ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

STATE OF SOUTH CAROLINA COUNTY OF NEWBERRY Allen L. Murray,[1] Christy Worthy Brown, and Michael Adam Brown, Plaintiffs, v. Newberry County, South Carolina, Defendant.	IN THE COURT OF COMMON PLEAS FOR THE EIGHTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-36-00385 ORDER GRANTING DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT AND DISMISSAL

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SC Court of Appeals

STATUS AND DISPOSITION OF THE CASE

This case is before the Court for final disposition of all issues. Although the Plaintiffs originally requested a jury trial, counsel for the Plaintiffs by email to the Court (Judge William P. Keesley) on January 10, 2019, agreed with the Defendant Newberry County (the "**County**") that the case should be tried non-jury. At a videoconference hearing before the undersigned on January 15, 2021, counsel for the Plaintiffs stated that the Plaintiffs needed no further discovery and that the case was ready for trial. Transcript of January 15, 2021 Hearing (hereinafter, "**1-15-21 Tr.**"), p. 15, line 25 – p. 16, line 2. Counsel for both parties agreed, and the Court ordered, that the matter would be submitted and decided on written motions and memoranda for final disposition "as to all of Plaintiffs' causes of action." 1-15-21 Tr., p. 27, lines 17-24; Form 4 Order by the Court issued

[1] Defendant Newberry County has informed the Court of its understanding that Plaintiff Allen L. Murray (first name shown as "Allan" in on-line records of Newberry County, Eighth Judicial Circuit - https://publicindex.sccourts.org/Newberry/PublicIndex/PISearch.aspx) died on January 28, 2021. The Plaintiffs have not confirmed or denied this understanding. Defendant Newberry County and the Court are without information as to the heir(s) of Plaintiff Murray's property(ies) at issue in this case or as to the personal representative of his estate or the executor of his will, if any.

and entered that same day, January 15, 2021. Accordingly, the Plaintiffs submitted "PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS." The Defendant County submitted its "FINAL DISPOSITIVE MOTIONS OF DEFENDANT NEWBERRY COUNTY, SOUTH CAROLINA" ("**County's Final Motions**") with five exhibits and its "MEMORANDUM IN SUPPORT OF FINAL DISPOSITIVE MOTIONS OF DEFENDANT NEWBERRY COUNTY, SOUTH CAROLINA." Neither party submitted nor sought leave to submit any response to the filings of the other party.

On the basis of the prior pleadings in this case, arguments previously made in hearings before this Court, and the above-referenced submissions and for the reasons stated below, the Court grants summary judgment to Defendant Newberry County on all issues. The case is therefore dismissed with prejudice.

NATURE AND BACKGROUND OF THE CASE

The Plaintiffs challenge the validity and implementation of the County's comprehensive land-use zoning ordinance (the "**Zoning Ordinance**").[2] The Zoning Ordinance contains the zoning regulations of the County as authorized by South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (as amended), S.C. Code of Laws § 6-29-710 *et seq.* (the "**Zoning Act**").

The Plaintiffs, who allege that they own certain unspecified parcels of real property in the County, want to rent out multiple spaces on each of their properties to non-County residents who

[2] Newberry County Code of Ordinances, Chapter 153 [http://library.amlegal.com/nxt/gateway.dll/South%20Carolina/newberryco_sc/newberrycountysouthcarolinacodeofordinan?f=templates$fn=default.htm$3.0$vid=amlegal:newberryco_sc at Chapter 153]. Exhibit 3 to County's Final Motions. Exhibits to the County's Final Motions are referred to herein as "**CFM Ex. No.** __." Regarding self-authentication and judicial notice of documents cited herein that are on file with the Court or that appear in government websites, see fn. 7 below.

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

have employment in or near the County and who own recreational vehicles ("**RVs**"), in order to allow those non-residents to park their RVs and connect them to water, sewer, and electric services so that the RVs may serve as accommodations to the RV owners during their employment in or near the County. The Plaintiffs allege that they were making some use of their property before the effectiveness of the Zoning Ordinance, that the Zoning Ordinance has forbidden the prior use, and that the Zoning Ordinance therefore violates their vested property rights. Especially while the now-terminated V.C. Summer nuclear construction project was still underway in neighboring Fairfield County, Plaintiffs believed that a more permissive zoning regulation would allow them to offer rental spaces to workers on that project and thus to realize more income. The Zoning Ordinance did substantially enlarge the ability of property owners zoned like the Plaintiffs to use their property in this way. The Zoning Ordinance did not, however, enlarge that ability as much as the Plaintiffs would like.

In the second Amended Complaint in this action (the currently operative iteration of the Complaint, filed and served on September 30, 2020, the "**Second Amended Complaint**"), the Plaintiffs seek:

- in their First Cause of Action, to have the Zoning Ordinance declared unconstitutional on the basis that it is arbitrary, is unreasonable, is discriminatory, is overly broad, is not a legitimate use of the County's zoning power, is selectively and discriminatorily enforced, was passed contrary to procedures, and deprives the Plaintiffs of vested property rights in unspecified parcels of property that the Plaintiffs claim to own;
- in their Second Cause of Action, to have the County estopped from enforcing the Zoning Ordinance against the Plaintiffs on the basis of unspecified representations made by unspecified County officials; and

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

- in their Third Cause of Action, to have the Zoning Ordinance as it affects unspecified parcels of property that the Plaintiffs claim to own declared an inverse condemnation that entitles them to actual damages and attorneys' fees.

Procedural History of the Case

Despite the longevity of this case, the procedural history is relatively simple and is set forth here as context. Because there are questions regarding the specificity and adequacy of the allegations made in the several iterations of the Complaint including the current Second Amended Complaint, this discussion is necessarily somewhat detailed.

The County adopted the Zoning Ordinance on September 21, 2016, as described under "HISTORY OF ZONING ORDINANCE ADOPTION," below. The Plaintiffs filed their first Complaint on July 28, 2017, but did not effect service. The Plaintiffs filed a first Amended Complaint (the "**First Amended Complaint**") on November 13, 2017, serving the same shortly thereafter. The First Amended Complaint was identical to the original Complaint except for the deletion of six plaintiffs and the addition of Plaintiff Christy Brown.

The County noted in its Answer to the First Amended Complaint numerous deficiencies and requested relief including but not limited to an order from the Court requiring that:

> [t]he Plaintiffs make their First Amended Complaint more definite and certain, to include (i) the particular parcels as to which they complain; (ii) the use(s) on each parcel as to which they complain; (iii) the date on which they began each such use on each such parcel; (iii) the particular provision(s) of the Zoning Ordinance that they contend to be facially unlawful and, with respect to each such Zoning Ordinance provision, the particular law (Constitutional provision, statutory provision, County land-use plan provision) that they claim it violates; (iv) each administration, interpretation, or enforcement of the Zoning Ordinance that they contend to be an unlawful application and, with respect to each such application, the particular law (Constitutional provision, statutory provision, County land-use plan provision) that they claim it violates . . . .

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

Among the most problematic of those deficiencies for judicial review of the Plaintiffs' claims is the first – the failure to identify which parcels the Plaintiffs allege to be unconstitutionally impacted. The Plaintiffs have failed to address or remedy that deficiency in any filing with or hearing before this Court, despite requests from the County and orders from this Court. The County has identified from tax records certain parcels that appear to be owned by the Plaintiffs (the "**County-Identified Parcels**"); [3] however, the Plaintiffs have not confirmed or denied that these are the subjects of the allegations in the Second Amended (or any prior) Complaint. Each of the County-Identified Parcels is classified by the Zoning Ordinance as "R2."[4] The "R2" designation is described by the Zoning Ordinance as "primar[ily] rural." Zoning Ordinance § 153.067 (CFM Ex. No. 3).

> The district is intended to be rural in nature, allowing <u>low density</u> residential uses including manufactured housing on individual properties, as well as home occupations, family daycare, agriculture, forestry, hunting, and religious uses, but also accommodating complementary and associated uses such as recreation, government services, and appropriate service, commercial and industrial uses.

Zoning Ordinance § 153.068 [*emphasis added*]. The Zoning Ordinance separately defines "manufactured" homes and "recreational vehicles." Recreational vehicles do not come within the definition of "manufactured" housing. Zoning Ordinance § 153.231.

Similarly problematic are the Plaintiffs' failure to identify any particular use or the beginning date of any particular use that the Plaintiffs claim to have established pre-Zoning Ordinance vested property rights, and the Plaintiff's failure to identify any particular representation (by content, date, or maker) that would estop the County from adopting or enforcing the Zoning Ordinance.

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3 CFM Ex. No. 5.

4 CFM Ex. No. 1.

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

Following the County's Answer, the Plaintiffs did not voluntarily revise their First Amended Complaint. The County subsequently filed and served a motion ("**Motion for More Definite Statement**") pursuant to SCRCivP Rule 12(e), re-iterating its request for an order requiring the Plaintiffs to make a more definite statement and asking for summary judgment on or dismissal of several aspects of the First Amended Complaint. The County, in its memorandum in support of the Motion for More Definite Statement, specified 18 deficiencies in the First Amended Complaint, including and elaborating on those quoted above from its Answer.

Pursuant to agreement reached on the record by the parties at a hearing, Judge Walton J. McLeod IV ordered the Plaintiffs to make a more definite statement not later than February 1, 2020. The Plaintiffs failed to do so; and the County filed and served a motion to dismiss for failure to comply with Judge McLeod's order. Judge R. Lawton McIntosh ordered the Plaintiffs to comply with Judge McLeod's order.[5] The Plaintiffs thereupon served their Second Amended Complaint.

The Defendant County contends that the Second Amended Complaint has many of the same deficiencies described above with respect to the First Amended Complaint. Accordingly, the County filed a second motion to dismiss ("**Second Motion to Dismiss**"), both under SCRCivP Rule 12(b) for failure to allege facts sufficient to state a claim (citing Paradis v. Charleston Cty. Sch. Dist., 424 S.C. 603, 613, 819 S.E.2d 147, 153 (Ct. App. 2018), rev'd on other grounds and remanded, No. Op. No. 28030 (S.C.Sup.Ct. filed August 18, 2021) (Howard Adv.Sh. No 28 at 12) and premise modified by Skydive Myrtle Beach, Inc. v. Horry Cty., 426 S.C. 175, 826 S.E.2d 585 (2019)) and under SCRCivP Rule 41(b) for Plaintiffs' failure to comply with the Court's order that they make such a definite statement and other orders of the Court.

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[5] Judge McIntosh also ordered Plaintiffs or their counsel to pay the County's legal fees incurred to enforce Judge McLeod's order.

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

The Second Motion to Dismiss was heard by the undersigned on January 15, 2021, as described above. Pursuant to the Order entered following that hearing, the Court now has before it for consideration the following:

A. The County's Final Motions:[6]

1. For summary judgment affirming the validity of the Zoning Ordinance, under the authority of SCRCivP Rule 56, Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230, 489 S.E.2d 630 (1997) and Quail Hill, LLC v. Cty. of Richland, 379 S.C.

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[6] The County's Final Motions include the following exhibits:

- Exhibit 1 - Affidavit of the County's Zoning Administrator establishing the zoning classifications under the Zoning Ordinance of the County-Identified Parcels: https://publicindex.sccourts.org/Newberry/PublicIndex/PIImageDisplay.aspx?ctagency=36002&doctype=D&docid=1546636708151-409&HKey=116706655668183117110655182112119771211129712084861131207988110115978375711045579115110102121851188485103 ;

- Exhibit 2 - Affidavit of Assistant to the County Administrator of Newberry County, attaching true and correct copies of the acts of Newberry County Council adopting the Zoning Ordinance and its predecessor zoning ordinance: https://publicindex.sccourts.org/Newberry/PublicIndex/PIImageDisplay.aspx?ctagency=36002&doctype=D&docid=1546636708167-905&HKey=48984912210076888989814967756672657610090671046981115821165481108555252517380114891159088439810З

- Exhibit 3 - a copy of the Zoning Ordinance, as codified: https://publicindex.sccourts.org/Newberry/PublicIndex/PIImageDisplay.aspx?ctagency=36002&doctype=D&docid=1546636708182-923&HKey=861221221181151081001219776555657688968497274479877103807586101116745610675116106529812097735370867З

- Exhibit 4 - a copy of the County's predecessor zoning ordinance, as codified: https://publicindex.sccourts.org/Newberry/PublicIndex/PIImageDisplay.aspx?ctagency=36002&doctype=D&docid=1546636708214-767&HKey=43786710910589561088584654910774559997691067490110551038010684110102107668368549911884745312285531111 and

- Exhibit 5 - Affidavit of counsel for the Defendant County with September 10, 2018, downloads of tax records from the website of Newberry County, supporting the County-Identified Parcels.

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

314, 665 S.E.2d 194 (Ct. App. 2008), aff'd in part, rev'd in part, 387 S.C. 223, 692 S.E.2d 499 (2010) and other principles of law; and

2. For summary judgment denying the purported second cause of action alleging estoppel against enforcement of the Zoning Ordinance, based on unspecified reliance by the Plaintiffs on unspecified representations by County officials, under the authority of SCRCivP Rule 56, Quail Hill, LLC v. Cty. of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010), and other principles of law;

3. For summary judgment denying the purported third cause of action alleging inverse condemnation and seeking damages and attorneys' fees, under the authority of SCRCivP Rule 56, Dunes W. Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 737 S.E.2d 601 (2013), the terms of the Zoning Ordinance, and other principles of law;

4. For summary judgment denying any claim that a Plaintiff had established a lawful, non-conforming use prior to the effectiveness of the Zoning Ordinance and so has a right to continue that use post-effectiveness, because: (a) with respect to Plaintiff Mrs. Brown, that matter had been fully adjudicated and final judgment rendered against her in C.A. No. 2018-CP-36-00558 on December 18, 2019, and that judgment was not appealed, so that *res judicata* precludes her raising the issue again here; and (b) with respect to Plaintifffs Murray and Michael Adam Brown because neither has sought to have any such use recognized and confirmed as compliant with the Zoning Ordinance, §153.030, and so have failed to exhaust their administrative remedies as required by Dunbar v. City of Spartanburg, 266 S.C. 113, 221 S.E.2d 848 (1976); and

5. In the alternative to the foregoing motions for summary judgment, for dismissal under Rule 12(b)(6), for failure to allege facts rather than conclusions of law, as required by Paradis v. Charleston Cty. Sch. Dist., *supra*, and other principles of law;

and

B. The Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss.

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

HISTORY OF ZONING ORDINANCE ADOPTION[7]

Prior to adoption of the Zoning Ordinance, the County's predecessor zoning ordinance, Ordinance No. 12-24-01 (the "**Prior Zoning Ordinance**"), was in effect, having been adopted on December 5, 2001. CFM Ex. No. 2 (County Council action); CFM Ex. No. 4 (as codified).[8]

Unlike the current Zoning Ordinance, the Prior Zoning Ordinance did not provide any "conditional use" option for RVs. The Prior Zoning Ordinance would have allowed a use similar to the use that Plaintiffs want only if the property owner requested and received from the County Board of Zoning Appeals (the "**BZA**") affirmative approval of a special exception under § 153.069 of the Prior Zoning Ordinance, related to commercial campgrounds, under narrow conditions specified in that provision. § 153.148(D) of the Prior Zoning Ordinance otherwise allowed RVs in R2 districts only for temporary recreational use – not long-term quarters for rental income as the Plaintiffs wish. § 153.191(C) of the Prior Zoning Ordinance specified additional factors that the BZA was to consider on an application for a special exception.

None of the Plaintiffs ever sought a special exception under the Prior Zoning Ordinance. (Plaintiff Mrs. Brown did unsuccessfully seek a special exception and other relief under the current Zoning Ordinance. See discussion at fn. 10 below.)

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[7] The facts with respect to County Council's adoption of the Prior Zoning Ordinance and the Zoning Ordinance, as well as the contents of those enactments, are legislative facts of which this Court may take judicial notice. *See* Rule 201, SCRE, reporter's comment. In addition, public records of governmental actions, the records of the Court, and materials at government websites are self-authenticating; and this Court may take judicial notice of their contents. *See* Rules 201, 803(8), and 902(5), SCRE. *See also* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 551 (D. Md. 2007), and Paralyzed Veterans of America v. McPherson, 2008 U.S. Dist. LEXIS 69542, *21-23 (N.D.Cal., September 8, 2008) (government website documents are self-authenticating under Rule 902(5), FRE, which is identical to Rule 902(5), SCRE).

[8] Section references to the Prior Zoning Ordinance are to the as-codified version at CFM Ex. No. 4.

The County had begun the process of considering a revision and update of the Prior Zoning Ordinance prior to March 5, 2014.[9] Pursuant to the Zoning Act, the draft revision to the Prior Zoning Ordinance was referred to and considered by the Newberry County Joint Planning Commission (the "**County Planning Commission**") between February 16 and April 25, 2016.[10] Plaintiff Michael Brown, who is the husband of Plaintiff Christy Brown and the manager of her property apparently involved in this present case,[11] was a member of that County Planning Commission.[12] He recommended several changes that would have allowed the more expansive use for rentals to non-resident worker RVs that Plaintiffs want.[13] His recommended changes would

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9 See County Council minutes of that date at https://www.newberrycounty.net/sites/default/files/uploads/minutes/id-36.pdf.

10 Affidavit of Bridgett Fain, Secretary of the County Planning Commission ("**Fain Aff.**"), appearing in the records of this Court in Case No. 2018-CP-36-00558 (the "**Brown Appeal**"). The Brown Appeal was the appeal by Christy Worthy Brown (a Plaintiff in this present case) of a denial of her applications to the BZA for relief from the provisions of the Zoning Ordinance challenged in this present case. Fain Aff. appears as Exhibit 3 to the BZA hearing of September 4, 2018 ("**BZA Brown Hearing**"), and was filed on December 11, 2018, with the Clerk of Court by the BZA as part of its record ("**BZA Brown Record**"), as required by S.C. Code § 6-29-830. The Brown Appeal was denied and the judgment of the BZA (the "**BZA Brown Decision**," also filed as part of the BZA Brown Record) was affirmed by order of Judge Walton J. McLeod IV, entered December 18, 2019; and Mrs. Brown did not take any appeal therefrom. [The formatting of the BZA Brown Record is explained in a letter to the Court dated April 3, 2019, and filed with the on-line records
of the Brown Appeal at
https://publicindex.sccourts.org/Newberry/PublicIndex/PIImageDisplay.aspx?ctagency=36002&doctype=D&docid=1554385031755-198&HKey=57431017172688284697611911312211048544911211867109477251107111477110285711081065566708310450767354111.]

11 BZA Brown Record, BZA Brown Hearing Tr. p. 50, lines 13-18; p. 52, lines 2-4 [testimony of Plaintiff Christy Brown].

12 BZA Brown Record, BZA Brown Hearing Tr. p. 56, line 20 - p. 57, line 7 [testimony of Plaintiff Michael Brown].

13 Fain Aff. and attachment thereto.

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

have allowed RVs on smaller lots (the proposal was a minimum of 10 acres; Mr. Brown recommended 1 acre); would have allowed greater density of RV sitings (the proposal allowed one per acre with a maximum of five per parcel; Mr. Brown recommended siting three RVs per acre); and would have substantially reduced the proposal's required setbacks in order to allow denser RV sitings. The County Planning Commission did not recommend those changes to the County Council.[14]

The County Council adopted the Zoning Ordinance, also without making the changes recommended by Mr. Brown.[15] Its first reading was on June 1, 2016.[16] At that time, County Council also, by separate and unanimous vote, invoked the Pending Ordinance Doctrine established by Sherman v. Reavis, 273 S.C. 542, 257 S.E.2d 735 (1979), and Stratos v. Town of Ravenel, 297 S.C. 309, 376 S.E.2d 783 (Ct. App. 1989).[17] That doctrine cuts off the ability of a property owner to begin a "prior, non-conforming use" that would be grandfathered under a new zoning ordinance, even before final adoption of the new ordinance. Second reading approval was on June 15, 2016.[18] County Council held a public hearing on July 6, 2016;[19] and final adoption

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

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14 BZA Brown Record, BZA Brown Hearing Tr. p. 76, line 8 - p. 81, line 23 [testimony of Plaintiff Michael Brown].

15 CFM Ex. No. 3.

16 https://www.newberrycounty.net/sites/default/files/uploads/minutes/id-4574.pdf

17 https://www.newberrycounty.net/sites/default/files/uploads/minutes/id-4574.pdf at page 8

18 https://www.newberrycounty.net/sites/default/files/uploads/minutes/id-4690.pdf

19 https://www.newberrycounty.net/sites/default/files/uploads/minutes/id-4692.pdf

was on September 21, 2016.[20] The resulting County Council action appears at CFM Ex. No. 2; and the Zoning Ordinance as codified appears as CFM Ex. No. 3.

Relevant Provisions of the Zoning Ordinance

The stated purposes of the Zoning Ordinance include "promoting public health, safety, morals, convenience, order, appearance, prosperity, and general welfare; lessening congestion in the streets; securing safety from fire; providing adequate light, air, and open space; preventing the overcrowding of land; avoiding undue concentration of population; facilitating the creation of a convenient, attractive and harmonious County; protecting and preserving scenic, historic, and ecologically sensitive area; and regulating development in harmony with the adopted Comprehensive Plan for Newberry County." CFM Ex. No. 2.

Under the Zoning Ordinance, the use sought by Plaintiffs is allowed within their R2 zoning classification only if the conditions set forth in one of two options provided by the Zoning Ordinance are met.

The first such option is as a "conditional use as temporary accommodations for workers." This provision is a new addition to the current Zoning Ordinance; there was no similar provision in the Prior Zoning Ordinance. A conditional use is a use that is allowed in a zoning district if certain conditions are met.[21] The Zoning Ordinance, at § 153.123(H), allows as a conditional use

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[20] https://www.newberrycounty.net/sites/default/files/uploads/minutes/id-5916.pdf

[21] The conditions for this conditional use include:

- The parcel must be 10 contiguous acres or larger.
- One such temporary RV may be allowed per acre, however RV units may be clustered as long as they comply with all other requirements of this section and the setbacks

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

in R2 districts the renting of property for the siting of recreational vehicles used as temporary accommodations for persons working in or near Newberry County but who do not intend to relocate permanently to the County. If the conditions are met, there is no need for approval by the BZA.

The second option is through a "special exception as commercial campground or RV park." The Zoning Ordinance, at § 153.053, will allow the use in specified zoning districts if certain general and certain specified requirements regarding the use and the property are met.[22] Relevant

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required in the R2 zoning district. No more than 5 temporary RVs shall be allowed for this use on 1 parcel.

- No portion of any RV may be located closer than 20 feet to any portion of another RV or from a permanent residence if one is on the parcel.
- Application must be made by the property owner for each temporary RV requested to be located on the property. Application for more than 1 temporary RV may be submitted for a property at the same time.
- Such temporary RV shall be maintained in a manner which will facilitate and enable its removal by the expiration date of the permit.
- The placement of the temporary RV must meet SCDHEC requirements for water and wastewater connections and Newberry County requirements for temporary electrical service. Each proposed temporary RV dwelling shall have individual water, sewer and electrical service and connections and may not share such services with other temporary RV dwellings or permanent dwellings.
- A minimum setback of 100 feet is required between the perimeter of all RV sites and all property lines and the road right-of-way. A buffer of at least 50 feet in width is required along all side and rear property lines.

[22] The general requirements (§ 153.053(D)) for special exception use are:

(D) No special exception permit shall be approved by the Board of Zoning Appeals unless the following general findings of fact are made concerning the proposed special exception:

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

(1) The use will not materially endanger the public health or safety if located, designed, and proposed to be operated according to the information submitted.

(2) The use complies with all regulations and standards of this chapter.

(3) The use will not substantially injure the value of adjoining properties, or the use is a public necessity.

(4) The location and character of the use, if developed according to the information as submitted and approved, will be in harmony with the area in which it is to be located.

(5) The use will not create traffic impacts that will endanger public safety, or create or contribute to congestion.

(6) The use will not create noise, light, glare, odor, or obstruction of air flow on adjoining properties.

(7) That the proposed use will not be in conflict with but will further the objectives of the Newberry County Comprehensive Plan for the area in which it is located.

The special requirements (§ 153.041) for special exception as a commercial campground or RV park are:

Commercial campgrounds and recreational vehicle (RV) parks may be permitted by special exception in the R2 zoning district provided the Board of Zoning Appeals finds that the following conditions are met.

(A) Commercial Campground and RV Park facilities may include a residence for the owner/manager of the premises; utility hook-ups; accessory structures, playgrounds and open space areas, fenced yard areas for pets, and other similar amenities; and recreational vehicles (including travel trailers) in designated spaces.

(B) All campground and RV park facilities, including structures, camping sites, RV camp/parking sites, and other facilities associated with the use shall be setback a minimum of 100 feet from all adjacent property lines, except where contiguous properties are zoned for commercial (LC or GC) and/or industrial (IND) uses.

(C) All campground and RV park facilities, including structures, camping sites, RV camp/parking sites, man-made uses, and other facilities associated with the use shall be surrounded by a minimum 50 foot wide buffer, which meets the applicable requirements of § 153.182 - Buffers. Such facilities shall be

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

here is special-exception use as a commercial campground and RV park, which is allowed by Zoning Ordinance § 153.141. A property owner must obtain approval from the BZA prior to any use as a special exception. In order to grant a special exception, the BZA must find that all of the general and special requirements are met (Zoning Ordinance §§ 153.053(D) and 153.141).

Failure to meet any condition in either option can be excused by the BZA as a "variance" under Zoning Ordinance § 153.052 and S.C. Code of Laws § 6-29-800(A)(2).[23] However:

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surrounded by an opaque screen which meets the requirements of § 153.183 - Screening.

(D) All applicable conditions required in § 153.089 - R2 Rural District Conditional Uses shall be met for this use.

(E) Site design shall ensure safe, predictable vehicular access and movement onto and off of the site.

(F) The use will not substantially injure the value of adjoining properties.

(G) Additional conditions may be imposed to ensure that the use will not create a safety, health or traffic hazard.

[23] The requirements for granting a variance under the Zoning Ordinance and the statute are substantially identical. Those requirements, as stated in the Zoning Ordinance, are:

(C) A variance may be granted if the Board [*the BZA*] makes and explains in a written order all of the following findings and conclusions:

(1) There are extraordinary and exceptional conditions pertaining to a particular piece of property;

(2) These conditions do not generally apply to other property in the vicinity or in that district;

(3) Because of these conditions, the application of the chapter to a particular piece of property would effectively prohibit or unreasonably restrict use of the property;

(4) The authorization of the variance will not be a substantial detriment to adjacent property or to public good, and the character of the district will not be harmed by the granting of the variance; and

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

> In order to grant a variance, the Board must make the factual determination that each of the four elements above [*see fn. 23 above*] favor granting the variance. *See* Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 418 S.E.2d 319 (Ct.App.1992). Granting a variance is an exceptional power which should be sparingly exercised and can be validly used only where a situation falls fully within the specified conditions. Hodge v. Pollock, 223 S.C. 342, 75 S.E.2d 752 (1953).

Rest. Row Assocs. v. Horry Cty., 335 S.C. 209, 214, 516 S.E.2d 442, 445 (1999) [*emphasis added*].

The primary aspects of the Zoning Ordinance that prevent the Plaintiffs from qualifying for the newly-created conditional use and making their desired use of the County-Identified Parcels are the requirements that the parcel be at least 10 acres and have certain setbacks and that the density on a parcel not exceed a certain level. This can be seen from the property descriptions at CFM Ex. No. 5 and from Plaintiff Michael Brown's proposed amendments to the Zoning Ordinance, set out in the Fain Aff., each of which related to the parcel size and number of RVs allowed on a parcel.

ANALYSIS AND OPINION

At least since the decision of the U.S. Supreme Court in Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926), nearly a hundred years ago, zoning for land use has been one of the primary functions of local government throughout the United States, including in South Carolina. As authorized by S.C. Code §4-9-30(9) and the Zoning Act, and after extensive consideration and public input, the County adopted its Zoning Ordinance, in accordance with the procedures established by South Carolina law. Every zoning plan restricts every property owner

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(5) The effect of the variance would not allow the establishment of a use not otherwise permitted in the zoning district; would not extend physically a nonconforming use of the land; would not change the zoning district boundaries shown on the official zoning map.

(D) The fact that property may be utilized more profitably, should a variance be granted, may not be considered grounds for a variance.

from making some uses of his property that he might at some point like to make. Indeed, each aspect of every zoning plan restricts some property owners from making some use of their property that they might like to make.

The Zoning Ordinance's restrictions and conditions regarding placement of recreational vehicles on certain properties for certain purposes are a permissible way for the elected governing body of the County to address valid policy concerns relating to the possible proliferation of such placements.[24] The fact that these restrictions and conditions mean that some property owners may not make some uses of their property that they would like to make is simply a feature of zoning.

The Plaintiffs allege without any specifics that the Zoning Ordinance "unreasonably restricts" in some unexplained way the Plaintiffs' ability to use their land "for the [*unidentified*] business for which they are engaged" (Second Amended Complaint, Paragraph 5); "is arbitrary and unreasonable in that it allows others to use the property in the exact same way provided the property is not used by workers. Recreational use and hunting use can be made of the property by as many people as desire to use it as long as the people are not workers who are renting the property" (Paragraph 6); "is arbitrary as it discriminates against a particular class of people," "is unreasonably discriminatory against workers and people who own property desiring to lease to workers," and "is overly broad" (Paragraph 7); is "arbitrary and unreasonable as written and enforced" in some unexplained way (Paragraph 8); was passed in contravention of unidentified "procedures" and for a likewise-unidentified "improper purpose" (Paragraph 11); is the subject of

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[24] In the proceedings related to the BZA Brown Decision, Mrs. Brown had alleged that she had checked with her neighbors and that none objected to her intended use of the property. However, at the first hearing before the BZA, only two neighbors appeared. Both said that they liked the Browns and thought that the current RV occupants were decent; but both also said that they were concerned about the long-term impact of this use of the property on the surrounding area. In short, the policy concerns reflected in the Zoning Ordinance are shared by affected neighbors. *See* BZA Brown Record.

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

representations by County officials that estop the County from enforcing the ordinance (Paragraphs 15-17); requires the Plaintiffs "to stop using their [*unidentified*] land for the [*unspecified*] historical use" (Paragraph 21); and constitutes an unconstitutional taking of property by inverse condemnation (Paragraph 22).

Argument in prior hearings in this case indicate that the gravamen of the Plaintiffs' claims is the allegation that the Zoning Ordinance discriminates against long-term workers and/or some group of property owners and is therefore arbitrary and unreasonable. The argument below addresses that and other general validity arguments apparently being made by Plaintiffs under the rubric of "CFM First Motion." Other issues are treated sequentially under the rubric of the relevant County Final Motion ("CFM").

***CFM First Motion*: The Plaintiffs have not shown (and cannot show) the Zoning Ordinance to be unreasonable, arbitrary, capricious, or discriminatory.**

Whether under federal or state law, on the facts that they have alleged or of which this Court may take judicial notice, the Plaintiffs have not met their burden of proving that the Zoning Ordinance is unreasonable, arbitrary, capricious, or discriminatory.

The Plaintiffs face a steeply uphill climb in challenging the validity of the Zoning Ordinance, as "[a] strong presumption exists in favor of the validity and application of zoning ordinances." Peterson Outdoor Advertising, 327 S.C. at 235, 489 S.E.2d at 632. Similarly, "there is a strong presumption in favor of the validity of municipal zoning ordinances, when within the municipal power as here." Talbot v. Myrtle Beach Bd. of Adjustment, 222 S.C. 165, and 173, 72 S.E.2d 66, 69–70 (1952).

Judicial deference to legislative bodies on zoning matters is deeply entrenched.

> One of the most firmly established principles in the field of constitutional law is that the wisdom of legislation is a matter exclusively for legislative determination.

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

> This principle has been applied to zoning laws, and courts have been declared to have nothing to do with the question of the wisdom, expediency, propriety, or good policy thereof. The courts may not interfere with the enactment or enforcement of zoning provisions for the sole reason that they may be considered unwise, as long as their requirements may not be classified as unreasonable, or as long as there is an apparent legal reason for the enacted requirements. The matter is largely within the discretion of the legislative authority, which is presumed to have investigated and found conditions such that the legislation which it enacted was appropriate, so that if the facts do not clearly show that the bounds of that discretion have been exceeded, the courts must hold that the action of the legislative body is valid. In this respect, it has been declared that the municipal governing bodies are better qualified because of their knowledge of the situation to act upon those matters than are the courts, which will not substitute their judgment for that of the legislative body.

Talbot, *supra*, 222 S.C. at 169-70, 72 S.E.2d at 68. And venerable federal precedent is in accord: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 388, 47 S. Ct. 114, 118, 71 L. Ed. 303 (1926).

Substantive Due Process – The Arbitrary and Capricious Standard

The South Carolina Supreme Court dealt at length with just how heavy the Plaintiffs' burden is in Dunes W. Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 737 S.E.2d 601 (2013). In Dunes W., a golf course owner's request for residential rezoning was denied. On a challenge that (like here) alleged violations of Equal Protection, substantive Due Process, and the Takings Clause, the Supreme Court upheld a grant of summary judgment against the landowner. What the Plaintiffs must show, as established by the Dunes W. Court, is high-hurdle enough:

> "The authority of a municipality to enact zoning ordinances, restricting the use of privately owned property is found in the police power." McMaster v. Columbia Bd. of Zoning Appeals, 395 S.C. 499, 505, 719 S.E.2d 660, 663 (2011). "In reviewing substantive due process challenges to municipal ordinances, a court must consider whether the ordinance bears a reasonable relationship to any legitimate interest of government." *Id.*
>
> "In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

> in state law." Harbit, 382 S.C. at 394, 675 S.E.2d at 782 (citing Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004)). "The State's deprivation of the property interest must fall so far beyond the outer boundaries of legitimate governmental authority that no process could remedy the deficiency." *Id.* "Every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution." McMaster, 395 S.C. at 504, 719 S.E.2d at 663.
>
> "A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property." Harbit, 382 S.C. at 394, 675 S.E.2d at 782. "Courts cannot become city planners but can only correct injustices when they are clearly shown to result from municipal action." Knowles v. City of Aiken, 305 S.C. 219, 222, 407 S.E.2d 639, 642 (1991). "In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and unreasonable." *Id.* at 224, 407 S.E.2d at 642. "And in the context of a zoning action involving property, it must be clear that the state's action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'" Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 827 (4th Cir.1995) (quoting Nectow v. Cambridge, 277 U.S. 183, 187–88, 48 S.Ct. 447, 72 L.Ed. 842 (1928)).

Id., 401 S.C. at 296–97, 737 S.E.2d at 609–10.

But it is not only what must be shown that requires this Court to reject the Plaintiffs' claims here, but also the heightened standard by which they must show it:

> "The burden of proving the invalidity of a zoning ordinance is on the party attacking it, and it is incumbent on respondent to show the arbitrary and capricious character of the ordinance through clear and convincing evidence." Town of Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991). "[I]n cases requiring a heightened burden of proof ... the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." Hancock v. Mid–S. Mgmt. Co., Inc., 381 S.C. 326, 330–31, 673 S.E.2d 801, 803 (2009).

Id., 401 S.C. at 298, 737 S.E.2d at 610 [*emphasis added*].

Here, the Zoning Ordinance by its own terms shows its reasonable, non-arbitrary, and non-capricious nature. It is an exercise of the police power authorized by the South Carolina Constitution (art. VIII, §§ 9 and 17; *see* Williams v. Town of Hilton Head Island, 311 S.C. 417,

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

429 S.E.2d 802 (1993)); by the Home Rule Act (S.C. Code §§ 4-9-25, 4-9-30(9) and (14)); and by the Zoning Act.

The Zoning Ordinance is on its face in full accord with the Zoning Act. CFM Ex. No. 2 shows the process used in adoption of the Zoning Ordinance, which complies with both the Home Rule Act and the Zoning Act.[25] The Zoning Ordinance carefully and specifically delineates what uses are permitted where within the unincorporated areas of the County, and under what conditions. The Plaintiffs have alleged no fact and have adduced no evidence that would support a conclusion that any part of the Zoning Ordinance is irrational, arbitrary, or capricious. The Zoning Act permits and the Zoning Ordinance has adopted provisions allowing the continuance of a non-permitted use, where that use had been lawfully begun before the restrictions of the Zoning Ordinance became effective, either by final enactment or by the "Pending Ordinance Doctrine." The Zoning Act permits and the Zoning Ordinance has adopted procedures by which property owners may request special exceptions and variances; and the Zoning Act authorizes property owners to make judicial appeals of adverse decisions of the administrative bodies.

Looking specifically at the Zoning Ordinance provisions that hamper the Plaintiffs – the ones related to lot size and density of RVs allowed – those provisions serve quite directly the stated purposes of the Zoning Ordinance: lessening congestion in streets, fire safety, prevention of overcrowding, avoiding undue concentration of population. They fit the elements of the R2 classification, which is intended for "low density residential uses." The purposes as stated in the Zoning Ordinance and their congruence with the Zoning Ordinance provisions are an appropriate

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[25] *See also* the self-authenticating, judicially-noticeable governmental records of the process by which the Zoning Ordinance was adopted, cited at fns. 9, 16, 18, 19, and 20 above. *See* fn. 7 above, re judicial notice and self-authentication.

basis for determining a lack of arbitrariness and capriciousness. Bibco Corp. v. City of Sumter, 332 S.C. 45, 53, 504 S.E.2d 112, 116 (1998).

Minimum lot sizes for residential use are a commonplace of zoning regulations, as are setbacks. The South Carolina Supreme Court has declared unambiguously:

> The contention that the zoning ordinance is unconstitutional per se, is patently without merit. We cannot say that a zoning ordinance, which requires a front yard of 25 feet and a back yard of 15 feet for the development of office and institutional business, is arbitrary or unreasonable. Accordingly, we refuse to hold that the zoning ordinance is unconstitutional per se.

Dunbar v. City of Spartanburg, 266 S.C. 113, 118, 221 S.E.2d 848, 850 (1976) [*internal citations omitted*].

Equal Protection – The Rational Basis Standard

Turning from substantive Due Process – the arbitrariness and capriciousness issue – to Equal Protection – the discriminatory intent and effect issue – the Plaintiffs' claims likewise fail.

As an initial matter, to the extent that the alleged discrimination is against out-of-County workers, the three Plaintiffs here – all property owners and none of them out-of-County workers – lack standing to raise the issue. As standing is jurisdictional, these Plaintiffs' claim of discrimination against workers is inadequate as a matter of law to sustain this lawsuit. Lennon v. S.C. Coastal Council, 330 S.C. 414, 498 S.E.2d 906 (Ct. App. 1998) (one not suffering the injury does not have standing to bring the claim on behalf of others); *see also* Bardoon Properties, NV v. Eidolon Corp., 326 S.C. 166, 169, 485 S.E.2d 371, 373 (1997) (standing affects the court's ability to provide relief). So to the extent that relief is sought based on discrimination against workers, that claim by these Plaintiffs must be dismissed.[26]

[26] A claim by workers would also face additional obstacles. Although out-of-County workers cannot rent in R2 areas from owners whose properties do not qualify for the §153.123(H) conditional use, the Zoning Ordinance does not prevent them from renting in R2 areas from owners

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

Moreover:

> If there is no suspect or quasi-suspect class and no fundamental right is involved, zoning ordinances should be tested under the "rational basis" standard. Haves v. City of Miami, 52 F.3d 918 (11th Cir.1995).

Bibco Corp., supra, 332 S.C. at 52, 504 S.E.2d at 116. The alleged discrimination here is against landowners who have less than 10 acres of land and/or workers on projects near the County who are seeking temporary housing. Neither of those are the sort of "discrete and insular minorities" for whom enhanced or strict scrutiny is required. United States v. Carolene Prod. Co., 304 U.S. 144, 153 at fn. 4 (1938). Bibco, which dealt with (and upheld) the exclusion of mobile homes from areas that permitted modular homes, found no suspect or quasi-suspect class. Similarly, Whaley v. Dorchester Cty. Zoning Bd. of Appeals, 337 S.C. 568, 524 S.E.2d 404 (1999), which upheld a prohibition against a long-haul trucker parking his own rig outside his own house, found no protected class, employed a "rational basis" rather than "strict scrutiny" test, and found no discrimination. And the United States Supreme Court, in Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974), upheld a zoning restriction on the number of unrelated (but not the number of related) persons who could occupy a housing unit. Rejecting numerous claims of protected status, including arguments like ones made by Plaintiffs here that the restriction infringed on the right to travel or to migrate freely, the United States Supreme Court noted that it was permissible for a local government, through a zoning law, to address the issues where "[m]ore people occupy a given

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whose properties do qualify. Nor does it prevent them from availing themselves of similar opportunities in other zoning classifications (for example, the RG classification intended for "higher population densities" which allows manufactured home parks as a special exception. Zoning Ordinance §153.068(B)(5)). Nor does it prevent them from making use of housing opportunities in R2 areas that do not involve RVs (for example, the manufactured home that was previously on Plaintiff Mrs. Brown's property (see discussion under "CFM Third Motion" below)). Nor does it prevent them from making other housing arrangements such as apartments, extended stay facilities, *etc.*

space; more cars rather continuously pass by; more cars are parked; noise travels with crowds. A quiet space where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs." *Id.*, 416 U.S. at 9.

Under the rational basis test for equal protection applicable to economic/regulatory governmental actions, the Plaintiffs again face a very high hurdle that they fail to overcome.

> The requirements of equal protection are satisfied if: (1) the classification created by an enactment bears a reasonable relationship to the legislative purpose; (2) the members of the class are treated alike under similar circumstances; and, (3) the classification rests on a rational basis. Robinson v. Richland County Council, 293 S.C. 27, 358 S.E. (2d) 392 (1987). The burden is upon those challenging the enactment to prove a lack of rational basis. Y.C. Ballenger Electric Contractors, Inc. v. Reach-All Sales, Inc., 276 S.C. 394, 279 S.E. (2d) 127 (1981)

Ex parte Yeargin, 295 S.C. 521 at 525, 369 S.E.2d 844 at 845-846 (S.C. 1988) (upholding a sewer tax imposed on a special taxing district rather than the entire county). As stated specifically with respect to zoning enactments:

> There are three steps in determining whether an ordinance survives rational basis scrutiny under the Equal Protection Clause: (1) whether plaintiff was treated differently than others similarly situated; (2) whether defendant intentionally discriminated against plaintiff and had a rational basis for doing so; and (3) whether the discrimination/classification bears a rational relationship to a legitimate government purpose or goal. In determining whether there is a legitimate government purpose, the actual motivations of the enacting governmental body are entirely irrelevant. A reviewing court need only decide what goals the government body *could* have been pursuing [*and the Bibco Court looked at the purposes stated in the zoning ordinance in doing so*].

Bibco Corp., supra, 332 S.C. at 52-53, 504 S.E.2d at 116 [*internal citations omitted*]. Phrased a little bit differently in another zoning case (the truck-rig parking case), the Court stated:

> Equal protection is satisfied if 1) the classification bears a reasonable relation to the legislative purpose sought to be effected; 2) the members of the class are treated alike under similar circumstances and conditions; and 3) the classification rests on some reasonable basis. The determination of whether a classification is reasonable is initially one for the legislative body and will be sustained if it is not plainly arbitrary and there is any reasonable hypothesis to support it. "The fact that the classification may result in some inequity does not render it unconstitutional."

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

Whaley v. Dorchester, supra, 337 S.C. at 575–76, 524 S.E.2d at 408 [*internal citations omitted*].

Moreover:

> A legislatively created classification will not be set aside as violative of the equal protection clause unless it is plainly arbitrary and there is no reasonable hypothesis to support the classification. [*Citations omitted.*]

Brown v. Horry County, *supra*, 308 S.C. at 186, 417 S.E.2d at 569.

And again, not only is the test itself difficult, the standard of proof is similarly high:

> The burden of proving the invalidity of a zoning ordinance [*under the equal protection clause*] is on the party attacking it, and it is incumbent on the attacking party to show the arbitrary and capricious character of the ordinance through clear and convincing evidence.

Bibco Corp, *supra*, 332 S.C. at 52, 504 S.E.2d at 116 [*emphasis added*].

Here, the restrictions complained of are rationally related to the stated purposes of the Zoning Ordinance, treat similarly situated persons alike, and do not intentionally discriminate against Plaintiffs. Under Bibco and the other cases cited above, there is no impermissible discrimination imposed by the Zoning Ordinance.[27]

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[27] Plaintiffs also assert that the Zoning Ordinance is discriminatorily enforced. They have not, however, provided the requisite support for any such claim.

> Whaley further maintains Dorchester County has selectively enforced the ordinance against "drivers of 18 wheelers," but not against other commercial vehicles who are in violation of the ordinance. We disagree. "To prove that a statute has been administered or enforced discriminatorily, more must be shown than the fact that a benefit was denied to one person while conferred on another. A violation is established only if the plaintiff can prove that the state *intended* to discriminate." Although Whaley presented eleven photographs of "other large commercial vehicles in the immediate area that were not subjected to any enforcement action" at the Board hearing, he failed to establish any purposeful discrimination on the part of the planning and zoning officials. (plaintiff did not establish Equal Protection claim where he failed to allege or set forth any facts which could establish purposeful or intentional discrimination). Accordingly, he has failed to establish the enforcement of Ordinance 96–09 violates equal protection.

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

The Plaintiffs appear to be under the impression that the Zoning Ordinance restricts renting to out-of-County workers on a longer-term basis but does not restrict renting to persons in other categories such as recreational users. Second Amended Complaint, Paragraph 6. That impression is rebutted, however, by the terms of the Zoning Ordinance itself. The Zoning Ordinance allows "parking or recreational use of recreational vehicles." Zoning Ordinance, § 152.123(B). It does not allow occupancy as a place of residence, nor does it allow renting space to a recreational vehicle for use as a place of residence. The allowed "parking or recreational use" is subject to the requirement "that no occupancy or use of such vehicle rise to the level of permanent occupancy or use, and that any use remains temporary in nature." Zoning Ordinance, § 152.123(C) [*emphasis added*]; see also Zoning Ordinance, § 152.123(G)(1), reiterating the "temporary" requirement. For those purposes, "temporary" requires, among other things, that there can be "no permanent connection to electric power for the RV" (which out-of-County workers would, and did, have) and that "the RV may not be used as a fixed place of abode" (which the out-of-County workers would be doing). In short, regardless of what activity one is engaged in, one cannot, in R2 areas, rent space for and/or live in an RV on more lenient terms than can these Plaintiffs or any out-of-County workers. There is no discrimination.

Contrary to the Plaintiffs' allegations, the Zoning Ordinance actually improved the situation vis-à-vis property owners in R2 districts and out-of-County workers. By creating a new conditional use, the Zoning Ordinance allows owners who meet the conditions to rent to workers – and only to workers – without having to get the blessing of the BZA for a special exception. There is no similar new provision in the current Zoning Ordinance that eases requirements for

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Whaley v. Dorchester, *supra*, 337 S.C. at 576–77, 524 S.E.2d at 408–09 [*internal citations omitted*]. Plaintiffs here have provided no evidence of any such purposeful or intentional discrimination.

longer-term renters in other, non-worker categories (including, contrary to the allegations of the Second Amended Complaint, hunters and other recreational users).

Alleged Procedural Defects – Evident Propriety

Plaintiffs have also alleged that the adoption of the Zoning Ordinance was improper because it violated certain unspecified "procedures." The procedures reflected in the County Council's minutes and in the Zoning Ordinance itself, all of which have been provided in self-authenticating or affidavit-supported form by the County, appear on their face to be entirely compliant with the Zoning Act that and the Home Rule Act that authorize such action by county councils. In light of that, the Plaintiffs failure to come forward with anything more than its bare allegations is fatal to its claim on this point.

Alleged Procedural Defects – The Statute of Limitations Bar

With further regard to the allegation that the adoption of the Zoning Ordinance was improper because it violated certain unspecified "procedures." The Zoning Ordinance was adopted on September 21, 2016. S.C. Code § 6-29-760(D) provides that a "challenge to the adequacy of notice" or a "challenge to the validity of a [*zoning*] regulation or map, or amendment to it" must be made within sixty (60) days of the adoption. That sixty-day period expired on November 20, 2016. This lawsuit was commenced (at the earliest) by the Plaintiffs' filing of a never-served complaint on July 28, 2017, challenging the Zoning Ordinance. That statute is a complete bar to the claim of invalidity due to a violation of procedures in its adoption. Quail Hill, LLC v. Cty. of Richland, 379 S.C. 314, 320–21, 665 S.E.2d 194, 197 (Ct. App. 2008), *aff'd in part, rev'd in part*, 387 S.C. 223, 692 S.E.2d 499 (2010).

The Defendant County has presented evidence in the form of affidavits and uncontroverted self-authenticating public records, including the text of the Zoning Ordinance and the statutorily-

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

mandated public records of its adoption. The Plaintiff has presented no contrary evidence and cannot at this stage rest solely on its pleadings. Rule 56(e), SCRCP; Belton v. Cincinnati Ins. Co., 360 S.C. 575, 580, 602 S.E.2d 389, 392 (2004). The trial court must rule based "on the record the parties have actually presented, not on one potentially possible." Spencer v. Miller, 259 S.C. 453, 456, 192 S.E.2d 863, 865 (1972). For the foregoing reasons, the Plaintiffs' requested declaration of unconstitutionality of the Zoning Ordinance cannot be granted under any evidence that they have provided or under any set of facts that they could prove under their allegations. There is thus no material issue of fact, and summary judgment denying the Plaintiffs' requested relief of a declaration of invalidity of the Zoning Ordinance must be granted in favor of the County under SCRCivP Rule 56.

CFM Second Motion: The Plaintiffs have not shown (and cannot show) any statement made by the County that would estop the enforcement of the Zoning Ordinance.

Plaintiffs have made an unsupported, bare allegation that "Newberry County in its official capacity has made various representations to various of the Plaintiffs' which have been relied upon."[28] Second Amended Complaint, Paragraph 14.[29] The Plaintiffs have not identified any

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[28] Presumably, the Second Amended Complaint's request for an injunction against enforcement of the Zoning Ordinance, insofar as it is based on estoppel, relates only to enforcement against the Plaintiffs themselves. "[J]ustifiable reliance upon the government's conduct" is a necessary element of estoppel. Quail Hill, LLC v. Cty. of Richland, 387 S.C. 223, 236–37, 692 S.E.2d 499, 506 (2010). Consequently, estoppel would not support enjoining enforcement against all recreational vehicle and similar use, but only such use by those who had received and relied upon the representations. There is no allegation of such receipt and reliance by anyone other than the Plaintiffs.

[29] The Plaintiffs, in their Second Cause of Action, to the issuance by the County of unspecified permits and the allowance of recording of unspecified platting as being among the estopping representations. Second Amended Complaint, Paragraph 15. However, the Plaintiffs do not identify any permits: by whom given, to whom given, allowing what action, when given, for how long effective, what property affected, under what restrictions. Platting relates to the recordation of parcel boundaries and is not relevant to permitted land use. The Plaintiffs also state

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

representations by the County or its officials on which they have relied and that were not true when made. Moreover, the authority to alter the requirements of the Zoning Ordinance belongs solely to County Council. Misrepresentations regarding interpretation and implementation of the Zoning Ordinance, if there were any, would constitute misrepresentations of matters of law. Under South Carolina law, misrepresentations of matters of law do not give rise to an estoppel that would operate to prevent a local government from enforcing its zoning code as written.

> *The public cannot be estopped, however, by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment.* [Emphasis in the original.]

Quail Hill, LLC v. Cty. of Richland, 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010), citing DeStefano v. City of Charleston, 304 S.C. 250, 257–58, 403 S.E.2d 648, 653 (1991). In Quail Hill, the Supreme Court dealt, as here, with allegations that officials had mis-stated the impact of zoning regulations on a property. The Supreme Court reversed the Court of Appeals and cited a series of prior cases in holding that, nevertheless, the government body was not estopped to enforce the regulations. Quail Hill, *supra*, 387 S.C. at 237-238, 692 S.E.2d at 506-507. In the rare instances where estoppel may lie against a government agency:

> [A] relying party must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position.

Id., 387 S.C. at 236–37, 692 S.E.2d at 506. Here, the Plaintiffs have not alleged lack of knowledge. They have not alleged lack of the means of knowledge – the Quail Hill Court opined that public

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in their Second Cause of Action that they "have relied upon the zoning maps and zoning ordinances as they existed when they began planning to use their property for the intended purpose." Second Amended Complaint, Paragraph 17. There is, however, no right (and the Plaintiffs have cited to none) to lock in a zoning regime simply by beginning to plan a particular activity. To the extent that the Plaintiffs intended this allegation to be a claim for grandfathering of a use that was established prior to the effectiveness of the Zoning Ordinance, see CFM Fourth Motion below.

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

availability of the governing regulations constituted "means of knowledge," which the Plaintiffs here had. Nor have they alleged that their claimed reliance was justifiable. In short, the Plaintiffs have not alleged the necessary elements of this claim, much less come forward after four years of this lawsuit with any evidence of those elements.

The Defendant County has presented evidence in the form of affidavits and uncontroverted self-authenticating public records, including the text of the Zoning Ordinance and the statutorily-mandated public records of its adoption. The Plaintiff has presented no contrary evidence and cannot at this stage rest solely on its pleadings. Rule 56(e), SCRCP; Belton v. Cincinnati Ins. Co., *supra*. The trial court must rule based "on the record the parties have actually presented, not on one potentially possible." Spencer v. Miller, *supra*. For the foregoing reasons, Plaintiffs' requested estoppel relief cannot be granted under any evidence that they have provided or under any set of facts that they could prove under their allegations. There is thus no material issue of fact, and summary judgment denying the Plaintiffs' requested relief of estoppel against enforcement must be granted in favor of the County under SCRCivP Rule 56.

***CFM Third Motion*: The Plaintiffs have not shown (and cannot show) that the Zoning Ordinance effects any impermissible taking or inverse condemnation of their property.**

The Plaintiffs have alleged in their Third Cause of Action that "the ordinance as written destroys vested property rights" [Second Amended Complaint, Paragraph 19]; "the ordinance if it is appropriate amounts to a taking of Plaintiffs' rights to use their property as they have historically used it" [Paragraph 21]; and "the ordinance in question amounts to an inverse condemnation" [Paragraph 22]. Whether a taking has occurred is a question of law for the Court to decide.

> [I]n the regulatory taking context, the issue of whether a taking occurred is a question of law for the Court. *See* Carolina Chloride, 394 S.C. 154, 171, 714 S.E.2d 869, 877 (2011) ("In an inverse condemnation case, the trial judge will determine

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

whether a claim has been established."); Ex Parte Brown, 393 S.C. at 224, 711 S.E.2d at 904 ("The question of a taking is one of law.").

Dunes W. Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 314, 737 S.E.2d 601, 619 (2013), concerning a claim that the Mount Pleasant zoning ordinance constituted a taking – a claim that the circuit court denied by summary judgment, in a decision that the Supreme Court affirmed.

In zoning matters, South Carolina's Supreme Court has long recognized:

> "[A] property owner is not entitled to have his property zoned for its most profitable use." Hampton v. Richland County, 292 S.C. 500, 357 S.E.2d 463 (Ct.App.1987) (quoting 101A C.J.S. *Zoning and Land Planning* § 476 at 173 (1979)). A zoning classification is not an unconstitutional, compensable taking simply because it denies to a landowner the highest and best use of his property. *See* Board of County Com'rs. v. Mountain Air Ranch, 192 Colo. 364, 563 P.2d 341 (1977); Ohoopee Land Dev. Corp. v. Mayor & Council of Wrightsville, 248 Ga. 96, 281 S.E.2d 529 (1981); S.A. Healy Co. v. Town of Highland Beach, 355 So.2d 813 (Fla.Dist.Ct.App.1978); and Young v. City of Franklin, 494 N.E.2d 316 (Ind.1986).

Moore v. Sumter Cty. Council, 300 S.C. 270, 272 at fn. 2, 387 S.E.2d 455, 457 at fn. 2 (1990) [*emphasis added*]. More recently, in Dunes W. Golf Club, cited above, the Court held:

> "'Not all damages suffered by a private property owner at the hands of [a] governmental agency are compensable.'" Carolina Chloride, 394 S.C. at 170, 714 S.E.2d at 877 (quoting Woods v. State, 314 S.C. 501, 504, 431 S.E.2d 260, 262 (Ct.App.1993)). Indeed, "[u]nder our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property." Keystone Bituminous, 480 U.S. at 491, 107 S.Ct. 1232. "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." *Id.*

Dunes W. Golf Club, *supra*, 401 S.C. at 316, 737 S.E.2d at 620.

The Plaintiffs have not identified any particular parcel or parcels of property that they own, nor have they specified what pre-existing use they want to continue or when it began. As described in "NATURE AND BACKGROUND OF THE CASE," above, however, parts of the various versions of the Complaint and certain judicial records[30] make clear that they want to allow workers who come

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[30] For example, "travel travelers [*sic*]," at original and First Amended Complaints, Paragraph 4; "recreational vehicles, camper trailers, and the like," at original and First Amended Complaints,

into the area temporarily for major projects (most notably and until recently, for the V.C. Summer nuclear construction project) to park recreational vehicles on their property and to connect them to water, sewer, and electric services, in order to provide accommodations for those workers while their projects continue. In the absence of any identification of parcels by the Plaintiffs, this Court can look only to the County-Identified Parcels. It appears that none of the County-Identified Parcels meets the Zoning Ordinance's requirements for such use.

There are, however, multiple other permitted uses for R2 properties (without the need for approval of conditions or granting of special exceptions). The Zoning Ordinance, at § 153.073(D), spells them out. They include but are not limited to:

- duplex dwellings;
- single-family detached dwellings;
- post-1976 manufactured homes;
- rooming and boarding houses;
- various agricultural buildings;
- animal shelters/stables;
- private motor vehicle garages;
- private gardens and greenhouses; and
- certain recreational facilities; *etc.*

Paragraph 16; "use of their property for the placement of trouble trailers [*sic*] to be leased to various workers," at Second Amended Complaint, Paragraph 4; the BZA Brown Record; and transcripts of earlier hearings in the present case.

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

The foregoing list is substantially similar in type to the list of alternative available uses cited by the Moore Court in holding that a landowner is not entitled to the highest and most profitable use of his land. [31]

In considering a regulatory taking by zoning, as alleged here, South Carolina's Supreme Court has ruled:

> [T]he only issue is whether the [*amendment to the zoning*] Ordinance deprived Appellant of "all economically beneficial uses" of its land, and therefore, amounted to a taking. *See [*Lucas v. S.C. Coastal Council, *505 U.S.]* at 1019, 112 S.Ct. 2886. On these facts, we find there was no categorical taking because the [*Conservation Recreation Open Space zoning*] designation permits numerous recreation and conservation uses, and Appellant has failed to produce any evidence that those permitted uses are not economically beneficial. . . . Appellant has presented no evidence that this is the "extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." Lucas, 505 U.S. at 1017, 112 S.Ct. 2886. Thus, we find the trial court properly granted summary judgment in favor of the Town as to Appellant's categorical taking claim.

Dunes W. Golf Club, *supra*, 401 S.C. at 31-314, 737 S.E.2d at 619.

In light of the Dunes West/Lucas rule, and the fact that the Zoning Ordinance plainly permits multiple other uses of the Plaintiffs' R2-Rural District properties, the Plaintiffs cannot under any circumstances show that the Zoning Ordinance accomplishes a categorical, *per se* taking; and they have not alleged any specific facts and circumstances that would cause the Zoning Ordinance or any part to be "the functional equivalent of a classic taking." *Id.*

The Defendant County has presented evidence in the form of affidavits and uncontroverted self-authenticating public records, including the text of the Zoning Ordinance and the statutorily-mandated public records of its adoption. The Plaintiff has presented no contrary evidence and

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[31] As an example of other profitable uses, prior to attempting to rent to multiple (three) RV-owning workers, Plaintiff Mrs. Brown had a tenant on the County-Identified Parcel that she appears to own, paying rent and living in a manufactured home that he owned. BZA Brown Record, BZA Brown Hearing Tr. p. 74, line 12 - p. 75, line 8 [testimony of Plaintiff Michael Brown].

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

cannot at this stage rest solely on its pleadings. Rule 56(e), SCRCP; Belton v. Cincinnati Ins. Co., *supra*. The trial court must rule based "on the record the parties have actually presented, not on one potentially possible." Spencer v. Miller, *supra*. For the foregoing reasons, the Plaintiffs' request for a finding of a regulatory taking cannot be granted under any evidence that they have provided or under any set of facts that they could prove under their allegations. There is thus no material issue of fact, and summary judgment denying the Plaintiffs' requested takings relief must be granted in favor of the County under SCRCivP Rule 56.[32]

***CFM Fourth Motion*: The Plaintiffs have not shown (and cannot show) any non-conforming use that was lawfully established at the time the Zoning Ordinance was adopted that would**

[32] Neither Plaintiff Murray nor Plaintiff Michael Brown has made any application under the Zoning Ordinance for any use, by way of special exception, variance, or otherwise. Failure to exhaust administrative remedies precludes a takings claim against a zoning ordinance. South Carolina's Supreme Court has ruled:

> The Circuit Court judge granted summary judgment to the respondent on the basis that the Moores had failed to exhaust their administrative remedies, and that their claim for judicial relief was therefore premature. We agree. The United States Supreme Court has held that, "[u]ntil a property owner has 'obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property,' 'it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed.'" *Id.* (quoting Williamson Planning Comm'n. v. Hamilton Bank, 473 U.S. 172, 186, 190 n. 11, 105 S.Ct. 3108, 3116, 3118 n. 11, 87 L.Ed.2d 126 (1985)). Furthermore, this Court has stated, "[t]he impact of [a] zoning ordinance upon [a given] property cannot be determined [when] the landowner has failed to pursue his administrative remedies by applying for a variance." Dunbar v. City of Spartanburg, 266 S.C. 113, 221 S.E.2d 848 (1976).

Moore v. Sumter Cty. Council, 300 S.C. 270, 272–73, 387 S.E.2d 455, 457 (1990). A request for a variance (such as is allowed by the Zoning Ordinance, § 153.052, and by statute, S.C. Code § 6-29-800(A)(2)), is one of the available administrative remedies noted by the Court in Moore. Under the rule of Moore, neither Plaintiff Murray nor Plaintiff Michael Brown has standing to raise a Takings Claim.

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

allow continuation. Moreover, they are prevented from attempting to make any such showing by the doctrines of res judicata and failure to exhaust remedies.

The Plaintiffs have alleged in their First Cause of Action that the County, under the guise of the Zoning Ordinance, is requiring "the Plaintiffs' to stop using their land for the historical use [Second Amended Complaint, Paragraph 6] and that "the property in question equates to a non-conforming use pursuant to the zoning ordinance" [Paragraph 13]. This appears to be an attempt to claim the protection of Zoning Ordinance, § 153.030(A)(2).

As permitted by S.C. Code § 6-29-730, the Zoning Ordinance, at § 153.030(A)(2), provides that a use that is non-conforming under the Zoning Ordinance will be allowed to continue if it was lawfully undertaken prior to adoption of the Zoning Ordinance. As noted above under "HISTORY OF ZONING ORDINANCE ADOPTION," the Zoning Ordinance is effective against claims of prior non-conforming use as of its first introduction on June 1, 2016, under South Carolina's Pending Ordinance Doctrine, Stratos v. Town of Ravenel, 297 S.C. 309, 376 S.E.2d 783 (1989), publicly invoked upon the Zoning Ordinance's first introduction.

This protection is not available to the Plaintiffs here. First, "[a] use cannot be a nonconforming use if it was unlawful at the time of the amendment of the ordinance prohibiting the use." Whaley v Dorchester, *supra*, 337 S.C. at 579, 524 S.E.2d at 410. For any of the Plaintiffs to have lawfully established a prior non-conforming use under the Prior Zoning Ordinance, they would had to have obtained affirmative approval of the BZA, as noted under "HISTORY OF ZONING ORDINANCE ADOPTION." There is no record of any application for such approval or of the granting of any such approval; and Plaintiffs have not alleged, nor have they provided any evidence of, one.

Additionally, all three Plaintiffs are blocked from claiming grandfathered status.

With regard to Plaintiff Mrs. Brown's property, she sought permission from the BZA to use her property for the purpose herein as a prior, non-conforming use. The BZA Brown Decision

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

ruled that she had not established such use prior to the effectiveness of the Zoning Ordinance. Mrs. Brown appealed; and Judge Walton J. McLeod IV affirmed the BZA Brown Decision on December 18, 2019. Pursuant to S.C. Code § 6-29-850 and SCACR Rule 203(b)(1), Plaintiff Mrs. Brown had thirty (30) days – until January 17, 2020 – in which to appeal that ruling. She did not do so; and that Order and the underlying BZA Brown Decision are now final and binding. Consequently, her assertion of a right to continue a prior, non-conforming use is barred by the doctrine of *res judicata*. S.C. Pub. Interest Found. v. Greenville Cty., 401 S.C. 377, 737 S.E.2d 502 (Ct. App. 2013).

Neither Plaintiff Murray nor Plaintiff Mr. Brown has made any application under the Zoning Ordinance for recognition of a grandfathered use. As noted above:

> [T]his Court has stated, "[t]he impact of [a] zoning ordinance upon [a given] property cannot be determined [when] the landowner has failed to pursue his administrative remedies by applying for a variance." Dunbar v. City of Spartanburg, 266 S.C. 113, 221 S.E.2d 848 (1976).

Moore v. Sumter Cty. Council, 300 S.C. 270, 272–73, 387 S.E.2d 455, 457 (1990).

The Defendant County has presented evidence in the form of affidavits and uncontroverted self-authenticating public records, including the text of the Zoning Ordinance and the statutorily-mandated public records of its adoption. The Plaintiff has presented no contrary evidence and cannot at this stage rest solely on its pleadings. Rule 56(e), SCRCP; Belton v. Cincinnati Ins. Co., *supra*. The trial court must rule based "on the record the parties have actually presented, not on one potentially possible." Spencer v. Miller, *supra*. For the foregoing reasons, the Plaintiffs' request for a finding of a protected pre-existing use cannot be granted under any evidence that they have provided or under any set of facts that they could prove under their allegations. There is thus no

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

material issue of fact, and summary judgment denying the Plaintiffs' requested grandfathering relief must be granted in favor of the County under SCRCivP Rule 56.[33]

***CFM Fifth Motion*: The Second Amended Complaint, like its predecessors, is inadequate as a matter of law, and should be dismissed for failure to allege facts.**

> "[*South Carolina*]'retains the Code Pleading standard ... rather than the more lenient notice pleading standard found in the federal rules.'" *Gaskins v. S. Farm Bureau Cas. Ins.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000) (quoting Harry M. Lightsey, Jr. & James F. Flanagan, *South Carolina Civil Procedure* 93 (2nd ed. 1996)).

Paradis v. Charleston Cty. Sch. Dist., *supra*. While recognizing that pleadings must be liberally construed, the Paradis Court reiterated that a plaintiff must "allege facts" [*emphasis added*], and

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[33] Neither Plaintiff Murray nor Plaintiff Michael Brown has made any application under the Zoning Ordinance for any use, by way of special exception, variance, or otherwise. Failure to exhaust administrative remedies precludes a takings claim against a zoning ordinance. South Carolina's Supreme Court has ruled:

> The Circuit Court judge granted summary judgment to the respondent on the basis that the Moores had failed to exhaust their administrative remedies, and that their claim for judicial relief was therefore premature. We agree. The United States Supreme Court has held that, "[u]ntil a property owner has 'obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property,' 'it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed.'" *Id.* (quoting Williamson Planning Comm'n. v. Hamilton Bank, 473 U.S. 172, 186, 190 n. 11, 105 S.Ct. 3108, 3116, 3118 n. 11, 87 L.Ed.2d 126 (1985)). Furthermore, this Court has stated, "[t]he impact of [a] zoning ordinance upon [a given] property cannot be determined [when] the landowner has failed to pursue his administrative remedies by applying for a variance." Dunbar v. City of Spartanburg, 266 S.C. 113, 221 S.E.2d 848 (1976).

Moore v. Sumter Cty. Council, 300 S.C. 270, 272–73, 387 S.E.2d 455, 457 (1990). A request for a variance (such as is allowed by the Zoning Ordinance, § 153.052, and by statute, S.C. Code § 6-29-800(A)(2)), is one of the available administrative remedies noted by the Court in Moore. Under the rule of Moore, neither Plaintiff Murray nor Plaintiff Michael Brown has standing to raise a Takings Claim.

that where "nothing more than legal conclusions" is pleaded, the complaint should be dismissed. *Id.*

As noted above, a host of necessary elements are conspicuously absent from each of the several iterations of the Complaints, at least some combination of which must be shown to support any of the relief requested by the Plaintiffs. The bare, conclusory allegations are insufficient to support this or any other lawsuit and fail to meet the standard of Paradis, *supra*.

For that reason and in addition to the foregoing grants of summary judgment in favor of the County on all aspects of this lawsuit, this case should now be dismissed with prejudice.

FINAL ORDER

For the foregoing reasons, each of the County's Final Motions is hereby granted, summary judgment is entered in favor of the County on each of the Plaintiffs' alleged causes of action, and this case is hereby dismissed with prejudice in its entirety.

IT IS SO ORDERED.

Frank R. Addy, Jr.
Circuit Court Judge

January __, 2022

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385

Newberry Common Pleas

Case Caption: Allan Murray , plaintiff, et al VS Newberry County , defendant, et al

Case Number: 2017CP3600385

Type: Order/Summary Judgment

So Ordered

s/Frank R. Addy, Jr., 2159

ELECTRONICALLY FILED - 2022 Jan 27 10:54 AM - NEWBERRY - COMMON PLEAS - CASE#2017CP3600385