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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 2020-CP-26-00785
APPELLATE CASE NO. 2021-001074

ANI CREATION, INC. d/b/a Rasta; ANI CREATION, INC d/b/a Wacky T's; BLUE SMOKE, LLC d/b/a Doctor Vape; BLUE SMOKE, LLC d/b/a Blue Smoke Vape Shop; ABNME, LLC d/b/a Best for Less; KORETZKY, LLC d/b/a Grasshopper; RED HOT SHOPPE, INC.; E.T. SPORTSWEAR, INC. d/b/a Pacific Beachwear; MYRTLE BEACH GENERAL STORE, LLC; I AM IT, INC. d/b/a T-Shirt King; and BLUE BAY RETAIL, INC. d/b/a Surfs Up,

Appellants

vs.

CITY OF MYRTLE BEACH BOARD OF ZONING APPEALS and KEN MAY, ZONING ADMININISTRA TOR FOR CITY OF MYRTLE BEACH,

Respondents

RESPONDENT'S FINAL BRIEF

---

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STATEMENT OF ISSUES ON APPEAL

Whether the Circuit Court Judge erred in affirming the decision of The Board of Zoning Appeals for The City of Myrtle Beach.

STATEMENT OF CASE

Appellants are nine beachwear stores located in the City of Myrtle Beach in a zoning overlay district known as the Ocean Boulevard Entertainment Overlay District (OBEOD). [R42] They appealed a finding by the City's Zoning Administrator that they are engaging in nonconforming uses in the OBEOD in violation of §1807 of the Zoning Ordinances of the City of Myrtle Beach, South Carolina (OBEOD ordinance). Appellants' nonconforming uses are the sale of certain adult oriented commercial products that are prohibited or restricted in the OBEOD. [R42]

Appellants appealed the Zoning Administrator's finding to the City's Board of Zoning Appeals. [R39] Appellants claimed the OBEOD ordinance was unconstitutional, improperly enacted and the Zoning Administrator failed to offer sufficient proof that Appellants were engaging in nonconforming uses in the OBEOD. [R343-364] The BZA decided that it did not have the authority to determine the validity of the OBEOD ordinance. [R236] However, the BZA did allow the Appellants to proffer evidence on that issue for the record. Thereafter, based on the presumption that municipal ordinances are presumed valid, the BZA conducted a factual hearing in accordance with Section 505 of the Code of Zoning Ordinances of the City of Myrtle Beach and S.C. Code Ann. §6-

29- 800. [R220-321] The BZA affirmed the Zoning Administrator by deciding that Appellants were engaging in nonconforming uses in violation of the OBEOD ordinance. [R39-45]

Appellants duly appealed the BZA's order to the Circuit Court. [R69] The Circuit Court Judge denied the appeal and affirmed the order of the BZA by an order dated April 22, 2021. [R15] Appellants moved to have the Circuit Court Judge reconsider his order. [R85] The Circuit Court Judge denied Appellants' motion to reconsider by a second order dated September 16, 2021. [R1] Appellants duly appealed the Circuit Court Judge's orders to the S.C. Supreme Court.

STATEMENT OF FACTS

In 2011 the City of Myrtle Beach adopted a Comprehensive Plan pursuant to SC's Local Government Comprehensive Enabling Act of 1994, SC Code § 6-29-510. [Vol II R543-555] The provisions of the plan that are relevant to the present appeal are found in the City's Tourism Objectives and Strategies. The following objectives and strategies are stated in the plan: §3. Continue to define and maintain Myrtle Beach as a family beach; §11. Continue to revitalize the downtown area of Myrtle Beach; and §14. Continue to create an environment, which ensures that visitors and residents are safe. [Vol II 552]

In furtherance of those objectives and strategies in the comprehensive plan the City created a zoning district in 2018 known as the Ocean Boulevard Entertainment Overlay District (OBEOD. [R537] The OBEOD ordinance prohibits the following business uses in the OBEOD:

> Section 3. The following retail business uses are prohibited in the OBEOD:
>
> A. Smoke shops and tobacco stores.

> B. Retail merchandising or of alternative nicotine, alternative nicotine delivery product, vapor product, e-cigarette, tobacco paraphernalia or cannabis products.
>
> C. Retail merchandising of tobacco or tobacco products of more than an incidental nature.
>
> D. Retail merchandising or display of sexually oriented material, as defined herein. Any display of sexually oriented merchandise qualifies the retail operation as a sexually oriented business, which must be located in a permitted zone.
>
> E. Providing space for a "barker" for a business not located at the premises.
>
> *§1807, Section 3, of the Zoning Ordinances of the City of Myrtle Beach, South Carolina*

Appellants admit that they violate the OBEOD ordinance by engaging in one or more nonconforming uses prohibited in Section 3 of the OBEOD ordinance. [R297]

The boundaries of the OBEOD district are based upon an area historically known as the old downtown of Myrtle Beach. That area was a point of focus in the City's 2011 Comprehensive Plan. The overlay district covers a large area and includes multiple zoning districts in the historic downtown area of Myrtle Beach.

OCEAN BOULEVARD ENTERTAINMENT OVERLAY DISTRICT MAP

The OBEOD Overlay Map depicted above shows the overlay district. The area shown at the top of the map is the Atlantic Ocean. The heavy black line west of the Atlantic Ocean shows the outer land boundaries of the district. The district is

approximately 22 city blocks wide and approximately 5 city blocks deep. The OBEOD is bounded on the east by the Atlantic Ocean, on the south by Sixth Avenue South, on the west by the back edges of the lots fronting US Highway 17 (King's Highway) and on the north by Sixteenth Avenue North. The lots fronting on U.S. Highway 17 were excluded from the OBED.

After the OBEOD ordinance was enacted on August 14, 2018, the Zoning Administrator mailed approximately twenty- five letters to retail businesses in the OBEOD requesting those businesses to come into compliance with Section 3 of the OBEOD ordinance. [R Vol II 556-596] On January 2, 2019, Appellants, who are nine of the twenty five businesses, served a summons and complaint in U.S. District Court challenging the validity of the OBEOD ordinance. The U.S. District Court action was stayed pending a determination of the validity of the OBEOD ordinance in the present action. [R46, R65]

On July 2, 2019, Appellants appealed the Zoning Administrator's finding to the City's Board of Zoning Appeals (BZA). [R343] At the BZA hearing, the Zoning Administrator presented his factual case. [R245] Appellants through their attorney and witnesses presented their rebuttal. Appellant's witness, Tim Wilkes, admitted that each of the appellants engaged in one or more business uses in the OBEOD that were prohibited by Section 3 of the OBEOD ordinance. [R297] The BZA decided that the Appellants were engaging in business uses prohibited by the OBEOD ordinance. [R39]

The BZA issued its written order dated January 16, 2020. [R39] Appellants duly appealed and the circuit court. [R69] The circuit court judge found the ordinance was valid and he affirmed the BZA by an order dated April 21, 2021. [R15] Appellants made

a motion to reconsider which was denied by an order dated September 16, 2021 [R1]. The case is now on appeal to the South Carolina Supreme Court.

ARGUMENTS

I. THE CIRCUIT COURT JUDGE DID NOT ERR IN AFFIRMING THE DECISION OF THE BOARD OF ZONING APPEALS FOR THE CITY OF MYRTLE BEACH.

A. STANDARD OF REVIEW

A municipal ordinance is a legislative enactment and it is presumed to be constitutional." *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1992). "[E]very 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 v. Columbia Bd. of Zoning Appeals,* 395 S.C. 499, 504–05, 719 S.E.2d 660, 662–63 (2011) The burden of proving the invalidity of a zoning ordinance 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. v. City of Sumter,* 332 S.C. 45, 52, 504 S.E.2d 112, 116 (1998).

In the present appeal, the Court is asked to review zoning choices made by the City Council of Myrtle Beach. Zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of citizen's constitutional rights. In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and unreasonable. *Byrd, et al. v. City of North Augusta*, 261 S.C.

591, 201 S.E.2d 744 (1974). Courts have no prerogative to pass upon the wisdom of the municipality's decision unless such decision is "so unreasonable as to impair or destroy citizen's constitutional rights." *Hampton v. Richland County*, 292 S.C. at 503, 357 S.E.2d at 465 (Ct.App.1987) and the decision should not be overturned by a court so long as the decision is "fairly debatable." *Knowles v. City of Aiken,* 305 S.C. 219, 223, 407 S.E.2d 639, 642 (1991).

While the Appellants here and some other residents of the area may not embrace the City's OBEOD choice of zoning uses, other residents in close proximity may applaud the OBEOD ordinance. While the Appellants may not agree and may be able to convince this Court not to agree with the City's zoning choices, that is not the issue before the Court. The Court does not insinuate its judgment into a review of the City's decision. Rather, the Court must leave the City's decision undisturbed if the propriety of that decision is even "fairly debatable." *Rushing v. City of Greenville*, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975); *Hampton*, 292 S.C. at 503.

B. The OBEOD ordinance is constitutional and the OBEOD is rationally shaped to serve the City's purpose of establishing a family friendly entertainment and retail land use district.

The boundaries of the OBEOD are approximately the same as the boundaries of the area overseen by the Downtown Redevelopment Corporation (DRC). [R154] The DRC was actually formed probably 25 years ago. It is an action agent for development in the downtown area of Myrtle Beach and assigned various responsibilities in the City's 2011 Comprehensive Plan. [R155] As shown on the map above the OBEOD is bounded on the east by the Atlantic Ocean, on the west by lots fronting on U.S. Highway 17

(Kings Highway), on the south by 6th Avenue South and on the north by 16th Avenue North.

The City's intent in the creating the OBEOD is to restore the family friendly image of its downtown area to attract more family friendly tourists. *§1807 Section 1(H), Purpose and Intent.* In the City's 2011 Comprehensive Plan, part of the City's adopted tourism objectives and strategies were to continue to revitalize the downtown area and to continue to define and to maintain Myrtle Beach as a family beach. [RVol II 543-555]

The Zoning Administrator gave the following testimony about the OBED in his deposition:

> Q. Now, in this particular area, without going into why council did what it did, is this an area that is primarily trafficked by pedestrians?
>
> A. Yes, sir, without a doubt.
>
> Q. And is it also an area that contains a lot of amusement features that are designed to attract families and children?
>
> A. Yes, sir.
>
> Q. Okay. And if you were -- has it historically been that way?
>
> A. Yes, sir. I've been coming down here since I was three years old, and it's always been that way.
>
> Q. And is the -- I think it is Magic Kingdom, is that a family amusement park?
>
> A. Yes, sir.
>
> Q. And before the pavilion was removed, was it also a family amusement park?
>
> A. Yes, sir.
>
> Q. And do you have parking facilities, specifically, like a garage there that allows people to park and then walk along this area?
>
> A. Yes, sir. We have the garage and then multiple paved parking lots in and around the area.

> Q. And that's so pedestrians can get out and walk around the district?
>
> A. Yes, sir. [R201-202]

In recent years, a number of beachwear stores in the OBEOD have begun to display and to sell drug paraphernalia, CBD consumables, and sexually oriented merchandise. *§1807, Section 1. Purpose and Intent.* [VOLII R556-600] City Council found that there is a substantial likelihood of the expanded establishment and operation of such businesses. [RVol II 601-602] In addition, the continued operation and expansion of these family adverse retail offerings in the overlay district would result in undesirable impacts to the public welfare. Among these impacts are increased potential for CBD consumables and tobacco sales to minors, greater opportunity for the sale of illegal drug paraphernalia that is marketed as tobacco paraphernalia, and heightened risk of negative aesthetic impacts, blight, and loss of property values of residential neighborhoods and businesses in close proximity to such uses. *§1807, Section 1. Purpose and Intent.* [R Vol II 601- 602]

Appellants claim the City has no rhyme or reason for the enactment of the OBEOD ordinance. The City disagrees. The best evidence of City Council's reasons for creating the OBEOD is in the text of the ordinance. *Knotts v. S.C. Dep't of Natural Res.,* 348 S.C. 1, 10, 558 S.E.2d 511, 516 (2002) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will."); *City of Myrtle Beach v. Juel P. Corp.,* 344 S .C. 43, 47, 543 S.E.2d 538, 540 (2001).

Appellants claim the City failed to call witnesses to prove the validity of the ordinance. The City disputes Appellants' claim that City offered no evidence to prove the validity of the ordinance. The City's evidence is in the text of the ordinance and the

Zoning Administrator's presentation. [R245, RVol II 556-600] In addition, the OBEOD ordinance is a municipal ordinance and a legislative enactment. It is presumed to be constitutional. *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1992). Appellants bear a heavy burden of proof to show that the OBEOD ordinance is unconstitutional. The burden of proving the invalidity of a zoning ordinance 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. v. City of Sumter,* 332 S.C. 45, 52, 504 S.E.2d 112, 116 (1998). Appellants did not proffer any expert testimony and their witness's evidence on that point is subjective speculation. Appellants have not satisfied their burden of proof. [R220-316]

Appellants claim the OBEOD ordinance is arbitrary as a matter of law because the ordinance restricts uses in the OBEOD which are permitted in other nearby areas of the City. The City contends restricting property uses is the foundation of zoning law. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926). The Circuit Court Judge rejected Appellants' claim that different treatment of similar uses in different zones is unconstitutional. He found all zones must have beginning and terminating points. He found that if the existence of divergent uses across zone boundary lines were taken per se as an appropriate basis for a constitutional violation, the entire zone plan in any municipality might well crumble by chain reaction. [R1, R15] See *Scaduto v. Town of Bloomfield*, 127 N.J.L. 1, 4, 20 A.2d 649 (N.J. Sup. Ct. 1941); *Rexon v. Board of Adjustment of Borough of Haddonfield,* 10 N.J. 1, 9, 89 A.2d 233 (1952); *Ward v. Scott*, 11 N.J. 117, 128, 93 A.2d 385 (1952). *Izenberg v. Board of Adjustment of City of Paterson*, 35 N.J. Super. 583, 114 A.2d 732, 736 (App. Div. 1955).

See *§ 10:23.Neighbor's greener pasture lawsuits*, *1 Rathkopf's The Law of Zoning and Planning § 10:23 (4th ed.)*

It is well within the constitutional power of a municipality to adopt zoning regulations that limit the areas in which certain business uses may be allowed. *Bibco Corp. v. City of Sumter,* 332 S.C. 45, 52, 504 S.E.2d 112, 116 (1998)(excluding mobile homes from some but not all residential districts). Also see *D.G. Rest. Corp. v. City of Myrtle Beach,* 953 F.2d 140, 145 (4th Cir. 1991).

Appellants' claims are commonly known as neighbor's greener pasture lawsuits. See *§ 10:23.Neighbor's greener pasture lawsuits*, *1 Rathkopf's The Law of Zoning and Planning § 10:23 (4th ed.).* Where a community is divided into districts, there will of course be adjacent districts with different permitted and prohibited uses and different nonuse regulations covering bulk, height, density, and type of structure. This is the predicate and the purpose of zoning. *Id.*

The "presumption of validity" and "fairly debatable" rules applicable to legislative enactments were created to provide the necessary protection against those constitutional claims in such situations. *Knowles v. City of Aiken,* 305 S.C. 219, 223, 407 S.E.2d 639, 642 (1991); *Rushing v. City of Greenville,* 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975); *Hampton v. Richland County,* 292 S.C. 500, 503, 357 S.E.2d 463, 465 (Ct.App.1987), cert. denied, 296 S.C. 72, 370 S.E.2d 714 (1988). The decision of the legislature as to the location of the boundary line will be upheld by courts unless, by reason of the facts and circumstances involved, the existing zoning classification, as applied, is found to be arbitrary and unreasonable or by the absence of any legitimizing

rational basis related to an appropriate public purpose for the zoning. *1 Rathkopf's The Law of Zoning and Planning § 10:23 (4th ed.).*

For Appellants to successfully maintain a "neighbor's greener pasture" lawsuit, the presumption of validity must be overcome by clear and convincing evidence of the arbitrariness of the zoning classification as applied. Most such lawsuits are unsuccessful. *Id.* As early as 1937 the Virginia Supreme Court stated:

> It is seldom that there is a definite reason for holding that a lot on one side of a line should be devoted to one purpose and that just across it to another. The adaptability of certain territorial sections of cities to certain uses fade into each other. One end of a field may be, beyond peradventure, suited to industrial developments, the other to private homes. Intervening there must be a twilight zone. If the legislature cannot be relied upon to say where lines must run, who can be vested with that discretion? Demonstrative accuracy is an impossibility. *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271, 283-84, 192 S.E. 881, 886 (1937).

More recently, in *Fairfax County v. Pyles*, 224 Va.629, 638-639, 300 S.E.2d 79, 84 (1983), the court stated:

> ...the crux of the issue is whether the zoning boundary has been fairly drawn. Fixing the specific location of boundaries between zoning districts is a legislative function that "is, by nature, more or less arbitrary." *Fairfax County v. Williams*, 216 Va. at 60, 216 S.E.2d at 41. In making that zoning judgment, the governing body must consider, for example, "the general boundary guidelines" set forth in the comprehensive plan, "location of property lines, physical characteristics of the land, and other factors affecting optimum geographical alignment*." Fairfax County v. Snell Corp.,* 214 Va. at 660, 202 S.E.2d at 894, quoted in *Vienna Council v. Kohler*, 218 Va. 966 , 974-75, 244 S.E.2d 542, 547 (1978).

Appellants have not proven the boundary lines are arbitrary. The City contends the boundary lines for the OBEOD are fairly drawn. They are based on pedestrian travel patterns, family friendly attractions and historical uses that existed before CBD consumables, drug paraphernalia, and sexually oriented merchandise gained an expanded

presence in the OBEOD. [R201-202] The OBEOD's boundary guidelines adopted by the City were anticipated by the City's 2011 Comprehensive Plan. [R Vol II 543-555]

C. The OBEOD ordinance does not violate Appellants' 14th Amendment rights.

Appellants claim the City has taken their property by denying them substantive due process and equal protection of the laws. [App. Br. 10] The City responds that no constitutional right to do business is implicated when the government imposes generally applicable restrictions on business activities pursuant to its police power to promote public health, safety or welfare. *Safeway Inc. v. City & Cty. of San Francisco, 797 F. Supp. 2d 964 (N.D. Cal. 2011); § 18:14. Restrictions on business or occupation, 5 McQuillin Mun. Corp. § 18:14 (3d ed.).*

The City acknowledges the reasonableness of a zoning regulation of any business depends chiefly on the circumstances on which the regulation operates. No zoning regulation should be allowed to interfere with the enjoyment of individual rights beyond the necessities of the case. *Id.* When it is reasonable to regulate a business or industry in the public interest, the regulation will not be precluded by the fact that the investment made in the business prior to any legislative action will be diminished, or by the fact that the industry has been continued in the locality for a long period, although the regulation requires its removal from the area. *Id.* In other words, the fact that economic hardships may result from the enforcement of an ordinance adopted for the protection of the public health, safety, or welfare does not affect its constitutional validity unless the ordinance is shown to be clearly unreasonable or discriminatory. *Id.*

Legislation designed to promote the general welfare commonly burdens some more than others. See *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348

(1915) (law barring operation of brick mill in residential area); *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards); *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (law effectively preventing continued operation of quarry in residential area). The businesses were uniquely burdened by the legislation sustained in those cases. Similarly, zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account. For example, the property owner in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–388, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926) who wished to use its property for industrial purposes was affected far more severely by the ordinance than its neighbors who wished to use their land for residences. See *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 133, 98 S. Ct. 2646, 2664, 57 L. Ed. 2d 631 (1978).

Appellants are unable to refute the City's findings that the business uses restricted by the City create an atmosphere that is repulsive to mothers and fathers in the care of their children or that the ordinance promotes to minors crudity and sexually explicit apparel, drug paraphernalia, and consumables that mimic and promote drug and substance consumption. Appellants have not refuted the City's finding that the displacement of CBD consumables, smoke shops and tobacco stores is necessary to serve its stated purposes and in the interests of the public health, safety and general welfare.

Appellants claim that the City's ordinance creating the OBEOD violates their rights to equal protection of the laws. Appellants cite the case of *Walgreen Co. v. City & Cty. of San Francisco,* 185 Cal. App. 4th 424, 110 Cal. Rptr. 3d 498 (2010) as authority for their equal protection claim. The City contends that case is distinguishable on its

facts. In *Walgreen*, the City & County of San Francisco enacted an ordinance that prohibited businesses such as Walgreen's that were licensed as pharmacies with accessory sales from selling tobacco products. However, the ordinance exempted from the tobacco prohibition "big box" stores such as Costco or a supermarkets such as Safeway.

Both Costco and Safeway contained licensed pharmacies in their stores. In the appeal, the City & County of San Francisco admitted that businesses such as Walgreen's that were licensed as pharmacies and "big box" stores such as Costco or supermarkets such as Safeway that contained licensed pharmacies were similarly situated. The California Court of Appeals indicated that the different treatment of licensed pharmacies and general stores which contained licensed pharmacies could be found to be a distinction without a difference.

Appellants in the OBEOD are not similarly situated to other businesses in other zones. Unlike the ordinance in *Walgreens* which may have impacted similar businesses throughout the City, the present case involves different zoning districts. The City contends the OBEOD area is different from other areas in the City because the historic family friendly amenities and pedestrian activities that exist in the OBEOD make the OBEOD a distinguished and valuable asset for the City's tourism economy.

D. The city's actions are not an unconstitutional taking of property.

Appellants claim the OBEOD ordinance should be declared unconstitutional because it causes a partial regulatory taking without compensation. Appellants claim that a taking has occurred because the private harm to Appellants outweighs the ordinance's benefits to the public. See *Denene, Inc. v. City of Charleston*, 359 S.C. 85,

98–99, 596 S.E.2d 917, 924 (2004). In determining whether the public benefit from a regulation outweighs the private harm, the Court will consider: (1) the economic impact of the regulation; (2) its interference with reasonable investment-backed expectations; and (3) the character of the governmental action. *Id.*

1. The economic impact of the regulation.

Appellants have not shown a negative economic impact of the OBEOD ordinance on their businesses by clear and convincing evidence. The City's purpose and intent section to the OBEOD ordinance states the OBEOD's retail restrictions and criteria can encourage quality development and economic growth. The purpose of the OBEOD is to establish a family friendly entertainment and retail land use, and to encourage compatible land uses, which ensure higher quality development. The City seeks to protect property values and provide safe and efficient pedestrian access. *§1807, Section 1, Intent and Purpose.*

Appellants may find that the OBEOD ordinance will actually improve the value and profitability of their businesses. Tim Wilkes testified on behalf of the Appellants that Appellant's businesses were beachwear stores, like Walmart, because their businesses sell a huge variety of items. [R287] The improvement to the value and profitability of all businesses in the OBEOD is fairly debatable, including Appellants' businesses.

Mr. Wilkes testified that the OBEOD's restrictions on selling CBD consumables, smoke shops and tobacco stores and sexually oriented merchandise gave his competitors outside the OBEOD an unfair advantage. He claimed his beachwear stores could not compete and would go out of business. The only evidence offered by Mr. Wilkes was his own unsupported speculation. [R284-297]

2. Interference with reasonable investment-backed expectations.

A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.' *Dunes W. Golf Club, LLC v. Town of Mount Pleasant,* 401 S.C. 280, 319, 737 S.E.2d 601, 622 (2013). As stated above, Appellants' beachwear stores sell a large variety of items. Their primary witness Tim Wilkes testified: "We were like Walmart, sell an array of things, whatever the market is looking for." [R284] Appellants' investment backed expectations are nothing more than unilateral expectations or abstract needs to sell whatever the marketplace is looking for at any given time. Appellants have not proffered any evidence of structural changes or other similar long term investments to market the items restricted in the OBEOD. Appellants' expectations do not satisfy the requirements for reasonable investment backed expectations. *Id.*

3. The character of the governmental action.

The "common touchstone" of each regulatory taking theory is "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). However, the United States Supreme Court repeatedly has declined to identify a specific threshold of interference with property rights below which no taking occurs and above which there is a taking. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency,* 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) (holding that determining whether a regulatory taking has occurred is not best served by categorical rules but rather "requires careful examination and weighing of all the relevant circumstances").

In a wide variety of contexts, a government may execute laws or programs that adversely affect recognized economic values. *Dunes W. Golf Club, LLC v. Town of Mount Pleasant,* 401 S.C. 280, 314–15, 737 S.E.2d 601, 619 (2013) Not all damages suffered by a private property owner at the hands of [a] governmental agency are compensable.' *Carolina Chloride, Inc. v. Richland Cty.,* 394 S.C. 154, 170, 714 S.E.2d 869, 877 (2011). Under 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 Coal Ass'n v. DeBenedictis, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987)*. "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." *Id.*

The City's governmental action in the present case was to enact a zoning ordinance that restricted certain commercial uses in an overlay district known as the OBEOD to improve the area for families and children and to improve the area's image as a family friendly district. After the City enacted the ordinances the restricted uses in the OBEOD became nonconforming uses which were amortized instead being grandfathered.[1]

The City did not take or confiscate Appellants' products. Appellants retained the rights to sell or otherwise dispose of those products outside the OBEOD. The City contends that balanced against the legitimate public purposes of the OBEOD zoning ordinance, the impact of the rezoning is not the functional equivalent of a physical taking of Appellants' property. See *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 125 S. Ct.

[1] The reasonableness of the amortization period will be addressed later in this brief.

2074, 161 L. Ed. 2d 876 (2005); *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 318, 737 S.E.2d 601, 621 (2013).

Appellants cite *City of San Antonio v. El Dorado Amusement Co.*, 195 S.W.3d 238 (Tex. App. 2006) for its authority that the OBEOD constitutes an unconstitutional taking. That case can be distinguished from the present case on the facts. El Dorado had an eighteen-year historical use as a bar before the regulatory change occurred prohibiting the sale of alcohol for consumption on or off the premises. While Appellants claim they have been in business for 30 years as beachwear stores, unlike a bar, they also sell multiple items like a Walmart. [R287] The introduction of the restricted products, especially vape pipes or CBD consumables like Delta 8, 9 or 10, appear to be a recent phenomenon in the retail marketplace.

The property owner in El Dorado claimed the City's regulatory action denied him all economically viable uses of his property. *Park v. City of San Antonio,* 230 S.W.3d 860, 870 (Tex. App. 2007). In the present case, the Appellants claim through speculation that the OBEOD ordinance will unfairly prevent them from competing with other beachwear stores outside the OBEOD. Appellants cannot claim the City's regulatory action will deny them all economically viable uses of their property.

E. The OBEOD ordinance is rationally based.

Appellants claim the increased potential for CBD consumables and tobacco sales to minors, greater opportunity for the sale of illegal drug paraphernalia that is marketed as tobacco paraphernalia, and heightened risk of negative aesthetic impacts, blight, and loss of property values of residential neighborhoods and businesses in close proximity to such uses is not a rational basis for enacting the OBEOD ordinance. See *§1807 A.*

Purpose and Intent. Appellants' make the same claim for the sale of sexually oriented merchandise. The City respectfully disagrees. See *Centaur, Inc. v. Richland County,* 301 S.C. 374, 392 S.E.2d 165 (1990) (sexually oriented merchandise); Also see *S.C. Code Ann. § 44-53-*391(drug paraphernalia).

The City further contends that preserving a historic area is recognized as a valid zoning purpose. See 2 *Rathkopf's The Law of Zoning and Planning § 19:14* (4th ed.) (Evolution with zoning regulation); *Powell v. City of Houston*, 64 Tex. Sup. Ct. J. 1209, 2021 WL 2273976 (Tex. 2021) ("historic-preservation ordinances do not necessarily constitute zoning, though we recognize that such ordinances can amount to zoning if they share the common features of zoning"); Also see *Historic Charleston Found. v. City of Charleston,* 400 S.C. 181, 734 S.E.2d 306 (2012) (Hearn, J, Dissent). The City contends that the OBEOD ordinance furthers the City's purpose of reestablishing family friendly entertainment and retail land use in its historic downtown area of the City.

Appellants claimed their nonconforming uses should be grandfathered and not terminated. The City disagrees and contends it is permitted by statute to provide for the termination of a nonconformity by specifying the period or periods in which the nonconformity is required to cease or be brought into conformance, or by providing a formula where the compulsory termination of nonconformities may be so fixed as to allow for the recovery or amortization of the investment in the nonconformity. *S.C. Code Ann. § 6-29-730.* Reasonableness is determined by "[b]alancing the public gain against the private loss ..." The burden is upon the Appellants to prove the unreasonableness. *Bugsy's, Inc. v. City of Myrtle Beach,* 340 S.C. 87, 97–98, 530 S.E.2d 890, 895 (2000). Appellants in the present case have not met their burden of proof. *Id.* The City contends

that the public's gain as stated in the OBEOD ordinance's purpose and intent far outweighs the Appellants' unproven and speculative private losses.

Appellants requested a variance to allow them to be exempted from the OBEOD ordinance's regulation of the uses they wished to continue. Appellants' request for a variance was properly denied by the BZA. See *S.C. Code Ann. § 6-29-800(A) (2) (d) (i)* (BZA may not grant a variance, the effect of which would be to allow the establishment of a use not otherwise permitted in a zoning district).

F. The established public safety effect of the OBEOD ordinance.

The public safety effect of the OBEOD ordinance is shown in the purpose and intent section of the OBEOD ordinance. *§1807 Section A. purpose and intent.* The burden of proving the invalidity of a zoning ordinance by extrinsic evidence 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. v. City of Sumter,* 332 S.C. 45, 52, 504 S.E.2d 112, 116 (1998).

Appellants' claim that the City did not offer any evidence that the banned products affect public safety resonates in the City's favor. Appellants have the burden of proving that City's intent to protect public safety is not furthered by the OBEOD ordinance. *McMaster v. Columbia Bd. of Zoning Appeals,* 395 S.C. 499, 504–05, 719 S.E.2d 660, 662–63 (2011). Appellants did not offer any evidence to show how the OBEOD ordinance would affect public safety.

The City contends the purpose and intent provisions of the OBEOD ordinance demonstrate the public safety impact. Further, the positive public safety impact of regulating CBD consumables, preventing tobacco sales to minors, regulating greater

opportunities for the sale of illegal drug paraphernalia that is marketed as tobacco paraphernalia in a zoning district that is intended to attract children should be self-evident. See *2 Rathkopf's The Law of Zoning and Planning § 26:4 (4th ed.).* Local concerns with respect to some commercial recreational uses may involve fear of young persons being exposed to lewd language and behavior, gambling, and illicit drugs, to concerns about truancy, juvenile delinquency, and the lack of frugality thought to be associated with such uses. Courts have long recognized that, while the custody and care of children reside primarily with parents, the state has both the constitutional power to regulate and an independent interest in protecting the welfare of children. *Id.* Also see *Ginsberg v. State of N. Y.*, 390 U.S. 629, 639–40, 88 S. Ct. 1274, 20 L. Ed. 2d 195, 1 Media L. Rep. (BNA) 1424 (1968). This issue often arises in connection with age restrictions and special locational requirements. *Id.*

G. Appellants' sexually oriented merchandise challenge fails.

Responding to Appellants' First Amendment challenge, the threshold inquiries are whether the City had the authority to adopt the OBEOD ordinance and whether it did so to address a substantial government interest. The City contends it is well within the constitutional power of a municipality to adopt zoning regulations that limit the areas in which adult entertainment enterprises may operate. See *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *D.G. Rest. Corp. v. City of Myrtle Beach*, 953 F.2d 140, 145 (4th Cir. 1991); *Centaur, Inc. v. Richland County,* 301 S.C. 374, 392 S.E.2d 165 (1990).

Appellants claim that the section of the OBEOD ordinance that addresses sexually oriented merchandise is unconstitutional because it does not provide for a time sensitive

hearing on what constitutes sexually oriented merchandise. Appellants cite *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) for their authority. The City contends *FW/PBS, Inc. v. City of Dallas, supra,* is not applicable to the present case. That case addresses an adult business licensing ordinance and whether the amount of time allowed between the application for a license and the issuance of that license is reasonable. The present case involves a zoning ordinance which prohibits the sale of sexually oriented merchandise in the OBEOD. In connection with time sensitivity, the OBEOD ordinance is the same as any other valid zoning ordinance regulating adult businesses.

The question of what constitutes sexually oriented merchandise is spelled out in the text of the ordinance. Sexually oriented merchandise is defined in the OBEOD ordinance as follows:

> SEXUALLY ORIENTED MERCHANDISE. Any merchandise which graphically or by symbol or symbols depicts, describes, portrays, pictures by way of realistic, naturalistic or cartoonish representation human or animal sexual activities or specified anatomical parts. This shall include any depiction or description, by pictorial representation or language, of any sexual intercourse; masturbation; sadomasochistic abuse; sexual penetration with an inanimate object; sodomy; bestiality; uncovered genitals, buttocks, or female breast; defecation or urination; covered genitals in an obvious state of sexual stimulation or arousal; or the fondling or other erotic touching of genitals, the pubic region, buttocks or female breasts, or merchandise of that subject. *§1807 Code of Ordinances.*

Appellants claim the sexually oriented merchandise definition in the OBEOD ordinance is void for vagueness. Statutory provisions are unconstitutionally vague if they fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The void for vagueness question is a legal question that is determined by the

actual language contained in the ordinance. See *Williams v. City of Columbia,* 906 F.2d 994, 998 (4th Cir.1990); *Henry v. Jefferson Cty. Plan. Comm'n,* 215 F.3d 1318 (4th Cir. 2000).

In addressing Appellants' vagueness challenge, the Court must determine whether the challenged portions of the Zoning Ordinance are sufficiently clear "to 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,' and to 'provide explicit standards for those who apply them.' Appellate courts have previously opined that the amount of discretion afforded a zoning board in determining whether a particular land use is permissible is exceptionally high because zoning is an inherently discretionary system. See *Gardner v. City of Baltimore Mayor & City Council,* 969 F.2d 63, 67 (4th Cir.1992) (recognizing that land-use decisions are a core function of local government and that subdivision control is an inherently discretionary system). The City contends the OBEOD's ordinance definition of sexually oriented merchandise is valid because it provides people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits and the ordinance provides explicit standards for those who apply them. *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150 (10th Cir. 2006); *24 No. 12 McQuillin Mun. Law Rep. 4.* The City contends the OBEOD ordinance's definition of sexually oriented merchandise meets the court's requirements.

The City disputes Appellants' claim that the zoning administrator was unable to articulate what constituted sexually oriented merchandise. In the zoning administrator's deposition testimony on enforcement of the OBEOD ordinance, he testified that he enforced the ordinance as written. [R180-181] The City contends his answer is self-explanatory.

Appellants cite *Rosenberger v. Rector & Visitors of Univ. of Virginia,* 515 U.S. 819, 819, 115 S. Ct. 2510, 2512, 132 L. Ed. 2d 700 (1995) in support of their claims that the OBEOD violates the First Amendment because it discriminates against Appellant's viewpoint. *Rosenberger* is not applicable in the present case. That case involved the refusal of a college to fund a newspaper because it disagreed with the newspaper's viewpoint. The present case involves a zoning ordinance that limits the areas in which adult entertainment enterprises may operate. As stated above it is well within the constitutional power of a municipality to adopt zoning regulations that limit the areas in which adult entertainment enterprises may operate. See *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

The OBEOD ordinance does not prohibit sexually oriented merchandise throughout the City. The City contends its OBEOD ordinance is a necessary part of its reasonable time, place, and manner regulation of sexually oriented merchandise in its tourism economy. See *D.G. Rest. Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991)

H. Appellants' amortization time is reasonable.

First reading of the OBEOD ordinance occurred on May 9, 2017. The ordinance was enacted on August 14, 2018. The amortization period ended December 31, 2018. By agreement, the City allowed Appellants to continue selling the restricted products until the validity of the ordinance is finally determined. The City contends that the Appellants have had reasonable time to recoup any investments they made in their inventory of commercial products restricted by the OBEOD ordinance.

The amortization of the restricted uses in the OBEOD was first noticed on May 8, 2017 in the first reading of the ordinance. The amortization period from the second reading of the OBEOD ordinance was over four and one half months. The City contends that under the pending ordinance doctrine Appellants had at least twenty months' notice of the amortization provisions of the OBEOD ordinance. *Sherman v. Reavis,* 273 S.C. 542, 257 S.E.2d 735 (1979). Even if the Court did not consider actual period from the notice in the first reading of the OBEOD ordinance or the actual amortization period after final enactment together with the stay extension by agreement, the City contends the amortization period is reasonable. See *Northend Cinema, Inc. v. City of Seattle* (1978), 90 Wash.2d 709, 585 P.2d 1153 (upheld ordinance providing a 90–day amortization period for preexisting nonconforming adult theaters); *Hart Book Stores, Inc. v. Edmisten* (4th Cir.1979), 612 F.2d 821 (upheld ordinance providing a six-month amortization period with a discretionary extension of time, for preexisting nonconforming adult businesses).

An amortization provision is valid if reasonable. *Centaur, Inc. v. Richland County,* 301 S.C. 374, 392 S.E.2d 165 (1990). Reasonableness is determined by "[b]alancing the public gain against the private loss ..." *Id.* The burden is upon Appellants to prove the unreasonableness of the amortization period. An amortization period is presumed valid unless the Appellants demonstrate their loss outweighs the public gain. *Bugsy's, Inc. v. City of Myrtle Beach,* 340 S.C. 87, 97–98, 530 S.E.2d 890, 895 (2000). Appellants have not presented any clear or convincing evidence that they have suffered actual economic loss because of the length of the amortization period provided in the OBEOD ordinance.

I. Zoning regulation of products allowed in South Carolina.

Article VIII, § 14(5), of the South Carolina Constitution requires statewide uniformity of general law provisions regarding criminal laws and the penalties and sanctions for the transgression thereof. Accordingly, local governments may not criminalize conduct that is legal under a statewide criminal law. *Connor v. Town of Hilton Head Island,* 314 S.C. 251, 442 S.E.2d 608 (1994) *Martin v. Condon,* 324 S.C. 183, 478 S.E.2d 272, 274 (1996). Although the City's zoning ordinance provides criminal penalties for violation of its zoning ordinances, it does not criminalize the sale of the restricted products in the OBEOD. The City's criminal penalties are limited to violations of the City's zoning ordinance. *S.C. Code Ann. § 6-29-950* (A violation of any ordinance adopted pursuant to the provisions of this chapter is a misdemeanor). Also See *Bugsy's, Inc. v. City of Myrtle Beach*, 340 S.C. 87, 90–98, 530 S.E.2d 890, 891–95 (2000) (zoning ordinance did not improperly criminalize operation of video poker machines). So long as businesses comply with the requirements of the City's zoning ordinances, they may operate their businesses in the OBEOD. *Id.*

J. Appellants' procedural challenge to enactment of OBEOD ordinance is time barred and factually inaccurate.

Appellants claim the enactment of the OBEOD ordinance does not comply with the legislative intent and readings requirements of S.C. Code Ann. §5-7-270 . The City contends Appellants' §5-7-270 noncompliance claim is time barred. *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 on other grounds, 387 S.C. 223, 692 S.E.2d 499 (2010). S.C. Code §6–29–760(D) of the South Carolina Code (2004) provides:

> No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether enacted before or after the effective date of this section, may be made sixty days after the decision of the governing body if

> there has been substantial compliance with the notice requirement of this section or with established procedures of the governing authority or the planning commission.

The OBEOD ordinance was enacted by second reading on August 14, 2018. The City contends that Appellants first challenged the validity of the ordinance on January 2, 2019, by filing a lawsuit in U.S. District Court. The City contends Appellants' procedural challenge to the ordinance on the grounds that that it did not comply with the spirit of the two reading requirement found in S.C. Code Ann. §5-7-270 is time barred. S.C. Code §6–29–760(D); *Quail Hill, LLC v. Cty. of Richland*, 379 S.C. 314, 320–21.

Even if Appellants' challenge was not time barred, the City contends the OBEOD received two readings as required by S.C. Code Ann. §5-7-270. Appellants claim that the OBEOD ordinance was so substantially amended between first reading and the second reading, that the ordinance did not receive the required two readings. The City disagrees.

Amendments can be made during passage of an ordinance where the amendment is not one changing the original purpose. *§ 16:86. Generally, 5 McQuillin Mun. Corp. § 16:86 (3d ed.)*; Also see *Neumont v. State,* 967 So. 2d 822, 831 (Fla. 2007); *Hourglass Lounge, Inc. v. City of Johnson City*, 879 S.W.2d 860 (Tenn. Ct. App. 1994). (In a case where the amendment to a proposed ordinance prohibiting public sexual performances deleted reference to the term "food" and inserted a reference to the term "wine," the ordinance was not substantially affected and did not require three readings of the amended version). The original stated general purpose of the OBEOD ordinance to create a family friendly district with restricted commercial uses did not materially change between readings because specific clarifications and additions were made in the ordinance to the list of restricted products. *Id.*

K. The city did not engage in spot zoning in the OBEOD.

In *Talbot v. Myrtle Beach Board of Adjustment*, 222 S.C. 165, 72 S.E.2d 66 (1952), this Court stated that where an ordinance establishes a small area within the limits of a zone in which are permitted uses different from or inconsistent with those permitted within the larger area, such "spot zoning" is invalid where the ordinance does not form a part of a comprehensive plan of zoning or is for mere private gain as distinguished from the good of the common welfare. With respect to judicial review of spot zoning issues, the Court cautioned in *Talbot* that "Courts cannot become city planners but can only correct injustices when they are clearly shown to result from the municipal action." *Id.*

The Circuit Court found the OBEOD ordinance created an overlay zoning district named the Ocean Boulevard Entertainment District (OBEOD) for most of the original historic downtown area of the City. [R1, R15] It encompasses two amusement zoning districts, a mixed use high density district, and a downtown commercial district. The OBEOD is not a small area within the limits of a single zoning district. It includes several different zoning districts. The OBED is approximately twenty-two city blocks wide and approximately 5 city blocks deep. The OBEOD area and the uses regulated by the OBEOD ordinance were anticipated in the City's 2011 Comprehensive General Plan and they are consistent with it. The physical characteristics of OBEOD together with the City's wide discretion in such matters defeat Appellants' claim that the OBEOD is invalid because of spot zoning. See *Historic Charleston Found. v. City of Charleston*, 400 S.C. 181, 734 S.E.2d 306 (2012).

Appellant cites the Florida case of *Debes v. City of Key W.*, 690 So. 2d 700 (Fla. Dist. Ct. App. 1997) and its progeny to support their claim that OBEOD ordinance is

reverse spot zoning. Those cases are distinguishable on their facts. Those cases address zoning change requests by property owners in small areas after the business uses of the property in surrounding areas had changed. Further, those cases appear to be at odds with existing South Carolina law which cautions courts against becoming city planners and substituting their judgment for the judgment of legislative bodies. *Talbot v. Myrtle Beach Board of Adjustment*, 222 S.C. 165, 72 S.E.2d 66 (1952); *Hampton v. Richland County*, 292 S.C. at 503, 357 S.E.2d at 465 (Ct.App.1987)(Courts have no prerogative to pass upon the wisdom of the municipality's decision unless such decision is "so unreasonable as to impair or destroy citizen's constitutional rights.")

CONCLUSION

For the forgoing reasons, Respondent City of Myrtle Beach respectfully requests that the order of the Circuit Court Judge Hon. Benjamin H. Culbertson be affirmed and that the appeal be dismissed.

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