff to its proof thereof.

26. **Complaint**: On or around October 10, 2014, Plaintiff requested that the Town provide an estoppel certificate as required by Section 7.04 of the Parking License Agreement. The Town, however, refused to honor the requested estoppel certificate.

ANSWER: The Defendant admits that the Plaintiff on or about October 10, 2014, requested an estoppel certificate. As to the remainder of the allegations contained in paragraph 26, the Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations and does, therefore, deny the same and puts the Plaintiff to its proof thereof.

27. **Complaint**: Plaintiff commenced construction on the office building and parking deck on or about November 5, 2015. Although Section 1.07(a) of the Parking License Agreement required the Town to pay rent for the first year upon the commencement of construction, the Town did not make the required rental payment in violation of the Parking License Agreement.

ANSWER: The Defendant alleges that the Plaintiff failed to satisfy the terms and

conditions of the License Agreement and, as a result the Town did not make rental payments, which were conditioned on providing a specific number of public spaces. As to the remainder of the allegations contained in paragraph 27, the Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations and does, therefore, deny the same and puts the Plaintiff to its proof thereof.

28. **Complaint**: During construction of the project, Town Council explored the possibility of condemning the site of the parking deck project through the Town's exercise of eminent domain in an effort to prevent the completion of the project. However, those efforts ultimately failed, and Plaintiff; through its joint venture, completed construction on the office building and parking deck and received its final certificate of occupancy in 2017.

ANSWER: Defendant admits that the Plaintiff completed construction of the office building and parking deck and received a certificate of occupancy in 2017. As to the remainder of the allegations contained in paragraph 28, the Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations and does, therefore, deny the same and puts the Plaintiff to its proof thereof.

29. **Complaint**: The parking deck opened for business on February 8, 2017. Since that date, Plaintiff's project has provided 234 total parking spaces, including 117 Public Spaces in substantial performance of its obligations under the Parking License Agreement. However, the Town has failed to pay any rent to Plaintiff in breach of its obligations under the Parking License Agreement.

ANSWER: The Defendant admits that the parking deck has opened and is operating, and that the Defendant is not obligated to make any payments to the Plaintiff. The Defendant denies that the Plaintiff substantially performed its obligations under the Parking License

Agreement; in fact, the Plaintiff admits it has failed to satisfy the terms of the Agreement by not providing the specified number of public spaces. As to the remainder of the allegations contained in paragraph 29, the Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations and does, therefore, deny the same and puts the Plaintiff to its proof thereof.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

30. **Complaint**: Plaintiff realleges and incorporates the allegations contained in the aforementioned paragraphs as if fully and completely set forth herein verbatim.

ANSWER: The Defendant incorporates by reference all ANSWERs to aforementioned paragraphs as if fully set forth herein.

31. **Complaint**: The Parking License Agreement is a valid contract between Plaintiff and the Town.

ANSWER: The Defendant admits above that the Town signed the License Agreement and that said Agreement is in writing and subject to specific terms, conditions, and limitations. The Defendant further alleges that the Plaintiff failed to perform and satisfy specific terms of the Agreement because it made a business decision to maximize its profits and not provide the specific number of public spaces required by the Agreement. Whether the Agreement is "valid" is a matter of law and need not be addressed in this ANSWER. All other allegations in paragraph 31 are denied and the Plaintiff put to its proof thereof.

32. **Complaint**: Section 1.07 of the Parking License Agreement requires the Town to pay to Plaintiff annual rent in the amount of One Hundred Eighty-Five Thousand Dollars ($185,000) for fifteen (15) years, for a total amount of Two Million Seven Hundred Seventy-Five Thousand Dollars ($2,775,000).

ANSWER: The Defendants alleges that the Plaintiff refused to satisfy the terms of the Agreement, made a business decision to maximize its profits at the expense of providing the Agreement specific number of public spaces, but otherwise admits the allegations of paragraph 32.

33. **Complaint**: Plaintiff fully or substantially performed its obligation to provide Public Spaces under the Parking License Agreement. Despite Plaintiff's performance, the Town breached Section 1.07 of the Parking License Agreement by failing to pay rent.

ANSWER: The Defendant denies the allegations of paragraph 33.

34. **Complaint**: Section 3.04 of the Parking License Agreement requires the Town to accept the Premises if constructed in a manner substantially similar to Plaintiff's conceptual plan for the Premises.

ANSWER: The Defendant alleges that the Town was in no way required to accept fiduciary responsibility for non-compliance and nonperformance of a material term of the Agreement, and, therefore, denies the allegations contained in paragraph 34 and puts the Plaintiff to its proof thereof.

35. **Complaint**: Plaintiff constructed the Premises in a substantially similar manner to its conceptual plan, and the Town breached Section 3.04 by failing to accept the Premises.

ANSWER: The Defendant denies the allegations of paragraph 35.

36. **Complaint**: Section 7.04 of the Parking License Agreement required the Town to provide Plaintiff with an estoppel certificate on request.

ANSWER: The Defendant denies that any section of the Agreement, including Section 7.04, requires under all circumstances that an estoppel certificate be provided at the will of the Plaintiff. All remaining allegations are denied.

37. **Complaint**: Plaintiff requested that the Town provide an estoppel certificate, and the Town breached Section 7.04 of the Parking License Agreement by refusing to provide such estoppel certificate as requested by Plaintiff.

ANSWER: The Defendant admits that the Plaintiff requested of the Town an estoppel certificate but denies all remaining allegations of paragraph 37, including the allegation that the Town breached any provision of the Agreement, and puts the Plaintiff to its proof thereof.

38. **Complaint**: The Parking License Agreement contains an implied covenant of good faith and fair dealing, which required the Town to avoid doing anything to impair Plaintiffs rights to receive benefits under the Parking License Agreement.

ANSWER: Paragraph 38 contains legal arguments to which a response is not required. As to the remaining allegations, should a response be required, Defendant denies the allegations of paragraph 38 and puts the Plaintiff to its proof thereof.

39. **Complaint**: The Town breached the implied covenant of good faith and fair dealing by taking actions deliberately designed to prevent Plaintiff from developing the parking deck as envisioned under the Parking License Agreement and receiving rent thereunder, including (a) adopting zoning amendments that forced Plaintiff to redesign the parking deck and provide fewer spaces than originally planned; (b) requiring larger parking spaces than originally proposed by Plaintiff; (c) refusing to agree that Plaintiff's redesigned plan for the parking deck was "substantially similar" to the plan as envisioned under the Parking License Agreement; (d) refusing to consider a proposed amendment to the Parking License Agreement; (e) refusing to provide an estoppel certificate as requested by Plaintiff; (f) making public statements regarding the economic

unfeasibility of the parking deck that made it more difficult for Plaintiff to obtain necessary financing to develop the project; (g) receiving and relying on confidential information improperly obtained by opponents of the project without authorization to concoct pretextual grounds for its failure to honor its contractual obligations; (h) adopting unfavorable interpretations of zoning ordinances to hinder Plaintiffs ability to develop the project; and (i) exploring possible condemnation of the project site to prevent its development and completion.

ANSWER: The Defendant alleges that the Plaintiff attempted to maximize their profits by incorporating compact parking spaces which are not authorized by Town Ordinances and, therefore, the Town refused to permit these non-compliant parking spaces. The Defendant denies every allegation in paragraph 39 and puts the Plaintiff to its proof thereof.

40. **Complaint**: To the extent that Plaintiff failed to provide sufficient Public Spaces and fully satisfy its obligations under the Parking License Agreement, Plaintiff's failure to perform is excused under the doctrines of impossibility and commercial frustration because the Town rendered Plaintiff's performance impossible.

ANSWER: The Defendant denies every allegation contained in paragraph 40 and puts the Plaintiff to its proof thereof.

41. **Complaint**: To the extent that Plaintiff failed to provide sufficient Public Spaces and fully satisfy its obligations under the Parking License Agreement, Plaintiffs failure to perform is excused under Section 2.06 of the Parking License Agreement, which provides that a party shall not be deemed in default with respect to any terms, covenants, or conditions if such default arises from government regulations or controls.

ANSWER: The Defendant denies every allegation in paragraph 41 and puts the Plaintiff to

its proof thereof.

42. **Complaint**: As a result of the Town's breaches of the Parking License Agreement, the Town is in default, and Plaintiff is entitled to the rent owed to it by the Town in accordance with Section 6.01 of the Parking License Agreement.

ANSWER: The Defendant denies every allegation contained in paragraph 42 and puts the Plaintiff to its proof thereof.

43. **Complaint**: As a result of the Town's breaches of the Parking License Agreement, Plaintiff had to cure such breaches, and Plaintiff is entitled to costs incurred to cure such breaches in accordance with Section 6.02 of the Parking License Agreement.

ANSWER: The Defendant denies every allegation contained in paragraph 43 and puts the Plaintiff to its proof thereof.

44. **Complaint**: Under Section 6.01 of the Parking License Agreement, Plaintiff is entitled costs and attorneys' fees arising from this litigation.

ANSWER: The Defendant denies every allegation contained in paragraph 44 and puts the Plaintiff to its proof thereof.

FOR A SECOND CAUSE OF ACTION
(Quantum Meruit / Unjust Enrichment)

45. **Complaint**: Plaintiff realleges and incorporates the allegations contained in the aforementioned paragraphs as if fully and completely set forth herein verbatim.

ANSWER: The Defendant incorporates by reference all ANSWERs to aforementioned paragraphs as if fully set forth herein.

46. **Complaint**: Plaintiff provided a benefit to the Town in the form of increased public parking spaces available for the public park and restaurants along Shem Creek.

ANSWER: As the allegations contained in paragraph 46, the Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations and does, therefore, deny the same and put the Plaintiff to its proof thereof.

47. **Complaint**: The Town has realized the benefit of increased public parking by making the public park and restaurants along Shem Creek more accessible, which has consequently increased tax revenues for the Town and obviated the need for the Town to make improvements and expenditures for more parking opportunities along Shem Creek.

ANSWER: As the allegations contained in paragraph 47, the Defendant alleges a lack of information and knowledge sufficient to form a belief as to the truth of the allegations and does, therefore, deny the same and put the Plaintiff to its proof thereof.

48. **Complaint**: The retention by the Town of the benefits of increased public parking conferred upon it by Plaintiff would be unjust because Plaintiff developed the parking deck project under the reasonable expectation that the Town would pay rent for public parking spaces provided in the parking deck.

ANSWER: The Defendant assumed the risk of non-compliant construction motivated by a desire to maximize profits because they were clearly put on notice by the Town Administrator and the Town Council more than a year before construction commenced that strict compliance with the provisions of the Agreement was required. The Defendant denies the allegations contained in paragraph 48 and puts the Plaintiff to its proof thereof.

49. **Complaint**: As a result of the Town being unjustly enriched by Plaintiffs provision of increased public parking along Shem Creek, Plaintiff is entitled to be compensated for the value of providing such public spaces.

ANSWER: The Defendant denies the allegations contained in paragraph 49 and puts the

Plaintiff to its proof thereof.

50. All allegations not specifically and unreservedly admitted are deemed denied and the Plaintiff is put to its proof thereof.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests the following relief:

1. An award of all rent payments due under the Parking License Agreement, or in the alternative, the value of the spaces provided by Plaintiff to the Town;
2. An award for costs incurred to cure the breaches of the Parking License Agreement by the Town;
3. An award of Plaintiff attorneys' fees and costs associated with this matter pursuant to Section 6.01 of the Parking License Agreement; and/or
4. An award of all other appropriate relief as is just and proper under the circumstances.

ANSWER: The Defendant denies that the Plaintiff is entitled to any relief including all relief requested in its Prayer For Relief and puts the Plaintiff to its proof thereof.

AFFIRMATIVE DEFENSES

As for further and Affirmative Defenses all of which caused in whole or in part, all damages claimed by the Plaintiff, the Defendant alleges:

1. **Bad Faith Behavior and Unclean Hands.** The Plaintiff acted in bad faith and with unclean hands by, *inter alia*, misrepresenting material facts which formed the basis for the Agreement.
2. **Laches.** The Plaintiff delayed pursuing a claim against the Defendant for an excessive period and consequently, the Defendant is prejudiced in defending the claim.

3. **Business Decision.** The Plaintiff made a business decision to maximize profits by intentionally designing the structure to produce less than the required number of parking spaces despite the contractual provisions mandating a higher number of public spaces.
4. **Breach of Contract.** The Plaintiff intentionally breached the Agreement by failing to provide the requisite number of spaces which it promised to make available to the public.
5. **Equitable Estoppel.** The Plaintiff, by refusing to accept less extraordinary profit on the construction of this structure and failing to provide the required number of public spaces, acted in a manner which communicated that the Defendant's performance has been excused and the Defendant relied on such action.
6. **Mutual Mistake.** Apparently, from reading the Plaintiff's Complaint the number of public spaces to be provided was a rough estimate which could unilaterally be ignored by the Plaintiff in pursuit of extraordinary profits. The Defendant clearly believed the number of public spaces was an essential and material term. Therefore, the parties made a mistake as to this existing material term and condition of the bargain and the Agreement is voidable. If, however, this was a secret reservation known only to the Plaintiff, Plaintiff solely bears the risk of the mistake and the Defendant may be entitled to damages.
7. **Impossibility.** It has become impossible to perform the contract through the unforeseeable act of the Plaintiff in designing the structure to contain far fewer public parking spaces than specified in the Agreement.
8. **No Consideration.** The amended, proposed Agreement lacks consideration and the Defendant was not obligated to perform.
9. **Waiver.** The Plaintiff waived its rights to enforce any obligation contained in the Agreement by, inter alia, failing to provide the required number of public parking spaces.
10. **Absence of Condition Precedent.** A condition precedent to activating performance obligations did not occur. Providing the requisite number of public parking spaces was a

material condition precedent which needed to occur before Plaintiff had a right to enforce any provision of the Agreement.

11. The Defendant reserves the right to amend and add additional affirmative defenses or counterclaims as discovery proceeds.

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Attorneys for the Defendants

Charleston, South Carolina
December 22, 2017

CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 22nd day of December 2017, true copies of the foregoing **Defendant's ANSWER** has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto to.

E. Brandon Gaskins
MOORE & VAN ALLEN, PLLC
PO Box 22828
Charleston, SC 29413-2828

HINCHEY MURRAY & PAGLIARINI

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
SHEM CREEK DEVELOPMENT GROUP, LLC, Plaintiffs, vs. TOWN OF MT. PLEASANT, Defendants.	**Case No. 2017-CP-10-5493** **DEFENDANT'S NOTICE OF MOTION AND MOTION TO COMPEL PLAINTIFF TO PRODUCE DOCUMENTS RESPONSIVE TO DEFENDANT'S SECOND REQUEST FOR PRODUCTION AND, IN THE ALTERNATIVE, COMPEL THE PRODUCTION OF THE SAME DOCUMENTS IN RESPONSE TO DEFENDANT'S SUBPOENA TO RELATED ENTITY, 101 COLEMAN PARTNERS, LLC**

PLEASE TAKE NOTICE THAT Defendant THE TOWN OF MOUNT PLEASANT, by and through its attorneys, pursuant to Rules 37 and 45(c)(2)(B) of the South Carolina Rules of Civil Procedure, hereby moves this Honorable Court for an order compelling Plaintiff to respond to Defendant's Second Request for Production of Documents. Defendant also seeks an order compelling the production of financial documents from related entity 101 Coleman Partners, LLC, in response to a subpoena issued August 14, 2019.

PROCEDURAL HISTORY

On July 23, 2019, Plaintiff withdrew its named financial expert, Roy Strickland, and provided Tyler Flesch, a member of Shem Creek Development Group, LLC, as the representative to discuss the calculation of its damages claim.[1] In response, Defendant noticed Mr. Flesch's deposition for August 8, 2019, and issued a subpoena on August 5, 2019. Defendant also served its Second Requests for Production of Documents on Plaintiff (hereinafter

[1] See Pl's. 2d Supp. An. to Def. 1st Int. (Jul. 23, 2019), attached hereto as **Exhibit A.**

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"2d RFP").[2] Specifically, in both documents Defendant made 15 separate requests for documents concerning the financial performance of the Garage and Plaintiff's financial condition related thereto. Plaintiff's counsel objected to thirteen of the fifteen requests at least in part on the ground that "The financial information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and information relating to the financial projections for the project would not affect the damages to which Plaintiff is entitled in this case."[3] Plaintiff has refused to provide documents responsive to any of the fifteen requests.

Plaintiff's objection is improper on the following grounds: (1) the requested documents are relevant to Plaintiff's claim for rent allegedly due under the Parking License Agreement ("PLA") and the Town's defenses thereto; and (2) Plaintiff mischaracterizes the limitation on damages provision in the PLA as a liquidated damages provision.

In addition, during the supplemental deposition of Tyler Flesch, a member of Shem Creek Development Group, LLC, taken on August 8, 2019, Mr. Flesch refused to answer questions directly related to mitigation requirements and the Net Operating Profit of the garage, explaining that Shem Creek Development Group, LLC, assigned its ownership and management interests the day it filed suit against the Town to a new entity, 101 Coleman Partners, LLC.[4] Mr. Flesch also argued the Town was not allowed to consider mitigation in the calculation of damages.[5] He stated all records related to the operation of the garage were kept by 101 Coleman Partners, LLC.[6]

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[2] See Def. 2d RFP dated Aug. 5, 2019, attached hereto as **Exhibit B**.
[3] See Pl. Res. to 2d RFP and letter from Atty. Gaskins dated August 8, 2019, attached hereto as **Exhibit C.**
[4] See Dep. of Tyler Flesch, p. 25, ll. 14-18 (Aug. 8, 2019) attached as **Exhibit D.**
[5] Id. at p. 26, ll. 22-24 and p. 27, l.22 through p. 28, l.7.
[6] Id. at 29, ll.17-23.

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In response to the representations of Mr. Flesch, Defendant then issued a subpoena to 101 Coleman Partners, LLC on August 14, 2019. Defendant received a written response on August 26, 2019 from counsel for 101 Coleman Partners, LLC, objecting to the request claiming: (1) the Town should seek the records from Shem Creek Development Group, LLC, as it is a member of 101 Coleman Partners, LLC, and also has access; and (2) the information sought is irrelevant to this case.[7]

FACTS

Parking License Agreement Section 1.07. Rent

Section 1.07 of the PLA, titled "Rent", provided for the amount and structure of rent payments by the Town to Plaintiff. In consideration for the Garage's 276 spaces being reserved for the public for 30 years, the Town was to pay Plaintiff a "Fixed Minimum Rent" of $185,000/year for 15 years.[8] The PLA also provides that the Town would be eligible for a rent reduction based upon the financial performance of the Garage.[9] Specifically, the PLA stated, "If at any time during the Rent Period of this License, should the operation of the Parking Garage result in an annual net operating profit, [the Town] shall be entitled to reduce its Fixed Minimum Rent Payment for the following License Year by its pro rata share, based upon the percentage of the Parking Spaces comprising Public Spaces."[10] Plaintiff's principals and 30(b)(6) deposition designees Robert Small and Tyler Flesch both testified on behalf of Plaintiff that the Garage would be profitable over the term of the PLA.[11] In fact, Mr. Small specifically testified that the

[7] See ltr. From Atty. Lambert dated Aug. 26, 2019, attached hereto as **Exhibit E.**
[8] See Parking License Agreement, ¶ 1.07(a) attached hereto as **Exhibit F.**
[9] See ¶ 1.07(b).
[10] Id.
[11] See 30(b)(6) Dep. of Robert Small, pp. 67:1-69:24; see 30(b)(6) Dep. of Tyler Flesch, pp. 19:12-20:7, attached hereto as **Exhibit G.**

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rent reduction provision had value to the Town.[12] As such, the net rent under the PLA, if any, is calculated by beginning with the Total Minimum Rent due under Section 1.07(a) and subtracting the Rent Reduction as calculated under Section 1.07(b).

Plaintiff seeks damages for rent allegedly due under the PLA, however, Plaintiff's proposed damages calculation completely disregards Section 1.07(b)'s rent reduction provisions and includes only the Total Minimum Rent due under Section 1.06(b).[13] Despite the clear language of the PLA requiring a rent reduction calculation and Plaintiff's principals' admission related to the value of those provisions, Plaintiff argues that its damages claim for rent under the PLA is not subject to the rent reduction provisions, thereby rendering irrelevant Defendant's requests for documents concerning the profitability of the Garage.

PLA Limitation of Remedies Does Not Amount to Liquidated Damages

Article VI of the PLA is titled "DEFAULTS AND REMEDIES", wherein Section 6.01 prescribes the remedies available to the parties and provides,

> Licensor [(Plaintiff)] shall be entitled to bring an action for specific performance or breach of contract against Licensee, but agrees that its ***sole and exclusive remedy shall be the rent payments due under this Agreement***. Both parties waive any claims that either may have to any consequential or punitive damages, and agree that 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.

(emphasis added).

Notably, the parties waived any claims to consequential or punitive damages, with Plaintiff's sole remedy being a claim for "rent payments due under the Agreement." This provision does not disclaim the rent reduction provision nor does it change the way rent is calculated in the event Plaintiff pursues a breach of contract claim against the Town. Plaintiff's

[12] Id.

[13] See Pl's. 2d Supp. An. to Def. 1st Int. (Jul. 23, 2019), attached hereto as **Exhibit A.**

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position that it is entitled to the Fixed Minimum Rent in its entirety without a commensurate reduction based upon the Garage's profitability has no foundation or support in the PLA.

Therefore, the Town's request for documents related to the Garage's profitability and Plaintiff's financial condition related thereto is relevant to both Plaintiff's claim and the Town's defense of this action.

LEGAL AUTHORITY AND ARGUMENT

SCRCP 26(b)(1) provides:

> Parties may obtain discovery regarding any matter, not privileged, ***which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party***, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(emphasis added). The Town's specific requests for documents pertaining to the financial performance of the Garage include, but are not limited to:

- Any and all Pro Forma financial statements, both internally and externally generated, drafted or submitted from project inception to present;
- Any and all forecasts and/or projections, both internally and externally generated, including but not limited to revenues, profit, operating expenses, net operating income, etc.;
- Internal or and/or management prepared financial statements from inception to present;
- Internal and/or management prepared reports of revenues and expenses including sufficient segment detail (i.e., detailed by commercial rental, "Parking Spaces," "Public Spaces," and "Reserved Spaces") from inception to present;

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- Report detailing "Net Operating Profit generated by "Parking Spaces" from inception to present;
- Records or Reports detailing "Parking Spaces" usage and resulting revenue from inception to present.

These records are relevant to any calculation of rent due under the PLA, as prescribed by Section 1.07 and detailed above. Furthermore, Defendant seeks discovery regarding Plaintiff's mitigation efforts which are relevant to its defense of Plaintiff's claims.[14] Therefore, Plaintiff should be compelled to produce documents responsive to the Town's Second Request for Production.

Defendant Did Not Agree to a Liquidated Damages Provision

Plaintiff erroneously asserts both in its Responses to the Town's Second Request for Production and in correspondence from Plaintiff's counsel that "The information sought is not relevant to any issue in dispute in this case ***as the parties agreed to a liquidated damages provision in the parking license agreement*** and the financial information would not affect the damages to which Plaintiff is entitled in this case." (emphasis added).[15] Plaintiff argues that because the parties agreed to a liquidated damages provision, the Town cannot raise mitigation as a defense. Presumably, Plaintiff is referring to PLA Section 6.01 which indicates that the "***sole and exclusive remedy shall be the rent payments due under this Agreement.***" Although the PLA limits the remedies available to Plaintiff, this provision is not a liquidated damages provision.[16]

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[14] See Lyons v. Fid. Nat'l Title Ins. Co., 415 S.C. 115, 133, 781 S.E.2d 126, 136 (Ct. App. 2015) ("'A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances,...The duty to mitigate losses applies to contracts.'" (citations omitted)).

[15] See Pl. Res. to 2d RFP and letter from Atty. Gaskins dated August 8, 2019, attached hereto as **Exhibit C.**

[16] Assuming arguendo that the Court finds this limitation of liability to be a liquidated damages provision, the requested documents are still relevant to the calculation of rent as prescribed in PLA Section 1.07. Section 1.07 has

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Pursuant to PLA Section 6.01, Plaintiff and the Town agreed to "waive any claims that either may have to any consequential or punitive damages" and that Plaintiff's "***sole and exclusive remedy shall be the rent payments due under this Agreement***." "When a contract is entered into freely and voluntarily, contractual limitations are normally enforced."[17] "This Court has generally upheld limitations of liability and exculpatory clauses, finding they are commercially reasonable."[18] "[A] court's ultimate duty is confined to interpreting the contractual provisions agreed to by the parties—regardless of their wisdom or folly, apparent unreasonableness, or any failure of the parties to guard their interests carefully.[19] Importantly, Plaintiff does not allege this limitation is unenforceable, but rather that it is a liquidated damages provision.

A claim for damages is liquidated in character if the amount thereof is fixed, has been agreed upon, or is capable of ascertainment by mathematical computation or operation of law.[20] On the other hand, unliquidated are damages that cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury.[21]

Plaintiff's damage calculation for rent due under the PLA takes the fixed minimum rent of $185,000, multiplies it by 15 (the number of years the Town was to pay rent), incorporates statutory interest, and discounts the total to bring it to present value to arrive at the number it alleges is the amount of rent due under the PLA. Plaintiff's calculation; however, completely disregards the rent reduction calculation in PLA Section 1.07(b), which provides:

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nothing to do with mitigation of damages, but rather to rent calculation -- a calculation necessary to determine Plaintiff's alleged damages.

[17] Maybank v. BB&T Corp., 416 S.C. 541, 573, 787 S.E.2d 498, 515 (2016) (citations omitted).

[18] Id.

[19] Id.

[20] Wells Fargo, N.A. v. Marion Amphitheatre, LLC, 408 S.C. 87, 757 S.E.2d 557, 559 (Ct. App. 2014) (citations omitted).

[21] Id.

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> **Rent Reduction based upon Financial Performance of the Parking Garage:** If at any time during the Rent Period of this License should the operation of the Garage result in an annual net operating profit, the Licensee shall be entitled to reduce its Fixed Minimum Rent Payment for the following License Year of the Term by its pro rata share, based upon the percentage of the Parking Spaces comprising the Public Spaces.
>
> (i) For the purpose of this Agreement, "Net Operating Profit" shall be defined as gross revenue generated by the Parking Spaces during any License Year, less all expenses related to operation maintenance and repair of the Parking Garage (including reasonable reserves for repair and replacements), including but not limited to the total costs of operating, repairing, lighting, cleaning, maintaining, painting, securing, managing and insuring the Parking Garage and paying all management fees, taxes, public charges and assessments of whatsoever nature directly or indirectly assessed or imposed upon the land, buildings, equipment and improvements constituting the Parking Garage, including but not limited to, the cost of all utilities necessary to serve the Parking Garage, all ground rent payments for the Parking Garage, all real property taxes, rates, duties and assessments, local improvement taxes, import charges or levies, whether general or special that are levied charged or assessed against the Parking Garage by any lawful taxing authority whether federal, state, county, municipal, school or otherwise (other than income, inheritance and franchise taxes thereon)…(emphasis added).

Plaintiff's 30(b)(6) designee and principal Tyler Flesch testified that he believes Plaintiff's alleged damages should NOT be reduced as required by PLA Section 1.07(b).[22] Further, when asked about the financial records pertaining to Garage operations and net operating profit, Mr. Flesch emphasized that "interpretation of those financials is not cut and dry" and that the "expenses are not allocated in a way that – I can't say that it's accurate…"[23] The complexity of PLA Section 1.07(b) and the testimony of Mr. Flesch regarding the difficulty of allocating expenses as required by that Section demonstrate that the rent damages that Plaintiff seeks are not liquidated.

Plaintiff unilaterally interpreted the PLA and determined that Rent Reduction Section 1.07(b) does not apply to this case. Based upon this erroneous interpretation, Plaintiff improperly

[22] See Dep. of Tyler Flesch, pp. 27:22-29:2, (Aug.8, 2019), attached hereto as **Exhibit D.**
[23] Id.at pp. 29:17-32:13.

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withheld discovery to which the Town is entitled. It is for the Court to determine whether the Rent Reduction Section applies to Plaintiff's claimed damages. If so, then the Court will need to determine how expenses are allocated for determining the extent to which the Garage is profitable, not only in the present, but also for the purpose of forecasting at least ten years of future profits. Such damages will be left to the discretion of the Court and by definition are not liquidated.[24] Both entities are playing a shell game with Defendant in order to prevent the production of documents clearly relevant to their claim for damages and mitigation responsibilities.

CONCLUSION

Based on the foregoing, the undersigned hereby requests This Honorable Court to enter an order compelling Plaintiff to respond in full to Defendant's Second Request for Production of Documents. It is also undisputed that Shem Creek Development Group, LLC assigned operational rights to 101 Coleman Partners, LLC, the day it filed suit against the Town, while also maintaining an ownership interest. Defendant also seeks an order compelling 101 Coleman Partners, LLC to produce the financial and operational documents in response to the subpoena sent on August 14, 2019. This motion is supported by the pleadings in this case, as well as any memorandum of law to be submitted and arguments to the Court.

Pursuant to SCRCP 37(a)(4), Defendant also requests the court for an Order requiring Plaintiff to pay to Defendant's expenses incurred in obtaining the order, including attorney's fees.

The undersigned attorneys for Defendant hereby certify pursuant to Rule 11 of the South Carolina Rules of Civil Procedure that they have contacted the attorney for Plaintiff in an attempt to resolve this matter without the necessity of filing a motion and have not been successful.

[24] See Wells Fargo, N.A. v. Marion Amphitheatre, LLC, 408 S.C. 87, 757 S.E.2d 557, 559 (Ct. App. 2014) (citations omitted).

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Pursuant to SCRCP 37(a)(4), Defendant also requests the court for an Order requiring Plaintiff to pay to Defendant's expenses incurred in obtaining the order, including attorney's fees.

The undersigned attorneys for Defendant hereby certify pursuant to Rule 11 of the South Carolina Rules of Civil Procedure that they have contacted the attorney for Plaintiff in an attempt to resolve this matter without the necessity of filing a motion and have not been successful.

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Charleston, South Carolina

October 22, 2019

Attorneys for the Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 22nd day of October, 2019, true copies of the foregoing **DEFENDANT'S NOTICE OF MOTION AND MOTION TO COMPEL PLAINTIFF TO PRODUCE DOCUMENTS RESPONSIVE TO DEFENDANT'S SECOND REQUEST FOR PRODUCTION** has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto to.

E. Brandon Gaskins
MOORE & VAN ALLEN, PLLC
PO Box 22828
Charleston, SC 29413-2828

s/Julia P. Copeland
Hinchey, Murray & Pagliarini, LLC

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Exhibit A

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Moore&VanAllen

July 23, 2019

E. Brandon Gaskins
Attorney at Law

T 843 579 7038
F 843 579 8738
brandongaskins@mvalaw.com

Moore & Van Allen PLLC

78 Wentworth St.
Charleston, SC 29401-1428

Mailing Address:
Post Office Box 22828
Charleston, SC 29413-2828

VIA U.S. MAIL AND E-MAIL
jjhinchey@lawyershmp.com
jcopeland@lawyershmp.com
dpagliarini@lawyershmp.com

James J. Hinchey, Jr., Esquire
Julia P. Copeland, Esquire
David G. Pagliarini, Esquire
Hinchey Murray & Pagliarini, LLC
56 Folly Road Blvd.
Charleston, SC 29407

Re: ***Shem Creek Development Group, LLC v. Town of Mount Pleasant, South Carolina***
Civil Action No. 2017-CP-10-5493
MVA File No. 043920.01

Dear Counsel,

On December 31, 2018, Plaintiff, Shem Creek Development Group, LLC ("SCDG"), identified Roy Strickland CPA/CFF, CFE, MAFF, of Dixon Hughes Goodman LLP, as an expert witness who might testify in the above-referenced matter.

Plaintiff hereby withdraws Mr. Strickland as a potential testifying expert witness. Mr. Strickland will be serving as a consulting expert only.

Additionally, enclosed please find for service upon you Plaintiff's Second Supplemental Answers to Defendant's First Set of Interrogatories to Plaintiff, along with Plaintiff's document Bates labeled "SCDG0004389".

Sincerely,

MOORE & VAN ALLEN PLLC

E. Brandon Gaskins

EBG/meh

cc: Claude Tackett, Esquire (*Via E-mail Only*)

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Shem Creek Development Group, LLC, Plaintiff, v. The Town of Mount Pleasant, South Carolina, Defendant.	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2017-CP-10-5493 **PLAINTIFF'S SECOND SUPPLEMENTAL ANSWERS TO DEFENDANT'S FIRST SET OF INTERROGATORIES TO PLAINTIFF**

TO: JAMES J. HINCHEY, JR., ESQUIRE, AND JULIA P. COPELAND, ESQUIRE, HINCHEY, MURRAY & PAGLIARINI, LLC, ATTORNEYS FOR DEFENDANTS:

Plaintiff Shem Creek Development Group, LLC ("Plaintiff") further responds to Defendant's First Set of Interrogatories as follows:

GENERAL OBJECTIONS

1. Plaintiff objects to the Interrogatories to the extent that they: (a) seek to require Plaintiff to provide any information or identify documents beyond what is available to Plaintiff at present from a reasonable search of its own files; or (b) seek to require Plaintiff to provide any information or identify documents within, subject to, or protected by the attorney-client privilege, work-product privilege/immunity, or other privileges; or (c) seek to impose upon Plaintiff any other obligation not imposed by the South Carolina Rules of Civil Procedure, specifically Rules 26 and 33.

2. To the extent Plaintiff responds as set forth herein, nothing in these responses should be construed as waiving rights or objections which otherwise might be available to Plaintiff, nor should Plaintiff's responses to any of these interrogatories be deemed an admission of relevancy, materiality, or admissibility in evidence of the interrogatories or the responses thereto.

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3. These general objections apply to all of Plaintiff's responses. To the extent that specific general objections are cited in a specific response, those specific citations are provided because they are believed to be particularly applicable to the specific interrogatories and are not to be construed as a waiver of any other general objection applicable to information falling within the scope of the interrogatory.

4. The following responses reflect Plaintiff's present knowledge, information, and belief and may be subject to change or modification based on Plaintiff's further discovery, or on facts or circumstances which may come to Plaintiff's knowledge during the course of discovery and/or preparation for litigation.

ANSWERS TO INTERROGATORIES

19. In paragraph 32 of your Complaint you claim the Town was required to pay the Plaintiff over fifteen years a total amount of Two Million Seven Hundred Seventy-Five Thousand Dollars ($2,775,000). Please state:

a. The present day value of the stated "total amount";
b. The method used for the calculation made in (a) above;
c. The name and address of any individual participating in the above calculation.

ANSWER: **Plaintiff objects to this interrogatory because Defendant has exceeded the maximum number of interrogatories, including subparts, allowed under Rule 33(b)(9), SCRCP. Subject to and without waiving such objection, Plaintiff has not engaged an expert witness to calculate the present value of the total amount. Plaintiff reserves the right to supplement this answer at the appropriate time.**

SUPPLEMENTAL ANSWER:

a. **As of the estimated date of trial, the present day value of the total amount of rent due under the Parking License Agreement will be $2,347,229.**

b. As demonstrated by the attached spreadsheet labeled SCDG0004389, the present day value of the total amount of rent due under the Parking License Agreement is based on (1) past annual rent of $185,000 for license years 2017, 2018, and 2019 plus pre-judgment statutory interest accruing at a rate of 8.75% under S.C. Code Ann. § 34-31-20(A), and (2) future rent of $185,000 for each of the remaining thirteen years of the rent period discounted to present value using a 4.6% discount rate, which was chosen because it is the cost of debt under existing loan terms for the project.

c. Tyler Flesch.

E. Brandon Gaskins (State Bar No. 73274)
MOORE & VAN ALLEN, PLLC
78 Wentworth Street
P.O. Box 22828
Charleston, South Carolina 29413-2828
Telephone: (843) 579-7000
brandongaskins@mvalaw.com

Attorneys for Plaintiff Shem Creek Development Group, LLP

July 23, 2019
Charleston, SC

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Shem Creek Development Group, LLC vs. Town of Mount Pleasant, South Carolina	
Damages Associated With Present Value of Fixed Minimum Rent Payments	
Date of Loss:	July 28, 2017
Initial Lease Term (15 years):	July 27, 2032
Date of Trial:	February 27, 2019
Discount Factor:[1]	4.60%
Interest Rate (SC Statutory Pre-Judgement):	8.75%
Annual Rent:	$ 185,000

	Lost Rent	Present Value	Interest	Total Loss
Pre Trial: Past Losses	$ 555,000	$ 555,000	$ 76,756	$ 631,756
Post Trial: Future Losses	2,220,000	1,715,473	-	1,715,473
Total	**$ 2,775,000**	**$ 2,270,473**	**$ 76,756**	**$ 2,347,229**

Period	Lost Rent	Present Value	Interest	Total Loss
Pre-Trial: Past Losses				
July 28, 2017 - July 27, 2018	$ 185,000	$ 185,000	$ 41,773	$ 226,773
July 28, 2018 - July 27, 2019	185,000	185,000	25,585	210,585
July 28, 2019 - July 27, 2020 [2]	185,000	185,000	9,398	194,398
	$ 555,000	$ 555,000	$ 76,756	$ 631,756
Post-Trial: Future Losses				
July 28, 2020 - July 27, 2021	$ 185,000	$ 180,886	$ -	$ 180,886
July 28, 2021 - July 27, 2022	185,000	172,932	-	172,932
July 28, 2022 - July 27, 2023	185,000	165,327	-	165,327
July 28, 2023 - July 27, 2024	185,000	158,056	-	158,056
July 28, 2024 - July 27, 2025	185,000	151,105	-	151,105
July 28, 2025- July 27, 2026	185,000	144,460	-	144,460
July 28, 2026 - July 27, 2027	185,000	138,107	-	138,107
July 28, 2027 - July 27, 2028	185,000	132,033	-	132,033
July 28, 2028 - July 27, 2029	185,000	126,227	-	126,227
July 28, 2029 - July 27, 2030	185,000	120,676	-	120,676
July 28, 2030 - July 27, 2031	185,000	115,369	-	115,369
July 28, 2031 - July 27, 2032	185,000	110,295	-	110,295
	$ 2,220,000	$ 1,715,473	$ -	$ 1,715,473
Total	**$ 2,775,000**	**$ 2,270,473**	**$ 76,756**	**$ 2,347,229**

[1] Utilized cost of debt for project as discount factor. Interest rate on note is 4.6%. Utilized mid-year convention.

[2] Payment for this period should be received July 28, 2019, prior to trial date.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Shem Creek Development Group, LLC, Plaintiff, v. The Town of Mount Pleasant, South Carolina, Defendant.	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2017-CP-10-5493 **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this date he/she caused a true and correct copy of the foregoing **Plaintiff's Second Supplemental Answers to Defendant's Fist Set of Interrogatories to Plaintiff** to be served on the parties identified below via electronic mail and/or U.S. Mail, postage prepaid, addressed to the following:

James J. Hinchey, Jr., Esquire
Julia P. Copeland, Esquire
Hinchey Murray & Pagliarini, LLC
56 Folly Road Blvd.
Charleston, SC 29407

Claude Tackett, Esquire
Claude Tackett Law Firm, LLC
P.O. Box 429
Mount Pleasant, SC 29465

Megan Hickey

July 23, 2019
Charleston, SC

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Exhibit B

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STATE OF SOUTH CAROLINA **COUNTY OF CHARLESTON** **SHEM CREEK DEVELOPMENT GROUP, LLC,** **Plaintiff,** **vs.** **THE TOWN OF MOUNT PLEASANT SOUTH CAROLINA.** **Defendant.**	**IN THE COURT OF COMMON PLEAS** **NINTH JUDICIAL CIRCUIT** **CIVIL ACTION NO.: 2017-CP-10-5493** **DEFENDANT'S SECOND REQUEST FOR PRODUCTION**

TO: THE ABOVE-NAMED PLAINTIFF AND HIS ATTORNEY, E. BRANDON GASKINS:

Pursuant to Rules 26 and 34 of the South Carolina Rules of Civil Procedure ("SCRCP") Defendant, Town of Mount Pleasant ("Town") by counsel, requests Plaintiff to produce the documents specified below, within thirty (30) days of service, to James J. Hinchey, Hinchey, Murray & Pagliarini, 56 Folly Road Blvd., Charleston, SC 29407. Plaintiff's production of documents shall be in accordance with the Instructions and Definitions set forth below and S.C.R.Civ.P. 34.

INSTRUCTIONS AND DEFINITIONS

(a) Whenever reference is made to a person, it includes any and all of such person's principals, employees, agents, attorneys, consultants and other representatives.

(b) When production of any document in Plaintiff's possession is requested, such request includes documents subject to the Plaintiff's possession, custody or control. In the event that Plaintiff is able to provide only part of the document(s) called for in any particular Request for Production, provide all document(s) that Plaintiff is able to provide and state the reason, if any, for the inability to provide the remainder.

(iv) the name and position, if any, of each person to whom the contents of the documents have been communicated by copy, exhibition, reading or substantial summarization;

(v) a statement of the specific basis on which privilege is claimed and whether or not the subject matter or the contents of the document is limited to legal advice or information provided for the purpose of securing legal advice; and

(vi) the identity and position, if any, of the person or persons supplying the attorney signing the list with the information requested in subparagraphs above.

(e) "Relate(s) to," "related to" or "relating to" means to refer to, reflect, concern, pertain to or in any manner be connected with the matter discussed.

(f) Every Request for Production herein shall be deemed a continuing Request for Production, and Plaintiff is to supplement its answers promptly if and when Plaintiff obtains responsive documents which add to or are in any way inconsistent with Plaintiff's initial production.

(g) These discovery requests are not intended to be duplicative. All requests should be responded to fully and to the extent not covered by other requests. If there are documents that are responsive to more than one request, please note and produce each such document first in response to the request that is more specifically directed to the subject matter of the particular document.

(h) Any word written in the singular herein shall be construed as plural or vice versa when necessary to facilitate the response to any request.

(i) "And" as well as "or" shall be construed disjunctively or conjunctively as necessary in order to bring within the scope of the request all responses which otherwise might be construed to be outside its scope.

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56 Folly Road Blvd.
Charleston, SC 29407
(843) 577-7455

ATTORNEYS FOR DEFENDANT

August 5, 2019
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2019 I served the foregoing **DEFENDANT'S SECOND REQUEST FOR PRODUCTION** upon the Plaintiff by email and placing same in the United States Mail, postage prepaid, addressed as follows:

E. Brandon Gaskins
MOORE & VAN ALLEN, PLLC
78 Wentworth Street
P.O. Box 22828
Charleston, South Carolina 29413-2828

HINCHEY, MURRAY & PAGLIARINI, LLC

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Exhibit C

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Moore&VanAllen

August 8, 2019

E. Brandon Gaskins
Attorney at Law

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brandongaskins@mvalaw.com

Moore & Van Allen PLLC

78 Wentworth St.
Charleston, SC 29401-1428

Mailing Address:
Post Office Box 22828
Charleston, SC 29413-2828

VIA E-MAIL

Julia P. Copeland
James J. Hinchey, Jr.
David G. Pagliarini
Hinchey Murray & Pagliarini, LLC
56 Folly Road Blvd.
Charleston, SC 29407

Re: Shem Creek Development Group, LLC v. Town of Mount Pleasant
Civil Action No. 2017-CP-10-5493
Subpoena to Tyler Flesch
MVA File No. 043920.01

Dear Julia:

I received your subpoena to Tyler Flesch in his personal capacity in the above-referenced action, and I am writing to provide Shem Creek Development Group's and his objections to that subpoena pursuant to Rule 45, SCRCP.

First, the subpoena was issued to Mr. Flesch in his personal capacity, and he is not in personal possession of the documents that have been subpoenaed. Rather, the documents requested belong to either Shem Creek Development Group or its affiliated entity, 101 Coleman Partners, LLC. Because you have requested the same documents from Shem Creek Development Group in the Town's second request for production of documents, we will respond to those requests as required under Rule 34, SCRCP. To the extent that you desire documents from 101 Coleman Partners, LLC, a separate subpoena will need to be issued to that entity.

Second, and most importantly, Mr. Flesch and Shem Creek Development Group object to the scope of documents requested in the subpoena because they are irrelevant and outside the scope of discovery under Rule 26, SCRCP. As I understand from our discussion about the subpoena, the requested documents are sought to analyze Shem Creek Development Group's mitigation efforts and to potentially offset its alleged damages. However, the Town cannot raise mitigation as a defense because it agreed to a liquidated damages provision in the contract. In fact, it was the Town which insisted on this provision limiting the amount of damages Shem Creek Development Group could recover in the event of a default by the Town. Because the Town specifically negotiated for the liquidated damages provision to limit its potential exposure, it cannot now attempt to limit Shem Creek Development Group's damages through the mitigation defense after the Town defaulted.

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On this point, the law is clear, as jurisdictions have uniformly accepted the rule that mitigation is irrelevant and should not be considered in assessing damages when there is an enforceable liquidated damages provision. As one court stated in *NPS, LLC v. Minihane*, 451 Mass. 417, 423, 886 N.E.2d 670, 675 (2008), "When parties agree in advance to a sum certain that represents a reasonable estimate of potential damages, they exchange the opportunity to determine actual damages after a breach, including possible mitigation, for the 'peace of mind and certainty of result' afforded by a liquidated damages clause." *See also, Xerox Corp. v. RP Digital Servs.*, 232 F. Supp. 3d 321, 325 (W.D.N.Y. 2017) ("[W]here, as here, a contract contains a valid liquidated damages provision, 'mitigation of damages is not relevant.'"); *Barrie Sch. v. Patch*, 402 Md. 497, 513-14, 933 A.2d 382 (2007) (holding that a court need not consider mitigation when the parties have agreed to liquidated damages); *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 380, 613 N.E.2d 183 (1993) (stating that mitigation is not proper where there is a valid liquidated damages clause).[1]

Third, the subpoena was issued without providing a reasonable amount of time to compile and produce responsive documents.

As a result of these objections, Mr. Flesch will not be providing any documents in response to the subpoena. If you wish to discuss this matter further, please do not hesitate to contact me.

Sincerely,

E. Brandon Gaskins

EBG/

cc: Claude Tackett *(via e-mail)*

[1] There are many more judicial decisions supporting this legal principle, but I do not want to belabor the point.

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Shem Creek Development Group, LLC, Plaintiff, v. The Town of Mount Pleasant, South Carolina, Defendant.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2017-CP-10-5493 **PLAINTIFF'S RESPONSES TO DEFENDANT'S SECOND SET OF REQUESTS FOR PRODUCTION**

TO: JAMES J. HINCHEY, JR., ESQUIRE, AND JULIA P. COPELAND, ESQUIRE, HINCHEY, MURRAY & PAGLIARINI, LLC, ATTORNEYS FOR DEFENDANTS:

Plaintiff Shem Creek Development Group, LLC ("Plaintiff") responds to Defendant's Second Set of Requests for Production as follows. Plaintiff incorporates, as if fully set forth herein, all general objections from its previous responses.

GENERAL OBJECTION

Plaintiff objects to Defendant's Second Set of Requests for Production because the deadline for discovery expired prior to the issuance of these requests and Defendant had ample opportunity during discovery in this action to obtain the information sought.

RESPONSES TO SECOND REQUESTS FOR PRODUCTION

1. Any and all Pro Forma financial statements, both internally and externally generated, drafted or submitted from project inception to present.

RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The financial information sought is not relevant to any issue in dispute in this case as the parties agreed to a**

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liquidated damages provision in the parking license agreement and information relating to the financial projections for the project would not affect the damages to which Plaintiff is entitled in this case. Subject to and without waiving this objection, see documents previously produced in discovery, including those labeled SCDG0004368-4388.

2. Any and all forecasts and/or projections, both internally and externally generated, including but not limited to revenues, profit, operating expenses, net operating income, etc.

RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The financial information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and information relating to the financial projections for the project would not affect the damages to which Plaintiff is entitled in this case. Subject to and without waiving this objection, see documents previously produced in discovery, including those labeled SCDG0004368-4388.**

3. Business tax returns from inception to present.

RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The tax returns sought are not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and Plaintiff's tax returns will not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects because this request seeks confidential information.**

4. Backup copy of QuickBooks file or other relevant project accounting system from inception to present.

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RESPONSE: Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The financial information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and Plaintiff's accounting files would not affect the damages to which Plaintiff is entitled in this case. Subject to and without waiving such objection, Plaintiff does not have a QuickBooks file or accounting system for its own operations.

5. Support for interest rate on note as outlined in footnote 1, Bates SCDG0004389.

RESPONSE: Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff has amended its damages calculation presented in SCDG0004389 and no longer is using the interest rate referenced in that calculation as the present value discount factor. Subject to and without waiving such objection, see attached documents labeled SCDG0004390-4405.

6. Any and all documentation for loans, lines of credit, or other notes obtained to finance the project from inception to present.

RESPONSE: Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff has amended its damages calculation presented in SCDG0004389 and no longer is using cost of debt related to the project as its discount factor. Subject to and without waiving such objection, see documents previously produced, including SCDG00000056-59, and attached documents labeled SCDG0004390-4405.

7. Any all documentation for equity or other investments in project from inception to present.

RESPONSE: Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The documentation relating

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to equity investments in the project is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and information relating to investments in the project would not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects to this request because it is overly broad and unduly burdensome. The scope of documents requested is too vast, and the cost and burden of searching for all documents, many of which have little, if any, probative value, will far exceed the benefit of producing them. Plaintiff further objects because this request seeks confidential information. Subject to and without waiving such objection, see documents previously produced, including SCDG00000054-59, 101-103, 117-121, 429, 450-459, 483-484, and 639-725, and attached documents labeled SCDG0004406-4415.

8. Any and all documentation and correspondence related to the Plaintiffs solicitation of debt or equity financing, inception to present.

RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The documentation relating to debt equity or financing for the project is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and information relating to investment for the project's financing would not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects to this request because it is overly broad and unduly burdensome. The scope of documents requested is too vast, and the cost and burden of searching for all documents, many of which have little, if any, probative value, will far exceed the benefit of producing them. Plaintiff further objects because this request seeks confidential information. Subject to and without waiving such objection, see**

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documents previously produced, including SCDG00000054-62, 101-103, 117-123, 429, 450-459, 483-486, 623-625, 629-631 and 639-725, and attached documents labeled SCDG0004390-4415.

9. Internal and/or management prepared financial statements from inception to present.

RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The financial information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and financial statements would not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects because the request is vague and fails to specify about whom Defendant is seeking information. Subject to and without waiving this objection, Plaintiff does not possess financial statements for its own operations.**

10. Internal and/or management prepared reports of revenues and expenses including sufficient segment detail (i.e. detailed by commercial rental, "Parking Spaces," "Public Spaces," and "Reserved Spaces") from inception to present.

RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The financial information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and revenue and expenses for the project would not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects because the request is vague and fails to specify about whom Defendant is seeking information. Subject to and without waiving this objection, Plaintiff does not possess reports of revenues and expenses for its own operations.**

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11. Report detailing "Net Operating Profit" generated by "Parking Spaces" from inception to present.

RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The financial information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and the financial information relating to the project will not affect the damages to which Plaintiff is entitled in this case. Subject to and without waiving this objection, to the extent that "Parking Spaces" and "Net Operating Profit" are intended to have the same meaning as those terms in the parking license agreement, Plaintiff does not possess any documents responsive to this request because Plaintiff does not account for "Net Operating Profit" as that term is defined in the parking license agreement as a result of the Town's breach thereof.**

12. Any and all supporting schedules relevant to or documenting internal calculations or deliberations relevant to the allocation of operating expenses among revenue segments (i.e. commercial rental, "Parking Spaces," "Public Spaces," and "Reserved Spaces") from inception to present.

RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The financial information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and the financial information relating to the project will not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects because the request is vague and fails to specify about whom Defendant is seeking information. Subject to and without waiving this objection, Plaintiff does not possess any documents responsive to this request.**

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13. Any and all information and/or schedules, both internally and externally generated, regarding planned and actual parking rates from inception to present.

RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and the parking rates for the project will not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects because the request is vague and fails to specify about whom Defendant is seeking information. Subject to and without waiving this objection, see documents previously produced, including SCDG0004368-4388.**

14. Any internal or external evaluation of market rates for rental of "Parking Spaces," "Public Spaces," and "Reserved Spaces".

RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and the market rates for parking spaces will not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects because the request is vague and fails to define "Parking Spaces," "Public Spaces," and "Reserved Spaces." Subject to and without waiving this objection, to the extent that "Parking Spaces," "Public Spaces," and "Reserved Spaces" are intended to have the same meaning as those terms in the parking license agreement, Plaintiff does not possess any documents responsive to this request because the parking garage is not divided into "Public Spaces" and "Reserved Spaces" as contemplated by the parking license agreement.**

15. Records or reports detailing "Parking Spaces" usage and resulting revenue from inception to present.

RESPONSE: Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and the parking usage and revenue will not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects because the request is vague and fails to define "Parking Spaces." Subject to and without waiving this objection, to the extent that "Parking Spaces" is intended to have the same meaning as that term in the parking license agreement, Plaintiff does not possess any documents responsive to this request because the parking garage is not divided into "Public Spaces" and "Reserved Spaces" as contemplated by the parking license agreement.

E. Brandon Gaskins (State Bar No. 73274)
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Attorneys for Plaintiff Shem Creek Development Group, LLP

Dated: September 20, 2019
Charleston, South Carolina

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	
		Case No. 2017-CP-10-5493
Shem Creek Development Group, LLC,	)	
Plaintiff,	)	**CERFIFICATE OF SERVICE**
v.	)	
The Town of Mount Pleasant, South Carolina,	)	
Defendant.	)	

The undersigned does hereby certify that a copy of the foregoing **Plaintiff's Responses to Defendant's Second Set of Requests for Production** was served by electronic mail and/or by U.S. mail to the following:

James J. Hinchey, Jr., Esquire
Julia P. Copeland, Esquire
David Pagliarini, Esquire
Hinchey Murray & Pagliarini, LLC
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Moore & Van Allen, PLLC

Wendy Stockhausen
Wendy Stockhausen

September 20, 2019
Charleston, SC

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Exhibit D

Deposition of:

Tyler Flesch

Shem Creek Development Group, LLC
vs.
TOMP

Case #: 2017-CP-10-5493

April 24, 2019

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Q Well, I'm going to ask you to do that.
A Okay.
Q Yeah, because I do want to find that out. But let's just limit it to the real-time discussions.
A Okay.
Q So other than the public presentation by Mr. DeMoura, were any other communications from him, in any form, in your opinion misleading, inaccurate or inappropriate or whatever?
A The other one that comes to mind, however, was not direct to me. It was as it relates to Ordinance 14022, in which he intimated to my partner that the changes being implemented were more residential in nature and wouldn't impact our project. That was not directly to me.
Q Okay.
A So that turned out not to be true.
Q Okay.
A I'm sorry; I do have -- I'm sorry; I'm remembering some others.
Q That's okay. That's why we're here.
A They might have been subsequent. The other one that would ring home is Mr. DeMoura -- both in the initial meeting, I remember this, as well as what he told the Post and Courier about the spaces, the public

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spaces, the additional spaces, provided by us in the deck, would be available to surrounding businesses to satisfy their parking and zoning requirements, and that was one of the merits of the deal. And I don't know the date of that article in the Post and Courier, but I think we might have provided it in discovery. And I don't believe that to be a true statement.
Q Okay. That's assuming the Post and Courier got it all correct.
A He also said it in a meeting. I wasn't there.
Q That sounds good. So we've got the public presentation; the impact of an ordinance change, what he -- suggesting it wouldn't impact your project. It was primarily directed at residential?
A Right.
Q And then the -- that the additional spaces were available to other businesses in the area, and that was referable to a Post and Courier article?
A And he said it in the meeting, the first meeting.
Q First meeting?
A With Charlie Potts, that meeting where we talked about conceptually different things, and then that they couldn't do the deal viably through the DESMAN report.

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Q Anything else that you can --
A Yeah, subsequent. I mean, at the time when he said it, we believed him. I mean, I guess subsequently, I don't believe it now. As we were discussing the benefits, the ways, you know, these were all very rough conceptual ideas, ideas being kicked around in a room. One of the concepts or one of the thought processes Eric had to be helpful to us was they were going to, through a pool of money with SCE&G and the Town, help us locate the power lines underground.
There was also a trio of transformers on Coleman Boulevard which needed to be moved. And Eric intimated that there was a pool of money that was cooperative between the Town and SCE&G, and it had been utilized previously on Coleman Boulevard to, you know, to lower these, to put these power lines underground, which obviously not only improves the aesthetic, but for hurricanes, safety. You know, it's better reliability if you get these things underground. I think clearly we don't -- wouldn't want power lines running around a Class A office building. That wasn't something that anybody wanted. And those power lines were on both Coleman and Mill Street.
Q Anything else?
A Not that I can currently remember. There may

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be, but I don't remember.
Q Now, if we change the question a little bit and we talked about your qualification initially in your answer about being at the time as opposed to later, what were you referencing when -- what conversation with Mr. DeMoura were you referencing when you suggested that there were some things that later in time you knew not to be accurate at the time the statement was made?
A Well, I guess the last example I just gave would be one, in which we were told there was this pool of money. That cooperation was not there as we proceeded through the project. SCE&G did, in fact, take care of the power lines, move the transformers, and they billed us $340,000 roughly.
Q Okay. All right. Anything else?
A As it relates to the, you know, the suggestion that businesses could utilize the excess parking to satisfy their requirements, Tavern & Table was not given that opportunity when it wanted to open, and I don't know of any other businesses that have been given that opportunity to use the parking spaces to satisfy zoning requirements.
It would seem to me that if, in fact, they were available to any new business in the area, they

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should have been available to a new business in the form of Tavern & Table and they weren't. In fact, Tavern & Table, which I'm sure we'll discuss later, its partner requirements were a key component in the presentation I suggested I thought Eric wasn't being truthful or was mistaken in, and I think it will come around.

But I think that's a key component to when you go back all the way to the CRAB report. It's not just demand for parking; they were trying to spur economics down here, trying to spur tourism, restaurants. It succeeded with Tavern & Table; however, they didn't get the benefit of what they said they were doing the parking deal to do, and I think it's -- I don't think that was right or accurate. I guess we're talking about him being accurate.

Q Yeah, or however he thought. I'm going to come back to that. Anything else other than those two examples that you gave, or three examples?

A Sorry; I'm thinking.

Q That's okay.

A It's a lot.

Q Take your time.

A I don't know if there are any more. I can't recall any more off the top of my head.

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Q I'm not going to ask you to recall anything you can't recall.

A Okay.

Q Let me just kind of plod back through a couple of these. On this statement that you reference where Eric suggested that others would have -- or one of the benefits to the Town was that other businesses would have access to the garage parking.

A Right.

Q It would be accurate to say that patrons of -- or people who work at any one of those area businesses can and, to the extent availability was there, would have had the ability to go and park in that garage?

A Is that a question?

Q Question, yeah.

A Okay. Would somebody physically be able to pull into the garage, that is correct. However, that was not the statement Mr. DeMoura made. Mr. DeMoura made that they could satisfy their zoning requirements to any neighboring business that had, I'm paraphrasing, a shortfall, however you put it, it's a quote. And he said it again, it was to spur business. And the nature of the physicality down there, there are small lots and things where it would be hard to provide the totality needed for new development, and that's what the -- part

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of the deck was designed to do, was to lend these businesses the ability to satisfy their zoning requirement, not the physical someone driving into the deck, for example. That's --

Q That's where --

A -- the distinction.

Q Yeah.

A Yeah.

Q Because first time you hadn't mentioned zoning, so now we're going to get -- and I understand that. That's why I asked you the clarification question. All right. So we're both in agreement that any area business, a patron of any area business, or an employee of any area business, either with the Town's support or without the Town's support, has the privilege of pulling into the garage, paying a fee, and parking for whatever period of time they need parking.

A As it stands today.

Q Yes. Is that correct?

A That is correct, as it stands today.

Q And as you anticipated in the initial parking license agreement, that would have also been the case during -- under that initial parking license agreement, to the extent that public spaces were available?

A Correct.

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Q Okay.

A Not just public. I'm sorry; let me correct that. Not just the public spaces. Public spaces during certain hours, and then the totality of the spaces.

Q After hours?

A Correct.

Q Okay. So what you thought -- or what you were -- the concern with accuracy in what Mr. DeMoura said is really with respect to the ability of other businesses to satisfy the zoning requirement for a certain number of parking spaces?

A As it relates to the statement he made, that is correct.

Q Yes, okay.

A In particular, Tavern & Table.

Q Right.

A Which is relevant.

Q Sure. Do you have an ownership interest in Table & Tavern -- or Tavern & Table?

A The operating business?

Q Yeah.

A No.

Q But they lease from you?

A They do.

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Exhibit E

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August 26, 2019

VIA EMAIL, ORIGINAL TO FOLLOW BY U.S. MAIL

Julia P. Copeland
Hinchey Murray & Pagliarini, LLC
56 Folly Road Blvd.
Charleston, SC 29407

Re: *Shem Creek Development Group v. Town of Mount Pleasant*, No. 2017-CP-10-5493

Dear Julia:

This firm represents 101 Coleman Partners, LLC with respect to the subpoena you served on 101 Coleman Partners in *Shem Creek Development Group v. Town of Mount Pleasant*. I write pursuant to Rules 11, 26, and 45, SCRCP, to point out the multiple reasons why the subpoena is objectionable.

First, the Town of Mount Pleasant must seek the documents sought by the subpoena from Shem Creek Development Group. Courts have consistently protected nonparties like 101 Coleman Partners from documents that have been or could be obtained from a party to the litigation. *See, e.g.*, *UMB Bank, N.A. v. Sanofi*, No. 15CIV8725GBDRWL, 2017 WL 6398628, at *1 (S.D.N.Y. Nov. 22, 2017); *United States v. Crumb*, No. CV 15-655-WS-N, 2016 WL 6997122, at *3 (S.D. Ala. Oct. 4, 2016); *HDSherer, LLC v. Natural Molecular Testing Corp.*, 292 F.R.D. 305, 309 (D.S.C. 2013); *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637–38 (C.D. Cal. 2005); *Braxton v. Farmer's Ins. Grp.*, 209 F.R.D. 651, 653 (N.D. Ala. 2002).

In fact, the Town has already sought these documents from Shem Creek Development Group, in the Town's second request for documents. As you probably know, Shem Creek Development Group is a member of 101 Coleman Partners and has access to these records, to the extent they exist. Therefore, the subpoena is improper. (Of

course, that Shem Creek Development Group has access to them does not necessarily mean that Shem Creek Development Group has to produce them.)

Second, the subpoena seeks information that is not relevant to the litigation. I understand that Mr. Gaskins's letter of August 8, 2019 responding to the subpoena the Town served on Tyler Flesch has already explained that mitigation (the only conceivable relevance for the information the Town seeks[1]) is irrelevant here because of the liquidated damages provision in the Article VI of the agreement between the Town and Shem Creek Development Group. *See, e.g., Radisson Hotels Int'l, Inc. v. Majestic Towers, Inc.*, 488 F. Supp. 2d 953, 963 (C.D. Cal. 2007) ("one of the very purposes of liquidated damages is to allow the parties to avoid the cost, difficulty, and delay of proving damages" (internal quotation mark and alterations omitted)); *Days Inns of Am., Inc. v. P & N Enters., Inc.*, 164 F. Supp. 2d 255, 263 (D. Conn. 2001) ("the issue of mitigation of damages is not relevant where the parties have expressly sought to avoid the vagaries of damages calculations by means of using a liquidated damages clause"); *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle, Inc.*, 706 N.Y.S.2d 724, 727 (App. Div. 2000) ("Mitigation of damages is not relevant when there is a valid liquidated damages clause."). Because mitigation is irrelevant, these documents are not calculated to lead to the discovery of admissible evidence. *See* Rule 26(b), SCRCP. Likewise, the burden of producing them far outweighs any probative value they may have. *See* Rule 26(a), SCRCP; Rule 45(c), SCRCP.

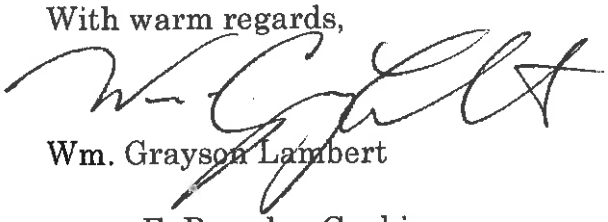
Third, even if the subpoena did not suffer from these two fatal flaws, it still demands that 101 Coleman Partners—a nonparty—produce its private financial information without any protection from its public disclosure. A court may quash a subpoena that seeks confidential commercial information like what the Town's subpoena seeks. *See* Rule 45(c)(3)(B), SCRCP.

In light of all of these issues, we respectfully request that you withdraw the subpoena. If you do not, we may be forced to seek a protective order.

[1] Even with that limited potential relevance, many of the subpoena requests go beyond the question of mitigation. As just a few examples, forecasts and projections, all QuickBooks files, and investments in the project are not needed to do any mitigation calculations. Other document requests are similarly flawed.

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With warm regards,



Wm. Grayson Lambert

cc: E. Brandon Gaskins

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Exhibit F

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PARKING LICENSE AGREEMENT

BY AND BETWEEN

SHEM CREEK DEVELOPMENT GROUP LLC

AND

TOWN OF MOUNT PLEASANT

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Article I.
BASIC LICENSE PROVISIONS

Section 1.01 Effective Date. The Effective Date of this License shall be October 17, 2013.

Section 1.02 Licensor. Shem Creek Development Group LLC ("SCDG")

Section 1.03 Notice Addresses.

Address of Licensor:	400 Hibben Street, Suite 200 Mount Pleasant, SC 29464
With a copy to:	Buist Byars & Taylor, LLC 652 Coleman Blvd., Suite 200 Mount Pleasant, SC 29464 Attn: Gray B. Taylor Esq.
Licensee/Town:	Town of Mount Pleasant ("Town")
Address of Licensee:	Town of Mount Pleasant Municipal Complex 100 Ann Edwards Lane Mount Pleasant, SC 29464
With a copy to:	Town of Mount Pleasant Legal Department 100 Ann Edwards Lane Mount Pleasant, SC 29464

Section 1.04 Property. The real property and improvements to be constructed thereon situated in the Town of Mount Pleasant, South Carolina, as more fully described on the attached Exhibit "A" (the "Property").

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. A conceptual rendering of the Project is attached hereto as Exhibit "A"

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"). 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".

Section 1.07 Rent.

(a) Fixed Minimum Rent: During the first fifteen years of the License Term (the "Rent Period,") Licensee covenants and agrees to pay to 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 to Licensor, in legal tender of the United States of America, without any prior

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demand and without any deduction or setoff whatsoever, Fixed Minimum Rent in the amount of One Dollar per year.

(b) Rent Reduction based Upon Financial Performance of the Parking Garage:If at any time during the Rent Period of this License, should the operation of the Parking Garage result in an annual net operating profit, Licensee shall be entitled to reduce its Fixed Minimum Rent Payment for the following License Year of the Term by its pro rata share, based upon the percentage of the Parking Spaces comprising the Public Spaces.

(i) For the purpose of this Agreement, "Net Operating Profit" shall be defined as gross revenue generated by the Parking Spaces during any License Year, less all expenses related to operation, maintenance and repair of the Parking Garage (including reasonable reserves for repair and replacements), including but not limited to the total costs of operating, repairing, lighting, cleaning, maintaining, painting, securing, managing and insuring the Parking Garage and paying all management fees, taxes, public charges and assessments of whatsoever nature directly or indirectly assessed or imposed upon the land, buildings, equipment and improvements constituting the Parking Garage, including, but not limited to, the cost of all utilities necessary to serve the Parking Garage, all ground rent payments for the Parking Garage, all real property taxes, rates, duties and assessments, local improvement taxes, import charges or levies, whether general or special that are levied charged or assessed against the Parking Garage by any lawful taxing authority whether federal, state, county municipal, school or otherwise (other than income, inheritance and franchise taxes thereon). Should the calculation of Net Operating Profit for any License Year result in a negative number (a "Net Operating Loss"), the Net Operating Profit for the following License Year shall be reduced by the Net Operating Loss from the preceeding License Year.

(ii) By way of example, should the Parking Garage result in an annual net operating profit of $10,000, Licensee's Fixed Minimum rent for the final License Year of the Term shall be reduced by $4,782.61 (e.g., $10,000 x 132/276 = $4,782.61).

Section 1.08 Operating Expense Payment. Licensor, as its sole and exclusive obligation, shall pay all expenses associated with the operation of the Parking Garage.

Section 1.09 License Year. A License Year shall be each successive period of twelve (12) calendar months commencing on the Rental Commencement Date.

Section 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.

Section 1.11 Permitted Use. The sole Permitted Use of the Public Spaces shall be for vehicular parking spaces for the general public at rental rates comparable to market rates for similarly situated parking facilities.

Article II.
LICENSE OF PREMISES AND QUIET ENJOYMENT

Section 2.01 Description of Premises.

(a) Licensor currently Leases (or has the ability to lease) the land shown on Exhibit "A", together with the existing buildings and improvements thereon depicted, all of which constitute the Property, pursuant to the

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Exhibit G

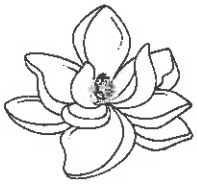
Deposition of:

Robert Small, Jr.

Shem Creek Development Group, LLC
vs.
TOMP

Case #: 2017-CP-10-5493

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comparative analysis to put the two together to see; but substantively, those were the issues. Those were the two.

Q That's fair. There may be some other minor adjustments, I understand that, but those are the two primary adjustments?

A Right. I mean, we had the profit sharing in the first agreement. There may have been some more clarification of something in here.

Q On that reduction in the -- the potential reduction in lease payments associated with the profitability of the structure, did that profitability include revenue -- consideration of revenue associated with the commercial space?

A No.

Q So it was just -- the only potential reduction would have been associated with revenue from non-reserved -- from -- from public parking or reserved parking availability at off hours. Is that right?

A Yes. And we calculate that by credit card receipts because a credit card is the only access -- way to access out of the parking garage to pay.

Q Because it was going to be operated remotely?

A Correct. But all of the tenants have their own fob to get in and out, so they don't pull tickets.

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Q Okay. Was -- was it ever projected that -- did anyone ever project that that potential discount was of any value?

A We did.

Q You thought it was of value?

A Absolutely.

Q Did anyone perform an analysis that indicated that the garage component, and I'm distinguishing between the garage and the tenants, was going to be profitable?

A We did.

Q And how did you do that? Or did someone do that for you, or did you do it internally?

A We did it internally.

Q Okay. And is that reflected in the document?

A No.

Q So is --

A Only the concept.

Q Okay. But it's -- it wasn't ever reduced to writing?

A Our analysis was not, nor did we share it with anybody, but it -- it was pretty obvious to us.

Q The DESMAN analysis that was done initially when it was just considered the garage operation, that showed that the -- that through 15 years, the garage

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would be constantly operating at a deficit?

A I don't recall what that showed. But, you know, it was in that -- in that agreement, it was a different time and a different environment. So I don't think it's relevant to when we built and future operations.

Q And I made a misstatement, so let me just correct that. I believe in the DESMAN study that they determined that it would be at a net deficit and by year -- every year up to the first seven years, because that's what their study was, they would operate at a net deficit which was, at best, minus $15,000. I'll show you this if you would like.

A I don't need it. To me, that's not relevant to what we did.

Q Okay.

A Although, I think it's relevant to say that even in those times, that's a minor deficit compared to what -- then eight more years, presumably, would get better, but, you know, that's --

MR. GASKINS: Go ahead. Are you done?

A (Continuing) -- speculation.

MR. GASKINS: I am going to object to this line of questioning about the projections of profitability, as I don't think it was properly

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noticed. To the extent you can answer, go ahead, but...

BY MR. HINCHEY:

Q Was there -- was there ever any study, other than the DESMAN study, that demonstrated or opined that the garage component would ever run profitably --

MR. GASKINS: Same --

BY MR. HINCHEY:

Q -- at any point in time?

MR. GASKINS: Same objection.

BY MR. HINCHEY:

Q You can answer.

A Of course.

Q Okay. And what study was that?

A We had to give the bank -- when the Town pulled out, we had to give the bank a financial reason that we were going to build it.

Q Okay.

A So we gave them projections and showed them what we perceived to be the value benefit of building, continuing to build, the 117 spaces that we did not need for the office building.

Q All right. Did those projections --

A Absolutely.

MR. GASKINS: Please let him finish.

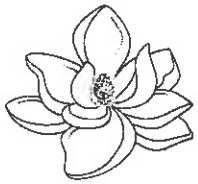
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Tyler Flesch

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see their vision of Coleman Boulevard revitalization, this was a place for structured parking, and there were a number of them along Coleman, I believe, that they identified. But it made sense because they knew the growth of the restaurants; they knew what they had there. And that certainly would occupy spaces during the nights and weekends.

Q There was a -- excuse me.

A No, go ahead.

Q There was a reference I think in Tex's testimony -- you don't mind if I -- I can call him Mr. Smalls if you prefer, but --

A Small. Sorry.

Q Mr. Small.

A It gets -- I don't know why, he's very particular about that.

Q I would be particular if I were him as well. There's reference in one of the studies to a -- to a hotel in that area. Where is the site of that prospective hotel?

A So, the hotel was on the adjoining parcel. Let's call it where Red's and Tavern & Table currently reside. Tavern & Table was not open for business.

Q It was an event --

A It was an event space by default. When we

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purchased the property or the ground lease, the events came with it, meaning the obligations on the contract were there. It was not the intent to have an event space forever. The DESMAN, I believe his name was David Taxman, asked for some starting places on what would be here, what could be here.

And if you go way back, Richard Coen had a plan to build potentially a hotel, a condo, a hotel, all the way back, years prior. So that, he had that, and I believe some office space as the parameters for his study initially, and that's what he went with.

You know, I think the Town was accurate in their vision looking forward on the CRAB report. Because if you look at, as Tex mentioned, this is 2011. The final report comes out in January 2012, but this was in process in 2011. You look where we are economically in this Town from then to now, you see the demand has changed, and you see what's happening. And so I don't think the DESMAN report accurately reflected where the parking demand was headed or what, ultimately, the parking demand has become there.

And when you're talking about a 30-year potential parking license agreement, you can't look out two years, you know, or at least we wouldn't do that. We would look out in time, and what's the demand out in

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time. And that's subjective; we can be honest about that. The DESMAN report will have -- I could probably do 10 reports and they would all be a little bit different. So...

Q Sure. If you did them at different points in time, absolutely.

A Correct.

Q And I think the DESMAN report, what, it only went out seven years? Is that --

A I'm not sure of that.

Q I thought that was the horizon. Okay. Other than that, those two or three discussions with Mr. DeMoura, there were some emails that were exchanged with Mr. DeMoura?

A Yeah. I recall one email asking if the parking license agreement was going to make it on the agenda for approval, I believe is one. I don't, off the top of my head, recollect the exact -- any of the emails. We provided them in discovery. I'm not -- I don't remember all of them. I know that's one of them. A simple one-line email, is this going to be on the agenda tonight, that's the only one I remember, and whatever else we've turned over.

Q Anything that Mr. DeMoura said to you or wrote to you or wrote to any group that included you that you

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thought was inaccurate, unprofessional, misleading?

A Inaccurate today? Or at the time he told me?

Q I'll ask both questions.

A Okay.

Q I'm interested in both. So let's start out with at the time.

A There wasn't any inaccurate or misleading at the time, the things he told us. I don't believe so that I can recall.

Q Okay. Don't believe that they were inaccurate or misleading?

A At the time of the conversation?

Q Yes, yes.

A Are we including public presentations?

Q Yeah, yeah.

A Then, yes.

Q Okay. So I extrapolate that you're referencing the public presentation when you qualified the misleading response, that you thought it was -- his public presentation was misleading?

A That is one instance in which I thought -- in real-time, he was misleading. You also asked if at the time I thought it was misleading or later thought it was misleading, and there's a difference there. And I'm happy to expound on that, if you would like.

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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's Memorandum in Opposition**
Plaintiff,	)	**to Defendant's Motion to Compel**
	)	**Plaintiff to Produce Documents**
v.	)	**Responsive to Defendant's Second**
	)	**Request for Production and, in the**
The Town of Mount Pleasant, South Carolina,	)	**Alternative, Compel the Production of**
	)	**the Same Documents in Response to**
Defendant.	)	**Defendant's Subpoena to Related Entity,**
	)	**101 Coleman Partners, LLC**
	)	

Plaintiff Shem Creek Development Group, LLC ("SCDG") submits this memorandum in opposition to Defendant's Motion Compel Plaintiff to Produce Documents Responsive to Defendant's Second Request for Production and, in the Alternative, Compel the Production of the Same Documents in Response to Defendant's Subpoena to Related Entity, 101 Coleman Partners, LLC.

I. INTRODUCTION

In its motion to compel, the Town seeks confidential financial and operational records of 101 Coleman Partners, which is not a party to this litigation or the underlying parking license agreement. These records are irrelevant and outside the scope of discovery.

According to the Town, the records are relevant to SCDG's damages because the Town may be entitled to reduce the rent SCDG seeks in this case. However, the parking license agreement includes a liquidated damages clause, which was drafted by the Town and fixes damages as the minimum unpaid rent. Although the parking license agreement contains a rent reduction clause, that clause does not apply, and the Town's rights under the clause did not survive termination of the parking license agreement according to its express terms and well-established

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principles of contract law. Therefore, the records are not relevant, and the Court should deny the motion to compel.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

In response to the growing need for parking near Shem Creek, SCDG and the Town partnered in 2011 to explore the possibility of developing more public parking options near Shem Creek. (Ex. 1 – Small Dep. pp. 17:11-30:2.) After an initial parking study demonstrated that there was insufficient weekday demand for a stand-alone parking garage to be economically feasible, SCDG and the Town developed a concept for a public-private partnership to develop an office building near Shem Creek with an attached parking garage. (*Id.*) Under this concept, the garage would provide office and public parking during the weekdays and only public parking during nights and weekends. (*Id.*)

Under SCDG's and the Town's partnership, SCDG would lease property and construct and manage the office building and parking garage. (*Id.*) SCDG envisioned that the garage would include approximately 276 parking spaces. (*Id.* at pp. 54:20-58:7; Ex 2 – DeMoura Dep. p. 27:18-21.) Of those, 144 spaces would be reserved for office tenants on weekdays from 6 AM to 5 PM, and 132 would be available to the public during those times. (*Id.* at pp. 29:19-32:11.) All spaces in the garage would be available to the public at all other times. (*Id.*)

To facilitate the development of the garage, SCDG and the Town negotiated and drafted a parking license agreement to memorialize the terms and conditions of SCDG providing the publicly available parking spaces. (*Id.* at 37:3-40:18, 44:20-47:4, 69:21-74:20.) The parking license agreement requires the Town to make annual minimum rent payments of $185,000 for the "Rent Period," which is defined as the first fifteen years of the License Term. The parking license agreement defines the "License Term" as beginning on the "Rental Commencement Date" and

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running for a period of 30 years, "unless extended or sooner terminated in accordance with the terms and provisions of this License." (Ex. 3 - PLA § 1.10.) The Rental Commencement Date is defined as the date of the Town's issuance of the certificate of occupancy for the garage. (*Id.* at § 1.10.)

The parties also included a provision that allows for a pro rata reduction of rent if at "any point in the Rent Period of this License" the operation of the parking garage results in a net operating profit. (*Id.* at § 1.07(b).)

As originally proposed, the parking license agreement included a default clause that would have allowed SCDG to terminate the license and accelerate all remaining rent payments if the Town defaulted by failing to pay rent. (Ex. 4 - Draft PLA § 6.01.) This draft default clause also provided that if SCDG relet the premises then sums paid by a new licensee should be first applied to the expenses that the Town was required to reimburse with any excess applied to the rent payments owed by the Town. (*Id.*) The draft default clause, however, contained no limitation on damages available to SCDG if the Town defaulted under the license. (*Id.*)

Ultimately, though, the Town drafted and proposed a revised default clause that liquidates damages and eliminates SCDG's ability to seek consequential and punitive damages. (Ex. 5 - Email from D. Pagliarini re: Revised Draft; Ex. 6 - Revised PLA § 6.01.) The Town's revision specifically provides that the "sole and exclusive remedy" for default was the rent payments due under the license and that "both parties waive any claims that either may have to consequential or punitive damages." (Ex. 6 - Revised PLA § 6.01.) The Town's revision also eliminates its right to have other revenue received from the operations of the garage applied to its remaining rent payments. (*Id.*) The Town's revision, however, maintains SCDG's right to terminate the license agreement if the Town defaults. (*Id.*)

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SCDG accepted the Town's revised default clause creating a liquidated damages provision, and that clause ultimately became part of the final parking license agreement approved by the Town and SCDG. (Ex. 3 - PLA § 6.01.) As one of SCDG's principals testified during his deposition, the intent of the change was to adopt a liquidated damages provision that fixed damages to the remaining minimum rent payments:

> In the negotiation of this document, I recall very specifically the original draft form had provisions in for consequential damages in addition to acceleration of rent in the event of default. And the Town's position, and I can't remember if it was Mr. DeMoura or yourself even, we discussed the Town's desire to narrow the scope and create a certainty in the case of default. And I remember the draft document being struck to eliminate the acceleration to change the consequential damages to the fixed rent, the fixed minimum rent amounts outlined in the documents, which is the 185,000 over 15 years. That was to be the sole remedy.
>
> So, as in any negotiation, there's give and take, and we agreed to the fixed minimum rent as the liquidated damages. The fixed minimum rent, not the offsets. . . .
>
> You guys were very specific in wanting to limit the damages, and I remember the draft specifically, we had the conversation about fixed minimum rent. Nobody wanted consequential damages. Nobody wanted acceleration clauses in there. We fixed it to rent.

(Ex. 7 - Flesch Dep. Aug. 8, 2019 pp. 16:18-17:9, 28:10-15.)

The parking license agreement also contains a survival clause, 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." (Ex. 3 – PLA § 8.17.) The survival clause does not provide for the survival of any rights of the Town, including the right to reduce rent. (*Id.*)

Soon after SCDG and the Town entered into the parking license agreement, public opposition to development around Shem Creek and in neighboring areas began to swell. (Ex. 1 –

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Small Dep. pp. 65:6-73:23; Ex. 2 – DeMoura Dep. pp. 74:22-76:17.) In response, the Town began exploring changes to the zoning district where the garage would be located. (*Id.* at pp. 86:7-94:24.) At the same time, a special interest group called Save Shem Creek was organized to stop the garage from being constructed, and it began lobbying Town council members and planning staff to prevent the completion of the project and to stop the Town's financial participation in it. (*Id*. at pp. 76:18-81:11.)

Unbeknownst to SCDG, the zoning changes considered by the Town included changing the setbacks specifically for the garage site. (Ex. 1 – Small Dep. pp. 92:1-93:3; Ex. 8 – Farrell Dep. pp. 76:14-77:20.) Although the changes would reduce the site's buildable area, the Town did not inform SCDG of the zoning changes, which were ultimately adopted in April 2014. (*Id.* at pp. 96:13-97:5; Ex. 1 – Small Dep. pp. 92:1-93:3; Ex. 2 – DeMoura Dep. pp. 94:25-96:17; Ex. 9 – Prause Dep. pp. 88:12-18, 102:19-103:11.)

In fact, SCDG did not learn of the zoning changes until shortly after their adoption when SCDG's architect presented plans of the office building and garage to the Town's planning staff in a design review meeting. (Ex. 10 – Flesch Dep. Apr. 24, 2019 pp. 41:1-43:10, 88:4-92:7.) During that meeting, the Town's planning staff informed SCDG's architect that the plans did not comply with the setbacks that had just been adopted. (*Id.*) Shortly thereafter, SCDG redesigned the garage to comply with the newly enacted setbacks and discovered that the changes reduced the number of spaces that could be included in the parking deck. (*Id.*)

Upon learning this information, SCDG sought from the Town various accommodations and applications of the zoning code that would enable SCDG to provide 276 total spaces in the garage. (*Id.*) However, the Town's cooperation disappeared as public opposition to the project grew. (*Id.* at pp. 47:11-49:6, 124:21-132:7; Ex. 2 – DeMoura Dep. pp. 74:16-75:4.) And the Town

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and its planning staff rejected all proposals from SCDG, thereby preventing SCDG from providing 276 spaces. (Ex. 10 – Flesch Dep. Apr. 24, 2019 pp. 47:11-49:6, 124:21-132:7.)

Instead of tabling the project, though, SCDG continued its pursuit by designing the garage under the new zoning requirements. (Compl. ¶¶ 19-20.) The reduction in the site's buildable area from the zoning changes caused the total parking spaces in the garage to be reduced from 276 to 234. (*Id.*) The Town approved the modified design in September 2014. (*Id.*)

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. (Ex. 11 – DeMoura Ltr., Nov. 11, 2014.) Eric DeMoura, the Town's administrator, responded to this request in November 2014 by letter, stating that the design did not include a sufficient number of parking spaces to comply with the parking license agreement. (*Id.*)

Town council later unanimously voted to "endorse" Mr. DeMoura's letter, thereby adopting his conclusion that the design did not comply with the parking license agreement. (Ex. 12 – Council Mtg. Minutes p. 9.) After adopting Mr. DeMoura's letter, council unanimously decided to "deny any new proposal that may be put forward or submitted by the developer/applicant pertaining to" the parking license agreement. (*Id.* at pp. 9-10.) 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.*)

Nevertheless, SCDG remained committed to building the parking deck and providing publicly available spaces. (Compl. ¶¶ 25-29.) But because the Town had decided to deprive SCDG of a steady stream of revenue payments by repudiating its obligations under the parking license agreement, SCDG could not obtain financing for the project on the terms that it originally

anticipated. (Ex. 7 – Flesch Dep. Aug. 8, 2019 pp. 21:22-22:7.) Instead, it was forced to seek alternatives to secure the necessary financing.

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. (Ex. 1 – Small Dep. pp. 74:24-75:9.) This joint venture was formed as 101 Coleman Partners, LLC in 2015. (Ex. 13 - LLC Agreement of 101 Coleman Partners.) Under the terms of the joint venture, SCDG relinquished its sole ownership of the project, and it has only a 15% membership interest in 101 Coleman Partners. (*Id.*)

After the formation of 101 Coleman Partners but before the Rental Commencement Date, SCDG terminated the parking license agreement in accordance with its rights under the default clause as a result of the Town's failure to honor the agreement. (Ex. 7 - Flesch Dep. Aug. 8, 2019 pp. 6:11-17, 28:3-9; Ex. 14 - Termination Notice.) Later, 101 Coleman Partners completed the project and received a certificate of occupancy for the garage in July 2017, which would have been the Rental Commencement Date but for the prior termination. (Ex. 7 - Flesch Dep. Aug. 8, 2019 pp. 6:11-17.) Since then, 101 Coleman Partners has operated the parking garage and office building, receiving all revenue and paying all expenses. (Ex. 7 – Flesch Dep. Aug. 8, 2019 p. 18:7-9.) However, 101 Coleman Partners does not account for revenue and expenses as required under the rent reduction clause because the Town repudiated the parking license agreement. (*Id.* at pp. 27:24-35:24.)

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 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. (Compl. ¶¶ 30-44.)

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In July 2019, SCDG disclosed its damages calculation, which is based on past rent payments plus interest and future rent payments discounted to present value. SCDG's damages calculation includes no reduction for rent based on prospective net operating profits under the rent reduction clause because the default clause provides solely for fixed minimum rent payments as liquidated damages and because the rent reduction clause is inoperable as a result of the termination of the license. (Ex. 7 – Flesch Dep. Aug. 8, 2019 pp. 27:22-29:2.)

Following SCDG's disclosure of its damages calculation, the Town issued its second requests for production of documents to SCDG and a subpoena for documents to 101 Coleman Partners. The requests for production and subpoena seek the same documents: financial and operational records of 101 Coleman Partners, including documents relating to the profitability of the parking garage owned and operated by 101 Coleman Partners. SCDG and 101 Coleman Partners objected to the requests for production and the subpoena because, among other reasons, the documents sought are not relevant to this action. However, subject to its objections, SCDG either identified or produced more than 160 pages of documents responsive to the request. (Ex. 15 - SCDG Resp. 2nd RFPs.) In response, the Town filed the present motion to compel, arguing that the documents sought are relevant under the rent reduction clause of the parking license agreement.

III. DEFENDANT'S FACTUAL MISREPRESENTATIONS

In seeking confidential financial and operational records of a business that is not party to this litigation or the parking license agreement, the Town makes several factual misrepresentations to support its allegations that SCDG has "improperly withheld discovery" and that SCDG and 101 Coleman Partners are playing a "shell game with Defendant" to prevent the production of documents. (Mot. Compel pp. 8-9.) These misrepresentations are not mere oversights but are

material to the questions presented by the Town's motion. Therefore, these incorrect assertions of fact cannot stand and must be corrected.

A. *SCDG and 101 Coleman Partners are separate legal entities, and 101 Coleman Partners has owned and operated the office building and garage prior to this litigation.*

First, and most importantly, the Town misrepresents 101 Coleman Partners' involvement in the project and falsely alleges that SCDG assigned its ownership and management interest in the parking garage to 101 Coleman Partners on the day that it filed this lawsuit. (Mot. Compel p. 2.) This claim falsely creates the impression that 101 Coleman Partners is a shell company created for litigation purposes.

The Town's assertion that 101 Coleman Partners did not own or manage the office building and parking garage until the lawsuit was filed in October 2017 is incredible. Documents produced by SCDG in discovery reveal that 101 Coleman Partners was formed as a Delaware LLC in December 2015, nearly two years before the lawsuit was filed. (Ex. 13 - LLC Agreement of 101 Coleman Partners.) Shortly thereafter, it registered to do business in South Carolina in February 2016, and its operating agreement became effective in March 2016. (*Id.*; Ex. 16 - SC Secretary of State Info.) Then, also in March 2016, 101 Coleman Partners obtained a loan to partially finance the project. (Ex. 17 - 101 Coleman Partners Promissory Note.) Perhaps most ironically, shortly before the parking garage began operating in July 2017, the Town issued 101 Coleman Partners a business license to operate the office building and parking garage in May 2017. (Ex. 18 - 101 Coleman Partners Business License.)

Put simply, the Town is playing fast and loose with the facts to create the impression that there is no difference between SCDG and 101 Coleman Partners. The two entities are separate and distinct, and the law requires that they be treated as such. SCDG has only a 15% interest in 101 Coleman Partners, and 101 Coleman Partners has no interest in the parking license agreement

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or this litigation. (Ex. 13 - LLC Agreement of 101 Coleman Partner; Ex. 7 – Flesch Dep. Aug. 8, 2019 pp. 22:8-25:18.) In fact, SCDG was required to indemnify 101 Coleman Partners and the other member from any claims or losses arising from this lawsuit, which demonstrates that 101 Coleman Partners has no interest in this lawsuit. (Ex. 19 - 101 Coleman Partners Indemnification and Hold Harmless Agreement.) As a result, 101 Coleman Partners' activities and financial information have no relationship to the parking license agreement or this litigation.

B. *SCDG has produced documents responsive to the Town's requests.*

Second, the Town incorrectly states that SCDG "has refused to provide documents responsive to any of the fifteen requests" included in the Town's second requests for production. (Mot. Compel p. 2.) This is blatantly false as a mere cursory review of SCDG's responses reveals. Instead of refusing to produce documents, SCDG identified and produced over 160 pages of documents. (Ex. 17 - SCDG Resp. 2nd RFPs.) Other requested documents either do not exist or are in the possession of 101 Coleman Partners. (*Id.*)

C. *SCDG did not refuse to answer questions relating to the profitability of the garage.*

Third, the Town inaccurately accuses Tyler Flesch, one of SCDG's principals, of "refus[ing] to answer questions directly related to mitigation requirements and the Net Operating Profit of the garage." (Mot. Compel p. 2.) But Mr. Flesch actually answered all questions relating to the profitability of the garage as his entire deposition transcript confirms. (Ex. 7 - Flesch Dep. Aug. 8, 2019.)

If the Town finds Mr. Flesch's deposition testimony unsatisfactory, it has no one to blame but itself. The deposition in question was a taken pursuant to Rule 30(b)(6), whereby the Town identified only one topic for questioning that was about Plaintiff's damages calculation of the present value of the total amount of rent due. (Ex. 20 - Def.'s Not. Supp. Dep. 30(b)(6) Deponent;

Ex. 7 – Flesch Dep. Aug. 8, 2019 pp. 26:4-14, 37:9-40:2.) Significantly, SCDG's calculation clearly did not include any reduction of rent based on the net profitability of the garage, and the Town did not identify in the deposition notice any topics specifically related to the garage's revenue, expenses, or profitability. (Ex. 20 - Def.'s Not. Supp. Dep. 30(b)(6) Deponent; Ex. 7 – Flesch Dep. Aug. 8, 2019 pp. 27:7-29:16.) Nevertheless, the Town focused the deposition almost exclusively on issues relating to revenue, expenses, and profitability of the garage. (Ex. 7 – Flesch Dep. Aug. 8, 2019.) Despite having no notice that these topics would be discussed or an opportunity to prepare for them, Mr. Flesch did his best to answer the questions posed to him, and he did not refuse to answer a single question about these topics. (*Id.*)

IV. STANDARD

According to the South Carolina Supreme Court, "the trial court must make an effort to impose reasonable discovery limits," and "requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution." *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010) (vacating lower court's ruling granting a motion to compel on the grounds that the discovery requests at issue sought information and documents that were not relevant to the resolution of the issues before the court). The proper procedure for resolving a relevancy dispute is for the trial court to first identify "the central issue in the case before it" and then determine if the "discovery requests are . . . relevant to a resolution of the [central] issue . . . ." *Id*. at 388-89, 692 S.E.2d at 925 (internal quotation marks omitted).

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V. DEFENDANT'S SECOND REQUESTS FOR PRODUCTION

A. RFP #1: ***Any and all Pro Forma financial statements, both internally and externally generated, drafted or submitted from project inception to present.***

RFP #2: ***Any and all forecasts and/or projections, both internally and externally generated, including but not limited to revenues, profit, operating expenses, net operating income, etc.***

Requests 1 and 2 seek pro forma financial statements and forecasts and projections related to the parking garage project. SCDG has produced all documents responsive to this request in its possession, custody, or control. (Ex. 15 - SCDG Resp. 2nd RFPs.) To the extent that responsive documents exist in the possession of 101 Coleman Partners, those documents are irrelevant as explained in Section VI, below.

B. ***RFP #3:*** ***Business tax returns from inception to present.***

Request 3 seeks SCDG's tax returns. Disclosure of tax returns are disfavored, and courts should exercise great caution in requiring their disclosure. *Terwilliger v. York Int'l Corp.*, 176 F.R.D. 214, 216 (W.D.Va. 1997). Accordingly, there exists a qualified privilege against disclosing tax returns, which can be overcome only if (1) the party seeking disclosure shows that the tax return is relevant to the subject matter in dispute; and (2) the resisting party is unable to identify an alternative source for the relevant information. *Id.* at 216-17.

Here, the Town has made no showing that SCDG's tax returns are relevant to the issue of damages. The Town's conclusory argument that it needs all financial records to determine if unpaid rent should be reduced does not make the tax returns relevant. SCDG does not operate the parking garage or office building, and its tax returns will not demonstrate the revenues and expenses of the garage. Nor has the Town proven that the other records it seeks are not an alternative source for the information that it needs. As a result, the Town has not overcome the qualified privilege against disclosure of tax returns.

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To the extent that the Town seeks the tax returns of 101 Coleman Partners, those documents are irrelevant as explained in Section VI, below, and the Town has not met its burden of overcoming the qualified privilege as to 101 Coleman Partners.

C. ***RFP #5: Support for interest rate on note as outlined in footnote 1, Bates SCDG0004389.***

RFP #6: Any and all documentation for loans, lines of credit, or other notes obtained to finance the project from inception to present.

Requests 5 and 6 seek documents relating to loans that 101 Coleman Partners obtained to finance the project. Presumably, the Town seeks this information to discover or confirm the basis for the rate used by SCDG to discount lost future rent to present value in its initial damages calculation. Although SCDG later amended its damages calculation that uses a different discount rate that is not tied to the cost of debt, SCDG nevertheless produced the loan notes that it used for its initial discount rate. (Ex. 15 - SCDG Resp. 2nd RFPs.)

Any other documentation about the project's financing is irrelevant. In fact, the Town does not explain how these documents are relevant in its motion to compel. Instead, it argues that all financial documents that it seeks are relevant to determine the profitability of the garage to calculate rent payments. Although SCDG disagrees that the Town may reduce damages based on the profitability of the project, loan documentation is not related to profitability. Therefore, those documents are not relevant and are outside the scope of discovery.

D. ***RFP #7: Any and all documentation for equity and other investments in project [sic] from inception to present.***

RFP #8: Any nd all documentation and correspondence related to the Plaintiffs [sic] solicitation of debt or equity financing, inception to present.

In Requests 7 and 8, the Town seeks confidential information relating to SCDG's business relationship with equity investors and efforts to seek financing for the project. Although SCDG

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produced certain documents relating to its efforts to find an equity partner and establishing that it did find an equity partner, it has not produced all such documents because they are irrelevant and confidential, and the burden and expense of compiling and producing such documents outweighs any arguable relevance they might have.

After the Town reneged on its agreement to provide a stable income stream that could help secure a lender for the project, SCDG was forced to seek alternative financing arrangements. Ultimately, it established 101 Coleman Partners to build, own, and operate the office building and parking garage, and SCDG holds only a 15% membership interest in 101 Coleman Partners.

Being forced to create a new entity in which it is only a small, minority member has caused SCDG significant damages. Yet SCDG does not seek damages for those losses because the parking license agreement expressly establishes that rental payments are the only monetary damages recoverable from the Town's breach of the agreement. Because SCDG's relationship with its equity partner is not related to the rental payments due under the parking license agreement, documents relating to that relationship are not relevant to this lawsuit.

E. ***RFP #4: Backup copy of QuickBooks file or other relevant project accounting system from inception to present.***

RFP #9: Internal and/or management prepared financial statements from inception to present.

RFP #10: Internal and/or management prepared reports of revenues and expenses including sufficient segment detail (i.e. detailed by commercial rental, "Parking Spaces," "Public Spaces," and "Reserved Spaces") from inception to present.

RFP #11: Report detailing "Net Operating Profit" generated by "Parking Spaces" from inception to present.

RFP #12: Any and all supporting schedules relevant to or documenting internal calculations or deliberations relevant to the allocation of operating expenses among revenue segments (i.e. commercial rental, "Parking Spaces," "Public Spaces," and Reserved Spaces") from inception to present.

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RFP #13: ***Any and all information and/or schedules, both internally and externally generated, regarding planned and actual parking rates from inception to present.***

RFP #14: ***Any internal or external evaluation of market rates for rental of "Parking Spaces," "Public Spaces," and "Reserved Spaces".***

RFP #15: ***Records or reports detailing "Parking Spaces" usage and resulting revenue from inception to present.***

In Requests 4 and 9-15, the Town seeks from SCDG financial statements, accounting records, and other operational records for the office building and garage. However, SCDG is not in possession, custody, or control of any documents responsive to these requests. SCDG's only business is being a 15% owner of 101 Coleman Partners. As a result, it does not maintain its own accounting system, have its own financial statements, or maintain operational records or reports for the office building or garage.

To the extent that the Town seeks 101 Coleman Partners' records, the Town is not entitled to them, to the extent they even exist, because they are not relevant to this lawsuit as explained in Section VI, below.

VI. DEFENDANT'S SUBPOENA TO 101 COLEMAN PARTNERS, LLC

The Town's document subpoena to 101 Coleman Partners unreasonably seeks nearly every financial and accounting record it possesses. Although the Town generally argues in its motion to compel that it needs each of the requested categories of documents to analyze whether the parking garage operations are profitable under the rent reduction clause, it bases its argument on a mistaken reading of the parking license agreement. Because SCDG terminated the parking license agreement prior to the Rental Commencement Date and the Town's right to rent reduction did not survive the termination of the license, the rent reduction clause is ineffective. Furthermore, any argument that the records are needed to determine SCDG's mitigation efforts fails because those

documents are irrelevant as mitigation is not required when contracting parties, as here, have agreed to a liquidated damages clause.

A. *The rent reduction clause is inapplicable because the parking license agreement terminated and it did not survive the termination of the agreement.*

The Town's motion to compel necessarily fails if the Court determines that the rent reduction clause is not applicable. Here, the rent reduction clause is ineffective because the clear and unambiguous terms of the parking license agreement demonstrate that it only applies during the Rent Period. The rent reduction clause states:

> If at any time during the **Rent Period** of this License should the operation of the Garage result in annual net operating profit, the Licensee shall be entitled to reduce its Fixed Minimum Rent Payment for the following License Year of **the Term** by its pro rata share, based upon the percentage of the Parking Spaces comprising the Public Spaces.

(Ex. 3 - PLA § 1.07(b)) (emphasis added). Thus, for the rent reduction clause to apply, profitability must occur during the "Rent Period," which is defined as "the first fifteen years of the License Term." (*Id.* at § 1.07(a).) And the License Term does not begin until the Rental Commencement Date and it expires upon the termination of the License in accordance with its provisions.

Under the default clause, the Town's failure to pay rent and comply with other obligations under parking license agreement was an event of default, which entitled SCDG to terminate the parking license agreement and bring an action for breach of contract for all rent payments due under the agreement. Here, SCDG terminated the parking license agreement in June 2016, before the License Term and Rent Period even began. And to the extent that the License Term and Rent Period ever began, they ended with the termination of the parking license agreement. (Ex. 7 - Flesch Dep. Aug. 8, 2019 p. 28:3-9; Ex. 14 - Termination Notice.) Either way, the rent reduction clause does not apply because there have been no operations of the garage in the Rent Period.

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The interpretation that the Town's rent reduction rights did not survive the termination of the parking license agreement is further supported by the survival clause found in Section 8.17 of the agreement. Under that section, the only obligations and rights that survived the termination of the parking license agreement were the Town's obligations to pay rent and perform other acts. (Ex. 3 - PLA § 8.17.) Significantly, the survival clause is silent as to the survival of any rights the Town possessed under the parking license agreement, including rent reduction rights.

The South Carolina Court of Appeals decision in *Donahue v. Multimedia, Inc.*, 362 S.C. 331, 608 S.E.2d 162 (Ct. App. 2005), supports the conclusion that the termination of the parking license agreement and survival clause jointly operated to terminate the Town's rent reduction rights under the agreement while preserving its obligation to pay minimum rent payments. In *Donahue*, the plaintiff and defendant entered into a contract that gave the plaintiff the right of first refusal to purchase the defendant's rights in a television program hosted by the plaintiff. *Id.* at 335-36, 608 S.E.2d at 164-65. After the contract expired, the defendant assigned its interest to a third party without providing the plaintiff the right of first refusal. *Id.* at 336-47, 608 S.E.2d at 165. The plaintiff then sued the defendant for breach of contract, and the trial court later granted summary judgment to the defendant because the plaintiff's right to first refusal only existed "during the term" of the contract and did not survive the contract's expiration. *Id.*

The Court of Appeals affirmed the trial court, ruling that the contract unambiguously provided that the plaintiff's right of first refusal lasted during the term of the contract and that he had no such right after the contact expired. *Id.* at 339-40, 608 S.E.2d at 166-67. It also rejected that other the plaintiff's argument that provisions which granted the plaintiff rights that survived the term of the contract applied to the right of first refusal:

> [The plaintiff's] right of refusal, as outlined in Section 6, is expressly limited to "the term" of the contract, which expired in

> August 1996. The fact that the parties expressly agreed certain provisions of the contract would last "in perpetuity" creates no ambiguity in terms expressly limited to the contract's general term. We therefore agree with the trial court that, as a matter of law, the transfer of MEI assets to Universal was in no way precluded by Donahue's right of first refusal as agreed upon in Section 6 of the contract.

Id. at 340, 608 S.E.2d at 167.

Under *Donahue*, the Town's right to rent reduction did not survive the termination of the contract. Just as the plaintiff in *Donahue* had a right of first refusal that was expressly limited to the term of the contract, the Town's right to rent reduction is expressly limited to the "Rent Period." And as the contract in *Donahue* granted rights that survived the expiration of the contract that did not include the right of first refusal, the parking license agreement includes a survival clause that requires the Town to pay rent after the termination but does not include a language maintaining rent reduction rights beyond the termination of the license. So just as the plaintiff's right of first refusal was extinguished when the contract expired in *Donahue*, the Town's right to rent reduction was similarly extinguished when the parking license agreement and Rent Period ended in this case. Therefore, the express terms of the parking license agreement render the rent reduction clause inapplicable and of no effect in this litigation.

This conclusion is also supported by well-established principles of landlord-tenant and contract law. According to the Restatement of Property, if a tenant abandons a lease, the landlord is under no duty to attempt to relet the leased property for the balance of the term of the lease to mitigate the tenant's liability under the lease, including the tenant's liability for rent. *Restatement (Second) of Property*, § 12.1(3). The Restatement further provides that the parties may agree that the tenant's rights to make future rent payments survives the termination of the lease. *Id.*, Comment g., n. 7. Thus, a valid survival clause allows a landlord or licensor to terminate the

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tenant's or licensee's rights under the lease or license without extinguishing the tenant's or licensee's obligation to pay rent. *Northbrook PLC, LLC v. CVS Pharm., Inc.*, Case No. 10 C 873, 2012 U.S. Dist. LEXIS 81089, *8 (N.D. Ill. June 5, 2012) (citing *Nat'l Jockey Club v. Ganassi*, 740 F. Supp. 2d 950, 961-62 (N.D. Ill. 2010)).

Here, the parties were free to negotiate a survival of the Town's rent reduction rights following termination of the license agreement. Instead, they expressly eliminated the survival of such rights and limited the Town's right to rent reduction to the Rent Period. The original draft parking license agreement included language that allowed the Town to partially offset its liability for future rent with payments received from subsequent licensees. But the Town rejected that language and instead proposed a liquidated damages provision that fixed damages as the minimum rental payments and eliminated SCDG's ability to recover consequential and punitive damages. The revised default clause drafted by the Town and approved by SCDG shows the parties' intent to eliminate the right to reduce future rent owed after termination of the parking license agreement, and the contrary position that the Town now takes is contradicted by its proposed revisions to the parking license agreement.

Also, considerations of equity and fairness justify the interpretation that the Town is not entitled to reduce rent based on the profitability of a third-party that is a stranger to the parking license agreement. As a result of the Town's repudiation of the parking license agreement and its obligation to pay rent, SCDG was forced to surrender its sole ownership of the project and create a joint venture with an equity partner to complete it. SCDG maintains only a 15% membership interest in 101 Coleman Partners, and any potential profits that SCDG will earn from the project have been greatly diminished by the Town's acts. Nevertheless, the Town asserts a right to reduce future rent based on 101 Coleman Partners' profitability – not SCDG's profitability. But nothing

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in the parking license agreement allows the Town to reduce the potential damages in this case based on 101 Coleman Partners' profitability, and it would be unfair to penalize SCDG for another entity's profitability. Therefore, the Town should not be allowed to benefit from its actions if the Court determines that it breached the parking license agreement. *See N.J. Indus. Properties v. Y.C. & V.L.*, 100 N.J. 432, 495 A.2d 1320 (1985) (ruling that defaulting tenant was not entitled to credit for excess rent received by landlord against unpaid rent and that notions of fairness and equity precluded the breaching tenant from benefitting from his breach).

B. *Mitigation is irrelevant because the parking license agreement contains a liquidated damages clause.*

The Town also argues that 101 Coleman Partners' financial and operational records are relevant to SCDG's mitigation efforts. Although this argument is made in conclusory fashion with no explanation of how 101 Coleman Partners' records will aid in determining any issue of mitigation, it nevertheless fails because the default clause includes a liquidated damages provision that makes mitigation irrelevant.

A "claim for damages is 'liquidated' in character if the amount thereof is fixed, has been agreed upon, or is capable of ascertainment by mathematical computation or operation of law." *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 91, 757 S.E.2d 557, 559 (Ct. App. 2014). "When parties agree in advance to a sum certain that represents a reasonable estimate of potential damages, they exchange the opportunity to determine actual damages after a breach, including possible mitigation, for the 'peace of mind and certainty of result' afforded by a liquidated damages clause." *NPS, LLC v. Minihane*, 451 Mass. 417, 423, 886 N.E.2d 670, 675 (2008); *see also, Xerox Corp. v. RP Digital Servs.*, 232 F. Supp. 3d 321, 325 (W.D.N.Y. 2017) ("[W]here, as here, a contract contains a valid liquidated damages provision, 'mitigation of damages is not relevant.'"); *Barrie Sch. v. Patch*, 402 Md. 497, 513-14, 933 A.2d 382 (2007)

(holding that a court need not consider mitigation when the parties have agreed to liquidated damages); *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 380, 613 N.E.2d 183 (1993) (stating that mitigation is not proper where there is a valid liquidated damages clause).

Here, the default clause contains a liquidated damages provision because it fixes damages based on the rental payments due under the parking license agreement. In exchange for eliminating the availability of consequential and punitive damages, the parties agreed to fix the damages, which meets the definition of liquidated damages. This conclusion holds even if the rent reduction clause applies because liquidated damages include those capable of ascertainment by mathematical computation. *Wells Fargo Bank*, 408 S.C. at 91, 757 S.E.2d at 559. And the rent reduction clause establishes a simple, straight-forward method of reducing rent that is based on a formula of revenue minus expenses multiplied by the percentage of public parking spaces in the garage.

To avoid this result, the Town argues that the rent reduction clause precludes liquidated damages based on a mischaracterization of Mr. Flesch's deposition testimony. According to the Town, Mr. Flesch claimed that the rent reduction formula is complex and difficult. However, the Town misconstrues his testimony. He actually testified that 101 Coleman Partners does not account for revenue and expenses the way they would have been accounted for if the Town would have honored the parking license agreement because it was terminated based on the Town's breach of its obligations:

> We never made it to a rent period of this license. Your client defaulted at estoppel. Your client defaulted on the deposit of $185,000. The agreement was done and terminated prior to the opening of the garage. There is no rent period. There is no operation of the deck as it relates to this [parking license] agreement, in my opinion. . . .
>
> There are financial statements for the entire project generated from 101 Coleman Partners. They don't separate the operations between the two. Now, we do have a management company that provides

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> operational financials, which I believe we provided to you. The interpretation of those financials is not cut and dry. It's apples to broccoli. To simply say whether one segment of the property was profitable or the other one wasn't, that's not how we operate the garage. We're not operating the garage under the premise of this license. Had this license been in place, things would have been accounted for differently, allocated differently.

(Ex. 7 - Flesch Dep. Aug. 8, 2019 pp. 28:3-9, 29:21-30:8.) Thus, Mr. Flesch was testifying that 101 Coleman Partners' financial records do not lend themselves to easy interpretation under the rent reduction clause – not that the rent reduction calculation is complex or difficult.

As a result, the Town's conclusory argument that there is no liquidated damages clause fails. Mitigation, therefore, is irrelevant to the Court's determination of potential damages, and the Court should deny the Town's motion to compel 101 Coleman Partners to produce its confidential financial and operational records.

VII. CONCLUSION

For the reasons set forth above, SCDG respectfully requests that the Court deny the Town's motion to compel.

/s/ E. Brandon Gaskins
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Attorneys for Plaintiff Shem Creek Development Group, LLP

November 27, 2019
Charleston, South Carolina

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EXHIBIT 1

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STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO. 2017-CP-10-5493

SHEM CREEK DEVELOPMENT GROUP, LLC,

Plaintiff,

vs.

THE TOWN OF MOUNT PLEASANT SOUTH CAROLINA,

Defendant.

* *

DEPOSITION OF: ROBERT SCOTT SMALL, JR.

DATE TAKEN: Wednesday, April 24, 2019

TIME: 9:00 a.m.

PLACE: 100 Ann Edwards Lane
Mt. Pleasant, SC

REPORTED BY: TERI L. SAMPSON, RPR,
Notary Public and Certified
Live Note Reporter

* *

POST OFFICE BOX 61011
NORTH CHARLESTON, SOUTH CAROLINA 29419

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A Yes.
Q Have you known him socially for a while?
A I have known him as Mayor before I knew him socially, yes.
Q Okay. What was the nature -- describe any conversation that you think is material to this case that you had with Mayor Swails.
MR. GASKINS: Object to the form. Go ahead and answer.
A (Continuing) Would you like the history?
Q Sure. That would be grand.
A Okay. In 2011, there was a discussion with the Mayor about the possibility of assisting the Town to bring additional parking to the Shem Creek area, and that resulted in our agreement to fund jointly, 50/50, a study by a Chicago firm to explore the feasibility of building a structured parking facility, whereby we would build it and manage it and operate it, and the Town would be a financial partner in it in some way. Never was discussed how. That study was completed. That study indicated that there was not enough daytime demand for a structured parking facility to make it economically feasible. We paid for it and it went on the shelf.
Q That was -- that study was completed in 2012?

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A '11.
Q '11. Was -- was it DESMAN?
A Yes. It may have been completed in '12, but it was started in '11.
Q That's fine. I think it was completed in 2012. Let me just check. I've got -- well, it's right on the cusp, anyway. At least the memo from them was dated the 26th of January.
A Right.
Q So that was pretty close.
A Yeah.
Q All right. Go ahead.
A So that was where it stood. We did not go any further because we understood the problems of doing a facility in that area.
Q All right.
A It was only later that my partner and I discussed the economy and where Class A office space was available in the Town of Mt. Pleasant, and we determined that there was a possibility to add an office component to the parking, whereby the office would use it in the day and the public would use it at nights, weekends and holidays and get the benefit of all the parking.
Q And when would that consideration have

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occurred, approximately?
A It was probably around the end of '12, first of '13, somewhere in that neighborhood.
Q When DESMAN did the study, it was to study the feasibility of about a 250 space parking facility?
A Correct.
Q Okay. With no office component to it?
A Correct.
Q Just simply parking?
A Correct.
Q Okay. Now, when -- the second time around in late 2012, 2013, or whatever the date was, did you -- how did that -- what was the genesis of that thought? Was that externally stimulated? Was it internally, just between you and Mr. Flesch in reaction to the market condition change?
A It was internally. It was just Mr. Flesch and I. And then we took it to a point where I felt like that we -- I could go back to the Mayor and speak to him about the possibility of solving their problem and bringing a Class A facility to Mt. Pleasant.
Q Now, when you brought it to the Mayor, and that would have been in -- sometime in the same time period, 2012, 2013?
A Correct.

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Q Just -- if I misstate the years, correct me, but I'm interested in a range.

A Me, too. Correct me.

Q Well, we're on the same wave length, then. When you brought it to the Mayor, did you bring it as a -- as a planned project, or was it sort of a kernel of a project?

A Kernel.

Q Just something that you hadn't reduced pen to paper, scaled it out, or developed it any more than just a --

A Concept.

Q A concept, okay. When you had the conversation with Mayor Swails -- you're talking about Mayor Swails?

A Correct.

Q Where did that conversation take place, do you recall?

A Do not recall.

Q Okay. Do you remember whether it was on Town property or was it at some other location?

A Most of the time, I met him in his office, Town property.

Q Okay. And what -- describe for me the conversation that you had with the Mayor in general

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terms.

A I think I can solve your problem.

Q All right.

A I think I've got a solution for how we can build a garage and service the needs of Shem Creek businesses and people and get them out of the neighborhoods and reduce the number of calls you're getting from the neighbors.

Q All right. Had he been getting a lot of calls from the neighbors?

A Of course he had.

Q About parking on the street?

A I would presume.

Q All right. What was Mayor Swails's reaction?

A He said formalize it some and bring it back in a form that we can take a look at it.

Q All right. And then what happened after that conversation?

A I hired an architect out of Greenville.

Q Who is the architect?

A Ken Betsch, B-E-T-S-C-H.

Q And what did you commission Mr. Betsch to do?

A Feasibility sketches, studies.

Q All right. And once -- when did that get accomplished? When did you finish with that?

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A Sometime in the spring, around the spring.
Q Of 2013?
A '13.
Q And what was the next -- did you bring that back to Mayor Swails?
A I certainly did.
Q And so your second meeting with Mayor Swails would have been after the second feasibility study?
A There may have been other meetings, but in order to talk about what produced results. I'm not saying those were the only meetings. I don't recall other meetings. I'm telling you that the sequence that brought us to the conclusion of the licensing agreement was I went to him with a concept; I came back to him with something on paper.
Q All right.
A And that was it.
Q When you came back to him with something on paper, what did you come back -- what was that paper that you brought back to him?
A It's attached as an exhibit to the agreement.
Q Okay. It looks -- it looked to me like an artist's rendition of the front elevation of a building.
A It had more to it than that.

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Q Okay.
A Because it had the parking layout.
Q All right. So the one -- I thought that the -- what was attached to the -- could be wrong.
MR. HINCHEY: Brandon, did you want to look at this? This is the agreement.
MR. GASKINS: That's fine.
(Defendant's Exhibit No. 1 marked for I.D.)
BY MR. HINCHEY:
Q I'm going to show you what's been marked as Exhibit 1. It's been previously disclosed. I don't have a Bate number on this document, but is that -- is Exhibit 1 what you're referring to?
A That's a rendering of the proposed building that he gave, but he also gave two sheets of drawings of the parking layout.
Q Okay.
A That I thought that they were part of it. They were on one document we looked at.
Q This is the only piece of paper that was -- well, the only depiction of the building that was attached to the lease.
A Okay.
Q All right. The other two sheets, do you recall giving them to Mayor Swails?

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A Yes.
Q The -- Exhibit 1, am I correct that that's basically an artist's rendition of the front face?
A Yes.
Q Okay. Now, the other two sheets would have looked like a parking layout design?
A Yes.
Q Internal to the building?
A On the deck.
Q On the deck, okay.
A And internal to the building, two levels.
Q All right. Did it also include any schematics as far as the office space?
A No.
Q The difference, conceptually, between your first consideration and this consideration was the addition of office space?
A Correct.
Q The -- the feasibility study was predicated on the addition of the office space?
A No.
Q It was not? The second feasibility study?
A I don't know of a second feasibility study.
Q Okay. The -- how important a component was it for you to have that office space added to the parking

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deck?

A Extremely.

Q Okay. And what caused that to be important to you?

A Code requirements for the office building for daytime parking use.

Q And what code are you specifically referencing?

A The Town of Mt. Pleasant code for office buildings and required parking to support it.

Q Okay. But having the office space, was that going to take the project from an infeasible -- or unfeasible project to a feasible -- financially feasible project?

A It did.

Q All right. Now, other than that -- what was the next conversation you had with Mayor Swails?

A I don't recall specifically what it was; but at some point, he told me to sit with Eric DeMoura and talk about how we could come together financially and what it would look like.

Q Did you -- I'm going to get to Mr. DeMoura, but I kind of want to exhaust your conversations or your interaction with Mayor Swails. After that second meeting with Mayor Swails, and I know you told me that

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there might have been some intermediate conversations you don't recall, but after that second meeting with Mr. Swails or Mayor Swails, what was the next meeting you had with Mayor Swails?

A I don't have a timeline for that.

Q Okay. What additional conversations, I'm not asking for time, but substantively, did you have with Mayor Swails about the deck?

A I think it's reflected in the licensing agreement. I mean, obviously, an agreement of that intricacy and detail doesn't come about just with one conversation.

Q I expect you're right, and that's why I'm asking the question.

A Here it is. It's a situation in which we had to provide a number of parking spaces to satisfy code for the building. If those were used 100 percent during the day, then what benefit would that be to the Shem Creek area? But if we use our resources to assist the Town, both financially, risk, taking risk off the table for the Town, management, insurance, everything about it, and built additional parking spaces that could be used 24/7, 365 days, was that beneficial to the Town. The answer was yes.

Q Okay.

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A Therefore, we pursued that.
Q All right. And from what source were you given the answer yes?
A It was we will take it to the Council, but we need to have the details of it.
Q All right.
A So that's why.
Q Okay. Did -- in any conversations with Mayor Swails, were there any promises made by Mayor Swails?
A No.
Q All right. It was always I like the idea, there might be a need, getting calls about parking or whatever --
A Can I stop you there?
Q Yeah, absolutely.
A It was never a might have a need. There was a definite need.
Q All right. Let me rephrase that, then.
A Okay.
Q There was a conversation with Mayor Swails that there's a need, I like what you've been presenting to me, let's go to Council. Is that a fair characterization of the conversations you had with Mayor Swails?
A I don't know with whom he spoke.

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Q Okay.
A I would imagine he spoke to the chairman of finance, he spoke to other members of Council, to see if they agreed with his approach before it ever got to the point of a document.
Q Okay.
A But I do not know that.
Q All right.
A But I do know that it progressed.
Q All right. And I want to get to all of those things, but I'm just trying to isolate, a little bit, the conversations you may have had with Mayor Swails.
A I pretty well told you the --
(Cell phone interruption.)
A (Continuing) I apologize for that.
Q No problem. Let me sort of make it easier for you.
A Great.
Q What I'm really interested in is you telling me about any communications you had, discussions, emails, letters, passing notes, however you want to do it, between your entity and Mayor Swails that you think are material to this case or important to this case other than what you've told me.
A I don't know of anything else.

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Q Okay. In other words, I'm just trying to exhaust your recollection so that at the time of trial we don't hear well, you know, I had this great conversation with Mayor Swails over a beer and he said geez, Tex, anything I can do for you and we're in full agreement, there isn't any problem, we'll take care of all the ordinance problems for you and whatever.

A He never said that.

Q Okay. What about with Mr. DeMoura? When was your first meeting with Mr. DeMoura?

A I don't recall.

Q It was after you had that second conversation with Mayor Swails?

A Correct.

Q And what was the purpose of that first meeting you had with Mr. DeMoura?

A To talk about a structure and to -- a financial structure that would be satisfactory to the Town perhaps and to us.

Q And was it just a financial structure that you were visiting with Mr. DeMoura about, or was it also the physical structure?

A It wasn't the physical. It was more of he had obvious concerns about how the public would have access and things of that nature, which were also part of the

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overall. But basically, it was how can we work together to make this happen.

Q Okay. So a friendly conversation?

A Oh, yes. It was all friendly for a while.

Q Until it got unfriendly. All right. What concerns did Mr. DeMoura express to you during those meetings -- or during that meeting?

A I just said them.

Q Okay. That's all of the concerns that he had?

A I don't recall.

Q Those are all the concerns he had that you recall?

A His concerns were reflected in the document.

Q In the lease agreement?

A Licensing agreement.

Q Licensing agreement, excuse me.

A Correct.

Q The primary concern that he had was access to space, parking spaces, by the public?

A Correct.

Q The time that the spaces would be accessible by the public?

A Absolutely.

Q The number of spaces that the public would have access to?

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payments is certainly as important and turned out to be very important.

Q Commencement date?

A Correct.

Q I guess I just kind of lumped that in with the term, but I understand that.

A Well, okay.

Q Okay. So if we include commencement date, those are the five primary deal points?

A What's your definition of "primary"? I mean, I hate to do this, but, you know, every point in this is important, as in any document. And whether it was important at the beginning or it turned out to be important later on is the reason that it was in there, so they were all important.

Q All right. I'll accept that. Thank you. Let's talk about the -- the number of spaces. How many spaces were discussed in the agreement?

A 176 is the number.

Q 176. Well, what's the total number of spaces that are discussed?

A I mean, 276. I'm sorry.

Q Okay. And that's referenced in the document, 276?

A Correct.

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Q How is that number of spaces described in the document?

MR. GASKINS: Object to the form.

BY MR. HINCHEY:

Q And let me ask you a better question than that.

A That would help.

Q You weren't supposed to be that blunt. On the 276, is that -- was it stated as a range in the document, or was it stated as a single numerical amount?

A Both.

Q It was stated as a range?

A Well, that was why we had in there the substantially similar language in it. Otherwise, it would have been a fact.

Q Okay. When it's --

A But it was a concept, so we didn't know what the factual number was. So we started with what we knew was a concept.

Q Okay. Understood. But as expressed in the document, is it expressed -- is 276 expressed in any place in the agreement as a range of numbers?

A It is -- the 276, I believe, in this document is referenced by the -- I thought the exhibit. But

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obviously, I've got more to find out about that.
Q Sure. We probably both do.
A Yeah.
Q If we look -- and I know that you're going to find out more about the exhibits.
A Correct.
Q So let's put that aside for a minute.
A Okay.
Q In the body of the document, the lease agreement --
A It does not state a range.
Q It states a single number, 276?
A It does state the number 276 and it states 132 for public use, and both of those numbers were based on the concept exhibit that was given to the Town and agreed to by the Town.
Q And it was also stated in the -- in the agreement that -- the 132 was also stated specifically in the agreement; correct?
A That number is in the agreement.
Q All right. Now, was that expressed as a range or as a single number?
A It was expressed that that's what the concept showed.
Q Okay. But it's expressed as a single number?

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A Correct.
Q Okay. Is there also a single number expressed for the reserved spaces?
A Yes.
Q Okay. And what was that single number that was expressed?
A Obviously, it was a difference, but I'm not -- I mean, I could look, but it was 144.
Q Right.
A Where it might be expressed, I don't know.
Q That's all right.
A Yes. It's on the first page, 106.
Q And that is not expressed as a range, but expressed as a single number?
A Yes, expressed in Section 106.
Q When you were --
MR. GASKINS: You're saying Section 106?
THE WITNESS: Correct.
BY MR. HINCHEY:
Q Yeah. The availability as you understood the -- this parking license agreement, you would agree that the -- or your entity agrees that the number of spaces available to the public, either in the form of reserved spaces that were to be available 24 hours a day, 365 days a year, or in the reserved spaces that

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would be available after business hours, seven days a week, that those -- that number of spaces was of material significance to the Town?

A It was a premise for this agreement given the fact that we had not designed the facility and could not be specific as to numbers, but we had to have a framework.

Q Okay.

A And so given the context of later sections, then, yes, that was the framework for it based on the concept plan.

Q So really, what the advantage, the primary advantage to the Town, the primary benefit to the Town, in entering into this agreement, was to get a specific number of spaces to which the members of the public would have access, either 24 hours a day, seven days a week, or after business hours. Am I correct?

MR. GASKINS: Can you restate it? I didn't hear the first part of that question.

(The record was read by the court reporter as follows:)

"QUESTION: So really, what the advantage, the primary advantage to the Town, the primary benefit to the Town, in entering into this agreement, was to get a specific number of spaces to which the members of the

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Mr. DeMoura at any other time?
A We've been over that.
Q Okay. Refresh my recollection.
A It was later on, after he made his presentation.
Q Oh, okay. Thank you. All right. That's fine. I just needed a refresher. Okay.
A And I think, you know, as I stated earlier, I believe that any legal document like this, that it falls to the negotiation, it doesn't happen in a vacuum one time. You present it, you talk about how you got there, and everything. So...
Q All right. The -- what were the primary points contained in the amendment, or were there --
A The change in the number of spaces and the change in the compensation for the public spaces.
Q So -- and I think it recites that it was from 276, at least as far as the space is concerned, it was a reduction in spaces from 276 to what number?
A 234.
Q And the compensation was from 185 to?
A 163,8.
Q Were any terms other than those two terms revised?
A Quite honestly, I would have to do a

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comparative analysis to put the two together to see; but substantively, those were the issues. Those were the two.

Q That's fair. There may be some other minor adjustments, I understand that, but those are the two primary adjustments?

A Right. I mean, we had the profit sharing in the first agreement. There may have been some more clarification of something in here.

Q On that reduction in the -- the potential reduction in lease payments associated with the profitability of the structure, did that profitability include revenue -- consideration of revenue associated with the commercial space?

A No.

Q So it was just -- the only potential reduction would have been associated with revenue from non-reserved -- from -- from public parking or reserved parking availability at off hours. Is that right?

A Yes. And we calculate that by credit card receipts because a credit card is the only access -- way to access out of the parking garage to pay.

Q Because it was going to be operated remotely?

A Correct. But all of the tenants have their own fob to get in and out, so they don't pull tickets.

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Q Okay. Was -- was it ever projected that -- did anyone ever project that that potential discount was of any value?
A We did.
Q You thought it was of value?
A Absolutely.
Q Did anyone perform an analysis that indicated that the garage component, and I'm distinguishing between the garage and the tenants, was going to be profitable?
A We did.
Q And how did you do that? Or did someone do that for you, or did you do it internally?
A We did it internally.
Q Okay. And is that reflected in the document?
A No.
Q So is --
A Only the concept.
Q Okay. But it's -- it wasn't ever reduced to writing?
A Our analysis was not, nor did we share it with anybody, but it -- it was pretty obvious to us.
Q The DESMAN analysis that was done initially when it was just considered the garage operation, that showed that the -- that through 15 years, the garage

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would be constantly operating at a deficit?

A I don't recall what that showed. But, you know, it was in that -- in that agreement, it was a different time and a different environment. So I don't think it's relevant to when we built and future operations.

Q And I made a misstatement, so let me just correct that. I believe in the DESMAN study that they determined that it would be at a net deficit and by year -- every year up to the first seven years, because that's what their study was, they would operate at a net deficit which was, at best, minus $15,000. I'll show you this if you would like.

A I don't need it. To me, that's not relevant to what we did.

Q Okay.

A Although, I think it's relevant to say that even in those times, that's a minor deficit compared to what -- then eight more years, presumably, would get better, but, you know, that's --

MR. GASKINS: Go ahead. Are you done?

A (Continuing) -- speculation.

MR. GASKINS: I am going to object to this line of questioning about the projections of profitability, as I don't think it was properly

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noticed. To the extent you can answer, go ahead, but...

BY MR. HINCHEY:

Q Was there -- was there ever any study, other than the DESMAN study, that demonstrated or opined that the garage component would ever run profitably --

MR. GASKINS: Same --

BY MR. HINCHEY:

Q -- at any point in time?

MR. GASKINS: Same objection.

BY MR. HINCHEY:

Q You can answer.

A Of course.

Q Okay. And what study was that?

A We had to give the bank -- when the Town pulled out, we had to give the bank a financial reason that we were going to build it.

Q Okay.

A So we gave them projections and showed them what we perceived to be the value benefit of building, continuing to build, the 117 spaces that we did not need for the office building.

Q All right. Did those projections --

A Absolutely.

MR. GASKINS: Please let him finish.

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BY MR. HINCHEY:

Q You have to let me put it on the record first. I know you knew what I was going to ask you.

A I want to get out of here in a couple of hours.

MR. HINCHEY: You don't have to object to that. I'll withdraw that question.

MR. GASKINS: Okay.

BY MR. HINCHEY:

Q I'm really trying my best to get you out of here well before the time.

A I know you are. I know you are.

Q The -- now you made me lose my train of thought.

A Well, you couldn't go down that one anyway.

Q Oh, I couldn't? All right. The projections that you gave to the bank, I assume that those projections included both the parking component, and then the -- the office component. Is that right?

A Sure.

MR. GASKINS: Same objection.

BY MR. HINCHEY:

Q Now, what I'm trying to get at is the -- we talked about this clause that's in the initial agreement, and I think it's also in the amended

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agreement, that suggests that there might be a discount available to the Town at some point in time in the future as an offset to any payment obligation. And as kindly as I could be, that always seemed to me, based on the studies, to be, because it's limited to the parking operation, that that was never going to be a source of any discount. Am I correct? In all likelihood?

MR. GASKINS: Same objection.

A (Continuing) You could certainly easily take that position.

Q All right. The -- you did a study also that would indicate -- that provided you with a range under these two agreements of charging -- or charges per hour or per day or per week, that were expected to be acceptable to the public. Am I correct?

A I don't know that we ever put anything on paper like that.

Q Okay.

A Certainly --

Q It's in the DESMAN agreement.

A Well, DESMAN did his own. We didn't -- he made those up.

Q Right.

A That was for a different 250 stand-alone

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facility.

Q I understand.

A So that is not relative to what we built.

Q Okay. All right. The -- let me move on to another topic. In your complaint, you indicate that there was a public/private partnership for the developer -- development of the parking deck. What do you mean by that?

A Well, I think the -- although it's not a partnership entity with liabilities, et cetera, to the Town, it -- the form of the licensing agreement is one of cooperation, and it has both public and private components to it. So, that's basically what I mean.

Q Okay. It doesn't suggest that there was, let's say, an enhanced legal relationship between the two entities?

A No.

MR. GASKINS: Object to the form.

BY MR. HINCHEY:

Q And there was never a partnership agreement or never any kind of a fiduciary relationship between the two entities?

A No. Excuse me. No.

Q What -- what financial benefits did your entity lose as a result of the -- not going forward

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with this lease agreement other than the obvious lack of annual payments by the Town?

MR. GASKINS: I'm going to object. I think that's more probably within the scope of Tyler's anticipated testimony.

MR. HINCHEY: All right.

A (Continuing) There was one -- there was one where I thought about.

Q I didn't hear you what you said. Well, before you answer --

MR. GASKINS: We provided that as a courtesy. I don't think we're bound by what I put in the email. If it's about damages and what was lost by the company, Tyler is the designee with that.

MR. HINCHEY: I'm fine with that. I'm fine with that. I just didn't want to not go into something that was going to be attributable to Tex's testimony that's in one of those things.

MR. GASKINS: Sure.

MR. HINCHEY: As long as I get to ask somebody, I'm happy.

MR. GASKINS: Absolutely.

BY MR. HINCHEY:

Q You don't have to answer that question. Let me go on to something else. Now, one other area that I

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wanted to talk to you about is financing of the project. In paragraph 25 of your complaint, you indicate that you were able to obtain financing by entering into a joint venture with a capital partner. Who was that capital partner?

A There was a fund that was located in Washington, D.C., and with partners in California.

Q What's the name of the fund?

A Mr. Flesch will answer that. I can ask him right now. I don't know why --

Q I don't care. Ask him right now.

MR. FLESCH: Somera Capital.

A (Continuing) Somera Capital.

MR. HINCHEY: S-U-M --

MR. FLESCH: S-O-M-E-R-A.

A (Continuing) Somera Capital.

Q Thank you. Did you have a previous relationship with Somera Capital?

A No.

Q How did you develop the association with Somera?

A The contact came through Jason Smallwood through a friend.

Q Okay. And did you enter into an agreement with them, a written agreement with them?

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A Yes, we entered into an agreement with them.
Q And what was the nature of the agreement?
A It was a joint venture.
Q Okay. Where they would have a participation in the downstream revenue flow?
A It had all the components of a joint venture in it. I mean, it's a very detailed...
Q All right. Pleasant read?
A Yeah.
Q Okay. Now, were they the primary source of capital for the construction of this garage?
A Well, "capital" has a couple of definitions. I mean, "capital" can be used as synonymous with "equity" in our vernacular. It can also be used as the total resources. In this case, it was equity.
Q All right. And they would --
A They were primary. Although, we put in our own money.
Q Can you give me some general idea of what the participation was on your entity's side, and then on Somera's side?
A (Witness pointing towards Mr. Flesch.)
Q Tyler, okay. Thank you. Other than Somera, did anyone else -- did you look to anyone else to finance the project?

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Q Tex, earlier, Jim was asking you about the conversations you had with various people, and I just want to make sure we don't lose any of those. Did you ever have any conversations with Eric DeMoura about the ordinance changes affected by -- or the zoning ordinance changes affected by Ordinance 14022 after those were initially passed and you all became aware of it?

A I did, before and after.

Q Okay. Tell me what you recall about those conversations.

A Well, the conversations were brief because when the changes to the overlay district were proposed and all, they, as sometimes government ordinances are, they were very obtuse and vague, and it was difficult to determine where they applied and didn't apply. And I had the conversation with him because it was coming up for Council on those changes, and he assured me that they did not affect our project or commercial properties, which turned out not to be true.

Q And you said there was a conversation afterwards. What do you recall about that conversation?

A He said he would look into it and find out how it came about and how that footnote got inserted. He

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later called me back and said that he had conversations with several of his staff and that he could not tell me how it got there.

Q All right. There were also some questions about conversations you had with Council members. Do you recall any substantive conversations with Council member Gawrych about the project, or the dispute about the project?

A I had conversations where he expressed support for what we were asking to do, and he had always been because he was a close confidant of the mayor, Billy Swails, when we did the parking license and agreement. And --

Q Did -- go ahead. I'm sorry.

A No.

Q Were you done?

A So I had conversations with him along, but he didn't participate in the negotiations. He -- he was just supportive of what we were doing.

Q Did you have any conversations with Councilman Gawrych about whether --

A The road.

Q -- the former Church Street right of way had been maintained by the Town?

A I did.

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EXHIBIT 2

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
:
COUNTY OF CHARLESTON) CASE NO. 2017-CP-10-5493

SHEM CREEK DEVELOPMENT GROUP, LLC,

Plaintiff,

-versus-

THE TOWN OF MOUNT PLEASANT, SOUTH CAROLINA,

Defendant.

WITNESS: ERIC DeMOURA

DATE: Monday, April 29, 2019

TIME: 10:08 a.m.

LOCATION: Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, South Carolina 29401

REPORTED BY: Janice D. Hayward, RMR
NCRA Registered Merit Reporter
240 Oak View Way
Summerville, South Carolina 29483
843.478.6756
JanHayward1@Gmail.com

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A Yes.
Q Okay. Location, this is at the intersection of Coleman and Mill Street, correct?
A Yes.
Q And that's where the project was ultimately constructed, correct?
A Yes.
Q Okay. It lists a total parking cost of $4,630,000. Do you know how that figure was calculated?
A I don't. Likely it was derived somehow or backed into. I don't recall that particular number or how we generated it unless it was some kind of multiplication between the bottom two numbers, or the next two numbers, I should say.
But I do recognize the other points in the document here.
Q Okay. The next one is total space is 276. I'm assuming that means that the garage would have 276 total spaces?
A Correct.
Q Okay. Do you know how that number was calculated?
A I do not.
Q What do you recall in these early

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perspective, you'd have to have an amount of spaces that made it worthwhile to the public value. But that's not our number.

BY MR. GASKINS:

Q Did the town ever do any type of analysis to determine what number would make it worthwhile for the town to enter into this partnership?

A I don't recall.

Q In reviewing documents as part of this litigation, do you remember seeing any documents in which the town discussed the number of spaces that would need to be provided for the town to enter into this partnership?

A No.

Q All right. Next one is cost per space, $16,775. Do you know how that was calculated or determined?

A I don't. I don't remember.

Q All right. Next area is use terms. We've already talked about 276. The next one is 144 spaces reserved for tenants. What is that referring to?

A The terms allowed 144 of the 276 spaces to be retained by office tenants of the structure of the parking garage for the days and times

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specified, Monday through Friday 6:00 to 5:00 p.m.

Q Do you know how that 144 spaces was determined for the tenants?

A I don't recall.

Q Okay. It's my understanding that the zoning code requires a certain number of spaces for office use based on the square footage and that that is how that number was determined. Do you agree or disagree with that?

A I wouldn't disagree with it. Could be.

Q All right. The next one, 132 spaces available Monday through Friday 6:00 a.m. to 5:00 p.m., what is that referring to?

A The balance of parking spaces that are not reserved or required for the tenants, public spaces.

Q Okay. And those spaces would be available to the public on a 24-hour seven-day-a-week basis, correct?

A Yes.

Q Do you know how that number was determined?

A I don't. Clearly it was the balance of 276 and 144.

Q Okay. I would agree that seems to be how

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it was determined.

Did the town ever go to Mr. Small and say, this is what we need for publicly available spaces 24/7 for us to go forward with this project?

MR. TACKETT: Object to the form.

A Well, yeah. I think in order for the town to authorize the license agreement, which has these terms, you know, for the amount of money the town was putting up, we expected those amount of spaces.

BY MR. GASKINS:

Q Understood. But what did the town do to determine whether 132 -- to determine 132 was the number?

A Well, I mentioned it was what was left over from the promised 276.

Q Okay. So it was basically a function of what Tex could provide and what was required to satisfy the parking requirements for the office building, is that correct?

A Yes.

Q Okay. There wasn't any type of independent analysis saying the town needs to have 132 spaces available to the public on a 24-hour

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seven-day basis?

A Not that I recall.

Q Okay. And the next bullet refers to 276 spaces available Monday through Friday from 5:00 p.m. to 6:00 a.m. and all day Saturday and Sunday, correct?

A Yes.

Q Okay. And those spaces would be publicly available during basically nights and weekends, correct?

A Yes.

Q The next one, next area or topic says, developer requests $200,000 over 15 years. What is that referring to?

A It is the amount of money that Tex had requested of us over that time period.

Q And the town countered that with $185,000 over 15 years, correct?

A Yes.

Q And that was ultimately what was agreed upon, right?

A Yes.

Q All right. The next topic is, good for Town of Mount Pleasant. What are these bullets referring to?

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A Yes.

BY MR. GASKINS:

Q And so at this point in time, June, late spring, early summer, the town and Tex had agreed in principle to the key terms of the parking agreement. Would you agree with that?

A Yes.

Q And as a result of the progression of the negotiations and you all reaching agreement on the principal terms, town council authorized legal counsel to work with Tex to finalize and formalize an agreement for the rental of those spaces?

MR. TACKETT: Object to the form.

A Yes.

BY MR. GASKINS:

Q And there's no reason for me to make this an exhibit. But it appears that that happened in July of 2013, would you agree with that?

A Yes.

Q Okay. So after town council authorized the negotiation of the agreement, explain to me the process of negotiating that agreement.

A I'm not sure I follow the question. The negotiations at that point had essentially been completed. It was more of legal putting it

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together with some appropriate legal language.

Q Okay. And were you involved in that process, reviewing the legal language?

A Yes.

Q Okay. Do you remember any points of disagreement regarding the legal terms of the agreement?

A I do not.

Q Okay. During this process, how many times did you meet with Tex?

A Goodness, perhaps a dozen.

Q What do you recall about those meetings?

A I enjoyed them. I found Tex to always be forthright, forthcoming. He followed through on what he said. You know, he was honest and he was good to work with. We were trying to pull together a partnership, and he -- in our dealings together, he was a good partner.

Q Did that ever change?

A No. I enjoyed our meeting.

(Marked for identification was Plaintiff's Exhibit 5.)

BY MR. GASKINS:

Q Based on the chronology that I've been able to piece together, it appears that the two

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sides negotiated a parking license agreement. Once you felt comfortable with the final product, it was considered by the police judicial and legal committee of town council in late September of 2013. Is that consistent with your recollection?

A Yes.

Q And I've handed you what's been marked as Exhibit Number 5 which are meeting minutes from the police judicial and legal committee meeting of September 30th, 2013. And on page five, there's some discussion about the approval of the parking license agreement. Do you see that?

A I do.

Q Okay. Take a minute to review it. Let me know when you're finished.

A (Witness complied.)

Okay.

Q You were at that committee meeting, correct?

A Yes.

Q And are these meeting minutes an accurate reflection of the discussion that the committee members had regarding the parking license agreement?

A It appears to be.

Q Okay. Do you see anything that you

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believe is inaccurate?

A No.

Q Okay. And the committee voted unanimously to recommend the approval of the parking license agreement, is that correct?

A Yes.

Q Okay. And town council considered the parking license agreement on its following meeting in October of 2013, is that correct?

A Yes.

Q And during that meeting, the parking license agreement and the associated resolution for that agreement was passed unanimously, correct?

A Yes.

Q Do you remember any members of town council having any objections to the parking license agreement?

A I don't recall.

Q In anticipation of that meeting, there was a Post & Courier article in which you were quoted in. Do you recall that article?

A I don't.

Q Okay.

(Marked for identification was Plaintiff's Exhibit 6.)

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would have nothing to do with any surrounding properties utilizing spaces, that that is a separate arrangement between them if there was adequate capacity.

But the 276 in total were for -- meant for visitors to find a place to park that may or may not be going to any one of those places. But any surrounding property or local office, if there was capacity, they had to work out their own arrangement.

Q All right. That was prior to the meeting in which town council approved the parking license agreement, correct?

MR. TACKETT: Object to the form.

A Let's see. It was about the same time. Yeah, just prior.

(Marked for identification was Plaintiff's Exhibit 7.)

BY MR. GASKINS:

Q I hand you what's been marked as Exhibit Number 7. Are you familiar with Exhibit Number 7?

A I am.

Q What is it?

A It's the resolution with regard to the license agreement.

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Q And this is the resolution that town council adopted authorizing the mayor to enter into the parking license agreement?

A Yes.

Q Let's walk through each of these recital paragraphs. The first one says, whereas, the Shem Creek area in the town of Mount Pleasant is a vibrant and busy public gathering area enjoyed by residents and tourists. Do you see that?

A Yes.

Q Okay. Was that true at the time this resolution was adopted?

A Yes.

Q The next one says, the need for accessible and safe public parking is evident.

Was that true at the time this resolution was adopted?

A I don't know. I assume so.

Q Okay. It's the town's position or town council's position --

A At that time, yes.

Q Okay. And the next one says, a parking garage located in this area will contribute to the growth of the Shem Creek area while providing safe and convenient access to residents and tourists.

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Was that the town's position at the time the agreement was entered into?

A I assume so. That's what they approved at that time.

Q The next one refers to Shem Creek Development Group constructing the parking facility. Then the next one says, it is in the best interest of the town of Mount Pleasant to reserve parking spaces within the proposed parking facility for the public.

A Yes.

Q And was that true at the time this resolution was adopted?

MR. TACKETT: Object to form.

A It appears so.

BY MR. GASKINS:

Q Okay. And not just town council, you thought it was in the best interest of the town of Mount Pleasant to reserve the parking spaces in the deck, didn't you?

A Well, I thought it was -- you know, I think in terms of what council -- what their desire is and their decisions are and given the revitalization plan and what council had adopted, I felt that I was acting in my negotiations with

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Tex based in line with how they felt.

So when this went to council for approval, I felt strongly and today feel strongly that that's what they were expecting at the time.

Q Was resolution 13102 ever rescinded or revoked?

A No, not that I believe.

Q Is it fair to say that it remains the town's position that it is in the best interest of the town of Mount Pleasant to reserve parking spaces within the proposed parking facility for the public?

MR. TACKETT: Object to the form.

A I don't think so. I mean, I can't speak for council, but surely as time went on, they didn't -- just from me, my opinion is it didn't seem like they believed it was still in the town's interest, I think especially when the scale shape of the structure produced less spaces.

BY MR. GASKINS:

Q Okay. All right. And attached to the resolution is a draft of the agreement.

A Yes.

Q Do you know whether this form that's Exhibit A and the one that was ultimately signed, were there any changes between those two drafts that

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license agreement?

A Yes.

Q What does that mean to you, good faith and fair dealing?

MR. TACKETT: Object to the form.

A Well, again, it's probably -- has its own meaning in the legal world. To me, it simply means we're going to be honest and truthful and, you know, cordial. I mean, we could sit here for a while and talk about what it meant. But I think we all know what it means, it means we're going to act in good faith.

BY MR. GASKINS:

Q Okay. Wouldn't you agree with me that the town had a duty to not interfere with Shem Creek Development Group in trying to make this project a reality?

MR. TACKETT: Object to the form.

A Yes.

BY MR. GASKINS:

Q And for awhile the town did act collaboratively with Shem Creek Development Group to make this project a reality, didn't it?

MR. TACKETT: Object to the form.

A We did, yes.

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BY MR. GASKINS:

Q And one way it did that was adopting some changes to the zoning ordinance. Do you recall those changes?

A Most of them, yes.

Q Okay. And I'm referring to ordinance Number 13077.

(Marked for identification was Plaintiff's Exhibit 10.)

BY MR. GASKINS:

Q I hand you what's been marked as Exhibit Number 10. Please review that, let me know when you're finished.

A (Witness complied.)

Okay.

Q What is this document?

A It is a ordinance amendment to the building code in support of -- well, that allowed the owner of this parking garage greater use of the property.

Q Okay. What was the purpose behind these amendments?

A I can't speak for council and why they approved this or what their thought was. I don't know. I mean, what is -- the product in here

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talks about the height allowance being more and no requirement to flood proof. But what was behind it, I don't know.

Q Who requested these amendments?

A Tex.

Q When did he request them?

A I want to say sometime in the spring or summer of 2013. They were requested prior to the finalization of the license agreement.

Q How do you know that?

A I remember the time line, and I think he sent a letter to the chairperson of our planning committee, which was Miss Stokes-Marshal, sometime in the summer of 2013. And I know we didn't finish up the license agreement, officially have it approved until October.

Q Do you know why he requested those changes?

A I don't know exactly why he did that.

Q Did he indicate to you why he was requesting them?

A I don't believe so.

Q So this is a complete mystery to you?

A No. I can only speculate. And it's -- obviously these amendments are of benefit to the

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property owner. So I suppose they were requested to add to the project.

Q To allow the project to be completed with -- in an effort to fulfill the developer's obligation under the parking license agreement?

MR. TACKETT: Object to the form.

A I would say so, yeah.

BY MR. GASKINS:

Q Who drafted these amendments?

A The planning staff.

Q Were you involved in that process?

A No.

Q Did you support the amendment?

A I don't recall.

Q And it was to the town's benefit as well to adopt these changes to the zoning code, correct --

MR. TACKETT: Object to the form.

BY MR. GASKINS:

Q -- to allow for the development of the project as planned?

MR. TACKETT: Object to the form.

A I don't know that. You know, at the time, I suppose the increased height helped meet the parking spaces in the license agreement.

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As to the provision in here to not have to flood proof, I don't know if that helped the project or didn't help the project.

But clearly -- well, I don't know what was on their mind at the time or what council's internal deliberations were, they were of mind to allow Mr. Small to not have to do that.

You know, the revitalization effort talks of the importance of uses and things like retail on the first floor and flood proofing allows for those things to happen.

And so without that, I recall, I think we knew at the staff level, at least I knew at the staff level at that time that we were probably giving up any hope of having any retail on the first floor with at least that provision in this ordinance.

Q And why was that?

A Because it was going to be -- you'd have to flood proof to have any retail. You can't get a CO if it wasn't constructed that way.

Q Was this zoning ordinance -- was there any opposition to this ordinance?

A I don't recall there being any.

Q Do you believe that it was passed

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unanimously?

A I don't recall. I'm sure the minutes indicate the outcome of the vote. It wouldn't surprise me if it was passed unanimously.

Q At this point in time in December of 2013, do you recall if there was any public opposition to the garage in general and to the parking license agreement in particular?

A This is December of 2013?

Q Yeah.

A Well, we know that it came. Exactly when it started coming that night, feel, knowing that we just passed the license agreement a month before, was that there probably wasn't much, if any, at this time.

Q And so at that point in time, the town was taking a collaborative position with regards to this project, right?

MR. TACKETT: Object to the form.

A Well, yeah, I'd say so.

BY MR. GASKINS:

Q Okay. Did that ever change?

A Well, I think as we -- as the timeline indicates, I mean, clearly when we reached, goodness, February of 2015, council's actions

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indicated that they weren't interested in pursuing this any longer.

Q Why do you think that was?

A I don't know.

Q Do you have any idea?

A Well, truly I can't speak to what was on their mind. I can say there was a significant level of public outcry over I think what was going on in the greater boulevard area.

Q Including around the same time there were some issues in Earl's Court?

A That's correct.

Q What were the issues with regards to Earl's Court?

A There was outcry over, well, the fact that there was a single-family residential being allowed in a dense area, so many units being allowed. So density.

Setbacks. Earl's Court had provisions that allowed a zero setback, build it right to the road. There may have been some other items.

But, you know, those two things, maybe some other things, and the public was starting to come out in opposition to a lot of the allowances

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provided or called for in the revitalization effort.

Q What were the concerns -- and I know there were many, but to the best of your recollection if you could list them, the concerns that some of the public opponents had with regards to the parking garage?

A Scale; size; I mean, the footprint of the building; proximity to the waterway, Shem Creek.

Q So when you say scale, the project was actually too big in their estimation?

A Yeah. Too big, too close. This is my observation of the time. Too big, too close. I think there were some who didn't care for the public investment portion. And there may have been other concerns, but that's all I can think of right now.

Q Are you familiar with the Save Shem Creek organization?

A I am.

Q What do you know about that organization?

A They were a grass-roots effort organized, I believe, due to this project.

Q Why do you believe they were organized due to this project?

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Q Why do you believe they were organized due to this project?

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A Because I don't believe they were associated, at least initially, with the Earl's Creek project. Maybe they were.

But I think the group organized, coalesced really around that garage project. And whether they had feelings towards Earl's Court, I think that came either at the same time or later.

Q Do you know who the organizers of that organization are?

A I believe Jim Owens was the initial organizer. And he had support from Jimmy Bagwell, I believe his son, Will Bagwell.

I don't recall whether Mayor Haynie was a member of the group at the outset or not. But -- and there were others. But those are the names that I can recall most clearly.

Q Other than unsolicited emails that they may have fired off, did you have any communications either by phone or in person with anybody opposing the parking garage?

A I don't believe so. And I think this followed a fairly typical pattern, and that is usually the opposition goes right to policymakers. So I don't recall any communication directly with them.

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Q Did you ever meet with Jim Owens about this project prior to him becoming a council member?

A I don't believe so, no.

(Marked for identification was Plaintiff's Exhibit 11.)

BY MR. GASKINS:

Q I'm going to hand you what's been marked as Exhibit Number 11. I believe it's a calendar invite. And for whatever reason, when we print them out, it changes the date to the date of the printing.

But I think if you look at the bottom, that should give you a better idea of when the meeting actually was.

A Okay.

Q The bottom half, there's an email from Christine Barrett to Nancy Dispenza. Who is Nancy Dispenza?

A She is my administrative assistant.

Q And the date is June 5th, 2014, and it references a Shem Creek meeting on Monday at 8:00 a.m. with various members of council. Christiane Farrell, Tex Small and Jim Owens. It was to be held in your conference room.

Did this meeting occur?

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A I can only assume so.

Q Okay. Do you have any recollection about that meeting?

A I don't.

Q Okay. You don't recall ever meeting with Mr. Owens one on one or in a smaller group than that?

A No. I didn't recall meeting with him at all until you produced the email. So to see him in a meeting obviously makes me feel a little bit uncomfortable about my response.

But I don't recall any real dealings on an individual basis with Jim Owens or any member of Save Shem Creek. Most of their activity, if not all, was with the policymakers.

It appears that if this meeting occurred, the way it's structured looks as if it was maybe a sit down to try to iron some things out. But that's the extent of it that I recall, my interaction anyway.

Q Okay. Were you made aware that Mr. Owens was meeting or providing information to council members as well as members of the staff and the town attorney regarding the project?

MR. TACKETT: Object to the form.

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A I know that there were communications between Mr. Owens and members of the staff which appeared to be more information gathering, requests for information, why this, why that. I recall those.

I learned through preparing for this deposition through reading emails about perhaps increased communication with members of the elected body that I was not aware of.

BY MR. GASKINS:

Q Okay. Do you know where Mr. Owens was employed at the time?

A Yes.

Q Where was that?

A ADC Engineering.

Q And ADC Engineering was the -- I think the structural engineer of record on this project?

A I don't know. I know they were in some way attached to the project.

Q Okay. Do you know whether Mr. Owens was using his position at ADC to obtain information regarding the project that he would share with council?

MR. TACKETT: Object to the form.

A I do not.

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BY MR. GASKINS:

Q Have you heard that before?

MR. TACKETT: Object to the form.

A I have heard that before but I am not aware of any of that information.

BY MR. GASKINS:

Q Where did you hear that?

A Oh, goodness, I can't possibly remember.

Q Do you know whether it's true or not?

MR. TACKETT: Object to the form.

A I have no idea.

MR. GASKINS: I can keep going, but seems like a good stopping point for lunch.

MR. TACKETT: Sounds good.

MR. GASKINS: Before we transition to different areas, is that all right with you all?

MR. TACKETT: Sounds good.

(Lunch recess, and Tyler Flesch is also present.)

BY MR. GASKINS:

Q Before we took a break we were discussing the public opposition that arose and how that may have impacted the town's -- the town council's

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adopted by town council in April of 2014. Does that help refresh your recollection?

A Yes.

Q So when I refer to ordinance 14022 you know what I'm referring to.

A Okay.

Q And it's my understanding that the adoption in April of 2014 was the culmination of a months long process, is that correct?

A Repeat that question.

Q That the adoption of ordinance number 14022 was the culmination of a months long, several months long or a few months long process going through study committee, planning committee, planning commission and so forth?

MR. TACKETT: Objection.

A Correct.

BY MR. GASKINS:

Q And that process began roughly in December of 2013, January 2014, is that right?

A Could have been.

Q And what was the impetus of that process?

A What started --

Q Yeah.

A -- the process?

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Q What started it?

A It -- you know, I can't recall all the particulars, but surely it resulted from public opposition to the project and citizens' sentiment about what was going on along the corridor. The things that we talked about earlier with the revitalization plan and things that it allowed, when those projects sort of started to come out of the ground, clearly the history shows that nearby public wasn't pleased with what they were seeing.

Q Explain to me the process as you understand it from when this first -- when the changes first began being explored by the town through April of 2014 when they were adopted.

A The process?

Q Yeah, the process.

A I can't recall the exact process but it goes something like this typically, and that is that the elected body will ask for amendments to be made. And when I say asked, it usually means that they'll post this item on a public agenda for a council meeting, committee meeting or subcommittee meeting, some kind of public meeting.

And then they'll talk about it, they'll task staff with collecting information or

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preparing recommendations. And then those recommendations will come back to a particular public body and either accept it or reject it.

Ultimately, if it affects a zoning code, it doesn't go right to council for approval, it's got to go through the planning commission first and then on to council for its approval.

Q So after council has made some request to review the zoning requirements perhaps, where does the staff get their direction from as to what changes need to be made?

A We'll get it typically from, it will be a product of some meeting, you know, planning committee, perhaps another subcommittee of council. Usually it ends up on a committee agenda first.

Typically, I can't recall if that was the exact case in this situation, but typically the planning committee, a subcommittee of council will add these items to an agenda, they'll talk about it, they'll ask staff to provide adjustments and we'll bring back the language after that.

Q Who typically drafts the amendments to the

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zoning ordinance?

A The planning staff.

Q At that point in time, early 2014, that would have included Christiane Farrell --

A Um-hum.

Q -- is that right?

A That's right.

Q Kent -- how do you say his last name? I've heard it pronounced many different ways. Prause?

A Prause.

Q Is that how you say it, Prause?

A Yes.

Q Anybody else who would be involved in the drafting?

A Legal. Legal only so far as they'd be trying to perfect what the idea or what's trying to be created with wording. But, yeah, you're looking at Christiane, Kent, supportive legal, maybe one or two others at the time.

Q Okay. What is your involvement in that amendment process?

A Almost nothing. You know, amendments, language, they follow the path of, as I mentioned before, the amendments really arrive on my desk

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when they arrive on subcommittee's desk at the same time. So I don't have much involvement in the construction of them.

Q Okay. Were you more involved than you typically are in the amendment process for ordinance 14022?

A No.

Q Were you aware of the -- were you generally aware of the changes that were being proposed in ordinance number 14022?

A I can't remember back to that time, but I suspect that, you know, I was aware of what staff was tasked to do, what they were working on.

Q And what was your understanding of what they were tasked to do?

A Make some amendments that would, you know, clean up what it felt like council no longer wished to entertain as part of an ordinance, mostly things that came from, I'd say, Earl's Court, you know, the zero setbacks, you know, I can't remember all the other items attached to the ordinance, but ...

Q What do you mean by zero setback?

A Earl's Court was allowed to build right to the property line. And I recall that being an

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item that council wanted to revisit. You know, there was a lot of consternation about that project back then. I mentioned it earlier in the deposition.

So my memory is that they were asking us at the staff level to craft things that wouldn't allow in the future things like that -- things like that to happen.

And so staff went about it and constructed it and -- to be applicable throughout the corridor.

Q Prior to the adoption of ordinance 14022 in April of 2014, were you aware of how that amendment would affect the parcel on Mill Street where the project was located?

A No.

Q When did you become aware of it?

A You know, thinking back over it, I might have become aware of it -- the best I can remember is I became aware of it perhaps when Tex had come to visit or called me, or I forgot how or what way, and said, hey, you know, wanted to talk about the impact of that ordinance on the project.

I believe at this time if my timeline is correct -- well, before I say that. I

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didn't know what the impact was, or not. And, frankly, I don't recall thinking it had any impact in what was being constructed.

You know, I had a general sense of what was going on, that it was occurring really for things like Earl's Court, maybe even the Boulevard Apartment complex, but not directly to the parking garage.

And I may have even mentioned to Tex one time that I didn't think one had anything to do with the other.

'Course, during this time I don't believe anyone at the staff level would even have necessarily known it would have impacted the parking garage. I think the application finally, or the full design of the parking garage didn't come till later.

So I think Tex had expressed that there was an impact, but I don't think we would have any real way of knowing without knowing the design of the garage.

Q When was that conversation with Tex?

A I don't recall. I can't remember.

Q In relation to the ordinance passing, was it before or after?

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A I think it was after. I think it was after.

Q Did you ever tell Tex that the zoning amendments would not affect that parcel?

A It's possible. And if I did -- I don't recall doing that, but it's possible, and if I did, that's what I believed at the time.

As I said earlier, I had a general sense of what was happening and no indication that what was designed had an impact on the parking garage. And as I said, I don't even know if staff knew it would have some connection to the parking garage.

(Marked for identification was Plaintiff's Exhibit 12.)

BY MR. GASKINS:

Q I'm going to hand you what's been marked as Exhibit Number 12. Are you familiar with this document?

A No, but I don't deny that I wrote it. I don't recall writing it.

Q It appears to be an email that you sent your assistant for distribution to Mayor Page and the members of council, correct?

A Yes.

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Q And it was dated February 20th, 2014?
A Yes.
Q So a good at least a month and a half before the adoption of the ordinance in April, correct?
A Yes.
Q Okay. And it appears that you were aware of how this amendment would affect, or the impact this amendment would have on the area in the urban corridor, is that right?
A Well, as I speak, I speak specifically to residential development, yeah, public street standards, lot development standards, parking requirements, dimensional requirements for residential development.
Q Okay. But it mentions commercial development standards as well, doesn't it?
A Yes, it does.
Q Is it fair to say that you had reviewed the amendment at that point in time?
A In general, yeah. You know, as I said, it arrived at my desk at the same time it arrived at council's so, you know, like I typically do, I would have looked through it.
Q And you don't recall advising Tex or Tyler

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A Yes, it does.
Q Is it fair to say that you had reviewed the amendment at that point in time?
A In general, yeah. You know, as I said, it arrived at my desk at the same time it arrived at council's so, you know, like I typically do, I would have looked through it.
Q And you don't recall advising Tex or Tyler

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or anybody with the developer about these changes?

A No. As I said, I didn't think they impacted that project at all and, you know, didn't feel any requirement to do so.

By the way, these are all public meetings too, so at some point, you know, I mentioned I didn't feel there was any link, didn't think of it in those terms, but the responsibility isn't entirely on the town. I mean, development interests, commercial interests have their own responsibility to keep track of what's going through the public process.

Q Certainly.

But your earlier testimony was that the developer was a partner with the town in this project.

A Um-hum.

Q And isn't it reasonable for a partner to apprise its other partner of changes in the zoning code that may affect the project?

MR. TACKETT: Object to the form.

A I had a good relationship with Tex throughout the negotiation of the agreement. We've covered that earlier. If I had believed or had evidence in my mind to know it would have

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affected the parking garage, I would have contacted him.

BY MR. GASKINS:

Q Well, the other members of planning staff who were involved in this amendment process, they were aware of the parking license agreement?

A Yes.

Q Do you know if either Miss Farrell or Mr. Prause or the town attorney ever contacted Tex or Tyler or anybody associated with the developer about these changes?

A I don't know. You know, being so -- if you look at the timeline, I mean, goodness, we just passed the license agreement. This wasn't far after the license agreement. So I just, you know, I'm not sure they even knew full well that it was a connection.

Q Are you suggesting that it was a mistake or an oversight to change to affect the project site?

MR. TACKETT: Object to the form.

A I don't know, you'd have to ask them.

BY MR. GASKINS:

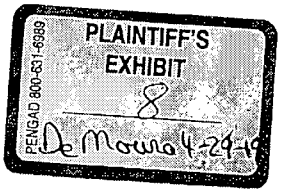
Q What's your specific understanding or what's your understanding of how ordinance number

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EXHIBIT 3

ORIGINAL



PARKING LICENSE AGREEMENT

BY AND BETWEEN

SHEM CREEK DEVELOPMENT GROUP LLC

AND

TOWN OF MOUNT PLEASANT

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Article I.
BASIC LICENSE PROVISIONS

Section 1.01 Effective Date. The Effective Date of this License shall be October 17, 2013.

Section 1.02 Licensor. Shem Creek Development Group LLC ("SCDG")

Section 1.03 Notice Addresses.

Address of Licensor:	400 Hibben Street, Suite 200 Mount Pleasant, SC 29464
With a copy to:	Buist Byars & Taylor, LLC 652 Coleman Blvd., Suite 200 Mount Pleasant, SC 29464 Attn: Gray B. Taylor Esq.
Licensee/Town:	Town of Mount Pleasant ("Town")
Address of Licensee:	Town of Mount Pleasant Municipal Complex 100 Ann Edwards Lane Mount Pleasant, SC 29464
With a copy to:	Town of Mount Pleasant Legal Department 100 Ann Edwards Lane Mount Pleasant, SC 29464

Section 1.04 Property. The real property and improvements to be constructed thereon situated in the Town of Mount Pleasant, South Carolina, as more fully described on the attached Exhibit "A" (the "Property").

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. A conceptual rendering of the Project is attached hereto as Exhibit "A"

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"). 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".

Section 1.07 Rent.

(a) Fixed Minimum Rent: During the first fifteen years of the License Term (the "Rent Period,") Licensee covenants and agrees to pay to 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 to Licensor, in legal tender of the United States of America, without any prior

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demand and without any deduction or setoff whatsoever, Fixed Minimum Rent in the amount of One Dollar per year.

(b) Rent Reduction based Upon Financial Performance of the Parking Garage:If at any time during the Rent Period of this License, should the operation of the Parking Garage result in an annual net operating profit, Licensee shall be entitled to reduce its Fixed Minimum Rent Payment for the following License Year of the Term by its pro rata share, based upon the percentage of the Parking Spaces comprising the Public Spaces.

(i) For the purpose of this Agreement, "Net Operating Profit" shall be defined as gross revenue generated by the Parking Spaces during any License Year, less all expenses related to operation, maintenance and repair of the Parking Garage (including reasonable reserves for repair and replacements), including but not limited to the total costs of operating, repairing, lighting, cleaning, maintaining, painting, securing, managing and insuring the Parking Garage and paying all management fees, taxes, public charges and assessments of whatsoever nature directly or indirectly assessed or imposed upon the land, buildings, equipment and improvements constituting the Parking Garage, including, but not limited to, the cost of all utilities necessary to serve the Parking Garage, all ground rent payments for the Parking Garage, all real property taxes, rates, duties and assessments, local improvement taxes, import charges or levies, whether general or special that are levied charged or assessed against the Parking Garage by any lawful taxing authority whether federal, state, county municipal, school or otherwise (other than income, inheritance and franchise taxes thereon). Should the calculation of Net Operating Profit for any License Year result in a negative number (a "Net Operating Loss"), the Net Operating Profit for the following License Year shall be reduced by the Net Operating Loss from the preceeding License Year.

(ii) By way of example, should the Parking Garage result in an annual net operating profit of $10,000, Licensee's Fixed Minimum rent for the final License Year of the Term shall be reduced by $4,782.61 (e.g., $10,000 x 132/276 = $4,782.61).

Section 1.08 Operating Expense Payment. Licensor, as its sole and exclusive obligation, shall pay all expenses associated with the operation of the Parking Garage.

Section 1.09 License Year. A License Year shall be each successive period of twelve (12) calendar months commencing on the Rental Commencement Date.

Section 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.

Section 1.11 Permitted Use. The sole Permitted Use of the Public Spaces shall be for vehicular parking spaces for the general public at rental rates comparable to market rates for similarly situated parking facilities.

Article II.
LICENSE OF PREMISES AND QUIET ENJOYMENT

Section 2.01 Description of Premises.

(a) Licensor currently Leases (or has the ability to lease) the land shown on Exhibit "A", together with the existing buildings and improvements thereon depicted, all of which constitute the Property, pursuant to the

terms and conditions of that certain Real Property License by and between Snowmill, LLC, as Licensor thereunder, and Lowcountry Capital, LLC, as Licensee thereunder, dated April 1, 2006, as amended and thereafter assigned from Lowcountry Capital, LLC to Lucasville Investments, LLC (the "Prime Lease"). In consideration of the rents, covenants and agreements reserved and contained in this License, Licensor hereby grants an exclusive Licenses over the Premises to Licensee and Licensee accepts same, subject only to the terms and conditions herein contained, and all applicable liens, encumbrances, easements, restrictions, zoning laws, and governmental or other regulations affecting the Property.

(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.

Section 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".

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.

Section 2.04 Possession/Alterations. Licensor and Licensee hereby agree that the Town's issuance of a certificate of occupancy for the Parking Garage shall be deemed conclusive evidence of Licensee's acceptance of the Premises in satisfactory condition and in full compliance with all covenants and obligations of Licensor related to construction of the Parking Garage. Licensee agrees that except as otherwise expressly set forth in this License, no representations or inducements respecting the condition of the Premises have been made to Licensee by Licensor or its authorized representatives. The Licensee shall notify the Licensor of any accident, defect, damage or deficiency in any part of the Premises or improvements which comes to the attention of the Licensee, its employees or contractors notwithstanding that the Licensor may have no obligation in respect thereof.

Section 2.05 Quiet Enjoyment. Licensor covenants that Licensee, upon paying all sums due from Licensee to Licensor and performing and observing all of Licensee's obligations under this License, shall peacefully and quietly have, hold and enjoy the Premises and the appurtenances throughout the License Term without interference by the Licensor, subject, nevertheless, to the other terms and provisions of this License.

Section 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.

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Article III.
OPERATING COVENANTS

Section 3.01 Management of the Project. Licensee acknowledges and agrees that the sole and exclusive control and responsibility for management of the Project shall be with the Licensor. In furtherance of such management, Licensor shall make such decisions regarding staffing, the hiring of employee, operational standards, maintenance, parking fees, rules and regulations for use of the Project, and other decisions related to the management and operation of the Project. Notwithstanding the foregoing, Licensor has agreed to certain standards and criteria for operation of the Parking Garage, as set forth herein.

Section 3.02 Operating Covenants. In consideration of this Agreement, Licensor hereby agrees to the following management guidelines and operational standards for the Premises and the Project:

(a) The Public Spaces subject to this License Agreement are intended to foster tourism and economic development along Coleman Boulevard and the Shem Creek waterfront, and to provide parking for existing local businesses. In order to achieve these objectives, the Public Spaces shall be available for public use, 365 days per year, 24 hours per day.

(b) The Reserved Spaces shall be reserved for separate allocation by Lessor Monday through Friday, 6:00 a.m. until 7:00 p.m. During all other times the Reserved Spaces shall be available for public use, on a first-come first-served basis.

(c) The Premises shall be operational 365 days per year, 24 hours per day. Licensor reserves the right to establish, charge and collect reasonable fees for use of the Public Spaces and for the Reserved Spaces for such times as the Reserved Spaces are available for use by the general public. Parking fees shall be at rental rates comparable to market rates for similarly situated parking facilities. Following the termination of this License Agreement, Licensor shall be free to set parking fees in its sole discretion.

Section 3.03 Operating Costs. Licensor shall be solely responsible for the total costs of operating, repairing, lighting, cleaning, maintaining, painting, securing, managing and insuring the Parking Garage and paying all management fees, taxes, public charges and assessments of whatsoever nature directly or indirectly assessed or imposed upon the land, buildings, equipment and improvements constituting the Parking Garage, including, but not limited to, the cost of all utilities necessary to serve the Parking Garage, all ground rent payments for the Parking Garage, all real property taxes, rates, duties and assessments, local improvement taxes, import charges or levies, whether general or special that are levied charged or assessed against the Parking Garage by any lawful taxing authority whether federal, state, county municipal, school or otherwise (other than income, inheritance and franchise taxes thereon).

Section 3.04 Licensor's Work. Licensee has inspected the Licensor's conceptual plans for the Project, and agrees to accept the Premises if constructed in a substantially similar manner, and that no other Licensor work shall be required.

Article IV.
INSURANCE

Section 4.01 Licensor's Coverage. Licensor shall maintain at its sole expense during the term hereof:

(a) public liability insurance covering the Premises in an amount of $2,000,000 for injury and/or death to one person. The Town of Mount Pleasant shall be named as an additional insured; and

(b) Earthquake, flood, fire and extended casualty, windstorm and hail coverage in an amount not less than 100% of the replacement value of the buildings and improvements now or hereafter located on the Premises (but in no case less than $5,000,000) with companies satisfactory to Licensor; and

Article V.
CASUALTY AND CONDEMNATION

Section 5.01 Fire, Explosion or Other Casualty. In the event the Premises are damaged by fire, explosion or any other casualty to an extent which is less than fifty (50%) percent of the cost of replacement of the Premises, the damage shall promptly be repaired by Licensor at Licensor's expense, but without abatement of Rent. In the event of any such damage and (a) the Premises shall be damaged to the extent of fifty (50%) percent or more of the cost of replacement, Licensor shall repair or rebuild the Premises or the building or buildings, with an abatement of the Fixed Minimum Rent during the time reasonably required to repair or rebuild and a tolling of the License Term for the time required to repair or rebuild.

Section 5.02 Major Capital Event. Following the 15th year of the Rent Term should uninsured capital improvements or repairs costing in excess of $750,000 be required in any single License Year Licensor may elect to terminate this License upon written notice to Licensee and consultation with Licensee's representatives.

Section 5.03 Condemnation. If the whole of the Premises, or so much thereof as to render the balance unusable by Licensee for more than 6 months, shall be taken under power of eminent domain, or otherwise transferred in lieu thereof, or if any part of the Property is taken and its continued operation is not, in Licensor's sole opinion, economical, this License shall automatically terminate as of the date possession is taken by the condemning authority, for so long as the Town of Mount Pleasant is not the condemning authority. No award for any total or partial taking shall be apportioned, and Licensee hereby unconditionally assigns to Licensor any award which may be made in such taking, or condemnation. In the event of a partial taking which does not result in the termination of this License, Fixed Minimum Rent shall be apportioned according to the part of the Premises remaining usable by Licensee.

Section 5.04 Condemnation Award. All compensation awarded or paid for any taking or acquiring under the power or threat of eminent domain, whether for the whole or a part of the Premises or Property, shall be the property of Licensor, whether such damages shall be awarded as compensation for diminution in the value of the License or to the fee of the Premises or otherwise, and Licensee hereby assigns to Licensor all of the Licensee's right, title and interest in and to any and all such compensation.

Article VI.
DEFAULTS AND REMEDIES

Section 6.01 Definitions. In the event that Licensee (a) fails to pay all or any portion of any Rent or other sum due from Licensee hereunder or pursuant to any exhibit hereto within ten (10) days following written notice; (b) fails to comply with any other obligation of Licensee under this License within 30 days after written notice; or (c) becomes bankrupt, insolvent or files any insolvency or similar bankruptcy, debtor proceeding; then Licensee shall be in default hereunder and Licensor may, at its option and without further notice to Licensee, (i) terminate Licensee's right to use of the Premises, (ii) without terminating this License, re-enter and resume exclusive possession of the Premises, or (iii) declare this License terminated, and may thereupon in either event remove all persons and property from the Premises in any manner permitted by South Carolina law. In addition, Licensor shall be entitled to bring an action for specific performance or breach of contract against Licensee, but agrees that it sole and exclusive remedy shall be the Rent Payments due under this Agreement. Both parties waive any claims that either may have to any consequential or punitive damages, and agree that 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. .

Section 6.02 Rights and Remedies. The various rights and remedies herein granted to Licensor shall be cumulative and in addition to any others to which Licensor may be entitled by law or in equity, and the exercise of

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one or more rights or remedies shall not impair Licensor's right to exercise any other right or remedy. In all events, Licensor shall have the right, upon notice to Licensee, to cure any breach by Licensee at Licensee's sole cost and expense, and Licensee shall reimburse Licensor for such expense upon demand.

Section 6.03 Bankruptcy. If Licensor shall not be permitted to terminate this License as hereinabove provided because of the provisions of Title 11 of the United States Code relating to insolvency, reorganization or bankruptcy, as amended ("Bankruptcy Code"), then Licensee as a debtor-in-possession or any trustee for Licensee agrees promptly, within no more than fifteen (15) days upon request by Licensor to the applicable bankruptcy court, to assume or reject this License, and Licensee on behalf of itself, and any trustee agrees not to seek or request any extension or adjournment of any application to assume or reject this License by Licensor with such court. In such event, Licensee may only assume this License if (a) it cures or provides adequate assurance that the trustees will promptly cure any default hereunder, (b) it compensates or provides adequate assurance that Licensee will promptly compensate Licensor for any actual pecuniary loss to Licensor resulting from Licensee's defaults, and (c) it provides adequate assurance of performance during the fully stated term hereof of all of the terms, covenants, and provisions of this License to be performed by Licensee. In no event after the assumption of this License shall any then existing default remain uncured for a period in excess of the earlier of ten (10) days or the time period set forth herein. Adequate assurance of performance of this License as set forth hereinabove. shall include, without limitation, adequate assurance (1) of the source of rent reserved hereunder, and (2) the assumption of this License will not breach any provision hereunder. In the event of a filing of a petition under the Bankruptcy Code, Licensor shall have no obligation to provide Licensee with any utilities or other services as herein required, unless Licensee shall have paid and be current in all payments of Operating Costs, utilities or other charges therefor.

Article VII.
SUCCESSION TO LICENSOR'S INTEREST

Section 7.01 Assignment and Attornment. Licensor, in its sole discretion, may assign its rights under this License Agreement at any time during the License Term, and Licensee shall attorn and be bound to any of Licensor's successors or assigns under all the terms, covenants and conditions of this License for the balance of its remaining term.

Section 7.02 Subordination. Licensee agrees that it shall, within 10 days after receipt of Licensor's request, subordinate this License to any mortgage held by an institutional lender which encumbers any portion of the Premises (each is a "Mortgagee"), pursuant to a commercially reasonable subordination, non-disturbance and attornment agreement (an "SNDA"). Upon request of Licensee, Licensor shall use reasonable diligence to obtain an SNDA from the Mortgagee.

Section 7.03 Mortgagee's Approval. If any mortgagee of the Property requires any modification of the terms and provisions of this License as a condition to such financing as Licensor may desire, then Licensor shall have the right to cancel this License if Licensee fails or refuses to approve and execute such modifications, within thirty (30) days after Licensor's request therefor. Upon such cancellation by Licensor, this License shall be null and void and neither party shall have any liability either for damages or otherwise to the other by reason of such cancellation. In no event, however, shall Licensee be required to agree, and Licensor shall not have any right of cancellation for Licensee's refusal to agree, to any modification of the provisions of this License relating to: the amount of rent or other charges reserved herein; the size and/or location of the Premises; or the duration of the License Term and/or Rental Commencement Date of the term.

Section 7.04 Estoppel Certificate. Within ten (10) days after request therefor by either party from time to time, the other party agrees to deliver in recordable form, a certificate to any proposed mortgagee or purchaser, or to the other party, certifying that this License is unmodified and in full force and effect (or, if there have been modifications, that the same is in full force and effect as modified, and stating the modifications), 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.

Article VIII.
MISCELLANEOUS

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Section 8.01 Assignment and Subletting. Licensee shall not directly or indirectly assign or in any manner transfer, mortgage, pledge, encumber or dispose of this License or any interest therein, or sublet or license the Premises or any part or parts thereof, or permit occupancy of all or any part thereof by anyone with, through or under it (each of the foregoing transactions is called a "Transfer"), without the prior written consent of Licensor, which may be withheld in Licensor's sole discretion.

Section 8.02 Waiver. The waiver by either party of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of rent hereunder by Licensor shall not be deemed to be a waiver of any preceding breach by Licensee of any term, covenant or condition of this License, other than the failure of Licensee to pay the particular rental so accepted, regardless of Licensor's knowledge of such preceding breach at the time of acceptance of such rent, and no covenant, term or condition of this License shall be deemed to have been waived by Licensor, unless such waiver be in writing by Licensor.

Section 8.03 Accord and Satisfaction. No payment by Licensee or receipt by Licensor of a lesser amount than the then due Rent herein stipulated shall be deemed to be other than on account of the earliest stipulated Rent, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as rent be deemed an accord and satisfaction, and Licensor may accept such check or payment without prejudice to Licensor's right to recover the balance of such rent or pursue any other remedy in this License provided.

Section 8.04 Entire Agreement. This License and the Exhibits and Rider, if any, attached hereto and forming a part hereof, set forth all the covenants, promises, agreements, conditions and understandings between Licensor and Licensee concerning the Premises and there are no covenants, promises, agreements, conditions or understandings, either oral or written, between them other than as are herein set forth. Except as herein otherwise provided, no subsequent alteration, amendment, change or addition to this License shall be binding upon Licensor or Licensee unless reduced to writing and signed by them.

Section 8.05 No Partnership. By execution or performance of this License or any related agreement, Licensor does not, in any way or for any purpose, become a partner of Licensee in the conduct of its business, or otherwise, or joint adventurer or a member of a joint enterprise with Licensee.

Section 8.06 Force Majeure. In the event that either party shall be delayed or hindered in or prevented from doing or performing any act or thing required hereunder by reason of strikes, lock-outs, casualties, Acts of God, labor troubles, inability to procure materials, failure of power, governmental laws or regulations, insurrection, war or other causes beyond its reasonable control, then it shall not be liable or responsible for any such delays and the doing or performing of such act or thing shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay; provided that nothing in this Section shall excuse or delay payment of Rent or any other sum.

Section 8.07 Notices. Any notice, demand, request or other instrument which may be or are required to be given under this License shall be delivered personally or sent by either United States certified mail postage prepaid or widely recognized commercial courier service requiring a signed receipt (such as Federal Express), and shall be addressed (a) if to Licensor at the address provided in Section 1.1 for Licensor or at such other address as Licensor may designate by written notice, and (b) if to Licensee at the address provided in Section 1.103 for Licensee or at such other address as Licensee shall designate by written notice. Notices shall be effective upon delivery, unless delivery is refused or cannot be made, in which event notice shall be effective as of attempted delivery, as indicated by written report or receipt of the postal service or commercial courier.

Section 8.08 Captions and Section Numbers; Interpretation. The captions, section numbers, article numbers, and index appearing in this License are inserted only as a matter of convenience and in no way define limit, construe, or describe the scope or intent of such section or articles of this License nor in any way affect this License.

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There shall be no interpretation or construing of this License favorable or unfavorable to either party by virtue of its preparation by Licensor.

Section 8.09 Licensee Defined, Use of Pronouns. The word "Licensee" shall be deemed and taken to mean each and every person or party mentioned as a Licensee herein, be the same one or more; and if there shall be more than one Licensee, any notice required or permitted by the terms of this License may be given by or to any one thereof, and shall have the same force and effect as if given by or to all thereof. The use of the neuter singular pronoun to refer to Licensor or Licensee shall be deemed a proper reference even though Licensor or Licensee may be an individual, a corporation, or a group of two or more individuals or corporations. The necessary grammatical changes required to make the provisions of this License apply in the plural sense where there is more than one Licensor or Licensee and to either corporations, associations, partnerships, or individuals, males or females, shall in all instances be assumed as though in each case fully expressed.

Section 8.10 Broker's Commission. Licensor and Licensee each represent and warrant to the other that no broker or real estate agent was involved in this transaction, and Licensor and Licensee each agree to indemnify and hold harmless the other from and against any and all claims, demands, liability, cost or expense (including attorney's fees) incurred by the other arising out of any claim for a brokerage commission or fee asserted due to the acts of the indemnifying party in connection with this License.

Section 8.11 Partial Invalidity. If any term, covenant or condition of this License or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this License, or the application of such term, covenant or condition to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby and each term, covenant or condition of this License shall be valid and be enforced to the fullest extent permitted by law.

Section 8.12 Execution of License and Municipal Authority. The submission of this License for examination does not constitute a reservation of or option for the Premises and this License becomes effective as a License only upon execution and delivery thereof by Licensor and Licensee. Licensee represents to Licensor that all necessary action has been undertaken to authorize this contractual obligation of the Licensee, and that the payments due under this License Agreement represent an ongoing obligation of the Town of Mount Pleasant. The Licensee may make this license contract beyond the term of the governing members of the municipal corporation entering into the License, since the subject matter of this License is an exercise of the Licensee's business and proprietary powers, and does not involve the exercise of a legislative function or the governmental power of the Licensee. Licensee has obtained the legal opinion of its Town Attorney confirming the provisions of this representation.

Section 8.13 Recording. Licensee agrees not to record this License nor any memorandum thereof, and upon any such recordation this License shall be voidable at Licensor's option. Said memorandum or short form of this License shall describe the parties, the Premises and the License Term and shall incorporate this License by reference. Licensor may record a notice prohibiting attachment of construction liens to its interest in the Premises and Property.

Section 8.14 Applicable Law. The Laws of the State of South Carolina shall govern the validity performance and enforcement of this License.

Section 8.15 Time is of the Essence. Time is of the essence of this Agreement.

Section 8.16 Successors and Assigns. Except as otherwise provided herein this License shall be binding upon and inure to the benefit of the parties hereto and their respective heirs personal representatives, executors, successors and assigns. Nothing herein shall authorize any transfer of this License, any interest in this License, or any interest in Licensee.

Section 8.17 Survival of Obligations. The provisions of this License with respect to any obligation of Licensee 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.

Section 8.18 Jury Trial. **LICENSEE AND LICENSOR BOTH WAIVE A TRIAL BY JURY OF ANY OR ALL ISSUES ARISING IN ANY ACTION OR PROCEEDING BETWEEN THE PARTIES HERETO OR THEIR SUCCESSORS, UNDER OR CONNECTED WITH THIS LICENSE OR ANY OF ITS PROVISIONS, AND THEIR RELATIONSHIP AS LICENSOR AND LICENSEE.**

Section 8.19 Representations. Licensee acknowledges that neither Licensor nor Licensor's agents, employees or contractors have made any representations or promises with respect to the Premises, the Property or this License except as expressly set forth herein.

Section 8.20 Licensor's Liability. Notwithstanding anything to the contrary herein contained, Licensee agrees that Licensor (and, in case Licensor is a joint venture, partnership, tenancy in common, association or other form of joint ownership, the individual partners, members and employees of any such joint venture, partnership, tenancy-in-common, association or other form of joint ownership) shall have absolutely no personal liability with respect to any of the provisions of this License, or any obligation or liability arising therefrom or in connection therewith. Licensee shall look solely to Licensor's equity in the Premises for the satisfaction of any remedies of Licensee against Licensor including, without limitation, the collection of any judgment (or other judicial process) requiring the payment of money by Licensor in the event of any default or breach by Licensor with respect to any of the terms and provisions of this License to be observed and/or performed by Licensor, subject, however, to the prior rights of any holder of any mortgage covering all or part of the Premises, and no other assets of Licensor or any principal or partner of Licensor shall be subject to levy, execution or other judicial process for the satisfaction of Licensee's claim, and in the event Licensee obtains a judgment against Licensor, the judgment docket shall be so noted. This exculpation of liability shall be absolute and without exception whatsoever. This section shall inure to the benefit of Licensor's successors and assigns and their respective principals.

[Signatures on following page]

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IN WITNESS WHEREOF, the parties hereto have executed this License this day and year first above written.

First Witness

Second Witness

LICENSOR:

Shem Creek Development Group LLC,
a South Carolina limited liability company

By: Tyler N. Flesch
Its: Manager

LICENSEE:

Town of Mount Pleasant

By: William D. Swails
Its: Mayor

First Witness

Second Witness

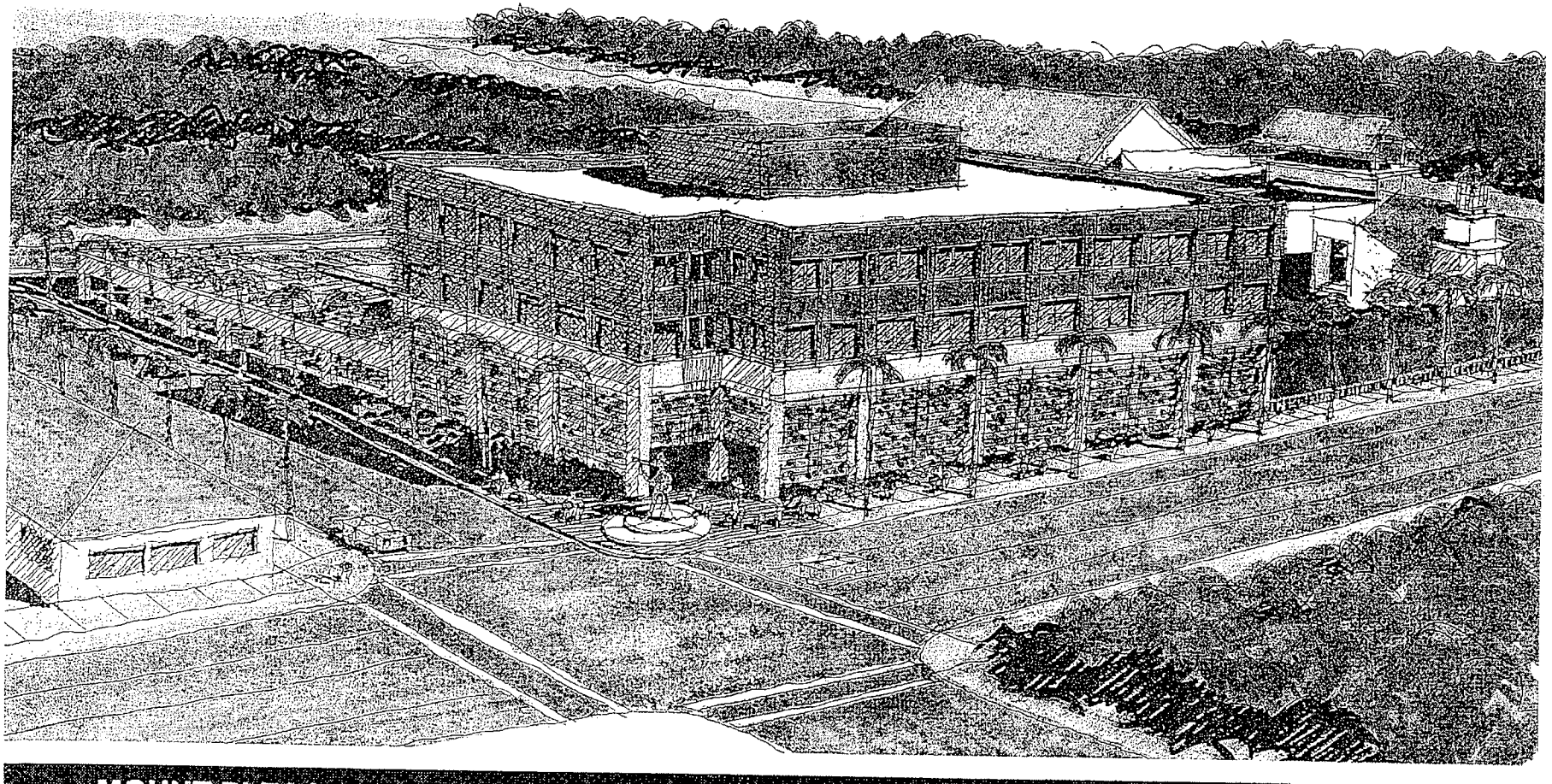
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EXHIBIT "A"

Legal Description and Site Plan for
Property, marked to show Premises

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MOUNT PLEASANT COMMERCIAL DEVELOPMENT
AVTEX COMMERCIAL PROPERTIES

BetschAssociates

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EXHIBIT "B"

Fixed Minimum Rent

Year	Total
1	$185,000.00
2	$185,000.00
3	$185,000.00
4	$185,000.00
5	$185,000.00
6	$185,000.00
7	$185,000.00
8	$185,000.00
9	$185,000.00
10	$185,000.00
11	$185,000.00
12	$185,000.00
13	$185,000.00
14	$185,000.00
15	$185,000.00

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EXHIBIT 4

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[GBT draft 8.15.13]

PARKING LICENSE AGREEMENT

BY AND BETWEEN

SHEM CREEK DEVELOPMENT GROUP LLC

AND

TOWN OF MOUNT PLEASANT

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automatically terminate as of the date possession is taken by the condemning authority, for so long as the Town of Mount Pleasant is not the condemning authority. No award for any total or partial taking shall be apportioned, and Licensee hereby unconditionally assigns to Licensor any award which may be made in such taking, or condemnation. In the event of a partial taking which does not result in the termination of this License, Fixed Minimum Rent shall be apportioned according to the part of the Premises remaining usable by Licensee.

Section 5.03 Condemnation Award. All compensation awarded or paid for any taking or acquiring under the power or threat of eminent domain, whether for the whole or a part of the Premises or Property, shall be the property of Licensor, whether such damages shall be awarded as compensation for diminution in the value of the License or to the fee of the Premises or otherwise, and Licensee hereby assigns to Licensor all of the Licensee's right, title and interest in and to any and all such compensation.

Article VI.
DEFAULTS AND REMEDIES

Section 6.01 Definitions. In the event that Licensee (a) fails to pay all or any portion of any Rent or other sum due from Licensee hereunder or pursuant to any exhibit hereto within ten (10) days following written notice; (b) fails to comply with any other obligation of Licensee under this License within 30 days after written notice; or (c) becomes bankrupt, insolvent or files any insolvency or similar bankruptcy, debtor proceeding; then Licensee shall be in default hereunder and Licensor may, at its option and without further notice to Licensee, (i) terminate Licensee's right to use of the Premises, (ii) without terminating this License, re-enter and resume exclusive possession of the Premises, or (iii) declare this License terminated, and may thereupon in either event remove all persons and property from the Premises in any manner permitted by South Carolina law and accelerate the payment of all remaining Fixed Minimum Rent payments such that they shall then be immediately due and owing. In no event shall Licensor's termination of this License and/or Licensee's right to possession of the Premises abrogate Licensee's agreement to pay Rent and additional charges due hereunder for the full term hereof. Following re-entry of the Premises by Licensor, Licensee shall continue to pay all such Rent and additional charges as same become due under the terms of this License, together with all other expenses incurred by Licensor in regaining possession until such time, if any, as Licensor relets same and the Premises are occupied by such successor. Upon any reletting, sums received from such new Licensee by Licensor shall be applied first to payment of costs incident to reletting; any excess shall then be applied to any indebtedness or other sums owing to Licensor from Licensee other than for Fixed Minimum Rent and Percentage Rent, if any; and any excess shall then be applied to the payment of Fixed Minimum Rent and Percentage Rent, if any, due and unpaid. The balance, if any, shall be applied against the deficiency between all amounts received hereunder and sums to be received by Licensor on reletting, which deficiency Licensee shall pay to Licensor in full, within five (5) days of notice of same from Licensor. Licensee shall have no right to any proceeds of reletting that remain following application of same in the manner set forth herein.

Section 6.02 Rights and Remedies. The various rights and remedies herein granted to Licensor shall be cumulative and in addition to any others to which Licensor may be entitled by law or in

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EXHIBIT 5

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From: Eric DeMoura <EDeMoura@tompsc.com>
Sent: Friday, September 27, 2013 8:56 AM
To: Nancy Dispenza <NDispenza@tompsc.com>
Subject: FW: RedLine Shem Creek
Attach: Shem Creek Parking Garage License Agreement REVISED9.18.13.doc

---

Please print

From: David Pagliarini [mailto:david@lawyershmp.com]
Sent: Wednesday, September 18, 2013 1:10 PM
To: Tyler
Cc: Eric DeMoura; Gray Taylor; Jim Hinchey
Subject: Re: RedLine Shem Creek

Tyler/Gray:

Please find our comments and revisions. I am available to discuss at any time.

On Tue, Sep 17, 2013 at 2:12 PM, Tyler <tyler@redtyadvisors.com> wrote:
David/Eric,

I understood from Tex Small that he spoke with Eric last week in regards to the parking agreement and where we are etc. Tex is out of town this week but has asked that I continue to pursue what we were working on. The last word was that we were to receive a redline version of the document for review. Our original draft was sent on august 15th and I know the height/retail amendment to the overlay is under way etc. As it relates to the document, it is paramount that we work through any issues and get to a final draft as quickly as possible. If possible I would like to review the redline and get any kinks worked out this week, so we can begin our engineering, design, etc. Please advise as to the status of the document and if my timetable is achievable. Thanks in advance….

Tyler Flesch
400 Hibben Street, Suite 200
Mt. Pleasant, SC 29464
843.628.3595 (O)
843.696.3030 (M)

RED DRUM CAPITAL

--
David G Pagliarini
Hinchey,Murray&Pagliarini,LLC
234 Seven Farms Dr. Suite 300
Charleston, SC 29492
(843) 971-8646
(843) 971-8073 (f)

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Hinchey,Murray&Pagliarini,LLC
webmail

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EXHIBIT 6

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[GBT draft ~~8.15~~9.20.13]

PARKING LICENSE AGREEMENT

BY AND BETWEEN

SHEM CREEK DEVELOPMENT GROUP LLC

AND

TOWN OF MOUNT PLEASANT

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Section 3.04 Licensor's Work. Licensee has inspected the Licensor's conceptual plans for the Project, and agrees to accept the Premises if constructed in a substantially similar manner, and that no other Licensor work shall be required.

Article IV.
INSURANCE

Section 4.01 Licensor's Coverage. Licensor shall maintain at its sole expense during the term hereof:

(a) public liability insurance covering the Premises in an amount of $2,000,000 for injury and/or death to one person. The Town of Mount Pleasant shall be named as an additional insured; and

(b) Earthquake, flood, fire and extended casualty, windstorm and hail coverage in an amount not less than 100% of the replacement value of the buildings and improvements now or hereafter located on the Premises (but in no case less than $5,000,000) with companies satisfactory to Licensor; and

Article V.
CASUALTY AND CONDEMNATION

Section 5.01 Fire, Explosion or Other Casualty. In the event the Premises are damaged by fire, explosion or any other casualty to an extent which is less than fifty (50%) percent of the cost of replacement of the Premises, the damage shall promptly be repaired by Licensor at Licensor's expense, but without abatement of Rent. In the event of any such damage and (a) the Premises shall be damaged to the extent of fifty (50%) percent or more of the cost of replacement, Licensor shall repair or rebuild the Premises or the building or buildings, with an abatement of the Fixed Minimum Rent during the time reasonably required to repair or rebuild and a tolling of the License Term for the time required to repair or rebuild. Following the 13th year of the Rent Term, Should the Premises shall be damaged to the extent of fifty (50%) percent or more of the cost of replacement, ~~during the last two (2) years of the License Term,~~ Licensor may elect to terminate this License.

Section 5.02 Condemnation. If the whole of the Premises, or so much thereof as to render the balance unusable by Licensee for more than 6 months, shall be taken under power of eminent domain, or otherwise transferred in lieu thereof, or if any part of the Property is taken and its continued operation is not, in Licensor's sole opinion, economical, this License shall automatically terminate as of the date possession is taken by the condemning authority, for so long as the Town of Mount Pleasant is not the condemning authority. No award for any total or partial taking shall be apportioned, and Licensee hereby unconditionally assigns to Licensor any award which may be made in such taking, or condemnation. In the event of a partial taking which does not result in the termination of this License, Fixed Minimum Rent shall be apportioned according to the part of the Premises remaining usable by Licensee.

Section 5.03 Condemnation Award. All compensation awarded or paid for any taking or acquiring under the power or threat of eminent domain, whether for the whole or a part of the Premises or Property, shall be the property of Licensor, whether such damages shall be awarded as compensation for diminution in the value of the License or to the fee of the Premises or otherwise, and Licensee hereby assigns to Licensor all of the Licensee's right, title and interest in and to any and all such compensation.

Article VI.
DEFAULTS AND REMEDIES

Section 6.01 Definitions. In the event that Licensee (a) fails to pay all or any portion of any Rent or other sum due from Licensee hereunder or pursuant to any exhibit hereto within ten (10) days following written notice; (b) fails to comply with any other obligation of Licensee under this License within 30 days after written notice; or (c) becomes bankrupt, insolvent or files any insolvency or similar bankruptcy, debtor proceeding; then Licensee shall be in default hereunder and Licensor may, at its option and without further notice to Licensee, (i) terminate Licensee's right to use of the Premises, (ii) without terminating this License, re-enter and resume exclusive possession of the

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Premises, or (iii) declare this License terminated, and may thereupon in either event remove all persons and property from the Premises in any manner permitted by South Carolina law. In addition, Licensor shall be entitled to bring an action for specific performance or breach of contract against Licensee, but agrees that it sole and exclusive remedy shall be the Rent Payments due under this Agreement. Both parties waive any claims that either may have to any consequential or punitive damages, and agree that 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. ~~and accelerate the payment of all remaining Fixed Minimum Rent payments such that they shall then be immediately due and owing~~. ~~In no event shall Licensor's termination of this License and/or Licensee's right to possession of the Premises abrogate Licensee's agreement to pay Rent and additional charges due hereunder for the full term hereof. Following re-entry of the Premises by Licensor, Licensee shall continue to pay all such Rent and additional charges as same become due under the terms of this License, together with all other expenses incurred by Licensor in regaining possession until such time, if any, as Licensor relets same and the Premises are occupied by such successor. Upon any reletting, sums received from such new Licensee by Licensor shall be applied first to payment of costs incident to reletting; any excess shall then be applied to any indebtedness or other sums owing to Licensor from Licensee other than for Fixed Minimum Rent and Percentage Rent, if any; and any excess shall then be applied to the payment of Fixed Minimum Rent and Percentage Rent, if any, due and unpaid. The balance, if any, shall be applied against the deficiency between all amounts received hereunder and sums to be received by Licensor on reletting, which deficiency Licensee shall pay to Licensor in full, within five (5) days of notice of same from Licensor. Licensee shall have no right to any proceeds of reletting that remain following application of same in the manner set forth herein.~~

Section 6.02 Rights and Remedies. The various rights and remedies herein granted to Licensor shall be cumulative and in addition to any others to which Licensor may be entitled by law or in equity, and the exercise of one or more rights or remedies shall not impair Licensor's right to exercise any other right or remedy. In all events, Licensor shall have the right, upon notice to Licensee, to cure any breach by Licensee at Licensee's sole cost and expense, and Licensee shall reimburse Licensor for such expense upon demand.

Section 6.03 Bankruptcy. If Licensor shall not be permitted to terminate this License as hereinabove provided because of the provisions of Title 11 of the United States Code relating to insolvency, reorganization or bankruptcy, as amended ("Bankruptcy Code"), then Licensee as a debtor-in-possession or any trustee for Licensee agrees promptly, within no more than fifteen (15) days upon request by Licensor to the applicable bankruptcy court, to assume or reject this License, and Licensee on behalf of itself, and any trustee agrees not to seek or request any extension or adjournment of any application to assume or reject this License by Licensor with such court. In such event, Licensee may only assume this License if (a) it cures or provides adequate assurance that the trustees will promptly cure any default hereunder, (b) it compensates or provides adequate assurance that Licensee will promptly compensate Licensor for any actual pecuniary loss to Licensor resulting from Licensee's defaults, and (c) it provides adequate assurance of performance during the fully stated term hereof of all of the terms, covenants, and provisions of this License to be performed by Licensee. In no event after the assumption of this License shall any then existing default remain uncured for a period in excess of the earlier of ten (10) days or the time period set forth herein. Adequate assurance of performance of this License as set forth hereinabove. shall include, without limitation, adequate assurance (1) of the source of rent reserved hereunder, and (2) the assumption of this License will not breach any provision hereunder. In the event of a filing of a petition under the Bankruptcy Code, Licensor shall have no obligation to provide Licensee with any utilities or other services as herein required, unless Licensee shall have paid and be current in all payments of Operating Costs, utilities or other charges therefor.

Article VII.
SUCCESSION TO LICENSOR'S INTEREST

Section 7.01 Assignment and Attornment. Licensor, in its sole discretion, may assign its rights under this License Agreement at any time during the License Term, and Licensee shall attorn and be bound to any of Licensor's successors or assigns under all the terms, covenants and conditions of this License for the balance of its remaining term.

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EXHIBIT 7

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STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO. 2017-CP-10-5493

SHEM CREEK DEVELOPMENT GROUP, LLC,

Plaintiff,

v.

THE TOWN OF MOUNT PLEASANT SOUTH CAROLINA,

Defendant.

* *

DEPOSITION OF: TYLER N. FLESCH

DATE TAKEN: Thursday, August 8, 2019

TIME: 2:00 p.m.

PLACE: 100 Ann Edwards Lane
Mt. Pleasant, SC

REPORTED BY: TERI L. SAMPSON, RPR,
Notary Public and Certified
Live Note Reporter

* *

POST OFFICE BOX 61011
NORTH CHARLESTON, SOUTH CAROLINA 29419

Electronically signed by Teri Sampson (401-251-957-7637)
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APPEARANCES

REPRESENTING THE PLAINTIFF:

BRANDON GASKINS, ESQUIRE
Moore & Van Allen
78 Wentworth Street
Charleston, SC 29401
(843) 579-7018
email: gaskinsb@mvalaw.com

REPRESENTING THE DEFENDANT:

DAVID G. PAGLIARINI, ESQUIRE
Hinchey, Murray & Pagliarini, LLC
145 River Landing Drive, Suite 101-B
Daniel Island, SC 29492
(843) 971-8646
email: david@lawyershmp.com

JULIA PARKER COPELAND, ESQUIRE
Hinchey, Murray & Pagliarini, LLC
56 Folly Road Blvd.
Charleston, SC 29407
(843) 577-7455
email: jcopeland@lawyershmp.com

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WITNESS: TYLER N. FLESCH

Examination Page

BY MR. PAGLIARINI. 4

REPORTER'S CERTIFICATE 48
ERRATA SHEET 49

EXHIBITS:

Defendant's
Exhibit Description Page

1 Plaintiff's Second Supplemental Answers to Defendant's First Set of Interrogatories to Plaintiff 6
2 Parking License Agreement 15

_____

STIPULATIONS

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the reading and signing of the transcript is reserved by the Deponent.

MT. PLEASANT, SOUTH CAROLINA, THURSDAY, AUGUST 8, 2019
2:00 P.M.

PROCEEDINGS

\- - - - -

WHEREUPON,
TYLER N. FLESCH,
being first duly sworn, testified as follows:

EXAMINATION

BY MR. PAGLIARINI:

Q Mr. Flesch, for the record, my name is David Pagliarini. I represent the Town of Mt. Pleasant, and the Town has provided to your counsel a notice of 30(b)(6) deposition. Have you received a copy of that notice?

A I have.

Q And just in summary, this notice relates to damages and testimony related to claimed damages. Is that your understanding?

A It is.

Q And have you been designated by the Shem Creek Development Group, LLC, to opine and testify as to claimed damages in this case?

A Yes.

Q Do you know of anyone else in the company or affiliated with the company who could possibly offer

testimony regarding or related to damages in this case if and when we get to trial?

A No.

Q Do you mind if I call you Tyler?

A Absolutely.

Q Tyler, we received from Mr. Gaskins a letter and an attached second supplemental answer to our interrogatories, and specifically I'm looking on this, the bottom of page 2. There's a supplemental response, supplemental answer that says, "As of the estimated date of trial, the present day value of the total amount of rent due under the parking license agreement will be $2,347,229." And is that the amount of damages you'll be testifying to based on an estimated date of trial?

A That is correct.

Q And there is an attachment to that, which we'll get to in minute, which I believe goes through the calculations. Did you prepare the exhibit or attachment regarding the -- related to damages?

A I collaborated along with a -- our consultant, yes.

Q And who is the consultant?

A Dixon Hughes.

Q So first of all, I've attached a cover letter

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to the response as well as the exhibit. Do you know if there is anything missing from this that would be of value or any other documents that were prepared?

A Just give me a minute, please.

Q Sure.

A No. This appears to be the present value calculation they utilized.

Q We're going to mark it as Exhibit 1.

(Defendant's Exhibit No. 1 marked for I.D.)

BY MR. PAGLIARINI:

Q And just so we know how to reference it when we -- as we go through. Tyler, looking at Exhibit 1, specifically the spreadsheet, the date of loss is shown as July 28th, 2017. What is the relevance of that date?

A That is the estimated rent commencement date upon certificate of occupancy for the building.

Q All right. And is that based on the actual certificate of occupancy for the existing building?

A Yeah. There was actually two certificates of occupancy issued for the project. One was a TCO, which is a temporary certificate of occupancy, which related, I believe, to the parking operation, which was previous to this. But the permanent certificate of occupancy I believe references this data.

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Q And the next date down is July 7th, 2032, which is the 15-year term, which I believe is specified in the -- in the agreement. Is that correct?

A I agree, yes.

Q By that I mean the parking license agreement?

A Correct.

Q And the estimated date of trial is an estimate. It's sometime in early 2020, probably based on our conversation with the judge as to when that might happen.

A Correct.

Q All right. Let's talk about the discount factor at 4.6 percent, and there is a note on that. And at the bottom of the page, it says, "Utilized cost of debt for project as discount factor. Interest rate on note is 4.6 percent. Utilized mid-year convention." All right. So there's a lot in that that I want to ask you about. What is the discount rate?

A It's the rate that's utilized to bring back the net present value of a future series of cash flows.

Q Can you tell me generally or specifically how you arrived at 4.6 percent?

A As we sat down to analyze the cash flows, an organization called the AICPA, which is the American Institute of Certified Public Accountants, sets a lot

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of standards that are utilized throughout the country, and practices, and they have a section as it relates to the net present value calculations. They lay out a series of, I believe it's four or five, methodologies to come to that rate that you're asking about. The first being if the agreement were to have a stipulated net present value rate, discount rate, in the agreement. In this case, the parking license agreement does not stipulate a present value rate.

The other ways that you can achieve the calculation is to -- what they say is an instrument that is at zero loss or near zero loss likelihood. You can also buy investments or equities that are the equivalent risk profile and use that rate of return on those assets, such as buying treasuries or, you know, a AAA-rated bond of some sort. Or the other one they identify is the use of the interest rate of the underlying project.

When we look at this future series of cash flow, we understand the Town of Mt. Pleasant is a AAA-rated entity, and that to ensure the security and safety of the future cash flow is to invest the lump sum amount in the future. If we were to purchase securities or an investment that would provide that AAA rating, the discount factor would actually be below two

Page 9

percent.

We looked at all of those possibilities of, you know, a discount rate all the way from one percent up to the 4.6, which is the most conservative estimate we could find, which is the rate of the debt on the project. The other options were less favorable to your client. We thought it was the easiest path to take the most conservative approach.

Q Okay. I notice -- well, you used the term "rate of debt," and in the -- on the exhibit itself, it says interest rate on the note is 4.6 percent. What is the note that is referenced on the exhibit?

A The loan for the project.

Q And has that 4.6 percent interest loan been in place since the -- at least since the time the CO was issued?

A It was actually 3.8 percent. And about -- I don't know the exact date, but about a year into operations, the permanent debt was placed on the property at 4.6 percent.

Q Approximately what is the principal balance of that debt as we sit here?

A It's amortized a little, but 14,650,000 was the original balance, and it's somewhere in the neighborhood of 14,000 -- 150,000 I believe today,

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somewhere in that realm.
Q 14 million?
A I'm sorry. I said 14,000. I apologize. 14,150,000. I wish, yeah. There's also, just for the numbers-sake, $6,300,000 of equity.
Q And I believe what you said before, you were -- your research was -- was that -- would you consider that research based on industry or market rate?
A Yeah. Well, wait. I'm sorry. Say that again. The discount factor, how we came to it?
Q Yes.
A Yeah, it's an AICPA standard. They give you several methodologies to get it, get you to a net discount factor. We chose the most conservative one and the one most favorable to your client.
Q What was the -- you mentioned the equity, you mentioned the balance on the existing note, and the initial, the initial balance. What was the total approximation of the cash investment by the --
A Slightly over 20 million dollars.
Q What is the name of the lending institution?
A South State Bank.
Q What is the remaining term on that note?
A I believe it's nine years with a five-year

Page 11

extension at our option, with a re-pricing mechanism.
Q Any other loans?
A No.
Q Was any capital contributed in exchange for an ownership percentage?
A I don't understand the question.
Q Did any of the investors, or were there investors, invest in exchange for a percentage of the ownership interest?
MR. GASKINS: I'm going to object as outside of the scope of the subject notice, deposition notice.
BY MR. PAGLIARINI:
Q All right. The borrowing entity is Shem Creek Development?
A It is not.
Q What is the name of the borrowing entity?
A 101 Coleman Investors, LLC.
Q Are you a member of 101 Coleman Investors, LLC?
A Individually, I am not.
Q You are through another entity?
A Yes.
Q As part of another entity?
A Yes.
Q What is that entity?

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A Shem Creek Development Group, LLC.
Q Is Shem Creek Development, LLC, the actual party claiming damages in this case?
A It is.
Q Is Shem Creek Development, LLC, the tenant in the subject property?
A I don't understand what you mean by the tenants in the property.
Q Well, this is a land lease; is that correct?
A That's correct.
Q Who is the -- what entity holds an interest in that lease?
A It has been assigned to 101 Coleman Partners, LLC.
MR. GASKINS: I object to that question. Same grounds.
BY MR. PAGLIARINI:
Q All right. Going back to the exhibit, as I understand it, it's broken down into two portions, pretrial losses and post-trial future losses. Is that correct?
A That is correct.
Q All right. And that is factored into an actual lost rent amount based on $185,000 per year; is that correct?

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A That is correct.
Q And the present value, I'm looking at the pretrial past losses, is $555,000; is that --
A In actual rent, yes, that's correct.
Q Okay. So that's present value of the actual rent?
A Just the rent, yes.
Q Right. And then the interest applied is, as discussed, is calculate -- it's the 76,000 plus. 76,756; is that correct?
A That is correct.
Q And, of course, you have not discounted future -- post-trial future losses; is that correct?
A I'm sorry. Say that again.
Q I'm sorry. I didn't ask that properly. The total future lost rent is calculated at 2.22 million dollars; is that correct?
A That is correct.
Q And that is discounted to present value, as you discussed; correct?
A Correct.
Q I asked you a little bit before about the parking license agreement. I know this has been entered prior, and you've seen this, and it's been discussed. But for the purposes of this deposition, I

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want to -- I'm not going to go through anything outside what we've asked you to be prepared to testify to in this circumstance. First of all, is it your understanding that this is a copy, a complete copy, of the parking license agreement between Shem Creek Development Group and the Town of Mt. Pleasant?
A Just give me a second, please.
Q Sure.
A I believe it to be, yes.
Q Tyler, specifically, I'm interested in article VI, defaults and remedies. Which is on page 6 of the document; is that correct?
A Yes.
Q Is it your testimony that there is a liquidated damages provision in this agreement?
A Yes.
Q All right. What are the -- where is the liquidated damages provision? And it may not be in article VI, I'm sorry. I just directed you to there.
A Yeah, just give me a minute.
Q Sure.
A It's midway down the paragraph, that it agrees that the sole and exclusive remedy shall be rent payments due under this agreement.
Q So you're looking at Section 6.01,

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definitions. And you said -- read the provision again, Mr. Flesch.
A Yeah. It says -- well, I'll just read it in its entirety. "In addition, licenser shall be entitled to bring an action, a specific performance, or breach of contract against licensee, but agrees that its sole and exclusive remedy shall be the rent payments due under this agreement."
Q So it's your testimony on behalf of the company that that is a -- that that sentence reflects a liquidated damages provision in the contract?
A Correct.
Q And so let's mark the parking license as Exhibit 2.
(Defendant's Exhibit No. 2 marked for I.D.)
BY MR. PAGLIARINI:
Q Now, Tyler, we had sent, sometime following the deposition notice, the subpoena that I've put in front of you. Have you seen a copy of this subpoena?
A Yes.
Q All right. And I'm specifically not going to get into any legal arguments with you about what is discoverable and what is not. But I'm going to ask you questions, and then if there are objections, fine. We'll deal with them at some point. First of all, you

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said you received a copy of this exhibit?
A Yes.
Q And is it the company's position that some or all of the documents referenced herein are not relevant to the damages calculation?
MR. GASKINS: I'm going to object as outside the scope of the deposition. And our position has been set forth in writing, so I don't know why we would be discussing that further.
BY MR. PAGLIARINI:
Q Are you taking the position -- is the company taking the position, Tyler, that mitigation, any attempts to discover documents or efforts related to mitigation of damages should be excluded in this case?
MR. GASKINS: Same objection.
A (Continuing) Yes.
Q Okay. Why is that?
A In the negotiation of this document, I recall very specifically the original draft form had provisions in for consequential damages in addition to acceleration of rent in the event of a default. And the Town's position, and I can't remember if it was Mr. DeMoura or yourself even, we discussed the Town's desire to narrow the scope and create a certainty in the case of default. And I remember the draft document

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being struck to eliminate the acceleration to change the consequential damages to the fixed rent, the fixed minimum rent amounts outlined in the document, which is the 185,000 over 15 years. That was to be the sole remedy.
So, as in any negotiation, there's give and take, and we agreed to the fixed minimum rent as the liquidated damages. The fixed minimum rent, not the offsets. So it is my position that the Town is in default, and the Town never performed on the opening of the deck or even so much as an estoppel. So, there is no mitigation to be had. The Town was in default prior to the deck ever opening.
Q Are you aware of the difference between admissibility at trial and discovery --
A I'm not an attorney.
Q -- and legal standard?
A Nope.
Q Okay.
A But I would further quantify my statement that the project today is owned and operated by somebody other than Shem Creek Development Group. And we have turned over, in our discovery, underwriting, some of the items on this list, as it related to these items prior to the default of the city, and I believe we've

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even done it since the default of the city. I believe we've provided -- I've even told our management company to provide you financial statements. I don't know every item on this list from memory, but the deck today is not operated under the same scenario it would have been had your client still been involved.

Q Who is the owner-operator of the project at this point?

A 101 Coleman Partners, LLC.

Q So what is, so we can define it, so I understand from a damages standpoint, what is Shem Creek Development Group, LLC's, current involvement, if any?

A In 101 Coleman Partners?

Q Yeah.

A They're a partner. Is that what you were asking?

Q In the -- let me specify that. In the operation, current operation, of management of the parking deck.

A It is a partner and was the developer.

Q What is -- what is the percentage of financial interest of Shem Creek Development Group, LLC?

MR. GASKINS: Objection. It's outside the scope of what has been noticed.

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BY MR. PAGLIARINI:

Q You're not going to answer that question?

A The financial participation, no. I don't understand the relevance to damages.

Q Well, it's Shem Creek Development Group claiming damages; is that correct?

A That is correct.

Q I'm going to have to get this straight. 101 Coleman Investors, LLC.

A Partners.

Q Partners, got it. Did 101 Coleman Partners purchase any rights from Shem Creek Development Group, LLC?

MR. GASKINS: Object. This is outside the scope. It's confidential information.

BY MR. PAGLIARINI:

Q Okay. So you're not -- are you going to answer that question?

A No.

Q How many parking spaces overall are there?

A Where?

Q As completed.

A In what?

Q In the parking garage, parking deck.

A 234.

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Q 234?

A Yes, sir.

Q Okay. Are there records, to your knowledge, kept, either on a daily, weekly, monthly basis, whatever it might be, as to how many of those spots are utilized on a daily basis?

A I'm sorry. I'm not going to --

MR. GASKINS: Same objection.

A (Continuing) I'm not going to -- I'm not trying to be wise with you at all. In what capacity do you mean by that? There's multitudes of ways those spaces are operated. It's not just people pulling in and paying to park. There's leases. There's other things.

Q All right. Well, that's what I want to get to.

A I know you do, but that's part of the operations that Shem Creek Development Group no longer handles. So I'll try to answer your question. If you'll ask it more specifically, I would appreciate it.

Q Let me get it so I understand, because I don't have the inside information or specific knowledge that you do. When we're talking about damages, I'm trying to understand the relevance and involvement of Shem Creek Development Group and 101 Coleman Partners. 101

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Coleman Partners -- well, let's make an assumption that the lease were still in place and payments being made. Who would be collecting and receiving the benefit of those annual rent payments?

MR. GASKINS: Object to the form. It's outside the scope of the deposition.

A (Continuing) I'm going to answer it. I'm going to answer it. It's impossible to tell you that. Because if your client had honored the agreement and made the payments, the make-up of the very partnership that owns it today, I don't know exactly how it would be. It would be different, I can tell you that.

Q Right.

A Everything would have been different had your client not defaulted.

Q All right. What I'm trying to answer -- get the basic question answered is, how is Shem Creek Development Group, LLC, now claiming damages at this point, now that it is not the owner-operator, primary owner-operator of the parking garage?

MR. GASKINS: Same objection.

A (Continuing) I just told you that they were the developer of the project and are a partner in it. I neglected to tell you the percentage of ownership that you asked, which I believe to be proprietary. We

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are very much involved in the project. We built the project. Our costs of building the project are a direct result, our borrowing costs, everything is a direct result of tenancy, agreements such as the parking license agreement. The absence of those payments changed things fundamentally, across the board.

Q Is it your testimony -- because you are here on behalf of Shem Creek Development Group, LLC; correct?

A Correct.

Q Is it your testimony that Shem Creek Development Group, LLC, would be entitled to 100 percent of the damages, either by settlement, award at trial, or otherwise?

A Correct.

Q What I want to try to identify, if you're not going to answer, is if we have to go before a judge, I want to know what it is we need to know to find out what it is we need to know, and that is -- and if it's proprietary, that's fine. But there is an agreement, I believe, that you claim that's proprietary between Shem Creek Development Group and 101 Coleman Partners, LLC; is that correct?

A That is correct. We are a partner in that

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entity. That is absolutely correct. What I neglected to tell you is the specific percentages and financial interests. I don't think that's --

Q I understand.

A But we are an active member in 101 Coleman Partners, LLC.

Q And that agreement, whether there's one or more agreements, you are claiming are proprietary; is that correct? And you are not going to disclose them, the contents of those agreements?

MR. GASKINS: So, that has not been requested. If you want to issue a request, we'll consider it. And if there are certain parts we can disclose, we will. If there are certain parts we need to make subject to a confidentiality order, we will. But until we get that request, we don't have anything to respond to.

A (Continuing) Can we go off the record?

MR. GASKINS: No. Let's keep going.

BY MR. PAGLIARINI:

Q What I'm here asking is about damages. You've testified that 100 percent of any damages claimed are Shem Creek Development Group, and I think it's well within the scope for me to ask questions about the basis for that answer.

A I understand. What name is the agreement in

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on the licensor side?

Q The license agreement, Exhibit 2, as you can see, is in Shem Creek Development Group, LLC --

A So we should be entitled to the remedies and defaults of an agreement that's in our own name. Why would it be anybody else?

Q Well, I don't know. Was that --

A I just told you we are entitled to 100 percent of the -- I've told you that. I've testified to that.

Q Was that -- was that -- could that have been assigned, any --

A It was not assigned. If you ask that question, I'll answer that question. It was not assigned.

Q Is there anything specific in the agreement that reserves any damages claims to Shem Creek Development Group, LLC?

A What do you mean by "reserves"?

Q Well, is there any specific language in those agreements where Shem Creek -- between Shem Creek Development Group, LLC, and 101 Coleman Partners where damages in this lawsuit are reserved for Shem Creek Development Group, LLC?

MR. GASKINS: Same objection.

A (Continuing) We are legally entitled to 100

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percent of any damages in this case, and it has been agreed to by 101 Coleman Partners, yes, specifically.

Q All right. Thank you for that.

A I'm not trying to be cagey, man. I just -- I've got confidentiality agreements on the other side of the table that I have to honor, too.

Q I appreciate that. All I'm trying to figure out is if I have to ask for something, I want to know whether it exists or doesn't.

A I get it.

Q Okay? So I hear what you just said. Is that in a written agreement that you're claiming confidentiality for? Or is that --

A It is. Upon the filing of this lawsuit, 101 Coleman Partners released all the costs, the bad side of it, and any potential winnings or earnings, whatever you want to call it, damages to SCDG, LLC, yes. It's a hundred percent us.

Q That's what I'm trying to get at.

A You got it. Good deal.

Q So let me go back to my earlier line of questioning where I asked you what was likely an impossibly broad question. But are there current -- you mentioned that there were current leases -- or a lease or current leases for utilization of the existing

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234 parking spaces. Is that correct?
A In the course of operation, there are some leases for some of the spaces, that is correct.
Q Do you know how many spaces are under lease?
MR. GASKINS: Same objection.
A (Continuing) Off the top of my head, I don't know. I wasn't prepared to speak to the performance of the deck today. I don't know the specific answer to that.
Q Well, what is the reason that you're not prepared to discuss leases and spaces?
A Well, I believe the notice spoke to the net present value calculation, any documents, pro formas, things that related to how we got to this, in damages. The operation of the deck today, the Town no longer has an interest in that operation. It's defaulted. Or if you win at trial, you walked away from the agreement because we didn't build the spaces is your argument. You don't have any rights to anything going on in that deck today.
Q Are you saying that as part of your consideration, in Exhibit 1, you did not consider mitigation?
A That is correct.
Q And as you did not consider that, you are not

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prepared to discuss it; is that correct?
A That is correct.
Q You did consider, though, the fixed minimum rent; is that correct? Of $185,000 per year?
A I believe that to be, yes, that's the liquidated damages we negotiated.
Q Let's look at Exhibit 2. And, Tyler, I'm specifically looking at Section 1.07, rent. And under B, under 1.07B, which is on page 3, is a paragraph beginning "Rent reduction based upon financial performance of the parking garage."
A Uh-huh.
Q Do you see where I'm going?
A Uh-huh.
Q And the -- I'll summarize and then ask you some questions. But if I read it correctly, the idea is that should the operation of the parking garage result in an annual net operating profit, licensee shall be entitled to reduce its fixed minimum rent payment. Is that correct?
A That's what it says, yes.
Q All right. In preparing your analysis, did you consider section 1.07B?
A No, because I read the first sentence to be the following, "Rent reduction is based upon financial

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performance of the parking garage. If at any time during the rent period of this license" -- and I'm going to stop there for my comment. We never made it to a rent period of this license. Your client defaulted at estoppel. Your client defaulted on the deposit of the 185,000. The agreement was done and terminated prior to the opening of the garage. There is no rent period. There is no operation of the deck as it relates to this agreement, in my opinion.
You guys were very specific in wanting to limit the damages, and I remember the draft specifically, we had the conversation about fixed minimum rent. Nobody wanted consequential damages. Nobody wanted the acceleration clauses in there. We fixed it to the rent.
Now, presumably, we all thought a default event could occur in year three or year eight. It didn't. It occurred in year negative one. We never made it to the operation of this deck under this license. The deck was never one day operated under the premise of any of this being true, with the exception of a requirement to put an estoppel up, with the exception of us needing to build it, start construction and get the building going.
So I stopped after reading that sentence. I

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don't believe there is any rent reduction eligibility here at all, is my position. Okay?
Q So, I hear and understand your position as to default and the like, and I believe that was covered in your earlier deposition. That is not -- I'm not going to repeat those questions today. What I will ask you, though, is on your analysis in Exhibit 1, you have calculated for past and future years $185,000 per year. Is that correct?
A That is correct.
Q Do you -- do you know whether the garage has operated at a net operating profit for the year 2018?
MR. GASKINS: Objection. Outside the scope of the deposition.
A (Continuing) Specifically, I don't believe it to have operated at a profit.
Q Would -- would those records be held by or -- and/or prepared by Coleman Partners, 101 Coleman Partners?
MR. GASKINS: Objection.
A (Continuing) There are financial statements for the entire project generated from 101 Coleman Partners. They don't separate the operations between the two. Now, we do have a management company that provides operational financials, which I believe we

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provided to you. The interpretation of those financials is not cut and dry. It's apples to broccoli. To simply say whether one segment of the property was profitable or the other one wasn't, that's not how we operate the garage. We're not operating the garage under the premise of this license. Had this license been in place, things would have been accounted for differently, allocated differently. We don't do that. The loan is for one project. Everything is premised on one capital stream, one expense stream. So for me to start parsing out expenses between the two operations is -- would be -- I'm not prepared to do that. I didn't prepare to do that.

Q Let me understand, just from a general standpoint. When you're talking about "two operations," are you talking about the parking element versus the office lease element?

A Right.

MR. GASKINS: Same objection.

A (Continuing) Yeah. And I would -- sorry. I would add a third element, which is a blended parking element in which office tenants utilize parking spaces, and then sometimes they don't and it's a transient parker. So there's -- how do you allocate a light bill for space used by three different cars in a day and

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those sorts of things? I haven't taken the time to parse through the operation that way.

I can tell you based on the expectations of this deal and the joint study we did with the Town, the Desmond study, the deck was anticipated to lose money for I believe seven years. It's my belief that's held true, that it's losing money, especially as it relates to debt service, and it will continue to lose money.

And that was the whole point of the negotiation of the minimum rent payment was to fill a gap that we all knew was there when we studied the project together. Well, it originally started out the Town was going to build it by themselves, and they didn't want to do that with the cost and the ongoing maintenance. We came up with this solution. We knew there was going to be an operating hole here, and it's, in fact, proven to be true, in my estimation.

Q So again, if we have to argue about this in court, there are the documents, that you've said that have been provided, show essentially profit and loss statements, but it's not specifically related to the parking element. Is that correct?

MR. GASKINS: Same objection.

A (Continuing) There are management statements broken out by type, but there are subjective

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allocations of expenses. Those subjective allocations can be modified. They can be done differently. An example of that would be ground rent. How do you modify ground rent to the parking operation versus the office? How do you do property taxes? How do you do insurance, a light bill, maintenance? I can go on and on and on. That has not been done under 101 Coleman Partners during their operation because there's no need to. There are management statements that break out the two operations, but the expenses are not allocated in a way that -- I can't say that it's accurate or can give you an idea of. I don't have a debt service number specific to the parking operation versus the office.

Q In those documents, could one look at them and determine a rate or a percentage of occupancy, percentage of the parking spaces?

MR. GASKINS: Same objection.

A (Continuing) No, not from those statements you couldn't. It's a 24-hour-a-day operation. I don't know where someone parks. You know what I mean? Whether -- so your premise here is to go back to the agreement, which was some spaces were for office tenants, small spaces were supposed to be available for nights and weekends, and during the day a limited number of spaces. I don't know where these people

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park. I don't know if they're office guests. We don't run the deck the way we would have had to had this gone through. So for me to testify to the expenses are "X" or if you want to look at those financial statements, they're not going to reflect the specific operation that would have happened under the agreement.

Q So -- and that's -- what I'm asking you is, and I think you answered it, but if one is looking at that, we're not able to get -- not a specific space. Not space 100.

A Right.

Q But a -- but an occupancy percentage or occupancy rate, maybe on a daily or weekly or monthly basis?

A It would be --

MR. GASKINS: Same objection.

A (Continuing) Sorry. It would be challenging. Because if you take revenue, for example, revenue comes in the form of someone pulling in the gate and pulling a ticket, which is what I think you're interested for in this part of the agreement, which is the people paying to park. There's also office tenants that lease parking on top of what we do. There's also people outside of our building that lease spaces. There's also an example of a movie film crew that's in town

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filming OBX, and they rent spaces by the week sometimes, or by, you know, a day, bulk, you know. They might not be renting the spaces that would have been part of the operation of the garage, if that makes sense to you.

Q And I understand what you've said, though not necessarily agree, about the -- we don't have to agree about the -- about the calculation of damages and how it's calculated. What I'm trying to understand is if there is a way, based on existing agreements, that you believe are discoverable, that we could determine, over whether it be a calendar year or an accounting year, to determine the gross amount received, whether it be through lease or by individual user for parking?

A Yes. You could take the --

MR. GASKINS: Same objection.

A (Continuing) You could take the financials, and we can go through them month by month and I'll allocate the expenses as I'm allowed to do under the management agreement, and we can recreate the financials to hypothetically tell you what would have happened. I mean, it's not -- it's subjective is what I'm telling you.

The allocation of expenses, you have to pick a way to do it. A ground rent payment of 125,000, you

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have to pick a subjective way to allocate it. This agreement allows me to allocate it as I see fit. So I see fit to put potentially 125,000 into the parking operation. We don't do that, now. We're not doing that. We're not running around, you know.

So the answer is you would have to take the reports, and we can go through them month by month if you like, and I can sit here and go through every expense with you if that's what we want to do. That's the way, though. But to take the financial statements we have, you can see revenue, you can see some expense allocation, but everything changed in this building, David.

The way we negotiated the office leases changed. We require office tenants to absorb much more of the burden of expenses through triple net leases because we didn't have the 185,000 coming in and because I didn't want the exposure to the long-term expenses. We changed these things. So to take the set of financials for how it's running today and try to project 12 years out in the future how it would have been had we run it, it's as subjective as it gets. And, but to answer your question, if you want to try to go through each month, I'm here. Let's do it.

Q I understand that in your, as you testified

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earlier, in your analysis, you did not consider mitigation. And again, I'm not going to revisit whether you should or shouldn't have. But you didn't; right?

A That's correct. Right. Correct.

Q And in the -- had the -- had all parties fulfilled obligations, hypothetically, as called for in Exhibit 2, the parking license agreement, $185,000 a year would have been -- that income would have been realized?

A Correct.

Q And in that scenario for the -- I realize the spaces were broken down, and it's very difficult to assign certain spaces for specific use. But in the agreement, 132 of the 276 total parking spaces were designated as public spaces; correct? And those public really were for any time; is that right?

A Yeah. I didn't hear the number. But, yeah, there was a segment of the spaces that would be available to the public.

Q Sure.

A And the rest on nights and weekends.

Q Right. So the total of 276 would have been nights and weekends; correct?

A Right. Of course, that's the goal. We don't

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have to revisit where we ended up on number of spaces and why. We get that. So that number, yeah, I mean, it's 276, but that's not where we ended up from a ratio.

Q So now, at 234, is it -- first of all, the garage as currently operating and since it's opened, is that open 24 hours a day?

A It is.

MR. GASKINS: Are you going to have any further questions about the exhibit, on the spreadsheet, because that is what this deposition was about, and this is only what this deposition was about, and I've heard about five questions about the spreadsheet. So...

MR. PAGLIARINI: I disagree. It's about the spreadsheet, but how he got to those calculations and --

MR. GASKINS: He's explained it. And what you're asking about now has nothing to do with the calculations on the spreadsheet. They have to do with everything but the calculations on the spreadsheet.

A (Continuing) I would say this, David, if you were moving forward and things were as they were supposed to be, Shem Creek Development Group would have run this portion of the project as its own entity

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within 101 Coleman Partners. So there would had to have been an agreement between Shem Creek Development Group and 101 Coleman Partners on the ratio of expenses to be allocated and how we would do that.

I came to the deal -- or Shem Creek Development, LLC, came to the deal with the agreement from the Town; okay? We brought that in. We would have managed it. We would have run it. There would have been an agreement on how things got allocated. We never came to the deal with the agreement. It wasn't in place at that point. So we didn't negotiate with 101 and those partners how we would allocate things between a partnering operation and an office. To them, it's one thing.

There's no -- I mean, I appreciate you asking. I'm really not trying to be evasive. We don't look at it like that anymore. We haven't since the day your client said they weren't going to do this. And I've explained my position that I don't believe you're entitled to the mitigation based on we never had a rent period in the entire time of this agreement before they defaulted. I don't have a way to answer you without me just subjectively making up numbers. I mean...

Q I understand you didn't. And the fact is, if I have to go into further detail, you're going to

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object, and we can simply re-notice for specific issues. I don't have a problem with doing that.

A But, David, you can sit here and put a financial statement that I provided to you in front of me, and you can say how much of the light bill is for the parking garage. How the hell am I supposed to know that? I don't know how many of those lights are for the people that park under for the office leases versus how much would park for the transient parking. How much of the ground rent do you want to allocate to the parking operation? You're asking me to give those answers. I'll give them to you, but they're not going to be in your favor. They're subjective is what I'm telling you. So I'm not -- I'll answer the questions all day, let's do that, but they're going to be answers that are subjective. I'm being honest with you. I will allocate more heavily to the parking operation. What do you want me to say?

MR. GASKINS: So, this is a 30(b)(6) deposition. Whatever he says is binding on the company. If you want to ask those questions, notice them up so we can make sure he's prepared to answer them. But right now, you have him asking -- you know, you're asking a lot of questions which he's not prepared to answer, and that's just not fair. That's

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the purpose of having the notice, and I don't even know if you can --

A (Continuing) Yeah. I can be subjective.

MR. GASKINS: And we can handle all this off the record if you want.

MR. PAGLIARINI: No, I would like it on the record.

BY MR. PAGLIARINI:

Q The operating entity, whatever it is, in whatever form or function, is receiving revenue, whether it be through lease or through individual users or otherwise, for spots, parking spaces, that previously would have been covered as public spaces; is that correct?

A That's not a hundred percent -- that's not a -- that's not accurate.

Q All right. Tell me what --

A There are leases that are involved with the spaces at times of the day when the spaces would not be -- for example, an office tenant down the road leases office spaces from us, part of the -- I don't know the numbers, but the reserve spaces for office use. We have the ability to lease those spaces out to the public that we don't need inside the office building. Now, that revenue is not part of the parking

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garage operation. Those spaces are reserved for the office operation. It's that kind of parsing out.

Now, we do have people that pull tickets and clearly park there to go to a restaurant, and that we have. And that is revenue I believe would be applicable if we were in agreement on mitigation, that would be discussed here. But there are plenty of times we have tenant overages from the office people, that they pay -- you know, they -- we have things in the leases that don't have anything to do with the public spaces but would show up on a financial statement for our parking operation because our parking operation doesn't differentiate between what would have been in a license agreement and what we do in a normal operation because we're not under the agreement anymore.

Had we been under agreement and moved forward, there would have been two sets of operating books. One for this specific thing for the parking. We would have had language with 101 Coleman Partners allocating expenses down to a T. Now, whether those would have been equitable for you or not, or you would have agreed with, I don't know. But this agreement is very clear, we have the right to manage the garage and charge a market rate for the parking. We would have done all that. I'm telling you, we didn't do any of those

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things. I didn't take the time to figure out how much of the ground rent should be allocated to the parking because there was no need to.

Now, if you want us to do it now in order for you to try to get you your mitigation, we can sit and do that. That's what I'm telling you. But I'm telling you it doesn't exist because we weren't under agreement, and I didn't have the need or the time or the expense allocation to do it. There was no reason for me to sit there and say, well, if we had been under agreement, I would have charged 38 percent of something, billed to the deck. I mean, I don't even think about that anymore. So, I mean, I wish I could be more helpful. I don't know what else to say to it.

MR. GASKINS: Objection to the last question.

BY MR. PAGLIARINI:

Q What I'm trying to understand, I think you partially answered it, or partially enlightened me, is that there are, for example, individual users that are pulling tickets, to use your terminology --

A Uh-huh.

Q -- and paying for parking spaces that possibly could have been defined as public spaces under the -- under the parking license agreement. Is that correct?

A Yeah, or billed back to an office tenant or

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billed back to a restaurant. It could have been a lot of things, sure.

Q And just for summary purposes, there are no such records now that we can point to or documents that would -- that would give us insight as to the number, frequency, how much money is being generated?

A Yes. We have provided those to you.

Q Okay. Well, what you also said is if I look at those, the allocation of expenses, that those are --

A The expenses. You asked me about the income --

Q Okay.

A -- about the people coming in. We can walk through a financial statement, yeah, that. The income side still needs explanation because it's not all money you would have been entitled to under this analysis. The expense side is more complicated.

Q All right. From an income, what are the elements of income, then, that need explanation?

MR. GASKINS: Same objection.

A (Continuing) What I would call transient parking, the guy that pulls the ticket, the hourly guy. There are excess parking for tenants, office tenants. There are third parties that have monthly leases. There are third parties that have transient short-term

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leases, a week to one month. There are restaurant employees that park there complimentary through arrangements we've made. I think that that's probably it on the revenue side.

But there are always in a given month a unique set of leasers there. And I just gave you an example of a movie company that's in town, and they're not -- that expectation wouldn't be carried forward in any calculation. They're going to be gone in, I don't when, three months, say.

So the other thing to keep in mind is the variable nature of the parking. It's real difficult for me to say hey, we did 50,000 last year. Well, guess what, it didn't rain but three days. Shem Creek is an extremely sensitive area to climate, to the operation of those restaurants that are outdoor in nature, the boats that pull up there. Pulling a segment of time of operation is not something -- I don't have the magic ball going out in time. You want to talk about mitigation for 12 years. If you know what the economy is going to do, if you know what the demand in Shem Creek is, I hope someone shares it with me because I can make a lot of money doing that. I don't know. And that's what we're talking about, mitigation moving forward.

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So those, I answered your question about the four or five types of revenue we have, but I don't think that's an accurate baseline to project anything. I think it's a historic -- a relatively short historical snippet in time of what's gone on.

Q Past performance is not an indication of future -- future performance; is that --

A Ask anybody that owned a house here in 2006 what it was worth in 2008. Would you make that same argument? How many bankruptcies in this town? How do you think I bought the land there? It was out of a bankruptcy. So, no, not to be smart. Yeah, of course, there are some baselines; but is it indicative of future performance entirely, no. I signed an agreement. I thought I was going to get 2.7 million. It didn't happen.

Q Who decides the hourly or daily parking rates?

MR. GASKINS: Objection.

A (Continuing) The management company. Obviously, with oversight. I mean, they can't charge, you know, three pennies.

Q Does the --

A They give us budgets.

Q Does the management company negotiate leases or short-term, long-term related to parking?

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A They would. They would memorialize them. However, they bring us those offers to sign off on. They don't have carte blanche authority to sign a lease.

Q Is a budget prepared annually related to estimated parking income?

MR. GASKINS: Objection.

A (Continuing) Yes. Again, making up those four.

Q Those elements that you mentioned?

A Yes, yes. You won't see them broken out, necessarily. That's the problem again. But, yes.

Q Yeah. Again, I'm not trying to -- I've looked at them and I see numbers. I don't know -- it would be useless for me to throw those in front of you; I was aware of that. Because if they require breaking down, it make no sense.

A Yeah, there's -- yeah, there's budgets and there's variance reports and things like that.

Q Okay. Well, the purpose of this is for me and our client to understand what it is you're going to be testifying to, and you haven't prepared it. You're under no obligation to do so, but I want to know what it is you've relied on.

A I think we discussed that. We looked at the

rent. We talked about how we came to the discount factor. We walked through the past money due, the statutory interest rate. We walked through the calculation. And I think I have testified that I don't believe that -- on the rent reduction, I think we talked about there was no rent period. And for me to speculate on the -- what the deck is going to do in the next 12 years, I don't -- there is no preparation for that. How would I testify to that? I don't know.

Q That's all the questions I have for you on this notice, related to this notice.

MR. PAGLIARINI: I believe we've marked two exhibits; is that correct?

COURT REPORTER: Two.

MR. PAGLIARINI: Brandon?

MR. GASKINS: I have no questions.

(The deposition was concluded at 2:57 p.m.)

C E R T I F I C A T E

STATE OF SOUTH CAROLINA:

COUNTY OF CHARLESTON:

I, TERI L. SAMPSON, Registered Professional Reporter, Notary Public and Certified Live Note Reporter, State of South Carolina at Large, certify that I was authorized to and did stenographically report the foregoing deposition; and that the transcript is a true record of the testimony given by the witness.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

WITNESS MY HAND AND OFFICIAL SEAL this 19th day of August, 2019, in the City of Charleston, County of Charleston, State of South Carolina.

Teri L. Sampson, RPR,
Notary Public and Certified
Live Note Reporter
My commission expires:
May 13, 2025

ERRATA SHEET

I have read the transcript of my deposition and find that no changes are necessary.

_____
Tyler N. Flesch

Having read the transcript of my deposition, I wish to make the following corrections (Please state reason):

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_____
Tyler N. Flesch

Sworn to and subscribed before me this _____ day of _____, 2019, _____ County, South Carolina.

_____
Notary Public
My commission expires _____

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EXHIBIT 8

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
:
COUNTY OF CHARLESTON) CASE NO. 2017-CP-10-5493

SHEM CREEK DEVELOPMENT GROUP, LLC,

Plaintiff,

-versus-

THE TOWN OF MOUNT PLEASANT, SOUTH CAROLINA,

Defendant.

WITNESS: CHRISTIANE FARRELL

DATE: Thursday, May 2, 2019

TIME: 10:19 a.m.

LOCATION: Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, South Carolina 29401

REPORTED BY: Janice D. Hayward, RMR
NCRA Registered Merit Reporter
240 Oak View Way
Summerville, South Carolina 29483
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JanHayward1@Gmail.com

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real quick.

(Recess.)

(Marked for identification was Plaintiff's Exhibit 4.)

BY MR. GASKINS:

Q Before we broke, I believe it was your testimony that you don't remember whether you knew specifically that deleting the footnote would affect the setbacks or the parcel where the parking garage project was going to be located?

MR. TACKETT: Object to the form.

A Yeah, I don't recall.

BY MR. GASKINS:

Q I hand you what's been marked as Exhibit Number 4. This is an email that you sent to Kent Prause, Kelly Cousino, and others on January 13th, 2014, correct?

A Yes.

Q This is approximately one month after the changes had been made to subdistrict C1 in the urban corridor, correct?

MR. TACKETT: Object to the form.

A Yes.

BY MR. GASKINS:

Q Okay. And in this email, you are

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providing direction about what changes are going to be needed in the urban corridor zoning as a result of this process that the planning committee was going through, correct?

A Yes.

Q In the third bullet, don't you specifically direct that the footnote that allowed the reduction in setbacks be deleted specifically for property for the subdistrict C1?

A It is.

Q Okay. So based on this email, does that help refresh your recollection about whether you knew that the parking garage property was going to be specifically affected by the deletion of this footnote?

MR. TACKETT: Object to the form.

A Well, obviously it means that the property is located within C1 and these others that are identified, that that potential for reduction was being removed.

Did I think about it in the context of the parking garage? Probably not.

BY MR. GASKINS:

Q Why not?

A I don't know. I couldn't tell you.

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meeting. Is that consistent with your recollection?

A Those are committees of council and, as the administrator, he would be present.

Q And is it your testimony that the changes to the setbacks -- the changes to the setbacks that were ultimately adopted in April 2014 were considered or discussed during those two meetings?

A Yes. As we discussed earlier, the December meeting was where the issue of setbacks was identified. And the January meeting was the one specifically where we talked about the removal of the footnote.

Q Okay. Other than the meeting that you described to me earlier with Tex in 2013, did you ever have any other meetings with Mr. Small or Mr. Flesch?

A I definitely met with Mr. Small after. I couldn't tell you the date, but with respect to the changes. I guess it was probably after April and explained to him what they were.

Q Okay. Did you have any conversations with him between December of 2013 and April 2014?

A I may well have but I don't remember. I don't know.

Q If you did, do you recall providing him

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any information that changes to the setbacks and build-to lines were being considered for the parking garage property?

A I don't remember if I met with him, even, so...

(Marked for identification was Plaintiff's Exhibit 8.)

BY MR. GASKINS:

Q I hand you what's been marked as Exhibit Number 8. I'm not going to ask you to read all of it but you're welcome to if you want.

I will submit to you that it is ordinance Number 14022 which was adopted in April 2014 which implemented various changes to the urban corridor zoning district, some of which we've been discussing previously.

A I'd agree.

Q Would you agree with that characterization?

A Yes.

Q Okay. And so you've seen this document before?

A Yes.

Q Okay. And in it, it shows that, one, the town council adopted various definitions to add to

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EXHIBIT 9

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
:
COUNTY OF CHARLESTON) CASE NO. 2017-CP-10-5493

SHEM CREEK DEVELOPMENT GROUP, LLC,

Plaintiff,

-versus-

THE TOWN OF MOUNT PLEASANT, SOUTH CAROLINA,

Defendant.

WITNESS: KENT PRAUSE

DATE: Wednesday, May 1, 2019

TIME: 10:15 a.m.

LOCATION: Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, South Carolina 29401

REPORTED BY: Janice D. Hayward, RMR
NCRA Registered Merit Reporter
240 Oak View Way
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different uses than what are normally allowed under the existing zoning.

Q Okay. Fair enough. I'll rephrase my question. Have any of the other properties affected by footnote five or the deletion of footnote five been subject to a recent amendment specifically designed to increase the usable area of that property?

A Not to my knowledge.

MR. TACKETT: Object to the form.

BY MR. GASKINS:

Q And just so we're clear and I can phrase my question maybe a little more clear, you would agree with me, wouldn't you, that the deletion of footnote five reduced the buildable area on the parcel where the parking deck was to be located?

MR. TACKETT: Object to the form.

A Yes.

MR. GASKINS: Let's take a quick break.

(Recess.)

BY MR. GASKINS:

Q Mr. Prause, can you explain to me the legal process that the town has to follow to amend the zoning code?

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BY MR. GASKINS:

Q Anything more specific than that?

A No. The particular area is -- that we've been discussing, C1. C1B is not specifically mentioned.

Q Okay. And what is the reason for providing more specific information as to the amendments than what is provided in that first sentence?

A I think to provide clarity to those who might be interested.

Q Okay. Because it's not clear from that first sentence, correct?

MR. TACKETT: Object to the form.

A Well, I mean, it's clear to the extent of what it says. I think this was just to provide a bit more clarity to it.

BY MR. GASKINS:

Q Are you aware of -- well, did you ever provide notice to the developers of the garage project that the setbacks on their property were being changed in this amendment?

A No.

Q Are you aware of anybody else in the planning department providing the developer with

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notice of those changes?

A No.

Q Did it occur to you to provide the developers with notice of these changes?

MR. TACKETT: Object to the form.

A No.

BY MR. GASKINS:

Q Why not?

A It didn't occur to me to provide notice to any of the affected properties that these changes were to occur.

Q Okay. Do you know who drafted the amendment deleting the footnote?

A Miss Farrell came up with the wording. I put it in our ordinance form.

Q What wording?

A The wording that ultimately translated into the amendments with respect to the setbacks, the activity zones, the provision of access to residential properties, and development standards for residential lots in the urban corridor overlay district.

Q How did she provide that language to you?

A I assume it would have been in some type of written form. I can't recall specifically

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EXHIBIT 10

ELECTRONICALLY FILED - 2019 Nov 27 3:26 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1005493

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO. 2017-CP-10-5493

SHEM CREEK DEVELOPMENT GROUP, LLC,

Plaintiff,

vs.

THE TOWN OF MOUNT PLEASANT SOUTH CAROLINA,

Defendant.

* *

DEPOSITION OF: TYLER N. FLESCH

DATE TAKEN: Wednesday, April 24, 2019

TIME: 1:21 p.m.

PLACE: 100 Ann Edwards Lane
Mt. Pleasant, SC

REPORTED BY: TERI L. SAMPSON, RPR,
Notary Public and Certified
Live Note Reporter

* *

POST OFFICE BOX 61011
NORTH CHARLESTON, SOUTH CAROLINA 29419

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Q Anything that was reported to you by Stubbs Muldrow about anything Miss Farrell had to say in any of the meetings?

A Yes. And I do believe it was -- you are required to have a pre-submittal meeting before you can submit your plans. And I don't know the date, but it was subsequent to the passing of Ordinance 14022. Jeff Johnston was there on our behalf. I believe Christiane was in the room, as well as other staff members. I don't know exactly which ones. I believe it was Kent and potentially Michael Robertson. I'm not a hundred percent sure.

I was sent a memo from Jeff Johnston. As Jeff Johnston under -- excuse me. As Jeff Johnston laid out our potential submittal, it was pointed out to him that a new ordinance had been passed, the submittal would be deficient in a number of ways, and that memo was sent to me, and it was substantial to our project. It was -- it created a number of issues that we would have to deal with, meaning the submittal couldn't even happen. There was no way, based on the new ordinance, what we had drawn was even going to work.

Q And now we're -- Mr. -- is it Johnston or Johnson?

A I believe there's a "T" in there, yes,

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Johnston. Jeff is his first name. He's at Stubbs Muldrow.

Q Okay. Is he in Charleston or in Greenville?

A He's in Mt. Pleasant.

Q And he authored a memo that covers that topic?

A Yes. And I believe it was in the form of an email, but recapitulating what happened at the meeting the day before. I was not there.

Q And were any of those comments attributed to Miss Farrell?

A I believe -- we have the email. I believe he has attendees in the room. I don't know that he -- I don't believe he specifically ascribes each. I mean, really the comments were based on the amendment to the zoning ordinance. I don't think he ascribes who said them. That was the takeaway from the meeting.

Q All right. Now, this meeting took place after the execution of the parking license agreement?

A Correct.

Q Okay. And before the presentation of the amended agreement?

A Correct.

Q Who else would have been at that meeting other than Mr. Johnston, Miss Farrell?

A I think it was potentially Kent Prause,

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Michael Robertson. I don't know anyone else from the City. I don't know how -- whoever is standard to be at a preliminary DRB meeting. It's a requirement before you can submit your plans, so I'm sure it's a protocol they have of who's there.

Q Okay.

A And then from our side, I know Jeff was there. It's possible Charles Muldrow, who is also with Stubbs Muldrow, might have been there, but I'm not a hundred percent certain.

Q Other than those conversations, anything else that you would attribute to Miss Farrell -- or Mrs. Farrell?

A I don't have direct knowledge of anything directly to Miss Farrell.

Q Okay. What about Mr. Prause, communications with him?

A Directly? Me directly? Or anybody from the --

Q Anyone from the entity.

A I don't believe the entity. I believe Gray Taylor had a number of letters back and forth as our representation of counsel. And definitely, in the course of the design of the building, Jeff Johnston and/or Charles Muldrow would have had communications

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relates to the zoning code.

Q Okay. That's fair. Did you mention Mike Robertson as being a participant? I don't remember if Mike's name was used.

A Yeah, I did say I thought he -- it's a good possibility he was there. It is at the top of the memo. I don't have the memo. But it would make sense because he took up the lead on a lot of the design issues, the commentary that we had. I believe he was probably in that meeting.

Q Is there any statement that he would have made that you reference as a part of the basis for your complaint?

A I would say the level of cooperation changed through the process.

Q Okay.

A Things that should have easily been worked through became onerous. It's a general statement. I don't -- it seemed what was very collaborative in the beginning became very contentious as we moved through it, a lot more onerous changes. An example I can think of, and I'm going to say it in jest because we're sitting here and it's past, it wasn't funny at the time, we are the only parking deck I know of in the state that has granite sills, granite, like your

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kitchen counters, and that was a requirement that Michael subsequently put on us. Those type of cost issues became burdensome in conjunction with the redesign of the building, which I'm sure we're going to talk about. So the way I would phrase it is the sense of cooperation deteriorated, and I would say that's a fair statement across multiple people within the Town's permitting, zoning offices.

Q Okay. Is there anything you ascribe that to?

A My opinion?

Q Sure.

A My opinion would be the political pressure, the constant phone calls, emails from individuals, Save Shem Creek, to these people personally. You see numerous correspondence directly to these individuals, whether it be Kent, Christiane, Eric, I believe David, in which they're making their lives not so much fun. And they have the right to do what they do as citizens, but I would think as human beings that would wear on you at some point. And I'm sure they became fatigued with dealing with the same project for over the course of a number of years. So in general, that would be my opinion.

I don't have any direct evidence that they were told to be non-cooperative. But I don't think

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it's coincidence, either, that a project that starts out in good faith and collaboration and a feel-good, descends into where we are, and all of a sudden every aspect of the project becomes harder, and it's harder to get through things that shouldn't have been that hard to get through. That's my opinion.

Q Okay.

A Okay.

Q The -- you mentioned Save Shem Creek as an entity, and there are a number of people that are involved in that. Any particular individuals that would have stood out in your mind?

A Is this another topic?

Q No, it's all part of the communication.

A Are there individuals within that organization?

Q That is another topic, but I --

A Right. No, we'll go wherever you want to go.

Q I'll give you credit for it later on, by the way.

A Time will tell, literally.

Q I get paid by the hour.

A I don't. I'm losing money by the hour today. Yeah, are there individuals associated with that group, absolutely.

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the adoption of the ordinance was a -- that you would attribute it to say bad motivation on the part of the Town.

A Right. So if we speak to what the ordinance did itself, as it relates to our project, I believe it was Ordinance 14022. Within the overlay district, there's a chart. The chart has different districts, A-1, B-1. I believe we were in C-1.

The previous chart allowed for, I'm going to speak to Mill Street first, I believe a five-foot setback with certain conditions and trees that you had to perform, but you would have a five-foot setback. And then all -- then there's a section that has something to the effect of side streets, additional side streets, and it was also five feet if you provided the proper -- I believe it's a sidewalk requirement and some plantings. That is what we assumed the project would be designed under. That's what we did design the project under until we went to our pre-DRB meeting shortly after this April 8th adoption of the zoning.

The new zoning ordinance on Mill Street was changed via footnote, as we've discussed, in C-1. And the footnote designates, I believe, Mill Street only as an activity zone, and there might be a separate footnote on Simmons Street for an activity zone.

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However, the activity zone becomes a 20 to 30-foot build-to line, not five-foot setback. The activity zone also precludes on-street parking, which is something that was encouraged in the overlay district, could be counted towards your uses, office requirements, zoning requirements, we previously discussed. That's eliminated in the new ordinance. Activity zone you can't penetrate with parking.

It also pushed the footprint of the building in, subsequently, from the five-foot setback to the 20 to 30 foot build-to line, and that pushed us over our existing lease line for the footprint of the building into the Tavern & Table and Red's lease. That required a renegotiation of the lease document with my waterfront tenants, and that came at a cost. So when the zoning was changed, it compressed the building for Mill. The zoning on the new setbacks for side streets, I believe it's called, it's in the chart, which would be the Church Street right of way, was also reduced from five feet. Now it was a 20-foot setback, I believe. Now we have compression coming off of the Church Street right of way.

What it causes, particularly the Church Street change, it changed the grade of our deck, on the ramp and the deck, and it also -- we lost two floors of

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parking in those 20 feet. I believe our -- and I believe there's a memo to this from Jeff Johnston to myself indicating a minimum loss of 28 spaces off the Church Street change alone.

On the Mill Street side, you now have a 30-foot build-to line. It has to be landscaped. A bunch of things have to happen in there to code. It shifted the footprint of the building over, as I mentioned, which led to the renegotiation of our ground lease with our waterfront tenants to be able to accommodate the width of the building. There is only so much land we could achieve in that renegotiation, and it wasn't enough to completely offset the new setback for Mill.

Additionally, by moving the building towards this line, there was a zoning line, which I believe contained the Marine District zoning, and it put in some uncertainty as to where that line was, where our building would fall. There was some ambiguity in it, led to Save Shem Creek filing a lawsuit which we were named as a party, as was the Town, which caused us to have to defend that. Again, a public presence of a lawsuit out there. So the building was pushed in that direction as well, and it led to that lawsuit.

The other thing that, if you go all the way

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back to conceptual drawings, which is the two sketch drawings, the parking layouts, that we were discussing with Tex prior, in those drawings, it's clearly labeled those are eight foot six parking spaces.

So while the adoption of the zoning ordinance didn't change the previous statement of nine foot wide parking spaces, what the previous ordinance didn't do, they had no ordinance to deal with structured parking. And so in talking with the Mayor, presenting these things, there are plenty of examples of decks that have eight foot six parking spaces. It's pretty common, especially in urban environments. And it was clearly marked on the drawings that that was how we got to the 276 number. It was laid out.

While the zoning didn't change the width, clearly we had already said that that's what we wanted, or that's what the sketch was drawn on, conceptually, and there were some changes that needed to happen. For example, the old ordinance would deal with parking, rows of parking, where then plants were required, say at the end of an island. Well, we don't put plants inside of parking garages. I don't have trees at the end of parking rows. There was a, you know, discrepancy in code that didn't address all the way back to conception. There was no code to rely on to

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even come up, conceptually, with structured parking inside of the Town at that time.

But the main two in terms of the zoning ordinance would be the setbacks, Mill and Church right of way. I'm trying to think of what else the other main impact would be there. I believe those were the two main changes.

Q One of the things, you pushed back on it, and what I read is sort of my introductory paragraph there, that on the 276 spaces, the -- in the parking license agreement, as I recall it, there were only three times that the total spaces are referenced. And each time they're referenced, it just states 276 without any qualifier, adjective, adverb, whatever, that would suggest that it was a range as opposed to a -- as opposed to a statement of fact. Am I missing something?

A I disagree with that statement. I think there's language that says substantially similar.

Q Okay. And I guess what I'm looking --

A Let's talk about this in concept, then.

Q Sure.

MR. GASKINS: Well, I mean, I think this is outside the scope of what's -- of what's been identified for Tyler, and we've already addressed these

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recall at this time.

Q Now, have you performed any internal calculation of the damages?

A I have not. We have proper accounting, obviously, and legal fees, things of that nature. We have hired an economist that's going to perform those functions. I believe his name is Mr. Strickland; I'm not a hundred percent sure of the name. But he will take into account the totality of construction, all of those things put together, I believe.

Q All right.

MR. HINCHEY: Do you know when that will be complete?

MR. GASKINS: I do not.

MR. HINCHEY: But it will be sometime in the near future?

MR. GASKINS: I think so.

MR. HINCHEY: Just off the record.

(A brief discussion was held off the record.)

BY MR. HINCHEY:

Q Let's take a look at No. 20. It references paragraph 39. If you want to use that, be my guest. And it has to do with the implied covenant of good faith and fair dealing. And I recognize that these are -- there are some legal considerations here, and

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I'm not asking you to become a lawyer. I'm talking -- I just want you to explain to me, as a -- as a layperson and as a party to the contract, what you mean by the allegations in paragraph 39.

A I would say that the beginning of the process, all the way back to the first conversations, leading up to the execution of the PLA, it was a collaborative effort between us as a developer and the Town. As it became contentious and politically challenging, the level of cooperation evaporated.

We talked about multiple obstacles we felt like being put in our path and these pronouncements by Councilmen, et cetera, that they would kill the project. We didn't come across a single obstacle in the course of this that couldn't have been solved by Town Council, the Mayor, and us together. Oops, we made a mistake on the zoning ordinance; we didn't know we were going to push your building back. Christiane missed the fact that we were subject to the PLA. That's a correctable situation. No, we believe it's a civic use, five-foot setback. No, you're right, we didn't maintain the road. That collaboration and that spirit of cooperation was gone.

We attempted on multiple occasions to work through our differences, both in writing and, you know,

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just having conversations. There was no cooperation. We are the only ones to date that have suggested alternatives, both in the amendment PLA, the amendment to the PLA, and also we made an offer to settle, a letter from Gray Taylor. We made a letter to settle with the Town on another occasion. We've always been open to conversation. We've always been open to trying to work out our differences.

And I can tell you, when you were asking Tex about the amendment, as a partner inside this partnership, I was against the amendment initially, and he, being fairly wise and a bit older than I, said goodwill is a thing that, you know, bridges gaps. And we felt like we were constantly trying to solve the problems, and always trying to maximize the number of parking spaces we were provided because that's the benefit for everybody, and it just was not reciprocated.

And when you're dealing with a situation where you are trying to achieve something contractually together, both parties have to contribute to that. And our position is they not only didn't contribute, they became an obstacle to getting done what we wanted to do. A lot of these things that stopped us from building the exact building we wanted to build, the

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Town did; and the Town had the ability to undue or to create a variance or, you know, find another solution.

There were a lot of ways this could have been solved, and I just -- I don't believe it's good faith to come in and try to take somebody's property through I'll give you credit, the exploration of condemnation. I don't think it's proper, when you have a contractual relationship, to be out talking about how you're going to kill the project and kill the funding. I think that's in bad faith. I don't think there was any momentum here or effort to come to a compromise or to come to some accommodation that we all could have lived with.

Q And I -- do you think that was their responsibility, to come to an accommodation?

A I think it's good faith to try to work out your differences. I think it's good faith to not try to intentionally kill a project. We didn't, out of the blue, decide to build parking spaces. This was a collaborative effort. The Town identified the need in the CRAB report. The Town identified the needs through the complaints of the neighbors. They wanted this. Political environment notwithstanding, that's not an excuse to sabotage a contractual obligation. That's my opinion.

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So, yeah, in partnerships, you know, you brought up before the risk of dealing with municipalities. You know, the risk is both ways. You know, we could be sitting in a deposition very opposite to this, in which you're telling me I didn't do what I was supposed to do. That's not the case here. We cooperated on every front. We made accommodations on every front. We tried to offer things that would bridge the gap. There isn't a single instance you're going to show me that would suggest to me they did the same, and to me that's bad faith, under any sort of arrangement, you know.

Q Well, and I can -- I'll push back at you in a couple of areas. The purpose of this, the zoning in this area, is to create a walkability zone. Am I right? I mean, it's supposed to be a walkability area where there was supposed to be commercial space on the ground floor and there was supposed to be flood-proofing, but the Town consented to eliminate that requirement for this project.

A Do you know why?

Q Do I know why they did?

A Yeah.

Q Tell me why you --

A Are you suggesting that it was to our benefit?

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Q Well --
A The elimination of that requirement?
Q Yeah. I do think it was to your benefit.
A All right. I'll address that, then. It was strictly to get the grade of the ramp such that you could park on the ramp, meaning the ramp would have come in to the first floor space where you're talking about, plus it was building into a pretty high level flood zone. The cost would have prohibited.

This is all in the effort to give them the excess spaces they wanted. It was to the benefit of them to eliminate the first floor. It wasn't to the benefit of us, necessarily. I'm not saying it hurt us. It was to achieve what they wanted down here, which was office with maximizing the parking so we could provide that as a public benefit, and we told them this is how you maximize the parking here. We have to get this ramp -- I believe it's eight percent grade. You have to get it a certain grade. We ran into those issues with the Church right of way setback as well. But that was how we were going to get the most spaces we could.

And I reference back to the exhibit in the PLA. When you look at the conceptual rendering, you do not see occupied space in the first floor; you know? It was something that we -- it was kind of out there

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for consumption before the request. That request benefited, I'll say, the project; but it wasn't some big win for us, and it's not some olive branch they extended to treat us well. It was so they could get their public spaces, maximize them.

Q Well, I think you and I probably would have a little disagreement there, and that's fine. I just think that that's an indication, at least at a point in time, where there was an effort to be accommodating and an effort to be flexible in the Town's approach.

A And I would say that occurred in the beginning of our steps in this relationship, long before there was -- when that was undertaken, there was no public opposition to the building. Subsequent to that, as we progressed in time, clearly, that opposition was there, and then grew significantly through an election cycle. And I think I mentioned that, I thought. We started out in a very collaborative relationship, and it deteriorated through time.

So I won't disagree with you that they worked with us to solve a problem or to maximize the parking in that issue; but then why turn around and create a setback on both streets that's going to minimize -- I mean, it doesn't make any sense. If you're trying to get the accomplished goal of this, why would you pass

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that ordinance. It doesn't -- there's no reason to it.

The sidewalks and the walkability you referenced would have been there even with the five-foot setback that's required under the overlay. So I'm not going to say I know their exact -- but the walkability would have been there. What's better than walkability than to maximize the parking spaces so people can get out and enjoy the park and the restaurants? I think that was the goal in the CRAB report, by the way, identified for that parcel with a structured parking opportunity.

Q I think the CRAB report anticipated small businesses on the ground-floor level in that area. I mean, I think that was what the -- I mean, the CRAB report recognized the need for parking. And I'm not trying to debate you here, but there also was a concern about having ground-floor businesses so that it would create a flow within a large scale, in a lengthy area --

A Right.

Q -- that would encourage the walkability.

A Right. And, I mean, I don't disagree with that. I would say to you the CRAB report also said there should be a roundabout down the street, and the practicality of that roundabout, cost, design, it

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couldn't happen. Sort of like the first floor space in the deck, the ramp had to go somewhere. When you start to design it, changes have to be made, decisions have to be made, do you want the space with less parking, or do you want to maximize the parking spaces, and I think that's -- I think we all agree they wanted the spaces. I think that's why they approved the change.

Q Okay. Let me see. Other than the folks that you've mentioned by name today and other than the folks that might have been -- well, maybe I should ask, before I get to that question, who were your points of contact or which individual is your point of contact at Muldrow?

A Who did we deal with at Stubbs Muldrow?

Q Right.

A In the very narrowest of sense in the beginning, it was Sam Herin. On the project itself, Charles Muldrow, Jeff Johnston.

Q All right. And of those three, who would be the most knowledgeable?

A Jeff Johnston.

Q Okay. And then --

A You meant about the building; right?

Q Yes, yes. I wasn't asking you to comment on his intellectual capability. Any other folks that you

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EXHIBIT 11

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Mount Pleasant SC
COME ON OVER

PLAINTIFF'S EXHIBIT 16 DeMosura 4-29-19
PENGAD 800-631-6989

November 11, 2014

Gray B. Taylor, Esquire
Buist Byars & Taylor, LLC
652 Coleman Blvd, Suite 200
Mount Pleasant, SC 29464

Dear Mr. Taylor,

This letter is in response to your request regarding the project known as the 0 Coleman Boulevard Parking Garage (the "Project.") You have requested that the Town of Mount Pleasant confirm that if the Project is constructed pursuant to the approved plans the resulting number of parking spaces will satisfy the Licensor's construction obligations under the Parking License Agreement dated October 17, 2013 (the "Agreement.")

The Agreement represents the Town's obligation to lease from the Licensor a specific number of parking spaces for the public. The Agreement is contingent, among other things, on the issuance of a Certificate of Occupancy for the Project and the availability of the requisite number of Public Spaces as defined in the Agreement. The Town and the Licensor are neither partner nor involved in a joint venture and as such the Town has no obligation to ensure that the Project is completed.

The information contained in this letter is based on current available information and is subject to change should additional information be made available. Specifically, the Town is relying on parking data provided by your client. Further, any positions stated herein should not be considered binding or final as Town Council has the sole authority to decide policy matters.

The Agreement provides that in exchange for payment of rent in the amount of One Hundred and Eighty Five Thousand Dollars ($185,000.00) per year, two hundred and seventy six (276) Public Spaces shall be available to the public during non-business hours. During business hours, one hundred and thirty two (132) Public Spaces shall be available to the public. Rent is tied to the number of Public Spaces and as such the Town's position is that the Public Spaces shall be available for use by general public and not included as part of minimum parking requirements for surrounding businesses. Based on the provisions of the Agreement and the approved Project plans it is our position that at this time the Town is unable to state that the proposed number of available Public Spaces, as defined in the Agreement, will satisfy the Licensor's obligations.

The Town initially considered a document entitled Shem Creek Office Building Parking Analysis (the "Analysis") prepared by your client's engineer. The Analysis reflects a shared parking arrangement for the benefit of the Project (Office Building), Red's and the Tavern & Table. The Town's Corporation Counsel sought clarification from you and by letter dated October 20, 2014

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you indicated that the Analysis is a non-binding document and is not applicable in this situation. We have considered the Proposed Parking Layout, prepared by your client, attached as Exhibit A to this letter.

Per the Proposed Parking Layout the parking structure is expected to provide 234 total spaces. The adjacent surface lot is expected to provide 100 spaces. You have indicated that the 132 Public Spaces available during business hours will be in the structure which leaves 102 available for use by the Office Building (considered "Reserved Spaces" per Section 1.07 of the Agreement.) It appears that the Office Building requires 117 spaces.

During non-business hours 276 Public Spaces must be made available. To achieve that total the 132 Public Spaces inside the structure should be added to the 102 available Reserved Spaces for a total of 234. This means that 42 Public Spaces are necessary to meet the required total of 276.

We expect that your client takes the position that those 42 Public Spaces will be available in the adjacent surface lot. This letter does not address the issue of whether all 276 Public Spaces must be contained within the parking structure. However, even if adjacent surface spaces are allowed for that purpose we cannot ignore the parking needs of neighboring businesses. By your client's calculation Red's will require, at minimum, 77 spaces and the Tavern & Table, at minimum, will require 112 spaces for a total of 189. Notwithstanding Office Building use of the adjacent surface spaces, this total far exceeds the 100 available adjacent surface spaces. When the 42 Public Spaces are added to the 89 additional need by the restaurants there appears to be a total shortage of 131 spaces.

You recently provided a letter from Mr. William Crowley of Red's indicating that he can make an additional 50 spaces available. Assuming that is possible, a shortage of 81 spaces remains.

Based on our analysis and current information it does not appear that a sufficient number of Public Spaces, as defined in the Agreement, will be available. Should you have a different analysis we are happy to consider the same.

Sincerely,

E. M. DeMoura

Eric M. DeMoura
Town Administrator
TOWN OF MOUNT PLEASANT

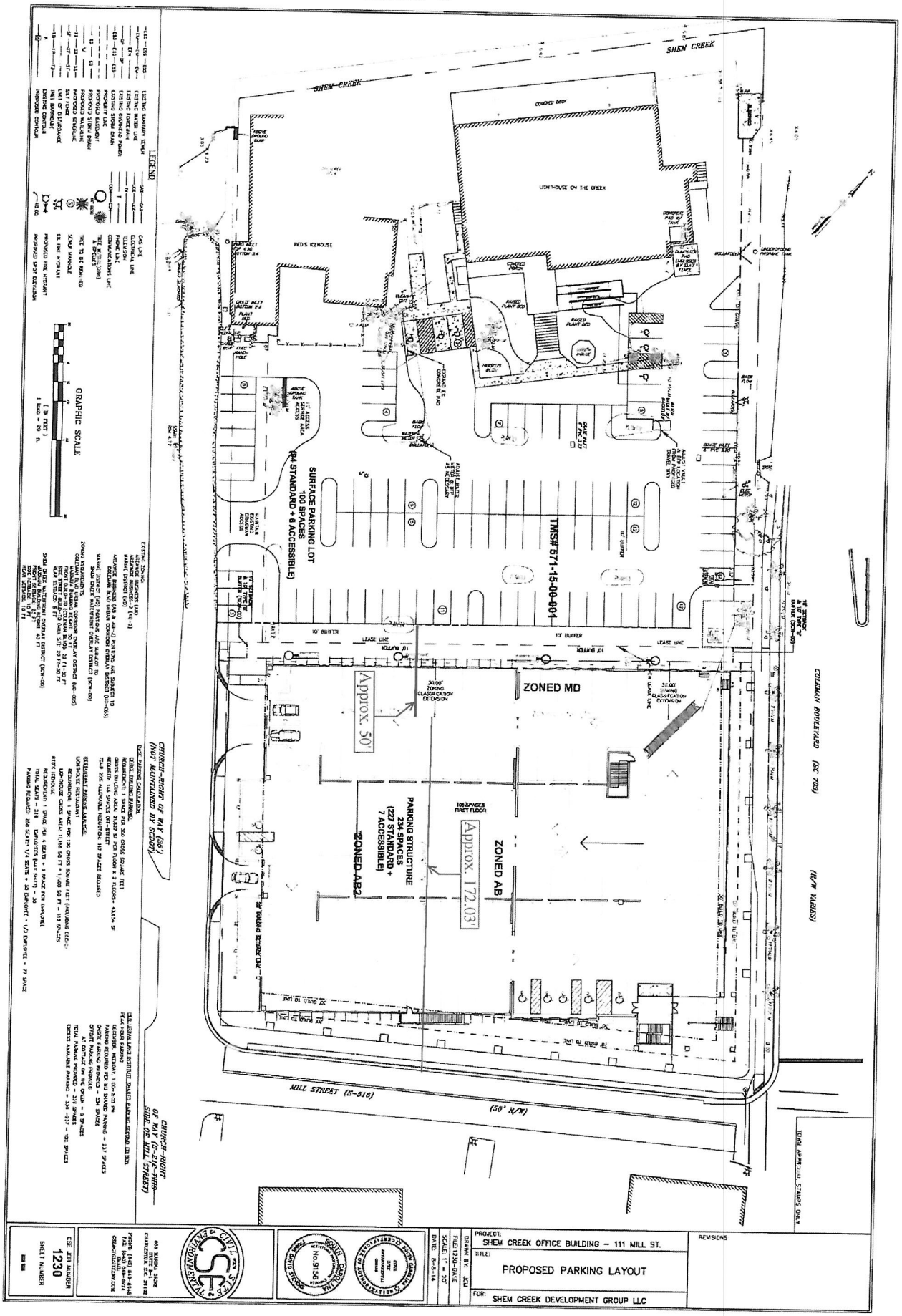
Enclosure: Exhibit A

cc Mayor Linda Page
Mount Pleasant Town Council
Christiane Farrell, Director of Planning
David Pagliarini, Corporation Counsel

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Exhibit A



Save Shem Creek000850

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EXHIBIT 12

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concerned as well about the proposed changes. They should select one or two individuals from all of the communities involved and have them contact the Transportation Director, Mr. Brad Morrison, and submit their names as representing their community. This item will go back to the Transportation Committee and those individuals will be contacted and asked to attend the meeting and to be involved in the decision-making process. Even though there are communities that are divided on this issue, they are trying to engage the community in the process. Council needs the residents' help and support to solve this issue.

Mayor Page said that Council has the approval to take this back to the Transportation Committee. They cannot solve this tonight and if there is division in the neighborhoods, they should choose a spokesperson for their neighborhood. She reminded that Monday, March 2nd is the date for the committees to meet. If they need a larger forum, the Transportation Committee can meet in the gym. She submitted the Transportation Committee report to the clerk for the record.

Mayor Page announced a break at 6:47 p.m. for people who wished to leave.

The Council meeting reconvened at 6:54 P.M.

Mayor Page announced that the amended agenda calls for Council – New Business as the next items (XI A. 1 & 2). This item was put on the agenda by Ken Glasson.

Mr. Glasson addressed items XI. A. 1. Consideration of request by Shem Creek Development Group, LLC to amend the parking license agreement (Resolution R.13102). He said he would defer this to Mr. Gawrych, co-sponsor of the item, after which he would speak.

Mr. Gawrych said he was contacted by Mr. Glasson last Thursday morning to co-sponsor this item that has been around since October 2013. He asked Town Administrator, Eric DeMoura, to provide a timeline of the events surrounding it to understand what they are dealing with.

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Mr. DeMoura stated that he had prepared slides on the history and a timeline that brings us to this point today. On October 14, 2013, the current parking license agreement was approved by Council and is contained in the Resolution. The Town agreed to pay for the parking privileges with Accommodation Tax funds that are paid by hotel visitors to the Town, which is an allowed use of those funds.

Two months later, December 2013, the developer approached Town Council for an increase in the height of the building, up to 55 feet. Within that same request, they asked to be released from the first floor requirement to have a business or residences. In April of 2014, the setbacks and build-to lines changed for that area and much of Coleman Boulevard that affected this proposed office/garage building.

On September 24, 2014, the project moved forward and received Design Review approval. In the middle of November 2014, the building height was reduced by Town Council to 45 feet, down from the 55 feet that had been granted on December 10, 2013. On that same date, Mr. DeMoura sent a letter to the project owner's legal representation, Mr. Gray Taylor, letting him know that based on the new project proposal, the parking requirements did not meet the Town's Parking License Agreement. He sent the letter to their legal representative on that date (12/10/13).

Mr. DeMoura noted that the project as it stands today has been approved and it is vested. There is some talk that a vote tonight on the Parking License Agreement will affect whether the project can be built or not. That is not true. What Council will be voting on is the public financing part of the agreement; whether or not public financing will be attached to this project. The project owner may submit for a building permit; that has not changed.

Mr. DeMoura stated that the current license agreement speaks of 276 parking spaces. During business/office hours Monday through Friday, 144 spaces are reserved for the office building, leaving 132 parking spaces for public use. On nights/weekends, all 276 parking spaces are to be provided by the project for public parking. Monetary consideration for that parking

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agreement was ATAC funds in the amount of $185,000 annually or $2.8M over the 15 year term of the agreement which amounts to $670 per parking space. Those are the terms of the current license agreement.

Mr. DeMoura referred to a drawing for clarity. He said the developer would be able to provide a total of 334 parking spaces for this project; 234 in the structure and 100 surface parking spaces. However, there is required parking for two nearby businesses that must be provided for: Tavern & Table, 112 minimum; Red's Ice House, 77 minimum parking spaces are required for a total of 189 required parking spaces to meet the parking needs of these two businesses.

Mr. DeMoura said that 334 total spaces minus the 189 required spaces leaves 145 parking spaces remaining for the public. However, there is a requirement to provide parking for first floor use which is designated retail/commercial/residential. They are not providing what is required in the ordinance for The Boulevard (100 spaces for public use). Bottom line, it leaves only 45 excess parking spaces free and clear if the project is built. Therefore, his letter that was sent to the project owner's legal representative stated that the current project does not meet the stipulations provided for in the license agreement.

Mr. DeMoura said that the Town received a new proposal that revises the number of parking spaces similar to what Mr. DeMoura indicated moments before. It requested a payment adjustment from the $185,000 in the original license agreement down to $163,000 or just shy of $2.5M over the life of the term. Mr. DeMoura indicated the options available on a slide. One option is to not act on the new proposal; do nothing on the new request. Council also has the option to deny it with a vote of this body, or they can approve it with a different amount of parking spaces as indicated on the slides. Council has the discretion for some variation of that at their pleasure. Mr. DeMoura stated that those are the facts and that is where Council stands currently.

Mr. Gawrych said that what is important tonight is considering a contract, how to address it or how to amend it. It has nothing to do with the

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parking facility. That will be handled later. He stated that he was on Council in 2004 when Council had a vision, which is now Shem Creek Park and the Town spent $6M for one acre of land and for all those docks. They spent another $2M to fix up all of those docks which came to $8M. It was done with Tax Increment Financing funds (TIF) and not direct tax dollars. They all know that Shem Creek is one of the Town's stellar gems. Shem Creek is now the cleanest it has been in 300 years. While figuring out how to protect, preserve and enhance it, Council realized that more people would want to come to enjoy it. That led to the topic of where to park cars in early 2005/06. Since that time, Phase I was finished and they planned Phase 2. The plan was a vision that when people came to Shem Creek Park, they could park their car and traverse every square inch of the park without moving their car. When the office/parking building was proposed, they approached the Town to see if they could join in to establish parking. Negotiations began and a contract was inked. They then came back to the Town because to get the needed parking spots, they would have to go up ten feet in height. Council voted 8 – 1 with Mr. Santos voting nay to grant the 10 feet to get the parking spots.

As Mr. DeMoura stated, 4-5 months later, Council was working to amend the Coleman Overlay District, which they did. Those amendments impacted the setbacks on this piece of property. The property was too small for the building they needed to get the required parking spaces. He noted that this has always been on the Council level and it is back before Council tonight where it needs to be. It was understood that Mr. DeMoura would review the project and he determined that it did not have the number of parking spaces that were required to meet the contract that was inked in October 2013. Therefore, he submitted a letter to the applicant. What has occurred since then has not been clear; has not gone away and it needs to be cleared up.

Mr. Gawrych moved to accept and endorse the letter that Mr. DeMoura wrote to the applicant stating that their project does not meet the contract requirements that was inked in 2013; motion seconded by Mr. Glasson.

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Mr. Santos said he was surprised and a little concerned about this action. He agreed with the letter, but wanted to make sure this action does not paint them into a corner legally.

Counsel Pagliarini stated that he had no problems with the motion as it stands. He said it represents the Town's position.

Mr. Nickels stated that Mr. DeMoura's letter seems intuitively correct, but he wondered if they needed to receive legal advice as to whether there were legal ramifications of an affirmation of the letter by Council. He wondered if that needed to be discussed privately in executive session.

Mr. Pagliarini stated that was up to Council's discretion. Typically legal advice relating to contracts is done in executive session.

Mr. Nickels moved as a point of order to obtain legal advice in a brief executive session about the motion before voting on it to make sure they fully understand the ramifications of adopting it formally as a Council; motion seconded by Mr. Santos.

Mayor Page objected and stated that they are trying to do this in the public arena.

Mr. Pagliarini said that the current motion was made during the comment period to go into executive session for legal advice.

Mr. Smith stated that he would not vote in favor of an executive session; this was too delicate an item to go into executive session and the Town's business should be discussed openly.

Mr. Santos stated that if all of Council had known this would come up, then probably Mr. Smith would be right. Mr. Santos said this was a surprise to him, but apparently some people knew about it. He wanted to make sure that Council was doing the right thing legally.

Mayor Page called for a roll call vote on the motion to go into executive session. The motion failed with 7 voting against and 2 voting in favor. Mr. Nickels and Mr. Santos voted in favor.

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Mayor Page referred back to the original motion which was to approve Mr. DeMoura's letter.

Mr. Nickels asked what accepting the letter would mean. Are they formally accepting a position that has already been published on the internet and already sent to the developer under the Town Administrator's signature?

Mr. Gawrych stated that this was generated by full Council and the contract was signed and approved by full Council with a directive to the Town Administrator to make a determination as to whether it met requirements of the contract or not. The Town Administrator reviewed it and deemed that it did not meet the contract requirements and therefore wrote a letter and sent Council a copy. Council is saying that as a body they approve the letter. If they accepted it on the front end, they are agreeing to close that contract on the back end.

Mr. Nickels asked Mr. DeMoura if he wrote that letter of his own accord without consulting Council. Who directed him to write that letter?

Mr. DeMoura replied that there was discussion at the Council level to examine the project and determine whether a sufficient number of parking spaces were included to meet the public funding requirement. The letter stated that a sufficient number of parking spaces were not provided.

A roll call vote carried unanimously to approve the letter that was written in October by the Town Administrator to the developer's legal counsel.

Mr. Gawrych said to follow that action and to continue the discussion, the developer now knows that he cannot provide the number of parking spaces that the Town requires for the project. The natural process for him would be to amend the process and submit something new. This has been going on for a while now and it has become clear that it cannot be achieved. 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.

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Mr. Gawrych moved to deny any new proposal that may be put forward or submitted by the developer/applicant pertaining to this contract; motion seconded by Mr. Glasson.

Mr. Glasson said that he appreciated the comments by Mr. Gawrych. If it was not clear to anyone, a vote on the motion will end any public dollars going into an office building for parking spaces. There will be zero public dollars spent at any level on this project. He added that any Council Member or the public can call or e-mail him when an item is placed on the agenda that they have a question about. He said it is sad to see that mutual respect does not exist between Council and the public and between Council Members. They brought this to the table to put an end to something that has been fought over for the last two and a half years.

Mr. Santos pointed out that maybe that is why some of the audience is a little bit hesitant. Not long ago, Mr. Glasson wrote a half page in the *The Moultrie News* about Mr. Santos taking items directly to Council without going first to committee. Mr. Santos said he did not find out until last Friday that this item would be on the Council agenda. It did not go to committee first as Mr. Glasson postulated so profusely in his article. Mr. Santos said they had recently decided that items would go to committee first and then go to Council. Apparently that did not happen with this item. It appeared on the agenda out of the blue and everyone got concerned because they did not know what was going on or what might happen. Apparently some members of Council knew what was going on since it sounded rehearsed and everybody knew what they were going to say. Mr. Santos said he was hesitant to approve the letter even though Mr. DeMoura had done an excellent job on it and he agreed with the letter, but he and many citizens were caught off guard when this item suddenly appeared on the agenda.

Mayor Page replied that she believes that some of her Council Members have had the same feeling about some items that Mr. Santos had put on the agenda.

Mayor Page called for a roll call vote. The vote was unanimous in favor of the motion.

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already. It should be disapproved for the incompatibility with the existing neighborhoods and the Town's Comprehensive Plan. He recommended disapproval based on the density of the housing in the proposal and the overall degradation of the quality of life in Park West.

Steve Gilder, 2135 Waldon Park Drive, Park West: He echoed what Mr. Sidwell said about disallowing the development of Cambridge Square. The traffic impact analysis is seriously flawed. It understates the tremendous load that will be put on Park West Boulevard which the traffic analysis shows to be overloaded already. There will also be an effect and impact on the schools in the Park West community. Please disallow the Cambridge Square development, he said.

Joe Bustos, 649 King Street, Mount Pleasant: Mr. Bustos reminded that Mount Pleasant purchased 40 acres of marsh and high land on the west side of Shem Creek to prevent condos and a marina being built on Shem Creek. Additionally, an overlay district was established on the eastern side to prevent a hotel that was ultimately disapproved and to prevent anything from encroaching on the waterborne business area of Shem Creek. He thought the decision was wise to not allow public money for this proposed garage. Do not let the developer get off by providing an incomplete development by simply excising the public funds, he said. If the developer does not deliver on everything, it should be disapproved and go back through the planning process. He concluded by saying that the comments tonight have been about over-density and Council needs to pay attention to that.

Dave Shimp, 1551 Ben Sawyer Blvd: Mr. Shimp said he is on the board at Simmons Point and also on the board of the Save Shem Creek Corporation. He had been coming to the commission, committee and Council meetings and he is frankly tired of coming to all these meetings, but he added that he is not going away and the people here are not going away. The ground swell is growing. He pointed out that he is equally disappointed and distressed that the Council seems to be in a confrontational situation with a lot of its citizens. That is not good governance. He said he applauded the vote tonight to take the public funds out of the garage project, but as

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Highway 17 on dry land that does not encroach upon the marsh. Those Hospitality funds can be spent on a trolley system instead.

Andrea Lewis, 1656 Seewee Fort Road, Park West: She wants Council to think about the quality of life. Just say no to the Cambridge Square variance because that is a big deal. She said they want quality over quantity.

Martie Adams, 409 Royall Avenue: Ms. Adams said she is a member of the Save Shem Creek Corporation board. She had two concerns about the still lingering possibility of a parking garage being built on Shem Creek. The builder can still do it, but will not now have Town money. She said their concern is that the garage encroaches into the marine district which is an area protected by zoning regulations. The CRAB report addresses economic growth and the enhancement of the beauty of the town. The CRAB report says that selected areas along Coleman Boulevard, such as Shem Creek must be protected. Building heights there should be no higher than 40 feet. The report says that Shem Creek is a natural and historic asset of Mount Pleasant. It is a public treasure owned by the hearts and souls of the citizens of Mount Pleasant and careful consideration must be given to protect Shem Creek. Building a parking garage on Shem Creek is not protecting the public treasure. To allow this area to develop in a way that distracts from its historical coastal village character is to make our town look like Anywhere, USA. We want to preserve the character of Mount Pleasant, not just for sentimental reasons. Studies show that community distinctiveness is a critical element for economic success. If we want prosperity, we must retain the character of Mount Pleasant and Shem Creek. If we need garages, there are other places to build them. The possibilities for increasing ugliness, noise, traffic congestion and shrinking open spaces in our town are numerous.

Jim Owens, 1197 Island View Drive: Mr. Owens said he is a native son and a lifelong resident. He applauded what was done tonight by eliminating the public funds. He was disappointed that they cannot go further and eliminate this garage altogether. He showed some slides of Shem Creek and the site plan of the garage project. It encroaches 30 feet into the Shem Creek Overlay District. How and why and by whom, he is not sure but he

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would like to get to the bottom of that. It is clear in the zoning interpretation; it would not extend more than 30 feet. It is outside the 30 foot limitation. Mr. Owens concluded, "We will take our Town back. That is a promise."

Jimmy Bagwell, 207 William Street: Mr. Bagwell said he had been coming to Council meetings for over a year and the residents have been telling Council that they are not a small group of zealots or agitators or whatever. The people in this town are tired of this. He said he had not heard one person stand up and say this is the greatest plan they have ever seen. Everyone he has heard had said enough is enough. The Boy Scouts were in here earlier to get their citizenship merit badge. Mr. Bagwell said he would like to give all these folks that are sitting in this audience a citizenship merit badge. Without their participation and concern for this town, he doubted that this action would have been taken tonight. It is only their efforts and their communications to Council to let them know how they feel, that Council turned this thing around. He said he applauded Council on eliminating the public money, but they also need to rescind the Coleman Overlay Plan. We need to take back our Coleman Boulevard. A developer asked him the other day his vision for the Town of Mount Pleasant. Mr. Bagwell responded that the one thing he knows is that The Boulevard and that garage are not in his vision for the Town of Mount Pleasant. He said he has lived here all of his 66 years. He concluded that Shem Creek is the heart and soul of this town. They need to save it and do away with this garage and turn around the plans that are in place now.

Nancy Fairless, 1111 Simmons Street: Ms. Fairless said she had some concerns but would wait until someone who could speak better and do research better to address her concerns. Those things that Jim Owens was pointing out and the 30 feet that extends out into a different zone where business is not allowed should be looked at hard. There is much gray area in that and other developments in this town. For the rest of her two minutes, she thought everyone in the audience should take a long look at what Mr. Owens was trying to point out and they need to get that garage stopped.

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EXHIBIT 13

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LIMITED LIABILITY COMPANY AGREEMENT OF 101 COLEMAN PARTNERS, LLC

This LIMITED LIABILITY COMPANY AGREEMENT (this "**Agreement**") of 101 COLEMAN PARTNERS, LLC, a Delaware limited liability company (the "**Company**") is entered into effective as of March 11, 2016, by and between SHEM CREEK DEVELOPMENT GROUP LLC, a South Carolina limited liability company ("**JV Member**"), and SCM 101 COLEMAN INVESTORS, LLC, a Delaware limited liability company ("**Somera**"). JV Member and Somera may hereinafter be referred to herein collectively, as the "**Members**" or individually as a "**Member.**" Capitalized terms used and not otherwise defined herein shall have the respective meanings assigned to such terms in Article XI.

ARTICLE I
FORMATION

1.01 Formation

The Company was formed under the Act by the filing with the Secretary of State of the State of Delaware of a certificate of formation on December 18, 2015 (the "**Certificate of Formation**"). The term "**Act**" means the Delaware Limited Liability Act (6 Del. C. §18-101, et. seq.), as hereafter amended from time to time.

1.02 Names and Addresses

The name of the Company is 101 Coleman Partners, LLC. The principal office of the Company is located at 15 Washington Park, Greenville, SC 29601, or such other place as may from time to time be determined by Managing Member. Managing Member shall give prompt notice of any such change to each of the Members. The names and addresses of the Members are set forth on Exhibit A attached hereto.

1.03 Registered Office and Agent Registered Office; Registered Agent

(a) The registered office of the Company shall be the office of the initial registered agent named in the Certificate of Formation or such other office (which need not be a place of business of the Company) as JV Member may designate from time to time in the manner provided for in the Act.

(b) The registered agent for service of process on the Company in the State of Delaware shall be the initial registered agent named in the Certificate of Formation or such other Person or Persons as JV Member may designate from time to time in the manner provided for in the Act.

PAGES 2-38 OF OPERATING AGREEMENT WITHHELD FOR CONFIDENTIAL-PROPRIETARY INFORMATION

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IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective as of the day and year first above written.

"**JV MEMBER**"

SHEM CREEK DEVELOPMENT GROUP LLC,
a South Carolina limited liability company

By: Avtex Commercial Properties, Inc., a South Carolina corporation, Its Manager

By: _____
Robert S. Small, Jr.
Its President

"**SOMERA**"

SCM 101 COLEMAN INVESTORS, LLC,
a Delaware limited liability company

By: _____
_____
_____

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IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective as of the day and year first above written.

"**JV MEMBER**"

SHEM CREEK DEVELOPMENT GROUP, LLC,
a South Carolina limited liability company

By: Causeway Capital Advisors, LLC, a South Carolina limited liability company, its Manager

By:_____
Tyler N. Flesch, its Managing Member

"**SOMERA**"

SCM 101 COLEMAN INVESTORS, LLC,
a Delaware limited liability company

By: Julie Lubin
Julie Lubin
Authorized Person

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NAMES, ADDRESSES, PERCENTAGE INTERESTS AND CAPITAL CONTRIBUTIONS OF THE MEMBERS

Names and Addresses of the Members:	**Percentage Interest**
JV Member:	15%
Shem Creek Development Group LLC c/o Avtex Commercial Properties, Inc. 15 Washington Park (P.O. Drawer 10287) Greenville, SC 29601 (29603) With a copy to: McNair Law Firm, P.A. 1221 Main Street, Suite 1800 Columbia, SC 29201 Attention: Judith L. McInnis	
Somera:	85%
SCM 101 Coleman Investors, LLC c/o Somera Capital Management, LLC 115 West Canon Perdido Street Santa Barbara, California 93101 Attention: Asset Management (101 Coleman Boulevard)	
Totals:	100%

EXHIBIT A

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EXHIBIT 14

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BUIST BYARS & TAYLOR LLC
ATTORNEYS AT LAW

652 Coleman Blvd., Suite 200
Mount Pleasant, SC 29464
Direct Dial 843.284.1407
Main 843.856.4488

Gray B. Taylor
gray.taylor@buistbyars.com

June 23, 2015

Via Email to: david@lawyershmp.com

David G. Pagliarini, Esq.
Hinchey, Murray & Pagliarini, LLC
234 Seven Farms Dr., Suite 300
Daniel Island, SC 29492

Re: Termination of the October 17, 2013 Parking License Agreement by and between Shem Creek Development Group LLC and Town of Mount Pleasant (the "Agreement")

Dear David:

Please allow this letter to serve as termination of the above-referenced Agreement due to the failure to cure default after notice by the Town of Mount Pleasant. Any capitalized terms herein shall have the meaning of set forth in the Agreement unless otherwise set forth herein.

As I informed you on February 10, 2015, the Town of Mount Pleasant was in default pursuant to the Agreement for failure to provide the Estoppel Certificate as required by Section 7.04 of the Agreement. That default has not been cured.

Further, the Agreement is terminated due to the Town of Mount Pleasant's anticipatory breach by failing and refusing to comply with Section 1.07(a). That Section provides as follows:

> *Payment for the first License Year of the Rent Period shall be paid into escrow upon the commencement of construction by the Licensor, with payment being released from escrow upon the Rent Commencement Date.*

To date, our client has not received any notice that the Town of Mount Pleasant has complied with payment of the first License Year's rent into escrow, which was to have happened upon the commencement of construction.

The failure to pay all or any portion of this Rent and the failure to cure after thirty (30) days constitutes grounds for termination pursuant to Section 6.01 of the Agreement.

As our client informed the Town of Mount Pleasant on June 8, 2016, our clients' damages under Section 6.01 include the full Rent Payments due under the terms of the Agreement along with potential recovery of attorneys' fees and costs should they be the

prevailing party. Our client reserves all of its rights under Section 6.01 of the Agreement to pursue all of the Rent Payments due to it in the sum of $2,770,000.00.

The Town of Mount Pleasant's breach of the implied duty of good faith and fair dealing and the express obligations of Section 2.03 of the Agreement are further cause for termination. The direct acts and omissions of the Town of Mount Pleasant and individual members of Town Council, some of whose actions were prior to their being seated on Town Council breach the implied duty of good faith and fair dealing. These Council members should govern themselves accordingly.

As you were informed on June 8, 2016, our client made a settlement offer which was summarily rejected by Town Council at its following Town Council meeting. There will be no action required by Town Council upon receipt of this notice of termination. With kind regards, I remain

Yours very truly,

Gray B. Taylor

cc: Shem Creek Development Group LLC (via email)

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EXHIBIT 15

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Shem Creek Development Group, LLC, Plaintiff, v. The Town of Mount Pleasant, South Carolina, Defendant.	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2017-CP-10-5493 **PLAINTIFF'S RESPONSES TO DEFENDANT'S SECOND SET OF REQUESTS FOR PRODUCTION**

TO: JAMES J. HINCHEY, JR., ESQUIRE, AND JULIA P. COPELAND, ESQUIRE, HINCHEY, MURRAY & PAGLIARINI, LLC, ATTORNEYS FOR DEFENDANTS:

Plaintiff Shem Creek Development Group, LLC ("Plaintiff") responds to Defendant's Second Set of Requests for Production as follows. Plaintiff incorporates, as if fully set forth herein, all general objections from its previous responses.

GENERAL OBJECTION

Plaintiff objects to Defendant's Second Set of Requests for Production because the deadline for discovery expired prior to the issuance of these requests and Defendant had ample opportunity during discovery in this action to obtain the information sought.

RESPONSES TO SECOND REQUESTS FOR PRODUCTION

1. Any and all Pro Forma financial statements, both internally and externally generated, drafted or submitted from project inception to present.

RESPONSE: Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The financial information sought is not relevant to any issue in dispute in this case as the parties agreed to a

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liquidated damages provision in the parking license agreement and information relating to the financial projections for the project would not affect the damages to which Plaintiff is entitled in this case. Subject to and without waiving this objection, see documents previously produced in discovery, including those labeled SCDG0004368-4388.

2. Any and all forecasts and/or projections, both internally and externally generated, including but not limited to revenues, profit, operating expenses, net operating income, etc.

RESPONSE: Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The financial information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and information relating to the financial projections for the project would not affect the damages to which Plaintiff is entitled in this case. Subject to and without waiving this objection, see documents previously produced in discovery, including those labeled SCDG0004368-4388.

3. Business tax returns from inception to present.

RESPONSE: Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The tax returns sought are not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and Plaintiff's tax returns will not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects because this request seeks confidential information.

4. Backup copy of QuickBooks file or other relevant project accounting system from inception to present.

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RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The financial information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and Plaintiff's accounting files would not affect the damages to which Plaintiff is entitled in this case. Subject to and without waiving such objection, Plaintiff does not have a QuickBooks file or accounting system for its own operations.**

5. Support for interest rate on note as outlined in footnote 1, Bates SCDG0004389.

RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff has amended its damages calculation presented in SCDG0004389 and no longer is using the interest rate referenced in that calculation as the present value discount factor. Subject to and without waiving such objection, see attached documents labeled SCDG0004390-4405.**

6. Any and all documentation for loans, lines of credit, or other notes obtained to finance the project from inception to present.

RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff has amended its damages calculation presented in SCDG0004389 and no longer is using cost of debt related to the project as its discount factor. Subject to and without waiving such objection, see documents previously produced, including SCDG00000056-59, and attached documents labeled SCDG0004390-4405.**

7. Any all documentation for equity or other investments in project from inception to present.

RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The documentation relating**

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to equity investments in the project is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and information relating to investments in the project would not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects to this request because it is overly broad and unduly burdensome. The scope of documents requested is too vast, and the cost and burden of searching for all documents, many of which have little, if any, probative value, will far exceed the benefit of producing them. Plaintiff further objects because this request seeks confidential information. Subject to and without waiving such objection, see documents previously produced, including SCDG00000054-59, 101-103, 117-121, 429, 450-459, 483-484, and 639-725, and attached documents labeled SCDG0004406-4415.

8. Any and all documentation and correspondence related to the Plaintiffs solicitation of debt or equity financing, inception to present.

RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The documentation relating to debt equity or financing for the project is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and information relating to investment for the project's financing would not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects to this request because it is overly broad and unduly burdensome. The scope of documents requested is too vast, and the cost and burden of searching for all documents, many of which have little, if any, probative value, will far exceed the benefit of producing them. Plaintiff further objects because this request seeks confidential information. Subject to and without waiving such objection, see**

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documents previously produced, including SCDG00000054-62, 101-103, 117-123, 429, 450-459, 483-486, 623-625, 629-631 and 639-725, and attached documents labeled SCDG0004390-4415.

9. Internal and/or management prepared financial statements from inception to present.

RESPONSE: Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The financial information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and financial statements would not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects because the request is vague and fails to specify about whom Defendant is seeking information. Subject to and without waiving this objection, Plaintiff does not possess financial statements for its own operations.

10. Internal and/or management prepared reports of revenues and expenses including sufficient segment detail (i.e. detailed by commercial rental, "Parking Spaces," "Public Spaces," and "Reserved Spaces") from inception to present.

RESPONSE: Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The financial information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and revenue and expenses for the project would not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects because the request is vague and fails to specify about whom Defendant is seeking information. Subject to and without waiving this objection, Plaintiff does not possess reports of revenues and expenses for its own operations.

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11. Report detailing "Net Operating Profit" generated by "Parking Spaces" from inception to present.

RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The financial information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and the financial information relating to the project will not affect the damages to which Plaintiff is entitled in this case. Subject to and without waiving this objection, to the extent that "Parking Spaces" and "Net Operating Profit" are intended to have the same meaning as those terms in the parking license agreement, Plaintiff does not possess any documents responsive to this request because Plaintiff does not account for "Net Operating Profit" as that term is defined in the parking license agreement as a result of the Town's breach thereof.**

12. Any and all supporting schedules relevant to or documenting internal calculations or deliberations relevant to the allocation of operating expenses among revenue segments (i.e. commercial rental, "Parking Spaces," "Public Spaces," and "Reserved Spaces") from inception to present.

RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The financial information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and the financial information relating to the project will not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects because the request is vague and fails to specify about whom Defendant is seeking information. Subject to and without waiving this objection, Plaintiff does not possess any documents responsive to this request.**

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13. Any and all information and/or schedules, both internally and externally generated, regarding planned and actual parking rates from inception to present.

RESPONSE: Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and the parking rates for the project will not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects because the request is vague and fails to specify about whom Defendant is seeking information. Subject to and without waiving this objection, see documents previously produced, including SCDG0004368-4388.

14. Any internal or external evaluation of market rates for rental of "Parking Spaces," "Public Spaces," and "Reserved Spaces".

RESPONSE: Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and the market rates for parking spaces will not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects because the request is vague and fails to define "Parking Spaces," "Public Spaces," and "Reserved Spaces." Subject to and without waiving this objection, to the extent that "Parking Spaces," "Public Spaces," and "Reserved Spaces" are intended to have the same meaning as those terms in the parking license agreement, Plaintiff does not possess any documents responsive to this request because the parking garage is not divided into "Public Spaces" and "Reserved Spaces" as contemplated by the parking license agreement.

15. Records or reports detailing "Parking Spaces" usage and resulting revenue from inception to present.

RESPONSE: **Plaintiff objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. The information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and the parking usage and revenue will not affect the damages to which Plaintiff is entitled in this case. Plaintiff further objects because the request is vague and fails to define "Parking Spaces." Subject to and without waiving this objection, to the extent that "Parking Spaces" is intended to have the same meaning as that term in the parking license agreement, Plaintiff does not possess any documents responsive to this request because the parking garage is not divided into "Public Spaces" and "Reserved Spaces" as contemplated by the parking license agreement.**

E. Brandon Gaskins (State Bar No. 73274)
MOORE & VAN ALLEN, PLLC
78 Wentworth Street
P.O. Box 22828
Charleston, South Carolina 29413-2828
Telephone: (843) 579-7000
brandongaskins@mvalaw.com

Attorneys for Plaintiff Shem Creek Development Group, LLP

Dated: September 20, 2019
Charleston, South Carolina

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	
		Case No. 2017-CP-10-5493
Shem Creek Development Group, LLC,	)	
	)	
Plaintiff,	)	
	)	**CERFIFICATE OF SERVICE**
v.	)	
	)	
The Town of Mount Pleasant, South Carolina,	)	
	)	
Defendant.	)	
	)	

The undersigned does hereby certify that a copy of the foregoing **Plaintiff's Responses to Defendant's Second Set of Requests for Production** was served by electronic mail and/or by U.S. mail to the following:

James J. Hinchey, Jr., Esquire
Julia P. Copeland, Esquire
David Pagliarini, Esquire
Hinchey Murray & Pagliarini, LLC
56 Folly Road Blvd.
Charleston, SC 29407

Claude Tackett, Esquire
Claude Tackett Law Firm, LLC
P.O. Box 429
Mount Pleasant, SC 29465

Moore & Van Allen, PLLC

Wendy Stockhausen
Wendy Stockhausen

September 20, 2019
Charleston, SC

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EXHIBIT 16

South Carolina Secretary of State

Business Entities Online

File, Search, and Retrieve Documents Electronically

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101 COLEMAN PARTNERS, LLC

Corporate Information

Entity Type: Limited Liability Company

Status: Good Standing

Domestic/Foreign: Foreign

Incorporated State: Delaware

Important Dates

Effective Date: 02/19/2016

Expiration Date: N/A

Term End Date: 12/31/2045

Dissolved Date: N/A

Registered Agent

Agent: ROBERT S SMALL, JR,.

Address: 6602 Calhoun Memorial Hwy, Suite 201
Easley, South Carolina 29640

Official Documents On File

Filing Type	Filing Date
Notice of Change of Designated Office, Agent or Address of Registered Agent	07/02/2019
Change of Agent or Office	08/15/2016
Authority	02/19/2016

For filing questions please contact us at **803-734-2158**

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EXHIBIT 17

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PROMISSORY NOTE

$13,650,000.00 March 14, 2016

FOR VALUE RECEIVED, 101 COLEMAN PARTNERS, LLC, a Delaware limited liability company ("Borrower"), promises to pay to the order of ***SOUTH STATE BANK***, a South Carolina state chartered banking corporation ("Lender" and, together with any subsequent holder hereof, "Holder"), at its offices at Columbia, South Carolina (or at such other place or places as the Lender may designate) the principal sum of up to $13,650,000.00 under the terms and conditions of this promissory note (the "Note") and in accordance with the Construction Loan Agreement of even date herewith by and between Borrower and Lender (as amended or modified, the "Loan Agreement"). This Note is secured, in part, by a Leasehold Mortgage, Security Agreement and Fixture Financing Statement given by Borrower of even date to be filed of record in the land records of the Charleston County, South Carolina (the "Mortgage Instrument"), and other agreements by and between Borrower and Lender. The defined terms in the Loan Agreement are used herein with the same meaning. All of the terms, definitions, conditions and covenants of the Loan Agreement, the Mortgage Instrument, the Loan Documents and the other agreements by and between Borrower and Lender are expressly made a part of this Note by reference in the same manner and with the same effect as if set forth in full herein, and any holder of this Note is entitled to the benefits of and remedies provided in the Loan Agreement, the Mortgage Instrument, and any other agreements by and between Borrower and Lender. Lender shall advance funds evidenced by this Note to Borrower pursuant to the terms of the Loan Agreement. Any Event of Default under the Loan Agreement, the Mortgage Instrument, or any other of the Loan Documents is an Event of Default under the terms of this Note.

Repayment and Maturity Date.

(a) During the Construction Phase (as defined in the Loan Agreement), all accrued and unpaid interest only, at the applicable interest rate, will be due and payable monthly in arrears. Interest payments shall be due and payable prior to the twentieth (20th) day of the month after the Closing Date, and in the same manner each month during the term of the Construction Phase.

(b) During the Permanent Phase (as defined in the Loan Agreement), Borrower shall make consecutive equal payments of principal plus interest in the amount of **Seventy-One Thousand Three Hundred Sixty Five Dollars and 86/100ths ($71,365.86) Dollars** per month commencing on or before the 20th day of the month following the conversion of the Construction Phase to the Permanent Phase. Payments of principal shall be based upon a 25-year amortization schedule. All outstanding principal, accrued but unpaid and interest, late charges, and other fees and costs due Lender shall be due and payable on or before March 14, 2021.

Interest Rate. The interest rate on the outstanding principal balance of the Note shall be a fixed rate of 3.85% per annum for the term of the Loan. Interest calculations will be based on the actual number of days outstanding based on a 360-day year.

Acceleration/Default Rate. Time is of the essence in the payment of this Note. If payment of all sums due hereunder remain unpaid after the cure period, if any, provided in the Loan Agreement, the then outstanding principal and all accrued but unpaid interest shall bear interest at the rate provided for hereunder

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plus four percent (4%) per annum until such principal and interest have been paid in full; provided, however, that in no event shall this or any other provision herein permit the collection of any interest which would be usurious under the law governing this transaction, and if any such interest is collected, the amount above the maximum rate permitted by law shall be deemed to be a principal payment hereunder. Further, in the event of such acceleration, the Loan and all other indebtedness of Borrower to Lender arising out of or in connection with the Loan shall, at Holder's option, become immediately due and payable, without presentation, demand, protest or notice of any kind, all of which are hereby waived by Borrower. The Holder may exercise this option to accelerate during any Event of Default (as defined in the Loan Agreement) by Borrower regardless of any prior forbearance.

Prepayment Privilege. This Note may be prepaid in whole or in part at any time without prepayment premium or fee. Any partial prepayment shall be applied first against accrued interest, if any, and then to the principal amount outstanding and shall not postpone the due date of any subsequent monthly installments or change the amount of such installments, unless Holder shall otherwise agree in writing.

Late Charges. In the event any payment of interest or principal is delinquent more than fifteen (15) days, Borrower will pay to Lender a late charge of five percent (5%) of the amount of the overdue payment. This provision for late charges shall not be deemed to extend the time for payment or be a "grace period" or "cure period" that gives Borrower a right to cure a Default Condition. Imposition of late charges is not contingent upon the giving of any notice or lapse of any cure period provided for in the Loan Agreement, the Mortgage Instrument or any Loan Document.

Application of Payments. All sums received by Lender for application to the Loan may be applied by Lender to late charges, expenses, costs, interest, principal and other amounts owing to Lender in connection with the Loan in the order selected by Lender in its sole discretion. All payments under this Note shall be payable in lawful money of the United States, in immediately available funds, and shall be made at the main office of Lender at its address set forth in this Note or at such other place and to such other person(s) as Holder may from time to time designate in writing.

Expenses. In the event this Note is not paid when due at any stated or accelerated maturity or this Note is otherwise given to an attorney to enforce any of Holder's rights hereunder, Borrower will pay, in addition to principal and interest, all reasonable costs of collection and other expenses incurred or paid by Holder, including reasonable attorneys' fees and any costs incurred by Holder in connection with the filing of a petition under the United States Bankruptcy Code.

Lender as Prevailing Party. In the event Holder is the prevailing party in litigation concerning this Note or the enforcement, declaration, or adjudication of any other rights or obligations under the Loan Documents, Holder, to the extent permitted by law, shall be entitled to reimbursement from Borrower of all costs and expenses incurred, including but not limited to reasonable attorney's fees, and such amount shall also be added hereto and secured and collectable on the principal hereof.

Usury. In the event that the interest provisions hereof or any exactions provided for herein shall result in an effective rate of interest which, for any period of time, transcends the limit of the usury or any other law applicable to the loan evidenced hereby, all sums in excess of those lawfully collectible as interest for the period in question shall, without further agreement or notice between or by any party hereto, be applied to principal effective as of receipt of such monies by the Holder hereof with the same force and effect as though the payor had specifically designated such and the Holder had agreed to accept such extra payment(s) as a prepayment of principal.

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Governing Law. Borrower submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Borrower agrees that any action concerning this Note or any instrument securing this Note, to the extent permitted by law, whether initiated by Lender, Borrower or any other party, shall be tried only in a court of competent jurisdiction within the State of South Carolina. All matters arising hereunder shall be determined in accordance with the law and practice of such South Carolina court. Borrower further agrees to comply with all requirements necessary to give such court in personam jurisdiction and agrees that service of process may be accomplished by, in addition to any other lawful means, certified mail, return receipt requested.

Waivers.

(A) BORROWER AND ALL ENDORSERS, GUARANTORS AND ALL PERSONS LIABLE OR TO BECOME LIABLE ON THIS NOTE WAIVE PRESENTMENT, PROTEST, AND DEMAND, NOTICE OF PROTEST, DEMAND AND DISHONOR AND NONPAYMENT OF THIS NOTE, AND CONSENT TO ANY AND ALL RENEWALS AND EXTENSIONS OF THE TIME OF PAYMENT MODIFICATIONS AND SUBSTITUTIONS HEREOF, AND AGREE, FURTHER, THAT AT ANY TIME AND FROM TIME TO TIME WITHOUT NOTICE, THE TERMS OF PAYMENT HEREIN MAY BE MODIFIED OR THE SECURITY DESCRIBED IN THE MORTGAGE INSTRUMENT RELEASED IN WHOLE OR IN PART, OR INCREASED, CHANGED OR EXCHANGED BY AGREEMENT BETWEEN THE HOLDER AND ANY OWNER OF PROPERTY AFFECTED BY THE MORTGAGE INSTRUMENT WITHOUT IN ANY WAY AFFECTING THE LIABILITY OF ANY PARTY TO THIS INSTRUMENT OR ANY PERSONS LIABLE WITH RESPECT TO ANY INDEBTEDNESS EVIDENCED HEREBY.

(B) TO THE EXTENT PERMITTED BY LAW, NONE OF THE RIGHTS AND REMEDIES OF HOLDER HEREUNDER ARE TO BE WAIVED OR AFFECTED BY FAILURE OR DELAY TO EXERCISE THEM. ALL REMEDIES CONFERRED ON THE HOLDER BY THIS NOTE OR ANY OTHER INSTRUMENT OR AGREEMENT SHALL BE CUMULATIVE AND NONE IS EXCLUSIVE. SUCH REMEDIES MAY BE EXERCISED CONCURRENTLY OR CONSECUTIVELY AT THE HOLDER'S OPTION.

(C) WAIVER OF JURY TRIAL. BY THE EXECUTION HEREOF, BORROWER KNOWINGLY, VOLUNTARILY AND INTENTIONALLY HEREBY AGREES THAT:

(1) NEITHER BORROWER NOR LENDER, NOR ANY ASSIGNEE, SUCCESSOR, HEIR, OR LEGAL REPRESENTATIVE OF BORROWER OR LENDER, SHALL SEEK A JURY TRIAL IN ANY LAWSUIT, PROCEEDING, COUNTERCLAIM, OR ANY OTHER LITIGATION PROCEDURE ARISING FROM OR BASED UPON THIS NOTE, THE MORTGAGE INSTRUMENT, THE LOAN AGREEMENT OR ANY OF THE LOAN DOCUMENTS EVIDENCING, SECURING, OR RELATING TO THE LOAN EVIDENCED HEREBY, OR TO THE DEALINGS OR RELATIONSHIP BETWEEN OR AMONG THE PARTIES HERETO;

(2) NEITHER BORROWER NOR LENDER WILL SEEK TO CONSOLIDATE ANY SUCH ACTION IN WHICH A JURY TRIAL HAS BEEN WAIVED WITH ANY OTHER ACTION IN WHICH A JURY TRIAL HAS NOT BEEN OR CANNOT BE WAIVED;

(3) THE PROVISIONS OF THIS PARAGRAPH HAVE BEEN FULLY NEGOTIATED BY THE PARTIES HERETO, AND THESE PROVISIONS SHALL BE SUBJECT TO NO EXCEPTIONS;

(4) NEITHER BORROWER NOR LENDER HAS IN ANY WAY AGREED WITH OR REPRESENTED TO ANY OTHER PARTY THAT THE PROVISIONS OF THIS PARAGRAPH WILL NOT BE FULLY ENFORCED IN ALL INSTANCES; AND

(5) THIS PROVISION IS A MATERIAL INDUCEMENT FOR LENDER TO MAKE THE LOAN EVIDENCED BY THIS NOTE.

SIGNATURE PAGE TO FOLLOW

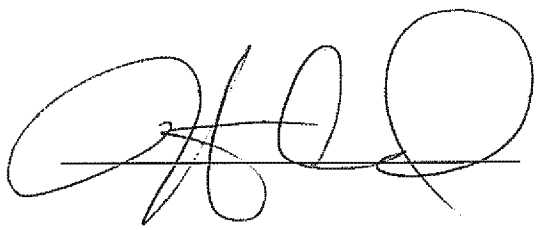
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(D) WAIVER OF APPRAISAL RIGHTS. TO THE FULLEST EXTENT PERMITTED BY LAW AND AS A MATERIAL INDUCEMENT FOR LENDER TO MAKE THE LOAN, BORROWER HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE PROPERTY GIVEN TO SECURE THIS NOTE.

IN WITNESS WHEREOF, the Borrower has caused this Note to be duly executed under seal as of the day and year first above written.

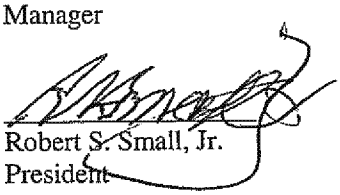
WITNESS:



101 COLEMAN PARTNERS, LLC

By: Shem Creek Development Group, LLC
Its: Managing Member

By: Avtex Commercial Properties, Inc.
Its: Manager

By: 
Robert S. Small, Jr.
Its: President

CONFIDENTIAL SCDG0004394

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EXHIBIT 18

Town of Mount Pleasant

100 ANN EDWARDS LN MOUNT PLEASANT, SC 29464 (843)849-2786

LICENSE NUMBER
20057215

BUSINESS LICENSE

THIS LICENSE (OR PERMIT) IS ISSUED ON THE PETITION OF THE APPLICANT, WHO ASSUMES ALL RESPONSIBILITY OF COMPLIANCE WITH FEDERAL OR STATE REGULATIONS. THE TOWN WILL MAKE NO REFUND IF SUCH REGULATIONS PREVENT OR RESTRICT THE TRADE, BUSINESS OR PROFESSION HEREIN PROPOSED.

DATE OF ISSUE
05/08/2017

THIS LICENSE EXPIRES
06/30/2017

BUSINESS MAILING ADDRESS

101 COLEMAN PARTNERS, LLC
P. O. DRAWER 10287
GREENVILLE, SC 29603

THIS LICENSE MUST BE DISPLAYED

ID NUMBER	TYPE	RATE
135716	531120	007IN

AUTHORIZED SIGNATURE

Town of Mount Pleasant

BUSINESS LICENSE
TAX INFORMATION
FOR LICENSE EXPIRING 06/30/2017

101 COLEMAN PARTNERS, LLC
P. O. DRAWER 10287
GREENVILLE, SC 29603

Tax:	219.28
Penalty:	0.00
Total Paid:	219.28

RECEIVED
MAY 15 2017

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EXHIBIT 19

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INDEMNIFICATION AND HOLD HARMLESS AGREEMENT

This INDEMNIFICATION AND HOLD HARMLESS AGREEMENT ("Agreement"), is made as of September 29, 2017 (the "Effective Date"), by and among **SHEM CREEK DEVELOPMENT GROUP, LLC**, a South Carolina limited liability company ("SCDG"), **SCM 101 COLEMAN INVESTORS, LLC**, ("SCM") and **101 COLEMAN PARTNERS, LLC**, a Delaware limited liability company (the "Company"). As used in this Agreement, SCM and the Company may jointly be referred to as the "Indemnitees".

WHEREAS, SCM and SCDG are the members of the Company;

WHEREAS, on October 17, 2013, SCDG executed and entered into a parking license agreement (the "Parking License Agreement") with the Town of Mount Pleasant, South Carolina (the "Town");

WHEREAS, following the execution of the Parking License Agreement, the Town improperly undertook efforts to undermine and escape its contractual obligations;

WHEREAS, SCDG intends to file a lawsuit against the Town in the Court of Common Pleas in the State of South Carolina complaining of the Town's actions with regard to the Parking License Agreement (the "Lawsuit").

WHEREAS, in connection with the Lawsuit, SCDG has agreed to indemnify and hold harmless the Indemnitees as more fully set forth below.

NOW, THEREFORE, in consideration of the mutual promises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, the parties hereto agree as follows:

1. Indemnification. SCDG agrees to indemnify, defend and hold harmless each of the Indemnitees (with Moore Van Allen or other counsel selected by SCDG and acceptable to SCM in its reasonable discretion), and its and their respective current and former owners, shareholders, members, principals, fiduciaries, agents, representatives, heirs, administrators, executors, attorneys, successors and assigns (collectively, "Indemnitee Parties"), from and against any and all claims, demands, suits, actions, causes of action, losses, damages, liabilities, obligations, judgments, orders, penalties, fines, taxes, assessments, liens, costs and expenses (including reasonable attorneys' fees and court costs) of any and every kind or character which arise out of or are in anyway related to or in connection with the Lawsuit. Unless and until SCDG designates such counsel acceptable to SCM as described above, SCM shall have the right to engage counsel of its own choosing to defend all Indemnified Parties in the matter in question and SCDG shall be obligated to pay the reasonable fees such counsel chosen by SCM. If SCDG does not propose counsel within ten (10) business days after receipt of notice from any Indemnitee pursuant to this paragraph, then SCM shall have the right to designate one counsel to defend them, which counsel must be acceptable to SCDG in its reasonable discretion.

2. Procedure for Indemnification. If any Indemnitee intends to make a claim for indemnification, it shall notify SCDG of the claim in writing, describing the claim, the amount

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thereof, and the basis therefore. SCDG shall respond to each such claim within ten (10) days of receipt of such notice. Failure to respond within such time period shall constitute an admission of liability for the claim(s) asserted in the notice. No action shall be taken pursuant to the provisions of this Agreement or otherwise by an Indemnitee seeking indemnification until the later of (a) the expiration of the 10-day response period (unless reasonably necessary to protect the rights of the party seeking indemnification) or (b) thirty (30) days following the termination of the 10-day response period if a response received within such 10-day period by the party seeking indemnification requested an opportunity to cure the matter giving rise to indemnification (and, in such event, the amount of such claim for indemnification shall be reduced to the extent so cured within such 30-day cure period). The Indemnitees shall have the right to file a declaratory relief action against SCDG for SCDG's Failure to Defend the Indemnitees within sixty (60) days of notice from any Indemnitees to SCDG of request for indemnity and defense pursuant to this Indemnity. As used herein, "Failure to Defend" shall mean that upon written tender by one or more Indemnitees to SCDG demanding indemnity and defense, SCDG fails to acknowledge said indemnification obligation and/or said defense obligation (including Indemnitees' right to counsel selected by SCDG but acceptable to SCM in its sole discretion) in writing within ten (10) business days of receipt of the tender, in which case, the Indemnitees are free to appoint their own counsel and submit all invoices for prompt payment by SCDG.

3. Term. This Indemnity shall survive for a period ending on the expiration of the applicable statute of repose of the State of South Carolina (the "Term"); provided, however, this Indemnity will not be affected by the expiration of the Term and will survive with respect to all claims arising prior to the expiration of the Term.

4. Prevailing Party. In the event any party to this Agreement commences an action in civil court to enforce the provisions of this Agreement, the prevailing party shall be entitled to recover from the losing party or parties the expenses of litigation (including reasonable attorneys' fees and court costs) incurred by the prevailing party.

5. Partial Invalidity. If any term or provision of this Agreement shall to any extent be held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement, or the application of such invalid term or provision to other persons or circumstances, shall not be affected thereby.

6. Captions and Pronouns. The paragraph captions of this Agreement have been inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of this Agreement.

7. Waiver/Modification. No delay or omission in exercising any right hereunder shall operate as a waiver of such right or any other right. No provision of this Agreement may be changed, modified, waived, discharged or terminated except by an instrument in writing signed by the party against whom enforcement of the change, waiver, discharge or termination is sought.

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8. Applicable Law. This Agreement shall be construed and enforced under and in accordance with the laws of the State of South Carolina. The parties agree that any appropriate state or federal court located in Charleston County, South Carolina, shall have exclusive jurisdiction of any case or controversy arising under or in conjunction with this Agreement and shall be a proper forum in which to adjudicate such case or controversy. The parties consent and waive any objection to the jurisdiction or venue of such courts.

9. Warranty of Authority. The individuals actually executing this Agreement personally represent and warrant that they have the necessary power and authority to execute this Agreement on behalf of the party they represent, and that their signatures are sufficient to make this Agreement the binding and enforceable obligation of such party. This warranty shall survive the execution of this Agreement.

10. Binding. This Agreement shall be binding upon, inure to the benefit of and be enforceable by the parties, and their respective representatives, administrators, executors, successors and assigns.

11. Counterparts. This Agreement and any amendment hereto or any other agreement (or document) delivered pursuant hereto may be executed in one or more counterparts and by different parties in separate counterparts. All of such counterparts shall constitute one and the same agreement (or other document) and shall become effective (unless otherwise therein provided) when one or more counterparts have been signed by each party and delivered to the other party. Facsimile transmission (which shall be deemed to include the e-mail delivery of documents in Adobe or pdf or similar static format) of any signed original counterpart and retransmission of any signed facsimile transmission shall be deemed the same as the delivery of an original.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective as of the date first written above.

SHEM CREEK DEVELOPMENT GROUP, LLC

By: R Small
Name: R. E. Small Jr.
Title: Manager
Date: 11-2-17

SCM 101 COLEMAN INVESTORS, LLC

By: _____
Name: _____
Title: _____
Date: _____

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8. Applicable Law. This Agreement shall be construed and enforced under and in accordance with the laws of the State of South Carolina. The parties agree that any appropriate state or federal court located in Charleston County, South Carolina, shall have exclusive jurisdiction of any case or controversy arising under or in conjunction with this Agreement and shall be a proper forum in which to adjudicate such case or controversy. The parties consent and waive any objection to the jurisdiction or venue of such courts.

9. Warranty of Authority. The individuals actually executing this Agreement personally represent and warrant that they have the necessary power and authority to execute this Agreement on behalf of the party they represent, and that their signatures are sufficient to make this Agreement the binding and enforceable obligation of such party. This warranty shall survive the execution of this Agreement.

10. Binding. This Agreement shall be binding upon, inure to the benefit of and be enforceable by the parties, and their respective representatives, administrators, executors, successors and assigns.

11. Counterparts. This Agreement and any amendment hereto or any other agreement (or document) delivered pursuant hereto may be executed in one or more counterparts and by different parties in separate counterparts. All of such counterparts shall constitute one and the same agreement (or other document) and shall become effective (unless otherwise therein provided) when one or more counterparts have been signed by each party and delivered to the other party. Facsimile transmission (which shall be deemed to include the e-mail delivery of documents in Adobe or pdf or similar static format) of any signed original counterpart and retransmission of any signed facsimile transmission shall be deemed the same as the delivery of an original.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective as of the date first written above.

SHEM CREEK DEVELOPMENT GROUP, LLC

By:_____
Name:_____
Title:_____
Date:_____

SCM 101 COLEMAN INVESTORS, LLC

By:_____
Name: DAVID A. BROWN
Title: Authorized Signatory
Date: 10/24/17

CHARLESTON\691250v3

CONFIDENTIAL SCDG0004409

101 COLEMAN PARTNERS, LLC

By: R K Small

Name: R. K. SMALL, III

Title: MANAGER

Date: 11-2-17

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EXHIBIT 20

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STATE OF SOUTH CAROLINA **COUNTY OF CHARLESTON** **SHEM CREEK DEVELOPMENT GROUP, LLC,** **Plaintiff,** **vs.** **THE TOWN OF MOUNT PLEASANT SOUTH CAROLINA.** **Defendant.**	**IN THE COURT OF COMMON PLEAS** **NINTH JUDICIAL CIRCUIT** **CIVIL ACTION NO.: 2017-CP-10-5493** **DEFENDANT'S NOTICE OF SUPPLEMENTAL DEPOSITION (*DUCES TECUM*) OF 30(B)(6) DEPONENT**

TO: SHEM CREEK DEVELOPMENT GROUP, LLC AND E. BRANDON GASKINS, ESQ. as Counsel for the Plaintiff:

YOU WILL PLEASE TAKE NOTICE that on August 8, 2019, at 2:00 p.m., at 100 Ann Edwards Lane, Charleston, South Carolina, the undersigned attorney for the Defendant will take the deposition of the person or person(s) who can testify most knowledgably on behalf of Shem Creek Development Group, LLC pursuant to and prepared in compliance with Rule 30(b)(6) of the South Carolina Rules of Civil Procedure as to the subject matter involved in this pending case and the following topic:

(1) **Plaintiff's calculation and quantification of damages including those described in their Second Supplemental Answers to Defendant's First Set of Interrogatories and associated exhibit bates labeled SCDG0004389, together with any supporting emails, notes, figures, spreadsheets, research, rent rolls, historical data, pro forma obtained and used to generate the present day value of the total amount of rent due in this litigation.**

The deposition shall be taken before a court reporter or other person authorized to swear witnesses and transcribe testimony, and shall continue from time to time until completed, including any adjournments thereof. The deposition is being taken for per-trial discovery, for use at trial, and for all other purposes as may be permitted by law.

The witness will be questioned about any and all documents produced at the deposition or provided and/or identified during the course of discovery at least two days prior to the aforementioned deposition date in accordance with Rule 30(j)(8) SCRCP.

You are hereby invited to be present and examine the witness as you may be advised in the premises.

David G. Pagliarini
Julia P. Copeland
Hinchey, Murray & Pagliarini, LLC
56 Folly Road Blvd.
Charleston, SC 29407
Telephone: 843-577-7455
Facsimile: 843-971-8745
Attorneys for the Defendant

Charleston, South Carolina
July 29, 2019

CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 29th day of July 2019, true copies of the foregoing **DEFENDANT'S NOTICE OF SUPPLEMENTAL DEPOSITION (*DUCES TECUM*) OF A RULE 30(b)(6) DEPONENT** has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto to.

E. Brandon Gaskins
MOORE & VAN ALLEN, PLLC
PO Box 22828
Charleston, SC 29413-2828

HINCHEY MURRAY & PAGLIARINI

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
SHEM CREEK DEVELOPMENT GROUP, LLC, Plaintiffs, vs. TOWN OF MT. PLEASANT, Defendants.	**Case No. 2017-CP-10-5493**

DEFENDANT'S MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANT'S MOTION TO COMPEL AND MEMORANDUM IN SUPPORT

Defendant, Town of Mount Pleasant (the "Town") respectfully moves the Court to reconsider its January 22, 2020 Order pursuant to Rule 59, SCRCP. This motion is made in accordance with the South Carolina Rules of Civil Procedure. Defendant hereby submits the following Memorandum in Support of its Motion for Reconsideration of the Court's prior Order Denying its Motion to Compel.

PROCEDURAL HISTORY

On October 22, 2019, Defendant filed its Motion to Compel Plaintiff to produce documents responsive to Defendant's Second Request for Production, and in the alternative, compel the production of the same documents in response to Defendant's subpoena to related entity, 101 Coleman Partners, LLC. All parties submitted briefs supporting their positions within the stated timelines, and by consent, no hearing was held. The arguments were considered based on the parties' briefs and supporting materials. After consideration of the law, the briefs filed by the parties, and all matters submitted, this Court issued an Order on January 22, 2020 denying Defendant's Motions. Defendant timely filed this Motion to Reconsider within ten days of receipt/entry of the Order.

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FACTS

Town Council adopted the terms of the Parking License Agreement ("Agreement") in 2013. The language is clear and unambiguous. Within the four corners of the Agreement, Section 1.07 of the PLA, titled "Rent", provided for the amount and structure of rent payments by the Town to Plaintiff. In consideration for the Garage's 276 spaces being reserved for the public for 30 years, the Town was to pay Plaintiff a "Fixed Minimum Rent" of $185,000/year for 15 years.[1]

Section 1.07(a) and (b) define "Fixed Minimum Rent" and the Town's ability to reduce its tax-funded obligation as the financial success of the structure improves. Section 6.01 caps Plaintiff's damages, if any, to Rent Payments actually "due" under this Agreement. Town never considered this provision a sum certain, liquidated damages provision. In fact, the language itself, contemplates a calculation of payments due. In order to determine what is actually due in actual damages, the parties would seemingly have to refer to other portions of the Agreement, specifically Section 1.07(b).[2]

Despite this reasonable interpretation, the October 22nd Order re-writes the terms of this Agreement, surmising the intent of the Town during negotiations that it sought a liquidated damages provision. This evisceration of Section 1.07(b)'s rent reduction provision assesses a disproportionate penalty against the Town that was never contemplated or intended.

STANDARD OF REVIEW

Rule of Civil Procedure 54(b) governs the Court's reconsideration of interlocutory orders.[3] Rule 54(b) permits a court to revise "any order or other decision …that it adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties…at any time

[1] See Parking License Agreement, ¶ 1.07(a) attached hereto as **Exhibit A.**
[2] Id., ¶¶ 1.07(b), 6.01
[3] See generally Carlson v. Boston Sci. Corp., 856 F.3d 320, 325 (4th Circ. 2017).

before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Rule 54(b), SCRCP.

Agreement Contains No Liquidated Damages Provision and Amount Demanded is an Unenforceable Penalty

The touchstone question in determining whether a sum stipulated in a contract is a liquidated damage or an unenforceable penalty is whether the amount is "reasonably intended by the parties as the predetermined measure of compensation for actual damages *that might be sustained* by reason of nonperformance...."[4]

Whether a stipulation is one for liquidated damages or for a penalty is, of course primarily a matter of the intention of the parties. Implicit in the meaning of liquidated damages, is the idea of compensation; in that of "penalty", the idea of punishment.[5] If it is clear that the stipulation is for liquidated damages, breach of the contract will generally entitle the offended party to retain or recover the sum stipulated, and neither more nor less without proof of damage actually sustained.[6]

The language used by the parties in this Agreement is conclusive of the question of whether the stipulation is for liquidated damages or for a penalty.[7] Interpretation of the contract is governed by the objective manifestation of the parties' assent at the time the contract was made.[8] It is clear within the four corners of this contract, that liquidated damages were never a consideration for the Town. The Court's attempt to surmise the Town's intent during negotiations is inappropriate. However, if this Court determines that the Town's redlines during negotiations are determinative of its intent, it should be noted that Town representatives also

[4] ERIE Ins. Co. v. Winter Const. Co., 393 S.C. 455, 462, 713 S.E.2d 318, 322 (Ct. App. 2011)(citing Tate v. Master, 231 S.C. 429, 441, 99 S.E.2d at 46 (1957) (emphasis added); see also Restatement (Second) of Contracts § 356 (1981).
[5] Tate v. Master, 231 S.C. 429 at 441, 99 S.E.2d at 46 (1957).
[6] Id.
[7] Id. (citing Ould v. Spartanburg Realty Co., 94 S.C. 184, 77 S.E. 866 (1913).
[8] Bannon v. Knauss, 282 S.C. 589, 593 320 S.E.2d 470 (1984).

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removed Plaintiff's ability to accelerate rent payments in a breach[9], which directly contradicts the supposition that liquidated damages were contemplated. Removal of the acceleration clause is certainly inconsistent with Plaintiff's attempt to recover rent payments for the entire 15 years when Plaintiff terminated the agreement prior to a Certificate of Occupancy being issued.

Determination of Actual Damages Requires a Review of the Entire Agreement

In Foster v. Roach, our supreme court identified criteria to utilize in making a determination as to the qualification of damages:

> In order to determine whether the sum named in a contract as a forfeiture for noncompliance is intended as a penalty or liquidated damages, it is necessary to ***look at the whole contract***, its subject-matter, the ease or difficulty in measuring the breach in damages and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach.[10]

The January 22, 2020 Order presumes the survival clause does not provide for the survival of any rights of the Town, including the right to calculate the amount of rent that may be due by eliminating Section 1.07(b). Section 8.17 allows the survival of all provisions that relate to "the obligation to pay any sum owing…"[11] Further, the parties waived any claims to consequential or punitive damages, with Plaintiff's sole remedy being a claim for "rent payments ***due*** under the Agreement."[12] One cannot deduce what sum, if any, is "owing" without referring to all provisions of the Agreement, including calculation of Rent payments. This provision does not disclaim the rent reduction provision nor does it change the way rent is calculated in the event Plaintiff pursues a breach of contract claim against the Town. In order to determine the amount of rent actually due, the parties would have to revert back to 1.07(a) and (b). This

[9] See 30(b)(6) Dep. of T. Flesch (Aug. 8, 2019), pp. 16:11-17:5, cited portion attached hereto as Exhibit **B**.
[10] ERIE Ins. Co. v. Winter Const. Co., 393 S.C. 455, 462, 713 S.E.2d 318, 322 (Ct. App. 2011)(citing Foster v. Roach, 119 S.C. 102, 107, 111 S.E. 897, 899 (1922) (emphasis added)).
[11] See Parking License Agreement, ¶ 8.17.
[12] See Parking License Agreement, ¶ 6.01.

Court's position that Plaintiff is entitled to the Fixed Minimum Rent in its entirety without a commensurate reduction based upon the Garage's profitability has no foundation or support in the Agreement and was never intended by Defendant during negotiations.

Town Would be Subject to an Unenforceable Penalty

Where the sum stipulated in an Agreement is so large that it is plainly disproportionate to any probable damage resulting from a breach of contract, the stipulation would be held one for penalty and not for liquidated damages, regardless of its terminology.[13] If the provision be for a penalty, recovery is measured not by the sum stipulated, but by the amount of ***actual damage*** proven to have been sustained as the result of the breach.[14] If this Court determines the Town committed a breach of the Agreement, the Defendant respectfully requests it be allowed to calculate the actual damages incurred as a direct result. This request is fair and reasonable, based on the terms of the Agreement. Therefore, the Town's request for documents related to the Garage's profitability and Plaintiff's financial condition related thereto is imperative to determine the actual damages, if any at all, as a penalty should this Court determine that Defendant did, in fact, breach this Agreement.

CONCLUSION

Based on the above, Defendant prays this Honorable Court reverse its Order denying its Motion to Compel.

s/Julia P. Copeland
David Pagliarini
Julia P. Copeland
Hinchey, Murray & Pagliarini, LLC
56 Folly Road Blvd.
Charleston, SC 29401
Telephone: 843-577-7455

Claude Tackett
Claude Tackett Law Firm, LLC

[13] Tate v. Master, 231 S.C. 429 at 441, 99 S.E.2d at 46 (1957) (citing 15 Am. Jur. Damages, Sec. 249, p. 681.).
[14] Id. (citing 25 C.J.S. Damages § 116b, p. 704)(emphasis added).

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P.O. Box 429
Mount Pleasant, SC 29465
Telephone: 843-800-1126

Charleston, South Carolina

January 29, 2020

Attorneys for the Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 29th day of January, 2020, true copies of the foregoing **DEFENDANT'S MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DENYING ITS MOTION TO COMPEL** has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto to.

E. Brandon Gaskins
MOORE & VAN ALLEN, PLLC
PO Box 22828
Charleston, SC 29413-2828

S/Julia P. Copeland
Hinchey, Murray & Pagliarini, LLC

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EXHIBIT A

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PARKING LICENSE AGREEMENT

BY AND BETWEEN

SHEM CREEK DEVELOPMENT GROUP LLC

AND

TOWN OF MOUNT PLEASANT

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Article I.
BASIC LICENSE PROVISIONS

Section 1.01 Effective Date. The Effective Date of this License shall be October 17, 2013.

Section 1.02 Licensor. Shem Creek Development Group LLC ("SCDG")

Section 1.03 Notice Addresses.

Address of Licensor:	400 Hibben Street, Suite 200 Mount Pleasant, SC 29464
With a copy to:	Buist Byars & Taylor, LLC 652 Coleman Blvd., Suite 200 Mount Pleasant, SC 29464 Attn: Gray B. Taylor Esq.
Licensee/Town:	Town of Mount Pleasant ("Town")
Address of Licensee:	Town of Mount Pleasant Municipal Complex 100 Ann Edwards Lane Mount Pleasant, SC 29464
With a copy to:	Town of Mount Pleasant Legal Department 100 Ann Edwards Lane Mount Pleasant, SC 29464

Section 1.04 Property. The real property and improvements to be constructed thereon situated in the Town of Mount Pleasant, South Carolina, as more fully described on the attached Exhibit "A" (the "Property").

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. A conceptual rendering of the Project is attached hereto as Exhibit "A"

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"). 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".

Section 1.07 Rent.

(a) Fixed Minimum Rent: During the first fifteen years of the License Term (the "Rent Period,") Licensee covenants and agrees to pay to 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 to Licensor, in legal tender of the United States of America, without any prior

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demand and without any deduction or setoff whatsoever, Fixed Minimum Rent in the amount of One Dollar per year.

(b) Rent Reduction based Upon Financial Performance of the Parking Garage:If at any time during the Rent Period of this License, should the operation of the Parking Garage result in an annual net operating profit, Licensee shall be entitled to reduce its Fixed Minimum Rent Payment for the following License Year of the Term by its pro rata share, based upon the percentage of the Parking Spaces comprising the Public Spaces.

(i) For the purpose of this Agreement, "Net Operating Profit" shall be defined as gross revenue generated by the Parking Spaces during any License Year, less all expenses related to operation, maintenance and repair of the Parking Garage (including reasonable reserves for repair and replacements), including but not limited to the total costs of operating, repairing, lighting, cleaning, maintaining, painting, securing, managing and insuring the Parking Garage and paying all management fees, taxes, public charges and assessments of whatsoever nature directly or indirectly assessed or imposed upon the land, buildings, equipment and improvements constituting the Parking Garage, including, but not limited to, the cost of all utilities necessary to serve the Parking Garage, all ground rent payments for the Parking Garage, all real property taxes, rates, duties and assessments, local improvement taxes, import charges or levies, whether general or special that are levied charged or assessed against the Parking Garage by any lawful taxing authority whether federal, state, county municipal, school or otherwise (other than income, inheritance and franchise taxes thereon). Should the calculation of Net Operating Profit for any License Year result in a negative number (a "Net Operating Loss"), the Net Operating Profit for the following License Year shall be reduced by the Net Operating Loss from the preceeding License Year.

(ii) By way of example, should the Parking Garage result in an annual net operating profit of $10,000, Licensee's Fixed Minimum rent for the final License Year of the Term shall be reduced by $4,782.61 (e.g., $10,000 x 132/276 = $4,782.61).

Section 1.08 Operating Expense Payment. Licensor, as its sole and exclusive obligation, shall pay all expenses associated with the operation of the Parking Garage.

Section 1.09 License Year. A License Year shall be each successive period of twelve (12) calendar months commencing on the Rental Commencement Date.

Section 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.

Section 1.11 Permitted Use. The sole Permitted Use of the Public Spaces shall be for vehicular parking spaces for the general public at rental rates comparable to market rates for similarly situated parking facilities.

Article II.
LICENSE OF PREMISES AND QUIET ENJOYMENT

Section 2.01 Description of Premises.

(a) Licensor currently Leases (or has the ability to lease) the land shown on Exhibit "A", together with the existing buildings and improvements thereon depicted, all of which constitute the Property, pursuant to the

terms and conditions of that certain Real Property License by and between Snowmill, LLC, as Licensor thereunder, and Lowcountry Capital, LLC, as Licensee thereunder, dated April 1, 2006, as amended and thereafter assigned from Lowcountry Capital, LLC to Lucasville Investments, LLC (the "Prime Lease"). In consideration of the rents, covenants and agreements reserved and contained in this License, Licensor hereby grants an exclusive Licenses over the Premises to Licensee and Licensee accepts same, subject only to the terms and conditions herein contained, and all applicable liens, encumbrances, easements, restrictions, zoning laws, and governmental or other regulations affecting the Property.

(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.

Section 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".

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.

Section 2.04 Possession/Alterations. Licensor and Licensee hereby agree that the Town's issuance of a certificate of occupancy for the Parking Garage shall be deemed conclusive evidence of Licensee's acceptance of the Premises in satisfactory condition and in full compliance with all covenants and obligations of Licensor related to construction of the Parking Garage. Licensee agrees that except as otherwise expressly set forth in this License, no representations or inducements respecting the condition of the Premises have been made to Licensee by Licensor or its authorized representatives. The Licensee shall notify the Licensor of any accident, defect, damage or deficiency in any part of the Premises or improvements which comes to the attention of the Licensee, its employees or contractors notwithstanding that the Licensor may have no obligation in respect thereof.

Section 2.05 Quiet Enjoyment. Licensor covenants that Licensee, upon paying all sums due from Licensee to Licensor and performing and observing all of Licensee's obligations under this License, shall peacefully and quietly have, hold and enjoy the Premises and the appurtenances throughout the License Term without interference by the Licensor, subject, nevertheless, to the other terms and provisions of this License.

Section 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.

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Article III.
OPERATING COVENANTS

Section 3.01 Management of the Project. Licensee acknowledges and agrees that the sole and exclusive control and responsibility for management of the Project shall be with the Licensor. In furtherance of such management, Licensor shall make such decisions regarding staffing, the hiring of employee, operational standards, maintenance, parking fees, rules and regulations for use of the Project, and other decisions related to the management and operation of the Project. Notwithstanding the foregoing, Licensor has agreed to certain standards and criteria for operation of the Parking Garage, as set forth herein.

Section 3.02 Operating Covenants. In consideration of this Agreement, Licensor hereby agrees to the following management guidelines and operational standards for the Premises and the Project:

(a) The Public Spaces subject to this License Agreement are intended to foster tourism and economic development along Coleman Boulevard and the Shem Creek waterfront, and to provide parking for existing local businesses. In order to achieve these objectives, the Public Spaces shall be available for public use, 365 days per year, 24 hours per day.

(b) The Reserved Spaces shall be reserved for separate allocation by Lessor Monday through Friday, 6:00 a.m. until 7:00 p.m. During all other times the Reserved Spaces shall be available for public use, on a first-come first-served basis.

(c) The Premises shall be operational 365 days per year, 24 hours per day. Licensor reserves the right to establish, charge and collect reasonable fees for use of the Public Spaces and for the Reserved Spaces for such times as the Reserved Spaces are available for use by the general public. Parking fees shall be at rental rates comparable to market rates for similarly situated parking facilities. Following the termination of this License Agreement, Licensor shall be free to set parking fees in its sole discretion.

Section 3.03 Operating Costs. Licensor shall be solely responsible for the total costs of operating, repairing, lighting, cleaning, maintaining, painting, securing, managing and insuring the Parking Garage and paying all management fees, taxes, public charges and assessments of whatsoever nature directly or indirectly assessed or imposed upon the land, buildings, equipment and improvements constituting the Parking Garage, including, but not limited to, the cost of all utilities necessary to serve the Parking Garage, all ground rent payments for the Parking Garage, all real property taxes, rates, duties and assessments, local improvement taxes, import charges or levies, whether general or special that are levied charged or assessed against the Parking Garage by any lawful taxing authority whether federal, state, county municipal, school or otherwise (other than income, inheritance and franchise taxes thereon).

Section 3.04 Licensor's Work. Licensee has inspected the Licensor's conceptual plans for the Project, and agrees to accept the Premises if constructed in a substantially similar manner, and that no other Licensor work shall be required.

Article IV.
INSURANCE

Section 4.01 Licensor's Coverage. Licensor shall maintain at its sole expense during the term hereof:

(a) public liability insurance covering the Premises in an amount of $2,000,000 for injury and/or death to one person. The Town of Mount Pleasant shall be named as an additional insured; and

(b) Earthquake, flood, fire and extended casualty, windstorm and hail coverage in an amount not less than 100% of the replacement value of the buildings and improvements now or hereafter located on the Premises (but in no case less than $5,000,000) with companies satisfactory to Licensor; and

Article V.
CASUALTY AND CONDEMNATION

Section 5.01 Fire, Explosion or Other Casualty. In the event the Premises are damaged by fire, explosion or any other casualty to an extent which is less than fifty (50%) percent of the cost of replacement of the Premises, the damage shall promptly be repaired by Licensor at Licensor's expense, but without abatement of Rent. In the event of any such damage and (a) the Premises shall be damaged to the extent of fifty (50%) percent or more of the cost of replacement, Licensor shall repair or rebuild the Premises or the building or buildings, with an abatement of the Fixed Minimum Rent during the time reasonably required to repair or rebuild and a tolling of the License Term for the time required to repair or rebuild.

Section 5.02 Major Capital Event. Following the 15th year of the Rent Term should uninsured capital improvements or repairs costing in excess of $750,000 be required in any single License Year Licensor may elect to terminate this License upon written notice to Licensee and consultation with Licensee's representatives.

Section 5.03 Condemnation. If the whole of the Premises, or so much thereof as to render the balance unusable by Licensee for more than 6 months, shall be taken under power of eminent domain, or otherwise transferred in lieu thereof, or if any part of the Property is taken and its continued operation is not, in Licensor's sole opinion, economical, this License shall automatically terminate as of the date possession is taken by the condemning authority, for so long as the Town of Mount Pleasant is not the condemning authority. No award for any total or partial taking shall be apportioned, and Licensee hereby unconditionally assigns to Licensor any award which may be made in such taking, or condemnation. In the event of a partial taking which does not result in the termination of this License, Fixed Minimum Rent shall be apportioned according to the part of the Premises remaining usable by Licensee.

Section 5.04 Condemnation Award. All compensation awarded or paid for any taking or acquiring under the power or threat of eminent domain, whether for the whole or a part of the Premises or Property, shall be the property of Licensor, whether such damages shall be awarded as compensation for diminution in the value of the License or to the fee of the Premises or otherwise, and Licensee hereby assigns to Licensor all of the Licensee's right, title and interest in and to any and all such compensation.

Article VI.
DEFAULTS AND REMEDIES

Section 6.01 Definitions. In the event that Licensee (a) fails to pay all or any portion of any Rent or other sum due from Licensee hereunder or pursuant to any exhibit hereto within ten (10) days following written notice; (b) fails to comply with any other obligation of Licensee under this License within 30 days after written notice; or (c) becomes bankrupt, insolvent or files any insolvency or similar bankruptcy, debtor proceeding; then Licensee shall be in default hereunder and Licensor may, at its option and without further notice to Licensee, (i) terminate Licensee's right to use of the Premises, (ii) without terminating this License, re-enter and resume exclusive possession of the Premises, or (iii) declare this License terminated, and may thereupon in either event remove all persons and property from the Premises in any manner permitted by South Carolina law. In addition, Licensor shall be entitled to bring an action for specific performance or breach of contract against Licensee, but agrees that it sole and exclusive remedy shall be the Rent Payments due under this Agreement. Both parties waive any claims that either may have to any consequential or punitive damages, and agree that 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. .

Section 6.02 Rights and Remedies. The various rights and remedies herein granted to Licensor shall be cumulative and in addition to any others to which Licensor may be entitled by law or in equity, and the exercise of

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one or more rights or remedies shall not impair Licensor's right to exercise any other right or remedy. In all events, Licensor shall have the right, upon notice to Licensee, to cure any breach by Licensee at Licensee's sole cost and expense, and Licensee shall reimburse Licensor for such expense upon demand.

Section 6.03 Bankruptcy. If Licensor shall not be permitted to terminate this License as hereinabove provided because of the provisions of Title 11 of the United States Code relating to insolvency, reorganization or bankruptcy, as amended ("Bankruptcy Code"), then Licensee as a debtor-in-possession or any trustee for Licensee agrees promptly, within no more than fifteen (15) days upon request by Licensor to the applicable bankruptcy court, to assume or reject this License, and Licensee on behalf of itself, and any trustee agrees not to seek or request any extension or adjournment of any application to assume or reject this License by Licensor with such court. In such event, Licensee may only assume this License if (a) it cures or provides adequate assurance that the trustees will promptly cure any default hereunder, (b) it compensates or provides adequate assurance that Licensee will promptly compensate Licensor for any actual pecuniary loss to Licensor resulting from Licensee's defaults, and (c) it provides adequate assurance of performance during the fully stated term hereof of all of the terms, covenants, and provisions of this License to be performed by Licensee. In no event after the assumption of this License shall any then existing default remain uncured for a period in excess of the earlier of ten (10) days or the time period set forth herein. Adequate assurance of performance of this License as set forth hereinabove. shall include, without limitation, adequate assurance (1) of the source of rent reserved hereunder, and (2) the assumption of this License will not breach any provision hereunder. In the event of a filing of a petition under the Bankruptcy Code, Licensor shall have no obligation to provide Licensee with any utilities or other services as herein required, unless Licensee shall have paid and be current in all payments of Operating Costs, utilities or other charges therefor.

Article VII.
SUCCESSION TO LICENSOR'S INTEREST

Section 7.01 Assignment and Attornment. Licensor, in its sole discretion, may assign its rights under this License Agreement at any time during the License Term, and Licensee shall attorn and be bound to any of Licensor's successors or assigns under all the terms, covenants and conditions of this License for the balance of its remaining term.

Section 7.02 Subordination. Licensee agrees that it shall, within 10 days after receipt of Licensor's request, subordinate this License to any mortgage held by an institutional lender which encumbers any portion of the Premises (each is a "Mortgagee"), pursuant to a commercially reasonable subordination, non-disturbance and attornment agreement (an "SNDA"). Upon request of Licensee, Licensor shall use reasonable diligence to obtain an SNDA from the Mortgagee.

Section 7.03 Mortgagee's Approval. If any mortgagee of the Property requires any modification of the terms and provisions of this License as a condition to such financing as Licensor may desire, then Licensor shall have the right to cancel this License if Licensee fails or refuses to approve and execute such modifications, within thirty (30) days after Licensor's request therefor. Upon such cancellation by Licensor, this License shall be null and void and neither party shall have any liability either for damages or otherwise to the other by reason of such cancellation. In no event, however, shall Licensee be required to agree, and Licensor shall not have any right of cancellation for Licensee's refusal to agree, to any modification of the provisions of this License relating to: the amount of rent or other charges reserved herein; the size and/or location of the Premises; or the duration of the License Term and/or Rental Commencement Date of the term.

Section 7.04 Estoppel Certificate. Within ten (10) days after request therefor by either party from time to time, the other party agrees to deliver in recordable form, a certificate to any proposed mortgagee or purchaser, or to the other party, certifying that this License is unmodified and in full force and effect (or, if there have been modifications, that the same is in full force and effect as modified, and stating the modifications), 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.

Article VIII.
MISCELLANEOUS

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Section 8.01 Assignment and Subletting. Licensee shall not directly or indirectly assign or in any manner transfer, mortgage, pledge, encumber or dispose of this License or any interest therein, or sublet or license the Premises or any part or parts thereof, or permit occupancy of all or any part thereof by anyone with, through or under it (each of the foregoing transactions is called a "Transfer"), without the prior written consent of Licensor, which may be withheld in Licensor's sole discretion.

Section 8.02 Waiver. The waiver by either party of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of rent hereunder by Licensor shall not be deemed to be a waiver of any preceding breach by Licensee of any term, covenant or condition of this License, other than the failure of Licensee to pay the particular rental so accepted, regardless of Licensor's knowledge of such preceding breach at the time of acceptance of such rent, and no covenant, term or condition of this License shall be deemed to have been waived by Licensor, unless such waiver be in writing by Licensor.

Section 8.03 Accord and Satisfaction. No payment by Licensee or receipt by Licensor of a lesser amount than the then due Rent herein stipulated shall be deemed to be other than on account of the earliest stipulated Rent, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as rent be deemed an accord and satisfaction, and Licensor may accept such check or payment without prejudice to Licensor's right to recover the balance of such rent or pursue any other remedy in this License provided.

Section 8.04 Entire Agreement. This License and the Exhibits and Rider, if any, attached hereto and forming a part hereof, set forth all the covenants, promises, agreements, conditions and understandings between Licensor and Licensee concerning the Premises and there are no covenants, promises, agreements, conditions or understandings, either oral or written, between them other than as are herein set forth. Except as herein otherwise provided, no subsequent alteration, amendment, change or addition to this License shall be binding upon Licensor or Licensee unless reduced to writing and signed by them.

Section 8.05 No Partnership. By execution or performance of this License or any related agreement, Licensor does not, in any way or for any purpose, become a partner of Licensee in the conduct of its business, or otherwise, or joint adventurer or a member of a joint enterprise with Licensee.

Section 8.06 Force Majeure. In the event that either party shall be delayed or hindered in or prevented from doing or performing any act or thing required hereunder by reason of strikes, lock-outs, casualties, Acts of God, labor troubles, inability to procure materials, failure of power, governmental laws or regulations, insurrection, war or other causes beyond its reasonable control, then it shall not be liable or responsible for any such delays and the doing or performing of such act or thing shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay; provided that nothing in this Section shall excuse or delay payment of Rent or any other sum.

Section 8.07 Notices. Any notice, demand, request or other instrument which may be or are required to be given under this License shall be delivered personally or sent by either United States certified mail postage prepaid or widely recognized commercial courier service requiring a signed receipt (such as Federal Express), and shall be addressed (a) if to Licensor at the address provided in Section 1.1 for Licensor or at such other address as Licensor may designate by written notice, and (b) if to Licensee at the address provided in Section 1.103 for Licensee or at such other address as Licensee shall designate by written notice. Notices shall be effective upon delivery, unless delivery is refused or cannot be made, in which event notice shall be effective as of attempted delivery, as indicated by written report or receipt of the postal service or commercial courier.

Section 8.08 Captions and Section Numbers; Interpretation. The captions, section numbers, article numbers, and index appearing in this License are inserted only as a matter of convenience and in no way define limit, construe, or describe the scope or intent of such section or articles of this License nor in any way affect this License.

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There shall be no interpretation or construing of this License favorable or unfavorable to either party by virtue of its preparation by Licensor.

Section 8.09 Licensee Defined, Use of Pronouns. The word "Licensee" shall be deemed and taken to mean each and every person or party mentioned as a Licensee herein, be the same one or more; and if there shall be more than one Licensee, any notice required or permitted by the terms of this License may be given by or to any one thereof, and shall have the same force and effect as if given by or to all thereof. The use of the neuter singular pronoun to refer to Licensor or Licensee shall be deemed a proper reference even though Licensor or Licensee may be an individual, a corporation, or a group of two or more individuals or corporations. The necessary grammatical changes required to make the provisions of this License apply in the plural sense where there is more than one Licensor or Licensee and to either corporations, associations, partnerships, or individuals, males or females, shall in all instances be assumed as though in each case fully expressed.

Section 8.10 Broker's Commission. Licensor and Licensee each represent and warrant to the other that no broker or real estate agent was involved in this transaction, and Licensor and Licensee each agree to indemnify and hold harmless the other from and against any and all claims, demands, liability, cost or expense (including attorney's fees) incurred by the other arising out of any claim for a brokerage commission or fee asserted due to the acts of the indemnifying party in connection with this License.

Section 8.11 Partial Invalidity. If any term, covenant or condition of this License or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this License, or the application of such term, covenant or condition to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby and each term, covenant or condition of this License shall be valid and be enforced to the fullest extent permitted by law.

Section 8.12 Execution of License and Municipal Authority. The submission of this License for examination does not constitute a reservation of or option for the Premises and this License becomes effective as a License only upon execution and delivery thereof by Licensor and Licensee. Licensee represents to Licensor that all necessary action has been undertaken to authorize this contractual obligation of the Licensee, and that the payments due under this License Agreement represent an ongoing obligation of the Town of Mount Pleasant. The Licensee may make this license contract beyond the term of the governing members of the municipal corporation entering into the License, since the subject matter of this License is an exercise of the Licensee's business and proprietary powers, and does not involve the exercise of a legislative function or the governmental power of the Licensee. Licensee has obtained the legal opinion of its Town Attorney confirming the provisions of this representation.

Section 8.13 Recording. Licensee agrees not to record this License nor any memorandum thereof, and upon any such recordation this License shall be voidable at Licensor's option. Said memorandum or short form of this License shall describe the parties, the Premises and the License Term and shall incorporate this License by reference. Licensor may record a notice prohibiting attachment of construction liens to its interest in the Premises and Property.

Section 8.14 Applicable Law. The Laws of the State of South Carolina shall govern the validity performance and enforcement of this License.

Section 8.15 Time is of the Essence. Time is of the essence of this Agreement.

Section 8.16 Successors and Assigns. Except as otherwise provided herein this License shall be binding upon and inure to the benefit of the parties hereto and their respective heirs personal representatives, executors, successors and assigns. Nothing herein shall authorize any transfer of this License, any interest in this License, or any interest in Licensee.

Section 8.17 Survival of Obligations. The provisions of this License with respect to any obligation of Licensee 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.

Section 8.18 Jury Trial. **LICENSEE AND LICENSOR BOTH WAIVE A TRIAL BY JURY OF ANY OR ALL ISSUES ARISING IN ANY ACTION OR PROCEEDING BETWEEN THE PARTIES HERETO OR THEIR SUCCESSORS, UNDER OR CONNECTED WITH THIS LICENSE OR ANY OF ITS PROVISIONS, AND THEIR RELATIONSHIP AS LICENSOR AND LICENSEE.**

Section 8.19 Representations. Licensee acknowledges that neither Licensor nor Licensor's agents, employees or contractors have made any representations or promises with respect to the Premises, the Property or this License except as expressly set forth herein.

Section 8.20 Licensor's Liability. Notwithstanding anything to the contrary herein contained, Licensee agrees that Licensor (and, in case Licensor is a joint venture, partnership, tenancy in common, association or other form of joint ownership, the individual partners, members and employees of any such joint venture, partnership, tenancy-in-common, association or other form of joint ownership) shall have absolutely no personal liability with respect to any of the provisions of this License, or any obligation or liability arising therefrom or in connection therewith. Licensee shall look solely to Licensor's equity in the Premises for the satisfaction of any remedies of Licensee against Licensor including, without limitation, the collection of any judgment (or other judicial process) requiring the payment of money by Licensor in the event of any default or breach by Licensor with respect to any of the terms and provisions of this License to be observed and/or performed by Licensor, subject, however, to the prior rights of any holder of any mortgage covering all or part of the Premises, and no other assets of Licensor or any principal or partner of Licensor shall be subject to levy, execution or other judicial process for the satisfaction of Licensee's claim, and in the event Licensee obtains a judgment against Licensor, the judgment docket shall be so noted. This exculpation of liability shall be absolute and without exception whatsoever. This section shall inure to the benefit of Licensor's successors and assigns and their respective principals.

[Signatures on following page]

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IN WITNESS WHEREOF, the parties hereto have executed this License this day and year first above written.

LICENSOR:

Shem Creek Development Group LLC,
a South Carolina limited liability company

First Witness

Second Witness

By: Tyler N. Flesch
Its: Manager

LICENSEE:

Town of Mount Pleasant

First Witness

Second Witness

By: William D. Swails
Its: Mayor

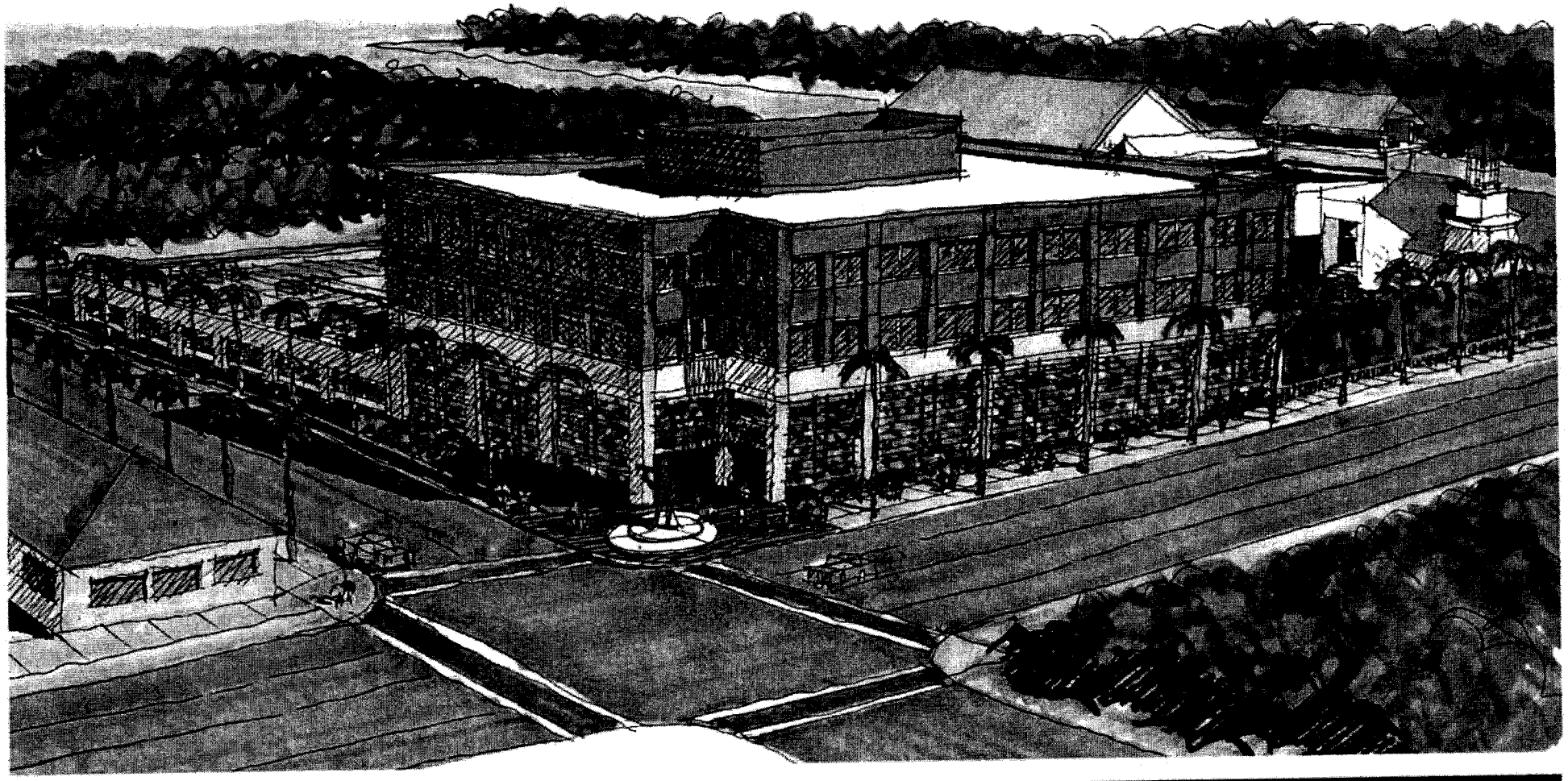
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EXHIBIT "A"

Legal Description and Site Plan for
Property, marked to show Premises

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MOUNT PLEASANT COMMERCIAL DEVELOPMENT

AVTEX COMMERCIAL PROPERTIES

Belsch

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EXHIBIT "B"

Fixed Minimum Rent

Year	Total
1	$185,000.00
2	$185,000.00
3	$185,000.00
4	$185,000.00
5	$185,000.00
6	$185,000.00
7	$185,000.00
8	$185,000.00
9	$185,000.00
10	$185,000.00
11	$185,000.00
12	$185,000.00
13	$185,000.00
14	$185,000.00
15	$185,000.00

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EXHIBIT B

Deposition of:

Tyler Flesch

Shem Creek
v.
TOMP

Case #: 2017-CP-10-5493

August 8, 2019

Magnolia Reporting, LLC
P.O. Box 61011
North Charleston, SC 29419
(843) 303-9141
www.MagnoliaReporting.com

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want to -- I'm not going to go through anything outside what we've asked you to be prepared to testify to in this circumstance. First of all, is it your understanding that this is a copy, a complete copy, of the parking license agreement between Shem Creek Development Group and the Town of Mt. Pleasant?
A Just give me a second, please.
Q Sure.
A I believe it to be, yes.
Q Tyler, specifically, I'm interested in article VI, defaults and remedies. Which is on page 6 of the document; is that correct?
A Yes.
Q Is it your testimony that there is a liquidated damages provision in this agreement?
A Yes.
Q All right. What are the -- where is the liquidated damages provision? And it may not be in article VI, I'm sorry. I just directed you to there.
A Yeah, just give me a minute.
Q Sure.
A It's midway down the paragraph, that it agrees that the sole and exclusive remedy shall be rent payments due under this agreement.
Q So you're looking at Section 6.01,

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definitions. And you said -- read the provision again, Mr. Flesch.
A Yeah. It says -- well, I'll just read it in its entirety. "In addition, licenser shall be entitled to bring an action, a specific performance, or breach of contract against licensee, but agrees that its sole and exclusive remedy shall be the rent payments due under this agreement."
Q So it's your testimony on behalf of the company that that is a -- that that sentence reflects a liquidated damages provision in the contract?
A Correct.
Q And so let's mark the parking license as Exhibit 2.
(Defendant's Exhibit No. 2 marked for I.D.)
BY MR. PAGLIARINI:
Q Now, Tyler, we had sent, sometime following the deposition notice, the subpoena that I've put in front of you. Have you seen a copy of this subpoena?
A Yes.
Q All right. And I'm specifically not going to get into any legal arguments with you about what is discoverable and what is not. But I'm going to ask you questions, and then if there are objections, fine. We'll deal with them at some point. First of all, you

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said you received a copy of this exhibit?
A Yes.
Q And is it the company's position that some or all of the documents referenced herein are not relevant to the damages calculation?
MR. GASKINS: I'm going to object as outside the scope of the deposition. And our position has been set forth in writing, so I don't know why we would be discussing that further.
BY MR. PAGLIARINI:
Q Are you taking the position -- is the company taking the position, Tyler, that mitigation, any attempts to discover documents or efforts related to mitigation of damages should be excluded in this case?
MR. GASKINS: Same objection.
A (Continuing) Yes.
Q Okay. Why is that?
A In the negotiation of this document, I recall very specifically the original draft form had provisions in for consequential damages in addition to acceleration of rent in the event of a default. And the Town's position, and I can't remember if it was Mr. DeMoura or yourself even, we discussed the Town's desire to narrow the scope and create a certainty in the case of default. And I remember the draft document

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being struck to eliminate the acceleration to change the consequential damages to the fixed rent, the fixed minimum rent amounts outlined in the document, which is the 185,000 over 15 years. That was to be the sole remedy.
So, as in any negotiation, there's give and take, and we agreed to the fixed minimum rent as the liquidated damages. The fixed minimum rent, not the offsets. So it is my position that the Town is in default, and the Town never performed on the opening of the deck or even so much as an estoppel. So, there is no mitigation to be had. The Town was in default prior to the deck ever opening.
Q Are you aware of the difference between admissibility at trial and discovery --
A I'm not an attorney.
Q -- and legal standard?
A Nope.
Q Okay.
A But I would further quantify my statement that the project today is owned and operated by somebody other than Shem Creek Development Group. And we have turned over, in our discovery, underwriting, some of the items on this list, as it related to these items prior to the default of the city, and I believe we've