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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Civil Action No. 2019-CP-10-06628
Appellate Case No. 2022-000020

Braden's Folly, LLC, ...Respondent,

v.

City of Folly Beach, ...Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

In 2006/2007, Braden's Folly invested over a million dollars building two single-family homes on adjacent lots on Folly Beach. The City approved and permitted this construction. Each home and lot were separately devisable for more than a decade and similarly developed lots were sold to separate owners. In 2019, the City changed its municipal code and declared both lots merged into one, thereby preventing Braden's Folly from accepting a significant offer for one of the houses. Does removing the right of alienation for a developed property amount to a regulatory taking under Penn Central?

STATEMENT OF FACTS

This is an inverse condemnation action involving the enforcement by the City of Folly Beach (the "City") of its lot merger ordinance on two developed, single-family residential properties owned by Braden's Folly, LLC ("Braden's Folly"). The subject properties are located on Folly Beach at 1681-A and 1681-B East Ashley Avenue (respectively, "Lot A" and "Lot B," and collectively, the "Properties"). See Updated PLS Survey, attached to Ex. A of Pl.'s Memorandum of May 13, 2021. Braden's Folly developed the Properties in reliance on a regulatory scheme that did not include a merger ordinance. Braden Affidavit ¶ 4. Appellant fully permitted Braden's Folly's development. Id. Then, over a decade later, Appellant passed a merger ordinance and declared the Properties merged into one lot. Id. ¶ 7. This regulatory action has taken away Braden's Folly's fundamental legal right to independently own and sell each property.

The undisputed material facts in the record are as follows:

In 1980, Margaret Braden, following the death of her husband and her retirement from teaching, purchased the Properties and moved to Folly Beach. Braden Aff. ¶ 2; Braden Letter, attached as Ex. 8 to Def.'s Memorandum of May 5, 2021. At that time, there was a modest house

on Lot A with no phone, television, or air conditioning, and Lot B was undeveloped. Braden Aff. ¶ 2; Braden Letter. Following her passing in 1999, Mrs. Braden's sons, Mark and Frank Braden (the "Bradens"), inherited the Properties. Braden Aff. ¶ 2. That year, the Bradens transferred the Properties to Braden's Folly, a limited liability company they created to simplify and safeguard their joint ownership of the Properties. Id. Notably, if the Bradens had simply created two LLCs, one named Braden's Folly-A and the other named Braden's Folly-B, then the merger ordinance would not apply to the Properties.

In 2006, the Bradens received an unsolicited offer to purchase the Properties, which surprised them because they had never listed the Properties for sale. Braden Letter. At that time, new beachfront houses were being built on multiple, adjacent lots like the Properties. Old single-story houses like theirs were being demolished, and large two-story houses were being constructed on both A and B-lots alike. Braden Aff. ¶ 3; Braden Letter. After discussing their options with the family's longtime property manager, instead of selling one or both lots, the Bradens decided to build a new house on each lot and then sell one of the developed lots to help pay for construction costs. Braden Aff. ¶ 3; Supp. Braden Aff. ¶ 1; Braden Letter.

Between 2006 and 2007, the Bradens spent approximately $1,100,000 constructing new two-story, four-bedroom, single-family houses on the lots. Braden Aff. ¶ 4; Supp. Braden Aff. ¶ 3. The City reviewed and approved the development project—including demolition, construction, utilities, easements, and zoning—and separately issued building and residential permits for each property. Braden Aff. ¶ 4; Permits and Approvals, attached as Exs. 2 through 8 to Braden Aff. Both Lot A and Lot B were nonconforming, developable lots, and the Properties were developed in reliance on and in compliance with then-existing City code. Pope Aff. ¶¶ 26-27; Braden Aff. ¶

4. At the time of development, Appellant's lot merger ordinance did not exist, and Braden's Folly had the undisputed legal right to separately sell either lot.

The Great Recession and housing market collapse of 2007-2008 followed shortly after the houses were constructed. Supp. Braden Aff. ¶ 3. As selling was no longer financially feasible, the Bradens put their plans to sell on indefinite hold. Supp. Braden Aff. ¶ 3; Braden 30(b)(6) Dep. 179:3-21. While the real estate market recovered, the Bradens rented out and vacationed at the Properties. Supp. Braden Aff. ¶ 4. At best, their rental profits have been modest due to property management fees, taxes, insurance, and various other home ownership costs. Id.; Braden 30(b)(6) Dep. 213:18-214:14. For example, annual insurance costs alone average around $20,000 per house, and even after the City declared them merged, the Properties have continued to be taxed separately. Supp. Braden Aff. ¶ 4; Tax Records, attached as Exs. 17 and 18 to Braden Aff. The taxes for each property are around $15,000-$18,000 per year, with the City receiving approximately 15% from each property's annual tax bill. Tax Records.

In 2018, the Bradens decided it was time to sell one of the lots, and separately listed both Lot A and Lot B for sale. Supp. Braden Aff. ¶ 5. Their plan remained to sell whichever one received the best offer and keep the other house for the family. Id. In Spring 2019, while the Bradens' agent was working with a prospective purchaser for Lot A, the City passed its ordinance merging the Properties. Id. ¶ 6; Braden Aff. ¶ 7. One month later, the City wrote to the Bradens informing them that, pursuant to the ordinance, the Properties could not be separately sold. Letter from Joseph C. Wilson, IV, Esq. to Braden's Folly, attached as Ex. 10 to Braden Aff. This lawsuit followed.

After this case was filed, Braden's Folly received several additional offers to purchase the Properties. Supp. Braden Aff. ¶¶ 7-9. Braden's Folly was not attempting to sell in violation of the ordinance, but their real estate agent had left the pre-litigation listings as active in the MLS Listing

Service. Id. This led to the City demanding that Braden's Folly remove the listings of the Properties. Id. Braden's Folly complied, and the Properties remain off the market pending the resolution of this lawsuit. Id. To its significant financial detriment, Braden's Folly is missing out on "an extraordinary seller's market - the best one that Folly Beach has ever seen." Id. at ¶ 13.

In determining the fair market value of the Properties, the only evidence in the record identifying the Properties' market value before and after application of the ordinance is found in the appraisal report prepared by Christopher D. Donato, MAI. Donato Report attached as Ex. 15 to Braden Aff. Mr. Donato found a market value of $1,335,000 for Lot A and $1,350,000 for Lot B, thereby identifying a combined market value of $2,685,000 if both lots were sold separately. Id. at iii, 64. On the other hand, if being sold together in a single transaction to one buyer, Mr. Donato found a market value of $2,177,000, which amounts to a price differential of $508,000. Id.

The City's merger ordinance is an automatic provision that applies to undeveloped and developed properties alike, with no exemptions or options for variances or hardship waivers. Folly Beach Code of Ordinances, § 168.04.01(B) (combining two or more nonconforming lots of record in common ownership into a single lot without exception); Pope Dep. 27:1-12. The City previously enacted a merger ordinance in 2010 (after the Properties were developed) that only applied to lots that shared "continuous frontage." Because the Properties do not share continuous frontage, that ordinance did not apply. Apparently, the City never enforced the original ordinance on *any* properties. Pope Dep. 22:20-24. When the City amended its ordinance in April 2019 it changed the phrase continuous frontage to "contiguous" lots. Am. Ordinance, attached as Ex. 11 to Braden Aff. One month later, in May 2019, the City sent its letter to Braden's Folly declaring the *contiguous* Properties merged under the amended ordinance. Letter, Ex. 10 to Braden Aff.

Approximately sixty-two beach lots have now been merged under the amended ordinance.[1] Supp. Pope Aff. ¶ 5. The vast majority of these merged lots have one house on one lot while the other lot is undeveloped, or both lots are simply undeveloped. See Merger Chart, attached as Ex. A to Supp. Pope Aff. Eleven of the lots are entirely underwater. Id. Appellant did not attempt to determine how many lots, whether developed or undeveloped, would be merged by its ordinance. Pope Dep. 26:12-25; Wetmore Dep. 43:9-15. Instead, Appellant automatically merged all lots regardless of whether the lots were undeveloped, semi-developed, or fully developed. According to the City, *only five landowners* have two developed beach lots being merged by the ordinance, one of whom is Braden's Folly. See Merger Chart. The A-lots and the B-lots neighboring the Properties are all developed, legally nonconforming lots, with two-story, single-family residential houses on each "A" and "B" lot. See Supp. Braden Aff. ¶ 1; Braden Letter. However, these neighboring lots have not been merged because they are not held in common ownership. See Merger Chart; Braden Letter. Again, if the Bradens had simply created two separate holding companies for the Properties, such as Braden's Folly-A and Braden's Folly-B, then the Properties would be treated just like these neighboring properties and would not have been merged by the ordinance.

STANDARD OF REVIEW

When reviewing a circuit court's order from a motion for summary judgment, appellate courts sit in the same position as the circuit court. Turner v. Milliman, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). When the parties file cross-motions for summary judgment, the issue

[1] Additionally, in December 2020, a year after this lawsuit was initiated, the City amended its merger ordinance again by adding language restricting its application to lots adjacent to either the OCRM Critical Line or Baseline, i.e., near the beach or the marsh. See Ordinance 24-20, attached as Ex. 19 to Braden Aff. This new language did not change the ordinance's applicability to the Properties, and likewise does not affect the takings analysis in this case.

becomes a question of law for the Court to decide de novo. Wiegand v. U.S. Auto. Ass'n, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). Additionally, the interpretation of an ordinance is a question of law for the Court to review de novo. DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce, 423 S.C. 295, 300, 814 S.E.2d 513, 516 (2018).

ARGUMENT

I. SUMMARY OF ARGUMENT
(Response to Appellant's Section I)

Braden's Folly built two single-family houses on two separate lots. The City permitted and approved this development. Over a decade later, the City changed its municipal code and involuntarily merged the Properties into one lot with two houses. This governmental action amounts to a regulatory taking because it directly interferes with the reasonable investment-backed expectations of Braden's Folly to separately sell one of the houses. In addition, the ordinance has caused significant financial damages to Braden's Folly by preventing it from accepting an offer of $1,100,000 for Lot A in August of 2019 and by causing the Properties' collective market value to be diminished by over a half million dollars. Furthermore, the ordinance disproportionately burdens Braden's Folly as, out of all the landowners on Folly Beach, only Braden's Folly and four other landowners have two developed lots being retroactively merged into one lot. When applying the Penn Central balancing test, the factors weigh in Braden's Folly's favor. Thus, the circuit court properly determined that the City's ordinance as applied to the Properties amounts to a taking.

Contrary to the City's contentions, the circuit court did not strike down the ordinance in its entirety, nor will the court's ruling revolutionize zoning law. App. Br. 21-22, 38. Instead, the circuit court issued a narrow ruling that only applies to Braden's Folly and potentially four other owners of two-developed lots. Order 12 FTN 7. The City also mischaracterizes various facts—such as identifying the Properties' gross rental income without accounting for property

management fees and expenses, taxes, and insurance, (compare App. Br. 20, 27, 42 with Supp. Braden Aff. ¶ 4; Braden 30(b)(6) Dep. 197:2-6, 213:10-215:6); and referring to a $2,550,000 offer as "unconditional" when it had contingencies such as bank appraisal and financing and was later reduced to $2,000,000. Compare App. Br. 10, 39 with Bonner Jan. 10 Offer ¶¶ 7, 10, attached as Ex. 44 to Def.'s Supp. Memorandum; Bonner Feb. 1 Offer, attached as Ex. H to Pl.'s Supp. Memorandum.

Finally, the City's reliance on Murr v. Wisconsin, —U.S.—, 137 S.Ct. 1933 (2017), and Quinn v. Board of County Commissioners of Queen Anne's County, Maryland, 862 F.3d 433 (4th Cir. 2017), is misplaced. These cases do not hold that all lot mergers are valid. App. Br. 12, 23, 28-29. While the circumstances in Murr and Quinn may not have constituted a taking, the facts in this case do amount to a regulatory taking under Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

II. THE CIRCUIT COURT PROPERLY APPLIED THE PENN CENTRAL BALANCING TEST IN DETERMINING THAT A TAKING OCCURRED. (Response to Appellant's Section II)

The Takings Clause of the Fifth Amendment establishes that government cannot take private property for public use without providing just compensation. U.S. Const. amend V; Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005) ("Both the United States Constitution and the South Carolina Constitution provide that if the government takes private property for public use, then it must compensate the owner for the value."). The Takings Clause does not prevent or limit governmental interference with property rights, but instead secures compensation for the property owner if the governmental interference goes too far. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536-37 (2005) (citations omitted). Government takings can be direct, through an eminent domain proceeding, or indirect, through an "inverse condemnation."

Byrd, 365 S.C. at 656, 620 S.E.2d at 79. An inverse condemnation may result from the government's physical appropriation of private property, or it may result from government-imposed limitations on the use of private property," which is otherwise known as a regulatory taking. Id.

In this case, the ordinance as applied to the Properties amounts to a regulatory taking. To prove a regulatory taking, a claimant must show (1) affirmative conduct by the governmental entity and (2) a taking. Kiriakides v. Sch. Dist. of Greenville Cnty., 382 S.C. 8, 14, 675 S.E.2d 439, 442 (2009) (citing Byrd, 365 S.C. at 657, 620 S.E.2d at 80). It is undisputed that there has been affirmative conduct by the governmental entity. The City took regulatory action by amending its merger ordinance in April 2019 and then enforcing it on the Properties in May 2019. Accordingly, the legal question here is whether a taking has occurred.

Since Braden's Folly has not asserted a categorial taking under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), the regulatory takings analysis in this matter is controlled by the seminal United States Supreme Court case of Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). E.g., Byrd, 365 S.C. at 658, 620 S.E.2d at 80; Kiriakides, 382 S.C. at 14, 675 S.E.2d at 442; Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 304, 737 S.E.2d 601, 614 (2013). In Penn Central, the owner of Grand Central Terminal in New York City wanted to build a fifty-story office building on top of the terminal. 438 U.S. at 116-17. Due to the building's designation as a landmark historic site, the owner's development plans were denied approval. Id. The owner filed suit asserting that denial amounted a taking under the Fifth Amendment. Id. at 119. The Court ruled in favor of the government, and in doing so set forth a framework for evaluating regulatory takings cases.

Under Penn Central, "[t]he general rule is that regulatory-takings cases require 'essentially ad hoc, factual inquiries,' balancing all relevant circumstances to determine whether the government has taken the property." Byrd, 365 S.C. at 658, 620 S.E.2d at 80 (quoting Penn Central, 438 U.S. at 124). The key factors in this framework are the economic impact on the claimant, with a particular focus on the extent to which the government has interfered with the claimant's investment-backed expectations, and the character of the government's action. Id. at 659, 620 S.E.2d at 80-81. The primary considerations are investment-backed expectations and economic impact, with the character of the government action serving as a secondary factor. Lingle, 554 U.S. at 538-40. "[T]he Penn Central inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." Id. at 540.

III. RESPONDENT HAS SUFFERED A REGULATORY TAKING BECAUSE THE PENN CENTRAL FACTORS WEIGH IN RESPONDENT'S FAVOR.

The Circuit Court properly determined that a regulatory taking has occurred as a balancing of the Penn Central factors weighs in Braden's Folly's favor. Braden's Folly developed the Properties in reliance on a regulatory scheme that did not include a merger ordinance, and now, over a decade later, the City has changed its rules and taken a fundamental property right away from Braden's Folly in direct contravention of Braden's Folly's reasonable investment-backed expectations and to Braden's Folly's financial detriment. Additionally, the regulatory burden of the ordinance is not spready evenly among the public and the ordinance does not secure an "advantage of reciprocity." As applied to the developed Properties, the City's ordinance goes "too far" and has the functional equivalency of a classic taking.

A. The Ordinance Interferes with Respondent's Reasonable Investment-Backed Expectations to Separately Sell One of the Properties.

(Response to Appellant's Section I, III, IV, and V)

A property owner's investment-backed expectations are defined at the time the investment is made. Columbia Venture, LLC v. Richland County, 413 S.C. 423, 449, 776 S.E.2d 900, 914 (2015) (citations omitted). In examining these expectations, the regulatory regime in place at the time of the investment shapes the reasonableness of the claimant's expectations. Id. This analysis should limit recoveries to property owners who can demonstrate that they invested in their property "in reliance on a state of affairs that did not include the challenged regulatory regime." Id. (quoting Cienega Gardens v. United States, 331 F.3d 1319, 1345-46 (Fed. Cir. 2003)). A reasonable investment-backed expectation must be more than a speculative hope or abstract need. Quinn v. Board of County Comm'rs, 862 F.3d 433, 442-43 (4th Cir. 2017). "The critical question is what a reasonable owner in the claimant's position should have anticipated." Columbia Venture, 413 S.C. at 449, 776 S.E.2d at 914 (quoting Chancellor Manor v. United States, 331 F.3d 891, 906 (Fed. Cir. 2003)).

Braden's Folly's investment-backed expectations were established in 2006/2007 when it spent approximately $1,100,000 to build separately marketable houses on each lot. The record clearly shows that, at the time of investment, Braden's Folly had the reasonable expectation and intent to separately own and sell the Properties. Supp. Braden Aff. ¶¶ 2-3; Braden 30(b)(6) Dep. 27:15-17, 49:4-10; 57:15-59:6, 67:23-68:6, 163:25-164:5, 179:3-8, 181:13-182:1 (testifying that Braden's Folly always planned to sell whichever house received the best offer to finance construction costs and keep the other house in the family). This ownership expectation was supported by the government's treatment of the Properties, as they have always been platted separately, they have different addresses, and they are taxed separately, with the City receiving approximately 15% from each property's annual tax bill even after enforcement of the ordinance. Tax Records, attached as Exs. 17 and 18 to Braden Aff.

In developing the Properties, Braden's Folly established cross-easements between the lots for sewer, beach, and road access. For example, the owner of Lot A has a right to access the beach via a crosswalk on Lot B. Creating these easements in 2006/2007 further shows that Braden's Folly treated the Properties separately, as cross-easements would not have been needed if Braden's Folly treated the Properties as just one lot. The City reviewed and approved this easement plan and the rest of Braden's Folly's development project. Braden's Folly invested accordingly. The applied ordinance now directly interferes with Braden's Folly's reasonable investment-backed expectation that it could later sell one of the developed Properties.

Moreover, Braden's Folly not only had the reasonable expectation to separately own and sell the Properties, but the legal right to do so at the time of investment. The City's ordinance takes away this fundamental property right. The Fourth Circuit has identified fundamental rights of ownership as having "the right to possess the property, exclude others from it, ***alienate the property*** and continue to use it for residential and recreational purposes." Esposito v. S.C. Coastal Council, 939 F.2d 165, 170 (4th Cir. 1991) (emphasis added) (finding a taking did not occur because the claimants retained the "fundamental incidents of ownership" including the right to sell or transfer their properties). The City attempts to avoid this by citing to Andrus v. Allard, 444 U.S. 51 (1979), where the loss of a single strand from the owner's bundle of rights was held not to be a taking. App. Brief 28-29. The Andrus case did not involve real property rights but instead involved a restriction on the sale of endangered bird feathers. While the opinion briefly cites Penn Central, it did not undertake any significant analysis of the claimant's investment-backed expectations. Furthermore, Andrus actually acknowledged, at least implicitly, that the denial of one property right *can sometimes* amount to a taking: "But the denial of one traditional property right does not ***always*** amount to a taking." Andrus, 444 U.S. at 65 (emphasis added); see also Youpee v. Babbitt,

67 F.3d 194, 200 (9th Cir. 1995) (finding a regulatory taking where the statute at issue "completely abolish[ed] one of the sticks in the bundle of rights . . . ."), aff'd, 519 U.S. 234 (1997).

The City next argues, without any evidentiary support, that using the Properties as short-term rentals was Braden's Folly's primary expectation. App. Br. 23, 34. The City claims that because it is not requiring Braden's Folly to tear down either house, there has been no interference with the use of the Properties since the houses can still be used for rentals or vacation homes. Id. at 19, 34, 45, 48. In support of this argument, the City cites to various takings cases that reference continued use as the owner's primary expectation. Id. at 33-34. However, these cases involved property owners who were attempting to develop or redevelop their properties *after* enactment of the at-issue regulations. For example, in Byrd, the owner wanted to rezone farmland from agricultural use to commercial use so that it could be sold to a developer. 365 S.C. at 654, 620 S.E.2d at 78. In Penn Central, the owner wanted to build a new office tower on top of Grand Central Terminal. 438 U.S. at 116. In Esposito, property owners challenged a set-back ordinance which prevented future development. 939 F.2d at 167-168. In Woodale Partnership v. City of Charleston, the owner challenged density restrictions on the development of over 700 acres of largely undeveloped land. No. 2:07-CV-2025-MBS, 2010 WL 11661368, at *1-2 (D.S.C. Sept. 17, 2010). In other words, the owners wanted to make new investments and change the nature of their properties after enactment of the regulation. Here, on the other hand, Braden's Folly is not seeking to develop or redevelop the Properties but rather to keep the rights and expectations it had at the time when it previously invested in the Properties, which clearly went beyond just using the Properties as rentals.

The City further argues it has not interfered with Braden's Folly's expectations because the use of the houses as dwellings is "grandfathered." App. Br. 19-20, 36-38. This is a red herring.

Whether the use of the dwellings from a zoning perspective is grandfathered is not at issue in this case. Lot merger ordinances deal with whether the ***separation*** of lots is grandfathered, not whether the "use" of lots is grandfathered. The National Association of Counties explains:

> The substandard lot problem . . . deals with whether the USE of a subdivision lot is "grandfathered." The "merger" problem, on the other hand, deals with whether the SEPARATION of that lot from adjoining property in common ownership, is "grandfathered."

Amicus Brief 34, attached as Ex. 32 to Def.'s Supplemental Memo of Sept. 8, 2021 (emphasis in original) (citations omitted).

In this case, while the use of the Properties as residential dwellings may be grandfathered from a zoning perspective, the separation of the Properties has not been grandfathered even though Braden's Folly developed the Properties before the ordinance was enacted. The City's definition of use is misleading, and it is not the proper standard to analyze Braden's Folly's expectations at the time it invested approximately $1,100,000 building two separate single-family residences on two separate lots. Because Braden's Folly had already separately developed both lots in reliance on the City's prior regulatory scheme, the City should have grandfathered the *separation* of its lots.

Additionally, the City asserts that when Margaret Braden purchased the lots, in 1980, she did not have any expectations to develop Lot B and therefore the "Braden family" has not suffered any interference with its expectation to have a separately marketable house on Lot B. See, e.g., App. Brief 7-8, 32, 35, 48. Mrs. Braden's expectations in 1980 are irrelevant. Braden's Folly's expectations are evaluated at the time it—not a predecessor-in-title family member—invested in the Properties. For example, in Murr v. Wisconsin, —U.S.—, 137 S.Ct. 1933, 1940-41, 49 (2017), the landowners' expectations were evaluated based on when they acquired and invested in the lots, not when their parents purchased the lots. The City omits this context when it inaccurately

conflates property *acquisition* dates with property *investment* dates in analyzing investment-backed expectations. App. Br. 31-32. Under Penn Central, the relevant timing is when the claimant invested in the property—whether purchasing it or developing it—and what regulatory scheme existed at that time. E.g., Columbia Venture, 413 S.C. at 449, 776 S.E.2d at 914.

Similarly, the City argues that Braden's Folly "made no investment in the lots, as they were donated to the entity." App. Br. 35 (referring to the Braden brothers inheriting the Properties then transferred them to a holding company). The City completely avoids the critical fact that Braden's Folly then spent $1,100,000 building separate houses on separate lots. The timing of that investment is what shapes the expectations-analysis in this case, not whether they were originally received as testamentary devises.

The City also criticizes Braden's Folly for not immediately listing the Properties for sale and not investing enough in the marketing of the Properties. Id. at 38-39. As explained, there was a recession, and it was untenable to sell as the housing market collapsed following construction of the houses. Regardless, the timing of when Braden's Folly chose to sell, and how it chose to market the Properties, is irrelevant. At the time Braden's Folly developed the Properties, it had not just a reasonable expectation but the legal right to separately sell each developed lot, and the interference with that expectation and right is what is at issue in this case.

Finally, the City incorrectly claims that separately selling the Properties was merely a contemplated use and that Braden's Folly only had a speculative or unilateral expectation to separately sell. Id. 38-40. First, Braden's Folly did not merely contemplate but did in fact separately list the Properties for sale prior to enactment of the 2019 ordinance. Second, and more importantly, the City's argument once again avoids the undisputed fact that Braden's Folly had the *legal right* to separately sell at the time of investment. An example of a speculative investment-

expectation is provided in Quinn v Board of County Commissioners, where the Fourth Circuit determined that a developer, who had purchased hundreds of vacant lots, did not have any reasonable investment-backed expectations to develop his lots because his development plans were contingent on the government later extending sewer service to the area. 862 F.3d 433, 442 (4th Cir. 2017). The court first found that the developer did not have a right to obtain sewer service. Id. at 439 ("The property owner must show more than a mere hope or expectation; he must, instead, have a legitimate claim of entitlement."). Then, in its Penn Central analysis, the court explained:

> Any hope of developing the land thus depended on receiving sewer service—a speculative proposition and one to which, as discussed above, Quinn had no entitlement. These types of speculative hopes—dependent on receiving a government service to which the plaintiff has no entitlement—are not the reasonable investment-backed expectations relevant to the Penn Central analysis.

Quinn, at 442-43. Here, at the time of investment, there was nothing speculative about Braden's Folly's expectations and legal right to separately own and sell the developed Properties. Braden's Folly is not a speculative developer like the claimant in Quinn; it had a legitimate entitlement that the City has now taken away.

In summary, the City reviewed and approved Braden's Folly's development project and issued separate building and residential permits for each property. In reliance on these approvals, Braden's Folly spent approximately $1,100,00 building separate houses on separate lots. Braden's Folly had not only the clear and objectively reasonable expectation to have two separate developed lots, but also the legal right to sell one house and keep the other when it invested in the Properties. Now, over a decade later, the City has declared the Properties merged, taken away Braden's Folly's legal rights, and directly interfered with Braden's Folly's reasonable investment-backed expectations.

B. The Ordinance Diminishes the Market Value of Respondent's Properties by Over a Half-Million Dollars.
(Response to Appellant's Sections I and VI)

The City's enforcement of its merger ordinance on the Properties has caused Braden's Folly to suffer financial damages. Beyond the lost $1,100,000 sale of Lot A to the Smiths in 2019, as well as the inability to sell either property over the last several years—a timeframe which the City acknowledged as the hottest real estate market in the history of Folly Beach (Def.'s Memorandum 49)—the City's marketability restriction has caused the Properties' market value to drop significantly.

Evaluating the economic impact on a claimant requires a comparison of economic value before and after the governmental action. Keystone Bituminious Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) ("[O]ur test for regulatory taking requires us to compare the value taken from the property with the value that remains in the property . . . ."). In his appraisal report, Christopher D. Donato, MAI, found a $508,000 differential in the market value of the lots sold separately compared to the market value if sold together to one buyer. Donato Report at iii, 64. Mr. Donato found a market value of $1,335,000 for Lot A and $1,350,000 for Lot B, which creates a gross potential sales price of $2,685,000 for both lots sold separately. Id. If both houses were sold together, however, Mr. Donato found a market value of $2,177,000. Thus, Braden's Folly has sustained a $508,000 market value loss due to a forced collective sale. Id.

The differential identified by Donato *is the only evidence in the record* comparing the market value of the Properties sold separately versus the Properties' market value if sold together. Instead of submitting its own appraisal numbers to the trial court, the City attempts to dismiss and recharacterize Mr. Donato's valuation as speculative loss of future profits. App. Br. 40. An appraisal report is not mere speculation; it is an expert's opinion of the fair market value of

property. In this case, it is the only evidence identifying the market value of the Properties before and after application of the ordinance.

The City also attempts to dismiss the over half-million-dollar diminution in value identified in the Donato Report as minimal. Id. The City references various cases with higher percentage reductions in value that did not amount to compensable takings. Id. 41-42. These cases, however, are simply representative of the basic premise that a diminution in value, *standing alone*, is insufficient to establish a taking. The City incorrectly references only the devaluation aspect of these cases without any examination of the underlying facts or any other Penn Central factor. Proper takings analysis disfavors formulaic rules and instead requires an inquiry into the particular circumstances of a case, Columbia Venture, 413 S.C. at 448, 776 S.E.2d at 91, and inquiry into the cases cited by the City reveals that they are inapplicable to the instant case. For example, Hadacheck v. Sebastian, 239 U.S. 394 (1915), was an annexation case involving the refusal of habeas corpus relief to a person convicted of violating an ordinance prohibiting brickmaking within a designated area. This case pre-dates modern takings jurisprudence and obviously does not involve application of the Penn Central factors. At that time, the Supreme Court's main tool for evaluating the constitutionality of a regulation was the doctrine of substantive due process, in which a zoning ordinance would be found valid unless it was clearly arbitrary or discriminatory and unrelated to the government's police powers. Now, however, the Supreme Court in Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540-41 (2005), has expressly recognized that a substantive due process analysis should not be applied to contemporary regulatory takings. Thus, Hadacheck is irrelevant to the case pending before this Court.

The City also cites to Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926), which involved the first passage of a zoning code in a Cleveland suburb where Amber Realty owned a

large undeveloped tract of land. This case was based on violations of due process and equal protection and involved a different analysis than Penn Central. The Supreme Court found that Ambler Realty offered no evidence that the ordinance affected the land's value and that its claims of loss were mere speculation. Id. at 385, 397. In the instant case, the Properties were already developed at the time the ordinance was enacted. In addition, Braden's Folly's loss is not speculative and is supported by the evidence set forth in the Donato appraisal report.

The City's reliance on Agins v. City of Tiburon, 447 U.S. 255 (1980), *abrogated by* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005), is also misplaced. In Agins, the landowners acquired five acres for residential development. Id. at 257. The municipality then adopted a zoning ordinance under which the landowners' unimproved property could only be developed with (up to five) single-family dwellings, accessory buildings, and open-space uses due to the new density restrictions. Id. However, because the landowners never sought approval for development, the issue of whether an as applied taking had occurred (as Braden's Folly claims here) was not ripe for decision. Id. at 260. Therefore, the only issue left was whether the zoning ordinance constituted a taking on its face and the Court held that it did not. Id. Of course, in the pending case, Braden's Folly received approval for the construction of two houses and then expended a significant sum in building those houses in reliance on that approval. The Supreme Court further noted that the landowners did not have a fundamental attribute of ownership taken away (instead they just may not be able to develop as densely as they would have liked), and there was no evidence indicating the burdens of the ordinance were disproportionately shared. Id. at 262. Here, Braden's Folly has lost the fundamental right to freely alienate its real property, and the regulatory burden of the ordinance is not evenly distributed.

The City further cites to Clayland Farm Enterprises, LLC v. Talbot County, 987 F.3d 346 (4th Cir. 2021), where the plaintiff challenged a development moratorium and regulations involving density that would prevent it from developing a six-lot subdivision. However, while the plaintiff had obtained approval for the subdivision in 1991, it took no further action to develop the property for years. Id. at 350. The Fourth Circuit found that a takings claim must be premised on a preexisting property right and the property owner, unlike Braden's Folly here, had no preexisting development right as it had never obtained a permit, begun construction, or taken *any* action in furtherance of the development approval obtained more than 20 years prior. Id. at 354-55. As already noted, Braden's Folly obtained its permits and completed construction years before the City enacted the 2019 merger ordinance. At that time, Braden's Folly had the undisputed legal right to independently own and sell each developed lot. Thus, its takings claim is premised on a preexisting property right.

Similarly, Pulte Home Corp. v. Montgomery County, 909 F.3d 685 (4th Cir. 2018), can be distinguished because the regulation applied to undeveloped land, unlike the developed land here. In Pulte, the developer had purchased undeveloped land that did not have water and sewer at the time of purchase. The existing zoning master plan informed the developer that there was no guarantee that "the land would maintain its existing zoning classification or that a water and sewer change application would be granted." Id. at 696. The Fourth Circuit found that the developer had only a speculative hope rather than a "legally cognizable" expectation. Id. Braden's Folly's preexisting property rights were, of course, not speculative.

In Tennessee Scrap Recyclers Ass'n v. Bredesen, 556 F.3d 442 (6th Cir. 2009), the court considered a challenge to a law requiring scrap metal dealers to "tag and hold" scrap metal for ten days. The court found that: (1) the scrap dealers failed to show that the holding period would

decrease the value of the scrap metal; and (2) the dealers' investment-backed expectations were "generalized and vague, involving the general health of their business rather than specific property, development plans, or figures as to their property's likely diminution of value." Id. at 456. Clearly, in the instant case, there is a permanent taking, not a ten-day temporary taking. Furthermore, Braden's Folly has not asserted a vague diminution of value, but presented evidence of actual damages in the valuation of its lots.

Finally, the City cites to Iowa Coal Mining Co., Inc. v. Monroe County, 257 F.3d 846 (8th Cir. 2001), where a business owner challenged a denial of a zoning designation to combine strip mining and solid waste landfill on property it leased. The Iowa Coal case involved claims under 42 U.S.C.A. § 1983, as well as violations of due process and equal protection. Id. at 851. The Eighth Circuit's decision does not even reference Penn Central or apply its factors. The court merely found that while the rezoning may have deprived Iowa Coal of the most beneficial use of its leased property, that fact did not render the rezoning an unconstitutional taking for the purposes of a § 1983 claim. Id. at 853. In addition, the court found that the mining company did not have any vested rights or legitimate expectations as it was racing to seek approval for the landfill while the zoning board was simultaneously seeking to outlaw it. Id. That scenario is completely different from the one here, in which Braden's Folly's improvements pre-dated the merger ordinance by more than ten years.

Braden's Folly had a legitimate, reasonable, investment-backed expectation, and its taking claim is based on a preexisting property right. Thus, unlike the claimants in the above-described cases, Braden's Folly has incurred more than a mere diminution in value. Furthermore, the record here contains evidence of real, market-value property damages, not vague or speculative assertions.

Instead of providing expert testimony on the value of the Properties before and after the ordinance, the City argues that Braden's Folly has not been damaged because it received a $2,550,000 offer to purchase the Properties together during this litigation, which the City mischaracterizes as a "full-price unconditional offer." App. Br. 35, 39. The City omits necessary facts and context about this offer. First, "full price" is a misnomer as Braden's Folly never listed both Properties for sale together and the offer was not "unconditional" as it was contingent on bank appraisal and financing. Bonner Jan. 10th Offer 7, 10, attached as Ex. 44 to Def.'s Supplemental Memorandum. Second, and more notably, the prospective purchaser then reduced his offer to $2,000,000 after analyzing the value of the Properties merged together as one rental investment property. Bonner Feb. 1st Offer, attached as Ex. H to Pl.'s Supplemental Memorandum; Carlomany Email dated Feb. 1, 2021, attached as Ex. 48 to Def.'s Supp. Memo ("At the $2.55M, these income numbers, and taking into consideration the expenses excluding maintenance he would be losing 2k per month . . . . That being said he is willing to almost break even which would be at the $2M mark. That would leave him making about $600 per month and that doesn't include the maintenance on the homes."). While an offer alone does not determine market value or damages, this offer reduction aligns with Mr. Donato's expert opinion on the diminishment in market value if the Properties were sold together to one buyer.

The City further argues, without any evidentiary support, that the highest and best use of the Properties is for short-term rentals. App. Br. 34. The City then asserts that because rentals can continue, Braden's Folly has not had any rights abridged or any meaningful financial damages. The City repeatedly references a combined income of over $100,000 per year to support this argument. Id. at 20, 27, 42. However, the City cites to *gross* rental income figures, which do not include property management fees and expenses, taxes, and insurance. At best, Braden's Folly's

rental profits are modest due to these expenses. Supp. Braden Aff. ¶ 4; Braden 30(b)(6) Dep. 197:2-6, 212:19-215:6. Braden's Folly will only truly profit from its investment when it sells. Renting is simply a way to defer the costs of owning beachfront property. Donato Dep. 12:17-13:8.

Ultimately, the City rests its economic damages argument on the legal proposition under Penn Central that a mere diminution in property value, standing alone, cannot establish a taking. E.g., App. Br. 21, 41-42. Braden's Folly has, of course, suffered more than a reduction in property market value; it has lost the legal right to sell each property. The City attempts to dismiss this right as a minimal piece of Braden's Folly's bundle of rights. Id. 10. To the contrary, the right to sell is a valuable and fundamental right of ownership. See Esposito v. S.C. Coastal Council, 939 F.2d 165, 170 (4th Cir. 1991) (identifying the "fundamental incidents of ownership" as including the right to sell or transfer properties). Braden's Folly's half-million-dollar market value property damages do not stand alone. They are accompanied by the City's interference with Braden's Folly's investment-backed expectations and by the City's termination of Braden's Folly's fundamental right to alienate its property.

C. The Ordinance Disproportionately Burdens Respondent
(Response to Appellant's Sections VII, VIII, and IX)

When analyzing the "character of the government action" courts place particular focus on the nature of the regulatory burden and how that burden is distributed among property owners. Columbia Venture, LLC v. Richland County, 413 S.C. at 451, 776 S.E.2d at 915 (2015). Courts should "examine[] the *magnitude or character of the burden* a particular regulation imposes upon private property rights as well as how any regulatory burden is *distributed* among property owners." Id. (quoting Lingle v. Chevron U.S.A. Inc., 554 U.S. 528, 542 (2005) (emphasis in original) (internal quotation marks omitted)). Additionally, "[i]n evaluating the benefits and burdens of a government regulation, a taking does not take place if the prohibition applies over a

broad cross section of land and thereby secures an average reciprocity of advantage." Id. (quoting Penn Central, 438 U.S at 147) (internal quotations marks omitted). The concept of reciprocity of advantage explains why zoning in general does not constitute a taking because the burdens of the zoning change are "shared relatively evenly" by all and generally "an individual who is harmed by one aspect of the zoning will be benefitted by another." Columbia Venture, 413 S.C. at 451-52, 776 S.E.2d at 915 (quoting Penn Central, 438 U.S at 147-48).

Here, the regulatory burden of the ordinance on Braden's Folly is severe and it has not been evenly distributed. First, as previously discussed, the ordinance takes away Braden's Folly's right to freely alienate the Properties in direct contravention of Braden's Folly's reasonable investment-backed expectations and legal rights and it diminishes the market value of the Properties by over a half million dollars. Second, the regulatory burden of the burden has not been evenly distributed. The City argues that the ordinance applies to a broad cross section of lots, and notes that approximately sixty-two beach lots have been merged by the ordinance and that twenty-five of the merged lots were developed with residential houses. App. Br. 46-47. However, the *burden* of the ordinance has not been evenly distributed. The City fails to acknowledge that only Braden's Folly and four other landowners have two developed properties being merged by the ordinance. See Merger Chart, attached to Pope Supp. Aff. (showing the vast majority of merged lots have one house on one lot while the other lot is undeveloped, or both lots are simply undeveloped). The burden imposed on an owner of two developed properties is far greater than the burden imposed on owners who only developed only one lot or did not develop at all.

For example, owners of undeveloped lots would not have any investment-backed expectations interfered with by the ordinance. As the City has noted, B-lots on Folly Beach were historically undevelopable and transferred for no or little cost. App. Br. 5. Accordingly, unless an

owner invested in a B-lot by constructing a house, the ordinance's restriction on the independent sale or development of a B-lot would not interfere with any investment-expectations. The trial court properly acknowledged this critical distinction between developed and undeveloped lots and issued a narrow ruling which only applied to Braden's Folly (and potentially could apply to only four other landowners). Order 10-11 ("Merging undeveloped or partially developed properties may not amount to a regulatory taking, but as applied to the Properties, I find that forcing two single-family residential houses to be merged into one property amounts to a taking.").

The City criticizes the trial court for not addressing whether the ordinance was functionally equivalent to a classic taking. App. Br. 42-43. However, the trial court did in fact find that "[a]s applied to the Properties, Defendant's ordinance goes too far and has the functional equivalency of a classic taking." Order 6. Regardless, this is simply a generalized takings construct that may be used by courts analyzing cases under Lucas, Penn Central, or otherwise, to identify regulatory actions that are equivalent to a classic taking by weighing all relevant factors. See, e.g., Lingle, 544 U.S. at 539; Murr v. Wisconsin, 137 S.Ct. 1933, 1942; Quinn v. Bd. of Cnty. Comm'rs, 862 F.3d 433, 442 (2017); Dunes West Golf Club, LLC v. Town of Mt. Pleasant, 401 S.C. 280, 314, 737 S.E.2d 601, 619 (2013).

The City also asserts that the circuit court improperly adopted a strict scrutiny test under Agins v. City of Tiburon, 447 U.S. 255 (1980), *abrogated by* Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528 (2005). App. Br. 43-44. In Lingle, the Court explained that Agins established a stand-alone test asking whether a regulation "substantially advanced" the state's interests. 544 U.S. at 540-46. The Court concluded that the Agins test was incorrectly based on due process principles, and held that, under takings analysis, courts should instead evaluate the "magnitude or character of the burden" that the regulation imposes on private property rights as opposed to whether the

regulation is "effective" or "ineffective." Id. at 541-43. Thus, pursuant to Lingle, the dispositive analysis is the burden on landowners, which is why Lingle identifies economic impact and interference with investment-backed expectations as the primary Penn Central factors, with the "character of the government action" serving as a secondary variable. Id. at 538-39.

Contrary to the City's contention, the circuit court did not apply strict scrutiny or hold that the ordinance "failed to substantially advance" the City's interests. Instead—while it referenced Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach, 345 S.C. 418, 548 S.E.2d 595 (2001), which involved a physical exaction and incorporated Agins in its discussion of takings case law—the circuit court focused on the unequal burden placed on Braden's Folly, which was not a strict scrutiny analysis.

> Defendant argues that the ordinance spreads its burdens across the public by merging approximately sixty-two lots . . . . [O]nly five landowners have two developed properties being merged by the ordinance. The critical difference in merging two developed properties versus merging undeveloped land is the impact on a landowner's investment-backed expectation.

Order 10. Additionally, the court followed the general principles outlined in, among many other cases, Columbia Venture, which instructs that "the benefits and burdens of a government regulation" should be evaluated to determine if the prohibition applies broadly and thereby secures an advantage of reciprocity. 413 S.C. 452, 776 S.E.2d at 915 (citing Penn Central, 438 U.S. at 147-48). As discussed above, the court properly determined that the ordinance did not secure an advantage of reciprocity with respect to fully developed lots. The court also acknowledged that the benefits of the ordinance did not outweigh the burdens on private property owners as the City has other regulatory measures in place to limit future beachfront development. See Pope Aff. ¶ 23 (identifying the City's Dune Management Area (DMA) setback restrictions as preventing new development all along the beach). The DMA is instructive because it is an example of a regulation

that applies to all beach landowners and thereby evenly spreads its burdens and benefits (i.e., secures an average reciprocity of advantage).

The City argues that the merger ordinance benefits the public because the ordinance will limit future development along the beach. App. Br. 44-45. However, the City does not account for the burdens on landowners who developed prior to enactment of the ordinance. Instead, the City reverts to its contention that because it is not requiring any dwellings to be torn down, it is not burdening any landowners. Id. at 45. While there is no litmus test for determining what level of regulatory burden can rise to the level of a Penn Central taking, the City's proposed standard is far too high. Indeed, if the ordinance *required* demolition of Braden's Folly's houses, the City would need to initiate eminent domain proceedings for its physical takings.

The City also argues the merger ordinance is effective in achieving the City's goal of limiting development. App. Br. 45. As applied to the Properties, however, it is not effective because both lots are already developed and because the DMA will restrict future development on all Folly Beach B-lots irrespective of the ordinance. Regardless, pursuant to Lingle, whether the City's claim of effectiveness is true is irrelevant to the takings analysis in this case. Indeed, a significant portion of the City's Statement of Facts, which delves deeply into the City's history regarding beachfront development and environmental issues, is similarly irrelevant. See generally id. 4-7, 13-17 (explaining why the City wants to unwind beachfront development). Braden's Folly is not arguing against the legitimacy and importance of public policies such as preventing erosion, and beach management and preservation efforts. However, the City's motivations, justifications, and assertions about the importance of its overall policy goals are not relevant to evaluating, under Lingle, the "magnitude or character of the burden" that the merger ordinance has imposed on Braden's Folly and how that regulatory burden has been distributed across the public.

Ultimately, Braden's Folly is being forced to shoulder a more significant regulatory burden than what has been exacted from both members of the general public and from the vast majority of other landowners with merged lots. As noted by this Court:

> Indeed, the Fifth Amendment prevents the public from loading upon one individual more than his just share of the burdens of government and provides that only when an individual surrenders to the public something more and different from that which is exacted from other members of the public, shall a full and just equivalent be returned to him.

Columbia Venture, 413 S.C. at 452, 776 S.E.2d at 915 (quoting Penn Central, 438 U.S. at 147-48) (internal quotations marks omitted). Because of the interference with Braden's Folly's investment-backed expectations, and due to the economic impact on the Properties, the regulatory burden imposed on Braden's Folly (and presumably up to four other landowners) is far different from the burdens imposed on other landowners. The City's ordinance does not secure an average reciprocity of advantage. As applied to the Properties, the ordinance goes too far and has the functional equivalence of a classic taking.

IV. NEITHER MURR NOR QUINN SUPPORT A MERGER OF TWO DEVELOPED LOTS.
(Response to Appellant's Sections I, II, III, IV, and VII)

The City claims that "[t]he circuit court has effectively ruled that any effort to impose a new regulation on an existing property is a taking." App. Br. 32. This dire warning is, of course, false. Regulatory takings only occur when "regulation goes too far." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Moreover, as noted previously, the court's order expressly only applied to the Properties, and at most could affect up to four additional landowners. See Order 12, FTN 7. The City relies on Murr v. Wisconsin, 137 S.Ct. 1933 (2017), and Quinn v. Board of County Commissioners, 862 F.3d 433 (4th Cir. 2017), for the proposition that merger ordinances

are presumptively valid. App. Br. 12, 23, 28-29. This view oversimplifies and misstates the holdings in these cases.

Murr, a lot merger case, added a new balancing test to accompany the partial and total takings tests established in Penn Central and Lucas. This "denominator" test provides guidance on how to identify the "relevant parcel" against which to assess the effects of the challenged government action.

> This case presents a question that is linked to the ultimate determination [of] whether a regulatory taking has occurred: What is the proper unit of property against which to assess the effect of the challenged governmental action? Put another way, because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction.

Murr, at 1943-44 (quoting Keystone Bituminous, 480 U.S. at 497) (internal quotation marks omitted).

In Murr, the landowners owned two lots, Lot E and Lot F, along a river that divided Minnesota and Wisconsin. Id. at 1939. Lot E was undeveloped, and Lot F had a small recreational cabin on it. Id. at 1940. The owners wanted to sell Lot E and use the proceeds to redevelop Lot F, but the merger provision prevented them from selling Lot E. Id. at 1941. The relevant parcel was in dispute because the landowners only wanted to evaluate the impact of the regulation on Lot E, which they claimed had been rendered virtually worthless by the regulation. Id. at 1941. The governmental entity argued, correctly, that both lots E and F should be evaluated together in the after (i.e., the "denominator"). Id. at 1948.

Here, the relevant parcel should not be in dispute. The circuit court properly recognized that the parcels in this case should be evaluated just as the two parcels in Murr were, both before

and after application of the ordinance. Although, the City's claim that Braden's Folly has "admitted" that the relevant parcel is the two merged lots is not completely accurate. App. Br. 26. Braden's Folly has consistently argued that the Properties should be evaluated, as was done in Murr, both as two individual lots before the merger and as one merged lot after the regulation (i.e., comparing the "before" with the "after").

More importantly, the facts of Murr are inapposite to the instant case. For example, the Murr landowners acquired their property ***after*** the merger provision was enacted. 137 S.Ct. at 1948. While the City claims the properties were acquired by the Murr family before the provision, the two lots were owned by separate parties, with one lot owned by the landowners' parents and the other owned by the family business. Id. at 1941. The properties were later transferred, years after the merger provision, to the landowners so that both parcels shared common ownership. Id. In other words, the Murrs voluntarily brought themselves within the application of the law. Thus, they had no reasonable investment-backed expectations that they could develop the lots separately and their ignorance of the merger provision was no excuse. Id. at 1949 ("Petitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots.").

Additionally, in its relevant parcel analysis, the Court found that the appraised value of the merged lots ($698,300) was *greater* than the total appraised value of the lots when separately regulated ($413,000). Id. at 1948-49. The Court further found that integrating the lots directly benefitted the landowners (e.g., increased privacy and recreational space, plus optimal location for any improvements). Id. It is for these reasons the Court determined that under both Lucas and Penn

Central the Wisconsin state statute did not amount to a regulatory taking as applied to the Murr's properties.[2]

Unlike the Murrs, Braden's Folly acquired and developed the Properties before enactment of the ordinance, has appraised damages of over a half million dollars due to the ordinance, and is not benefitted by integrating the lots. For Penn Central analysis, Bradens' Folly's facts are entirely different than the Murrs.

In Quinn v. Board of County Commissioners, another lot merger case, the Fourth Circuit affirmed a ruling against a landowner whose takings claim was based on both a lack of sewer service and the enforcement of a lot merger provision. 862 F.3d 433 (4th Cir. 2017). In that case, speculators purchased thousands of small lots on an island community in Maryland for prospective land development. Id. at 437. Quinn himself purchased over 200 vacant lots over the course of eighteen years; however, his development plans had to wait until a public sewer system was available on the island. Id. Eventually, the county government created a cohesive plan by extending sewer service to the island while at the same time enacting a merger provision to allow for orderly development.[3] Id. at 437-38.

[2] Several months after the Court's decision, the Wisconsin Legislature responded by enacting a new law to protect qualifying properties against regulatory rules or actions that would result in the involuntary merger of multiple lots. 8 Nichols on Eminent Domain § G14E.04[9][i] (3d ed. 2021).

[3] The City states that B-lots in general are only developable due to state, federal, and local renourishment efforts. App. Br. 5-6. However, unlike the comprehensive regulatory plan in Quinn that extended sewer and merged properties at the same time, the regulatory scheme here is not cohesive. The City's ordinance was enacted well after the renourishment that allowed for development, thereby contravening the expectations of property owners, like the Bradens, who developed in reliance on the prior regulatory scheme.

Critically, and unlike the City's ordinance, the Quinn merger ordinance only applied to unimproved vacant lots.[4] As the Fourth Circuit noted, merger ordinances are "common means of balancing the legitimate goals of regulation with the reasonable expectations of landowners ***by limiting building*** on [substandard] lots while ensuring that all property owners can still build on their land." Quinn, 862 F.3d at 438 (emphasis added) (citing Murr, slip op. at 16).

The Quinn takings claim was rejected because the landowner never had a property interest (i.e., a legitimate claim of entitlement) in obtaining sewer service and because the merger ordinance did not interfere with the landowner's reasonable investment-backed expectations since his investment in the land was highly speculative. Id. at 439, 442-43 ("These types of speculative hopes—dependent on receiving a government service to which the plaintiff has no entitlement—are not the reasonable investment-backed expectations relevant to the Penn Central analysis.").

Moreover, the regulation did not overly burden Quinn. Instead, its burdens and benefits were spread across the public. As the Fourth Circuit explained:

> Taken together, the sewer extension and the Grandfather/Merger Provision would provide sewer service to the failing septic systems on South Kent Island and 632 vacant lots, many of which could not have been developed without sewer service. The plan would also exclude hundreds of vacant lots, leaving them undevelopable. **The impact on Quinn mirrored the impact on the entire island**. He had several vacant lots that would receive sewer service and, subject to being merged with contiguous lots, will now be developable. However, Quinn also owned a large tract of nearly two hundred vacant lots that would not receive sewer service, meaning that he will continue to be unable to build on this land.

[4] Queen Anne's County, Md., Ordinance No. 13-24, available at https://www.qac.org/701/2013-Ordinances (codified at § 18:1-19(G), Public Local Laws of Queen Anne's County); Brief for Respondents the Bd. of Cnty. Comm'rs. for Queen Anne's Cnty., et al., Quinn v. Bd. of Cnty. Comm'rs, 862 F.3d 433 (4th Cir. 2017), 2018 WL 1425705, at *6, March 19, 2018 ("To limit the number of ***vacant lots*** on South Kent Island that would be become buildable as a result of the extension of public sewer service, the County enacted the Grandfather/Merger Provision . . . .") (emphasis added).

Id. at 438 (emphasis added). Accordingly, the regulation in Quinn secured a critical "advantage of reciprocity." Columbia Venture, 413 S.C. at 451-52, 776 S.E.2d at 915-16 ("[A] taking does not take place if the prohibition applies over a broad cross section of land and thereby secures an advantage of reciprocity."). For these reasons, the Fourth Circuit found that the merger provision did not amount a regulatory taking as applied to Quinn's properties.

Unlike the lots in Quinn, the Properties were not only developable before the City's ordinance was enacted, but they were in fact developed by Braden's Folly before the ordinance was enacted, thereby placing a much greater burden on Braden's Folly than on Quinn (or on the other Folly Beach owners of merged vacant lots). The City's ordinance also does not apply across a broad cross section of the public and does not secure an advantage of reciprocity like the Quinn ordinance does. The City could have instead exempted the five owners of fully developed properties and applied the ordinance to undeveloped and partially-developed land. Such an approach would have balanced the public interest with private rights.

The City theorizes that because there are only a few lot merger cases, it must be because lot merger ordinances are presumptively valid. App. Br. 18, 23, 29, 47. To the contrary, the more likely reason for the lack of lot merger takings cases is that municipalities simply do not apply merger provisions to fully developed properties. As the Murr Court explained, "Merger provisions often form part of a regulatory scheme that establishes a minimum lot size **in order to preserve open space while still allowing for orderly development**." 137 S.Ct. at 1947 (emphasis added). In support of the government in Murr, the National Association of Counties submitted an amicus brief stating that merger provisions are intended to limit the development of undeveloped, nonconforming parcels. The amicus brief explains:

> Local governments have accordingly sought some other way to strike a sensible balance between private and public interests. The

> solution has been merger. Where the owner of an ***undeveloped*** nonconforming lot also owns another contiguous lot, and where the two lots together would be large enough to comply with the lot size minimum, ordinances often treat the two lots as one for this purpose.

Amicus Brief 16, attached as Ex. 32 to Def.'s Supplemental Memorandum (emphasis added); see also id. 16-17, 19-20, 34 (repeating the construct that merger ordinances are used to prevent the development of vacant lots).

Neither Murr nor Quinn involved a merger provision applied to two developed lots, and additional lot merger case law involves reviews of local zoning board decisions either granting or denying building permit requests related to merged ***vacant*** land. See, e.g., Redman v. Zoning & Platting Bd. of Review of Narragansett, 491 A.2d 998 (R.I. 1985) (reversing a denial of building permits for vacant lots where one of the five merged lots was already developed prior to the ordinance being enacted); Sciacca v. Caruso, 769 A.2d 578 (R.I. 2001) (involving a dimensional variance request on hardship grounds by an owner wanting to subdivide previously merged lots so she could build a new house on a vacant lot); West Goshen Township v. Crater, 114 Pa.Cmwlth. 245, 538 A.2d 952 (Pa. Commw. Ct. 1988) (involving a special exception variance request for a building permit to construct a single-family home on an undersized vacant lot adjoining the property owners' current residence).

Furthermore, merger ordinances commonly contain provisions that balance the public interest with private rights, such as expressly exempting previously developed lots and allowing for variances and hardship waiver requests. For example, the regulation in Murr allowed for variances when enforcement would create "unnecessary hardship," 137 S.Ct. at 1940, and the Supreme Court itself noted that "the harshness of a merger provision may be ameliorated by the availability of a variance from the local zoning authority for landowners in special circumstances." Id. at 1947. The City's ordinance does not allow for any such exceptions or variances. Contrary to

the City's contentions, the lack of takings case law involving the merger of two developed properties shows that municipalities do not merge fully developed properties.[5] This case is before this Court because the City has taken the lot merger tool and rigidly applied it far beyond its normal use, which is to limit development on vacant, nonconforming parcels.

In summary, the significant factual differences in Murr and Quinn render them inapplicable to the issues before this Court. Here, the City enacted an automatic merger ordinance, without any exceptions allowed for developed lots, as in Quinn, or any avenues for a hardship waiver, as in Murr. The City's ordinance as applied also does not secure the advantage of reciprocity that the regulatory scheme in Quinn secured by applying over a broad cross-section of land. Furthermore, the landowners in Murr and Quinn had far less compelling arguments. The Murr owners were on notice of the at-issue regulation prior to acquiring both properties, they were trying to sell an undeveloped lot, and their market damages were not significant. The Quinn owner only had an abstract, speculative hope for development and his property rights were not affected. Neither claimant had reasonable investment-backed expectations anywhere near the level of Braden's Folly's expectations. Murr and Quinn do not support the proposition that the City's merger ordinance, as applied to the Properties, is presumptively valid. To the contrary, they indicate that the City's actions rise to the level of a taking.

CONCLUSION

When the Penn Central balancing test is applied to this case, all factors point in Braden's Folly's favor. In reliance on then-existing City code, Braden's Folly developed two adjoining lots

[5] Cf. Tuckner v. May Twp., 419 N.W.2d 836 (Minn. Ct. App. 1988) (involving the denial of a variance and the owners' failure to establish undue hardship where the merged, developed lots were *purchased and developed after enactment of the merger provision* and where the owners were warned twice by the municipality prior to buying and developing that the lots would have to be later sold together as one unit).

with single-family houses with the reasonable expectation and legal right to recoup their construction costs by selling one of them. Over a decade later, the City changed its rules and enforced the ordinance on the Properties in direct contravention of Braden's Folly's investment-backed expectations and to its financial detriment. The regulatory burden of the ordinance is not fairly distributed and it disproportionately impacts Braden's Folly.

The circuit court's order identifies a merger provision that has gone "too far" and narrowly holds that up to five landowners have been forced to shoulder too much regulatory burden on behalf of the public. It does not revolutionize zoning law. Accordingly, Braden's Folly respectfully requests that this Court affirm the circuit court's grant of summary judgment for inverse condemnation and allow this action to proceed forward with a trial on the issue of damages.

Respectfully submitted,

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