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 Surf's Up, Petitioners,

Appellants

vs.

CITY OF MYRTLE BEACH BOARD OF ZONING APPEALS and KEN MAY, ZONING ADMININISTRATOR FOR CITY OF MYRTLE BEACH, Respondents,

Respondents

FINAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN AFFIRMING THE DECISION OF THE BOARD OF ZONING APPEALS FOR THE CITY OF MYRTLE BEACH?

STATEMENT OF THE CASE

The Appellants are retail stores which operate in the City of Myrtle Beach on Ocean Boulevard between Sixteenth Avenue North and Sixth Avenue South. The Appellants sell a variety of goods including cigarettes, pipes, CBD oil, t-shirts and other souvenir and novelty items, food and general grocery items. The Appellants and their predecessors in business have been selling these same types of merchandise for over thirty years and all have current City business licenses.

On August 14, 2018, the City of Myrtle Beach adopted Ordinance 2017-23: Ordinance to Amend Appendix A, Zoning, by Enacting Article 18, Section 1806 to Enact and Establish the Ocean Boulevard Entertainment Overlay District (OBEOD), to Establish a Family Friendly Entertainment and Retail Land Use. The ordinance was first presented on May 2, 2017, continued first reading was on May 9, 2017 (R. p. 533), and continued on May 23, 2017 and June 13, 2017. A second reading of an entirely different version of the ordinance was finally presented and approved by City Council on August 14, 2018.[1] (R. p. 537).

The 2018 OBEOD Ordinance (2017-23) provides in Section 1. "Purpose and Intent" the reasons for enacting the ordinance. Specifically Section 1.A. stated, "Without debate, the City's economic engine is tourism." The ordinance further has the following relevant sections:

> Section 1.C. Tourism is threatened by perceived unseemliness or unsafety in any particular area.

[1] By agreement of the parties, the first reading of the Ordinance and the signed copy of the Ordinance by Mayor Pro Tem Brenda Bethune is added to the record. (R. p. 537).

Section 1.D. The perception of unseemliness or unsafety is, to large degree, a product of atmosphere.

Section 1.F. One component of atmosphere for a location is the proliferation of retail offerings of businesses in that area, that are not family attractive.

Section 1.H. The purpose of the Ocean Boulevard Entertainment Overlay District (OBEOD) is to establish a family friendly entertainment and retail land use, and encourage compatible land uses, and ensure higher quality development and business uses and function in order to protect property values and provide safe and efficient pedestrian and automobile access.

Section 1.J. The displacement of CBD consumables, smoke shops and tobacco stores is necessary and in the interests of the public health, safety and general welfare because there is the substantial likelihood of the establishment and operation of expanded retail offerings of CBD consumables, smoke shops and tobacco stores in the OBEOD.

Other parts of Section 1806 reference the sale of illegal drug paraphernalia and the heightened risk of negative aesthetic impacts, blight and loss of property values of residential neighborhoods and businesses in close proximity (1.L). Finally, in Section 1.P. of Section 1806, City Council is "determined to see a 'family friendly lens' placed over all policies, strategies and initiatives undertaken and supported by the Council."[2]

As a result of the enactment of the OBEOD, the City of Myrtle Beach overnight changed what legal consumer products could be sold in the OBEOD from Sixth Avenue South to Sixteenth Avenue North. Appellants own shops and businesses in this area and have been selling the now banned products for over 30 years prior to the enactment of Section 1806. The now banned products included the sale of cigarettes which are more than 10% of their retail offering, the sale of tobacco paraphernalia, the sale of pipes, the sale of e-cigarettes, the sale of CBD oil, the sale of vapor products, the sale of sexually oriented merchandise (such as t-shirts and novelty items) to include the retail merchandising of tobacco or tobacco products of more than an incidental nature.

[2] While the Ordinance is referenced as Section 1806 and Section 1807 in the record, the language is identical. The terms "family friendly" and "family attractive" are not defined in the Ordinance.

Section 1806 also provided that any nonconformity in these retail stores must cease no later than December 31, 2018. (See Section 4. Amortization. Retail stores offering space for the prohibited retail business uses that are operating on the effective date of the ordinance codified in this overlay are hereby declared immediately nonconforming as of the date of second reading[3] and shall be amortized as to the nonconformity and must cease the nonconforming portion of the retail offerings no later than December 31, 2018). The Ordinance was signed by the Mayor Pro Tem of Myrtle Beach on August 14, 2018 which gave the affected businesses a little more than four months to comply.

Immediately after this ordinance was passed, the Appellants who had retail businesses in the OBEOD filed suit in the United States District Court, Florence Division, South Carolina. The Appellants in the United States District Court asked for a temporary restraining order restraining the City of Myrtle Beach from enacting Section 1806 which provided for both civil and criminal penalties. A telephone hearing was held before United States District Court Judge, R. Bryan Harwell, and a consent order was entered January 15, 2019 staying prosecution of any violations of the ordinance pending these proceedings. (R. p. 65).

The Appellants had a hearing pursuant to South Carolina law before the City of Myrtle Beach Board of Zoning Appeals on October 10, 2019. A second order from United States District Court Judge Sheri Lydon on August 17, 2020 ordered Appellants to exercise their state law remedies. (R p. 46).

After a hearing, the City of Myrtle Beach Board of Zoning Appeals issued its order denying Appellants relief on January 16, 2020. The City of Myrtle Beach Board of Zoning Appeals upheld

[3] The Ordinance was signed August 14, 2018 and all of the consumer products on the list were immediately declared illegal (R. p. 537).

Section 1807 and found in its order that it could not decide the issue of whether the ordinance was constitutional. (R p. 39).

This matter thereafter came before the circuit court on appeal on March 1, 2021. The circuit court affirmed the City of Myrtle Beach Board of Zoning Appeals decision on April 22, 2021. (R. p. 15). Appellants then moved for reconsideration and the circuit court issued an order denying Appellants' motion to reconsider on September 16, 2021. (R. p. 1). Appellants appealed this matter directly to this Court based on SCAR 203(d)(1)(A)(ii).

STANDARD OF REVIEW

The standard of review of an appeal from a City or County Board of Zoning Appeals is set forth in *Restaurant Row Assoc. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). In that case, this Court stated:

> In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the board is correct as a matter of law. Furthermore, a court will refrain from substituting its judgment for that of the reviewing body even if it disagrees with the decision.

A corollary principle of the standard of review is that a decision of a municipal zoning board will be overturned if it is arbitrary, capricious and has no reasonable relation to the lawful purpose, or the board has abused its discretion. *See Williams v. Lexington County Board of Zoning Appeals*, 413 S.C. 647, 652, 776 S.E.2d 749 (Ct. App. 2015). See also, *Beachfront Entertainment v. Town of Sullivans Island*, 379 S.C. 602, 666 S.E.2d 912 (2008). In sum, this Court must decide two issues on ordinance validity. First, did local government have the power? Second, is the ordinance consistent with the Constitution and the general laws of this state? *Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 694 S.E.2d 213 (2010). In this case, the OBEOD ordinance fails this test set forth by this Court.

ARGUMENT

I. THE OCEAN BOULEVARD ENTERTAINMENT OVERLAY DISTRICT (OBEOD) IS ARBITRARY AND CAPRICIOUS AS A MATTER OF LAW.

Appellants' retail stores are located in the OBEOD in Myrtle Beach, South Carolina. The OBEOD outlaws as of December 31, 2018 various legal consumer products which the Appellants sell. Appellants are a collection of beachwear shops and variety stores which sell t-shirts, beachwear, cigarettes, CBD oil, e-cigarettes, pipes, novelty items, alternative nicotine delivery products and other tobacco products in their stores in downtown Myrtle Beach. Appellants have sold those products for thirty plus years prior to the City of Myrtle Beach enacting Municipal Ordinance Section 1806 which established a new zoning district (OBEOD) and prohibited the sale of the consumer products which Appellants sell in their stores.

The OBEOD is a narrow oceanfront area of Myrtle Beach from Sixteenth Avenue North to Sixth Avenue South and is approximately two blocks wide. The OBEOD does not reach U.S. Highway Business 17 and the boundary lines are irregular and zigzag in an illogical and confusing manner. In some areas of the OBEOD the boundary lines go inland toward U.S. Highway 17 and in other areas hug the Boulevard. A map of the OBEOD is found in the record. (R. pp. 341, 469, 542).

This case began when zoning inspectors from the City of Myrtle Beach issued a series of zoning ordinance violations pursuant to Section 1806 of the OBEOD ordinance against each of the individually named Appellants for the sale of the consumer products as referenced above. The letters sent certified to the Appellants list both criminal and civil penalties. (R, pp. 556-621). The zoning ordinance violation letters were served in June 2019 and Appellants demanded a hearing before the Myrtle Beach Board of Zoning Appeals. (R. p. 473).

The OBEOD is an irrationally shaped district in downtown Myrtle Beach and many of Appellants' competitors operate their retail businesses either directly across the street from the

Appellants or immediately adjacent to the OBEOD. As an example, owning a smoke shop on Seventeenth Avenue North in Myrtle Beach is legal while owning a smoke shop directly across the street on Sixteenth Avenue North is not legal. Selling e-cigarettes, pipes or CBD oil is illegal on Sixth Avenue South in Myrtle Beach while selling those same products is legal across the street on Seventh Avenue South in Myrtle Beach.[4] In fact, some of the retail stores share a common parking lot and on one side of the lot the consumer products are banned while on the other side they are legal. The result is that certain retail stores are favored by the ordinance since they sell the same consumer products which Appellants cannot sell in their stores.

The deposition of Ken May, the Zoning Administrator, revealed that there is no rhyme or reason as to how the OBEOD boundary lines were drawn by City Council. In his deposition May was asked the following questions:

> Q. Who actually drew the lines?
>
> A. The DRC was actually formed probably 25 years ago, so I don't know exactly who drew those lines. But I would have to assume that it would have been the Council that was sitting at the time for the City of Myrtle Beach.
>
> (R. p. 155, lines 1-20).

In another part of the deposition, May was asked:

> Q. Do you know what data City Council relied upon in deciding not to allow certain products and services to be sold in the Overlay District?
>
> A. Again, you are going to have to refer to the minutes.
>
> (R. p. 157, line 25; R. p. 158, lines 1-5)

[4] These consumer products are legal everywhere in South Carolina except in the OBEOD of Myrtle Beach.

May was also asked:

> Q. Do you know of any data that was relied upon in the City Council's decision not to sell certain products and services in the overlay area?
>
> A. I am not sure I really understand the question on that, so I do not recall.
>
> (R. p. 158).

In another portion of the deposition, May was asked about the consumer products being sold in the OBEOD.

> Q. And do you know why it is that certain products can't be sold in the overlay district, but they can be sold on the next street over?
>
> A. I mean, I hate to give you this answer, but I don't want to speak for city council. Again, you're going to have to refer to the minutes.
>
> (R. p. 159, lines 6-13).

Thus, the City of Myrtle Beach in enacting Ordinance 1806 and the OBEOD, provides no rationale as to how the OBEOD boundary lines were shaped nor can the City Zoning Administrator or its Zoning Department explain why the exclusive area between Sixth Avenue South and Sixteenth Avenue North was chosen so that only businesses in those areas could not sell certain consumer products such as cigarettes, CBD oil, novelty items while other merchants were free to sell those same products throughout the City and immediately adjacent to the OBEOD without fear of civil or criminal penalties.

Also, when the Board of Zoning hearing was held, no witness testified as to the intent or reasons City Council approved the OBEOD ordinance. (R. pp. 39-45). Furthermore, no data was presented by the City as to why the OBEOD was enacted in the area where Appellants' businesses are located. (R. pp. 39-45). In contrast, Appellants presented an affidavit of a former member of the Myrtle Beach Planning Commission. (R. 470). In that affidavit, Carl Sivertsen, who was a member of the Planning Commission stated:

> A citywide ban of these products was discussed by the Planning Commission and felt to be the only fair method for all merchants in the city. I, along with other Planning Commission members could not understand why other areas of the city could sell the same products that are being banned in the ordinance. As an example, the products which are currently banned are being sold at Broadway at the Beach and at the Mall of South Carolina, specifically, Spencer's Gifts, could sell the same products that are banned on the Boulevard.
>
> (Affidavit of Sivertsen, R. p. 471).

Sivertsen also expressed concern in his affidavit as to how these products were going to be banned from sale over a short period of time when the merchants had those products on the shelves in their stores. (R .p. 471).

Sivertsen's affidavit along with the testimony of May establishes the OBEOD enforcement, boundary lines, and reasons for the district are arbitrary and capricious. In *City of Myrtle Beach v. Juel P Corp.*, 337 S.C. 157, 172, 522 S.E.2d 153 (Ct. App. 1999) the Court of Appeals held: "The determination of whether zoning ordinances deprive a person of constitutional rights is a judicial and not a legislative function and where an ordinance is clearly violative of constitutional rights it is the duty of the court to so hold." See also *Town of Scranton v. Willoughby*, 306 S.C. 421, 412 S.E.2d 424 (1991) (arbitrary and capricious zoning ordinances are unconstitutional as a matter of law.)

Here, the OBEOD Ordinance which bans consumer products sold citywide is arbitrary as a matter of law. Those same products are freely sold at gas stations, stores, pharmacies, beachwear shops, Wal-Mart, the Mall of South Carolina and all over the city. (See R. pp. 371-453). Appellants assert that if the City of Myrtle Beach wanted to be fair to all merchants, it would ban those products including alcohol citywide versus banning them in such a small area.

II. THE OCEAN BOULEVARD ENTERTAINMENT OVERLAY DISTRICT (OBEOD) IS UNCONSTITUTIONAL

As has been stated above, the OBEOD Ordinance (Section 1806) only applies to a small number of retail businesses who own properties between Sixth Avenue South and Sixteenth Avenue North in Myrtle Beach. It is a narrow, irregularly shaped area which runs along Ocean Boulevard and has a width of about one or two blocks. Appellants produced a plethora of evidence of the sale of the same products that are prohibited in the OBEOD. The evidence included photographs which show the banned products being sold in various locations throughout the City. (See Exhibits 7a–7f). (R. pp. 371-453).

The photographic evidence shows that these same products prohibited in the OBEOD are sold in almost every store, pharmacy, grocery store and variety store in the City of Myrtle Beach Appellants have consistently argued that if the purpose of the ordinance is to make the City of Myrtle Beach family friendly or family attractive, the only solution would be to ban these products citywide. Further, the City's OBEOD boundary lines are irrational since some merchants sell those products directly across the street from the District while some of Appellants' businesses are just inside the OBEOD line and are unable to sell the same products. Appellants' competition sells the same products within feet of where Appellants cannot sell those products. Thus, Section 1806 unlawfully discriminates against Appellants without a rational basis. See *Town of Scranton v. Willoughby*, 306 S.C. 421, 412 S.E.2d 424 (1991), (An arbitrary and capricious zoning ordinance is unconstitutional as a matter of law.)

III. THE OCEAN BOULEVARD ENTERTAINMENT OVERLAY DISTRICT (OBEOD) IS A TAKING OF APPELLANTS' PROPERTY.

The Appellants have operated their small beachwear stores in the OBEOD for over 30 years and prior to the outlawing and/or banning of the products they sold, Appellants sold those consumer

products without complaint by the City. Section 1806 banned those products and criminalized their conduct effective December 31, 2018. After December 31, 2018, Appellants were either subject to arrest or to the loss of their business license if they sold the consumer products.

The Fourteenth Amendment to the United States Constitution provides in part:

> "No State shall deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const. amend. XIV, § 1).

This clause is the source of Appellants' challenge to the governmental taking of their businesses by the City.

The Equal Protection Clause also prohibits discrimination against a person or entity for belonging to a particular group.[5] In an Equal Protection challenge this Court first determines whether the government has adopted a classification that affects two or more similarly situated groups in an unequal manner. See *Doe v. South Carolina*, 421 S.C. 490, 808 S.E.2d 807 (2017). See *Safeway v. City and County of San Francisco,* 797 F. Supp. 2d 964, 971-973 (N.D. Cal.). If so, the Court then considers whether the classification furthers a legitimate government interest. When the law classifies individuals or groups for an economic regulation the classification must be a reasonable one and further a governmental interest. Here, the City has no legitimate government interest when the same products are sold within feet of a business which cannot sell those products.

In the case of *Walgreen Co. v. City and County of San Francisco*, 185 Cal. App. 4th 424, 419-436, 498 (Cal. Ct. App. 2010), the California Court of Appeals considered whether the trial court properly dismissed an equal protection challenge to a San Francisco law prohibiting certain pharmacies from obtaining licenses to sell tobacco products. The ordinance prohibited standalone pharmacies from obtaining licenses to sell tobacco but not grocery stores or big box stores containing

[5] The South Carolina Constitution has essentially the same language.

licensed pharmacies. The Court found the law treated the two categories of pharmacies differently. The Court found no basis for the differential treatment and returned the case to the trial court for further proceedings. (There is no rational basis to believe the supposed implied message conveyed by selling tobacco products at a Walgreens that has a licensed pharmacy in the back of a store is different in any meaningful way from the implied message conveyed by selling such products at a supermarket or big box store that contains a licensed pharmacy.)

After San Francisco amended the ordinance to prohibit the sale of tobacco by any store within San Francisco that contains a pharmacy, Safeway, a supermarket chain, filed an equal protection challenge. See *Safeway v. City and County of San Francisco,* 797 F. Supp. 2d 964, 971-973 (N.D. Cal.). *Safeway* argued the amended law treated general grocery stores, big box stores and other retailers without pharmacies differently from retailers who did have pharmacies and could sell tobacco. The Court held that even if the stores were classified and treated differently, San Francisco had a legitimate basis for treating the types of retailers differently. The Court stated, "In prohibiting the sale of tobacco products in pharmacies the amended ordinance accomplishes its purpose by ending an inference that tobacco products may not be harmful because they are sold by a major participant in the healthcare delivery system." As a result, the Court found that the amended law did not violate the equal protection clause.

In this case the Appellants are in the position of the plaintiffs in the *Walgreen* case. Appellants are unable to sell CBD oil, cigarettes, novelty items and other banned products in their stores while directly across the street and throughout the city those same products can be sold anywhere other than the OBEOD. Here, Appellants are treated differently while across the street from the OBEOD literally within feet of Appellants' businesses other similar stores can sell exactly the same products. Thus, if the City of Myrtle Beach wanted to ban the sale of certain products in any beachwear store

on Ocean Boulevard, it would have to do so throughout the city to satisfy equal protection. Here, the City has targeted a very small group of businesses and offers no legitimate rational reason for the ban on the sale of certain products in their stores. Further, the City allows the very same consumer products to be sold at other retail locations on Ocean Boulevard and throughout the city. (See pictures of other businesses. (R. pp. 371-453)).

The OBEOD Ordinance is clearly arbitrary and unreasonable since if the City wanted to produce a "family friendly" atmosphere, it would ban CBD oil, cigarettes, novelty items and the other products citywide in all retail stores. The OBEOD Ordinance does not reasonably further a public purpose especially in light of the fact that other retail businesses next door to the OBEOD can sell the same products without fear of prosecution or loss of their business license. Simply put, the OBEOD Ordinance is foolish, nonsensical, discriminatory and is not based on reason.

IV. THE CITY'S ACTIONS ARE AN UNCONSTITUTIONAL TAKING OF PROPERTY.

The Appellants will suffer a significant loss of their business revenue by being unable to sell cigarettes, CBD oil and the other banned products. In effect the City of Myrtle Beach has taken Appellants' business which has been operating legally for over 30 years. The Fifth Amendment to the United States Constitution provides property cannot be taken for public use without just compensation. See *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 536-539 (2005). The Takings Clause does not prohibit the government from taking Appellant's property for public use, but it requires economic compensation to the property owner if property is taken. If the City needs to take a parcel of property to complete a roadway for example, the City must first compensate the property owner. This is known as a "physical taking." The Fifth Amendment prevents the government from forcing the property owner alone to bear burdens that should be borne by the public as a whole. *See Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 123, 124 (1978). In the circumstances of this

case the Appellants have been operating their businesses for thirty plus years and the regulation of their property prohibiting them from selling cigarettes, CBD oil and the other banned products is so onerous that the City of Myrtle Beach's action rises to the level of a "regulatory taking" because it has deprived Appellants of a significant amount of the value of their businesses. This type of "regulatory taking" entitles Appellants to compensation under the Fifth Amendment if allowed by this Court. (See U.S. Const. amend. V).

The severity of the burden that the City of Myrtle Beach ordinance imposes upon private property rights is extreme. It extracts a benefit from the owner of the private property in the OBEOD that must be paid for by the public as a whole. An analogous situation similar to the Appellants' arose in the case of *City of San Antonio v. Eldorado Amusement Co.*, 195 S.W.3d 238 (Tx. App. 2006). The *Eldorado* case focused on whether rezoning that excluded the sale of alcoholic beverages constituted an unconstitutional taking of property that was leased to a licensed retailer of alcoholic beverages. The Texas Court of Appeals found that although the property was not physically taken from the retailer, the rezoning had a severe economic impact on the retailer's business and unreasonably interfered with the owner's "investment backed expectations."

In finding for *Eldorado*, the Court noted that the property had always been operated as a business that served alcohol and that "historic uses of the property are critically important when determining the reasonable investment backed expectations of landowners." The Court further went on to hold that the enactment of the rezoning ordinance had a severe economic impact on Eldorado's business and unreasonably interfered with Eldorado's investment backed expectations. The Court referred to the United States Supreme Court case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315, 107 S. Ct. 2378, 96 L.Ed. 2d 250 (1987) in

ordering compensation. Thus, any government action that works a taking of property rights necessarily implicates the constitutional obligation to pay compensation.

Here, Appellants requested a variance to the ordinance and that they be grandfathered. The City of Myrtle Beach Board of Zoning Appeals denied that request. In sum, Appellants assert error because the restrictions on Appellants' retail businesses are so dire and severe as to affect the economic value of Appellants' property and thus their retail businesses should have been grandfathered by the City and allowed to continue to sell the banned products.

V. THE OCEAN BOULEVARD ENTERTAINMENT OVERLAY DISTRICT (OBEOD) ORDINANCE HAS NO RATIONAL BASIS.

South Carolina law and the United States Constitution provide that a City ordinance must have a rational basis to pass constitutional muster. In this case, Kenneth May, the City of Myrtle Beach Zoning Administrator, offered no evidence as to why CBD oil, cigarettes and other consumer products were banned other than to say that these products had "no family friendly value."[6] May was pressed about why alcohol and beer was allowed in the OBEOD but not cigarettes. He could not explain the difference. (R. p. 182, lines 5-25). May also consistently testified that he could not answer how the OBEOD lines were drawn or as to why the City Council decided to ban certain products. May readily admitted that those same products were readily sold outside the OBEOD. (R. p. 159, lines 2-5).

There is no rational basis for allowing businesses immediately adjacent to the OBEOD to sell the same products that cannot be sold in the OBEOD. Appellants equal protection rights have been violated because the decision to allow the sale of the banned products citywide while not allowing those in the OBEOD bears no reasonable relationship to the legislative purpose. The Appellants are

[6] "Family friendly" is not defined in the Ordinance.

similar to other retail businesses in the city but are treated very differently. The Ordinance is plainly arbitrary and discriminates against the merchants inside the OBEOD. See *Samson v. Greenville Hospital System*, 295 S.C. 359, 368 S.E. 2d 665 (1988).

In this case, the City of Myrtle Beach's ordinance provides favored status to some merchants (those outside the OBEOD) and discriminates against other merchants (those inside the OBEOD). Further, there can be no rational basis or explanation by the City for allowing merchants to sell the same products immediately adjacent to the OBEOD while not allowing merchants inside the OBEOD to sell those products. Appellants have been deprived of a cognizable property interest right rooted in state law. See *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 96, 596 S.E.2d 917 (2004). See also *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004) (City may not arbitrarily and capriciously deprive a landowner of a cognizable property interest rooted in state law). See also *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 96, 596 S.E.2d 917 (2004) (City ordinance upheld when all bars in City of Charleston must close between the hours of 2 a.m. and 6 a.m. on Monday through Saturday).

VI. THERE IS NO EVIDENCE THAT THE BANNED PRODUCTS AFFECT PUBLIC SAFETY.

The OBEOD Ordinance Section 1. Purpose and Intent, Subsection J[7] provides:

> The displacement of CBD consumables, smoke shops and tobacco stores is necessary and in the interests of the public health, safety and general welfare because there is the substantial likelihood of the establishment and operation of expanded retail offerings of CBD consumables, smoke shops and tobacco stores in the OBEOD.[8]

Further, Section 1807 D provides: (R. p. 605; p. 540).

> The following retail business uses are prohibited in the OBEOD:

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[7] See Ordinance 2017-23 approved August 14, 2018. (R. p. 537).

[8] In fact, the arrest records of the City of Myrtle Beach are public and those indicate from 2015-2017 the leading cause of arrest was alcohol related and no one was arrested for CBD oil or cigarettes.

1. Smoke shops and tobacco stores.
2. Retail merchandising or of alternative, alternative nicotine delivery product. Vapor product, e-cigarette, tobacco paraphernalia or cannabis products.
3. Retail merchandising of tobacco or tobacco products of more than an incidental nature.

Appellants presented to the circuit court (Exhibit 7a) a list of smoke shops bordering the OBEOD overlay, beachwear stores outside the OBEOD overlay and gas stations outside the OBEOD overlay which sell tobacco, CBD oil and the other banned products. (R. pp. 371-374). Further, Appellants' photographic evidence presented to the circuit court included 17 smoke shops bordering the OBEOD overlay, 33 beachwear stores outside the OBEOD overlay, 23 gas stations outside the OBEOD overlay and an advertisement for a business at Coastal Grand Mall all of which are selling the same products that Appellants were prohibited from selling in the overlay district. (R. pp. 375-453).

Appellants' deposition of Kenneth May, the Director of Planning and Zoning, was also presented and he was asked what evidence he had that the sale of the banned products by Appellants' businesses affected public safety. May testified: "If you allowed that to be in every store, that would almost be like the Boulevard was similar to a red-light district down there."[9] (R. p. 183, lines 15-18). Of course red-light districts are illegal and selling tobacco is legal everywhere in South Carolina. In this case Appellants only sold legal products. However, May was unable to explain why those same products were being sold citywide nor could he explain the photographs of all the businesses in the City of Myrtle Beach including beachwear stores, gas stations, pharmacies, the Coastal Grande Mall and other merchants which sold the very same products and why they were being allowed to do so. (See Exhibit 7b Smoke shops bordering the overlay which sell the same products; Exhibit 7c and 7d

[9] Red light district is defined by Merriam Webster Dictionaries as "a district in which houses of prostitution are frequent."

Beachwear stores outside the overlay which sell the same products; and Exhibit 7e Gas stations outside the overlay and those pictures selling the same products.) (R. pp. 375-453). In sum, no evidence was offered by the City except innuendo and conjecture to support the proposition the sale of these consumer products affected public safety. The City offered no evidence at the Board of Zoning Appeals that smoke shops or CBD oil cause an increase in crime.

VII. THE OCEAN BOULEVARD ENTERTAINMENT OVERLAY DISTRICT (OBEOD) ORDINANCE IS UNCONSTITUTIONAL AS TO SEXUALLY ORIENTED MERCHANDISE.

The Appellants argued before the Board of Zoning Appeals and the circuit court that the City of Myrtle Beach could not regulate Appellants' sale of sexually oriented merchandise. Appellants have sold this very same novelty merchandise in the OBEOD for over thirty years. Appellants currently have merchandise in their stores which automatically become banned products should the OBEOD Ordinance be affirmed by this Court. In regard to the sexually oriented merchandise, the OBEOD Ordinance states 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 public region, buttocks or female breasts, or merchandise of that subject.[10]
> (R. p. 605; R. p. 540).

The above section of the OBEOD Ordinance was one of the subjects of the deposition of the City's Director of Planning and Zoning, Kenneth May. In his deposition, May was asked about Section

[10] No evidence of sexually oriented merchandise was offered at the Board of Zoning Appeals although the City Police Chief held up a t-shirt at a City Council meeting as an example of a banned product in the OBEOD.

1807. A.7 of the Ordinance and about sexually oriented merchandise. May stated: "I feel like we all know what it is." (R. p. 181, lines 12-13). May, the Chief Zoning Enforcement Officer, was thereafter unable to articulate what sexually oriented merchandise would be illegal under the OBEOD Ordinance and admitted it was subjective. May's statements as being unable to determine what products such as t-shirts or other merchandise would be banned puts the City Planning and Zoning enforcement inspectors in the position of having to decide what messages or which products may be censored by the City without redress. It essentially makes the zoning inspector judge and jury as the stores have no right of appeal to an independent tribunal.

Here, Section 1807 of the Overlay Zone Regulation overly restricts the sale of sexually oriented merchandise. The Ordinance, however, does not comply with the Constitution. The Ordinance does not provide for a hearing as to the sale of those items which the City is attempting to ban. It simply bans merchandise of a sexually oriented nature.[11] In the case of *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 220, 221 (1990), the Supreme Court considered a challenge to a city ordinance that regulated sexually oriented businesses through a scheme incorporating zoning, licensing and inspections and prohibited individuals convicted of certain crimes from obtaining a license to operate a sexually oriented business for a specified period of years. The Court held that the licensing scheme did not provide for an effective limitation on the time within which the licensure's decision must be made. It also fails to provide an avenue for prompt judicial review so as to minimize suppression of speech in the event of a license denial. The Court further held that the failure to provide these essential

[11] Ironically, these same products can be sold outside the OBEOD without restriction. It should also be noted the prohibited sale of t-shirts with slogans on them which may be offensive violates the First Amendment. In *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) the Supreme Court held viewpoint discrimination is an egregious form of content discrimination and presumptively unconstitutional.

safeguards renders the ordinance's licensing requirements unconstitutional in so far as it is enforced against those businesses engaged in First Amendment activity.

In this case, the Ordinance prohibits the sale of sexually oriented merchandise. It provides no right of hearing by the affected stores which are selling the merchandise; it simply prevents the sale of the merchandise based on a subjective opinion of the inspector. In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1973), the Court set out certain requirements to prevent the sale of obscene books. The New York statute provided for a hearing on one day's notice with the judge being required to hand down his decision within two days after termination of the hearing. Here, none of these safeguards protect the Appellants but instead subject them to the whims of the zoning inspectors from the City as to what is obscene and what is not obscene.

Thus, the City's attempt to ban the sale of sexually oriented merchandise offends the Fourth Amendment, and, thus, this Court should declare the sexually oriented merchandise section of the Ordinance unconstitutional as a matter of law.

VIII. THE APPELLANTS' TIMELINE TO CURE THE NONCONFORMITY IS ARBITRARY AND UNREASONABLE.

Appellants also attack the OBEOD Ordinance Section 1807 because it required Appellants to immediately stop selling the merchandise by December 31, 2018. The Ordinance was approved by City Council after second reading on August 14, 2018. (R. pp. 537-541). The first reading was fifteen months prior to that on May 9, 2017. (R. pp. 533-536). The Ordinance has a section entitled Amortization. It provides as follows:

> Retail stores offering space for the prohibited retail business uses that are operating on effective date of the ordinance codified in this overlay are hereby declared immediately nonconforming as of the date of second reading, and shall be amortized as to the nonconformity, and must cease the nonconforming portion of the retail offerings no later than December 31, 2018.
> (R. p. 540).

Appellants note that on August 15, 2018 pursuant to the Ordinance whatever merchandise Appellants were selling that was listed in the Ordinance was banned and hereby declared to be illegal to sell. Appellants were given a little more than four months to sell their entire inventory of merchandise which they had in their stores. The Ordinance is not only arbitrary and onerous, but the time limitation in the Ordinance for the Appellants to cure the nonconformity is unreasonable and unconstitutional. Appellants have hundreds of thousands of dollars of merchandise in their stores that has now become illegal pursuant to the Ordinance. Appellants entire business model and revenue stream is turned upside down by the Ordinance's short time period requiring the businesses to sell the offending merchandise within a little more than four months.

A request was made before the Myrtle Beach Board of Zoning Appeals to grandfather Appellants' businesses. This request was denied, and the circuit court affirmed it. Appellants assert that their vested property rights to run their retail stores and sell the products has been destroyed by the Ordinance and its requirement that all banned products be removed by December 31, 2018. This Court has held that zoning power may never destroy vested property rights and has so stated in several cases. See *Conway v. City of Greenville*, 254 S.C. 96, 173 S.E.2d 648 (1970) (zoning power may not destroy vested property rights);see also *Byrd v. City of Augusta*, 261 S.C. 591, 201 S.E.2d 744 (1991) (property owner has a constitutionally protected right to continue use following enactment of a zoning ordinance). (rezoning property from commercial to residential is unreasonable and arbitrary – which results in deprivation of plaintiff's property rights.)

In sum, Appellants are entitled to having their businesses grandfathered as a matter of law and to continue to allow them to sell their products in the OBEOD. The failure of the Ordinance to allow grandfathering is an unconstitutional taking of Appellants' property and in effect of their business.

This is an especially egregious case since these same products can be sold throughout the city and are sold within feet of Appellants' businesses or across the street from their businesses.

IX. THE CITY OF MYRTLE BEACH CANNOT BAN CONSUMER PRODUCTS WHICH ARE LEGALLY SOLD THROUGHOUT SOUTH CAROLINA AND ENFORCE CRIMINAL PENALTIES.

This is a unique case in that the City of Myrtle Beach seeks to selectively ban the sale of certain consumer products in the OBEOD as of December 31, 2018. These products include cigarettes, rolling papers, CBD, vape and/or vape products, t-shirts with sexual messages on them, pipes, tobacco paraphernalia, and other tobacco related products. It is ironic that these same products are legal throughout South Carolina and are sold in every city and county throughout the state. Further, these same products which are banned in the OBEOD can and are sold everywhere in Myrtle Beach including gas stations, variety stores, drug stores, restaurants, department stores, malls and other places of business without any restriction. However, if these products are sold in the OBEOD, they are subject to severe civil and criminal penalties including arrest, the loss of a business license and the shutting down of Appellants' retail stores. See *Town of Sullivans Island v. Murray,* Opinion 5856, filed September 1, 2021 (citizen cannot be held to answer charges based on penal statutes whose mandates are so uncertain....).

South Carolina Code § 16-17-504 entitled "Implementation, local laws" speaks directly to the General Assembly's view on the sale of cigarettes or tobacco products on private property. It states:

> Nothing in this section affects the right of any person having ownership or otherwise controlling private property to allow or prohibit the use of tobacco products or alternative nicotine products on their property.

Appellants assert that the sale of tobacco products on their properties is allowed by state law and the City of Myrtle Beach is prohibited from enforcing selectively a law against them selling those

tobacco products. See *Colyer v. Thomas*, 268 S.C. 455, 234 S.E.2d 862 (1977) (where there is a conflict between a state statute and city ordinance the ordinance is void).

In this case, the City of Myrtle Beach's ordinance criminalizes conduct, i.e., the sale of tobacco products. Article VIII of the South Carolina Constitution, Section 14, limits certain powers of local governments. Section 14 provides in pertinent part:

> In enacting provisions required or authorized by this article, general law provisions applications applicable to the following matters shall not be set aside: ...(5) criminal laws and the penalties and sanctions for the transgression thereof....

This Court has observed that this section of the Constitution requires "statewide uniformity regarding the criminal law of this state and therefore "local governments may not criminalize conduct that is legal under a statewide criminal law." See *Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272, 274 (1996) and *Connor v. Town of Hilton Head*, 314 S.C. 251, 442 S.E.2d 608 (1994) where the court held a municipality cannot criminalize nude dancing when state law does not.

In sum, the ordinance in this case makes it a crime to sell any of the banned consumer products in the OBEOD. State law including the Constitution and case law prohibits a municipality from prescribing conduct that is not unlawful under state criminal laws governing the same subject. See *Connor*, 314 S.C. 254, 442 S.E. 2d at 609.

In this case, a violation of the OBEOD Ordinance in the sale of the banned products is criminalized and thus the ordinance attempts to "set aside the criminal laws of South Carolina" regarding cigarette sales

Stated more simply, a zoning ordinance cannot criminalize the sale of consumer products which are sold in the city and indeed throughout the state at virtually every establishment open for business. To allow such a zoning ordinance to stand, criminalizes conduct which is not criminal in the rest of South Carolina.

This Court has on another occasion found that the City of Myrtle Beach cannot enact an ordinance which violates State law. In that case the Court found the City of Myrtle Beach's helmet ordinance failed due to the need for statewide uniformity in traffic laws and issued a declaratory judgment striking down the ordinance. See *Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 694 S.E.2d 213 (2010).

A similar situation exists here. The City of Myrtle Beach cannot legally regulate the sale of tobacco or CBD products including tobacco paraphernalia vape and/or vapor products. These products are regulated by state law. The only restriction on the sale of tobacco in South Carolina is found in S.C. Code § 16-17-500(a) which states: "It is unlawful for an individual to sell, furnish, give, distribute, purchase for, or provide a tobacco product or an alternative nicotine product to a minor under the age of eighteen years."[12] [13]

X. THE CITY OF MYRTLE BEACH OBEOD ORDINANCE IS DEFECTIVE AS A MATTER OF LAW.

South Carolina law requires that all ordinances comply with S.C. Code § 5-7-270 which states:

> **SECTION 5-7-270.** Form and procedures for introducing and passing ordinances. Every proposed ordinance shall be introduced in writing and in the form required for final adoption. Each municipality shall by ordinance establish its own rules and procedures as to adoption of ordinances. No ordinance shall have the force of law until it shall have been read two times on two separate days with at least six days between each reading.

In the case of the OBEOD, the ordinance which was presented on May 9, 2017 for first reading is not the same ordinance which was adopted on second reading on August 14, 2018 and signed by

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[12] Counsel is aware of this Court's opinion in *City of Greenville v. Foothill Brewing*, 377 S.C. 355, 660 S.E. 2d 264 (2008) which upheld a citywide smoking ban ordinance as long as it had no criminal penalties.

[13] South Carolina law also allows the cultivation and sale of CBD oil. See S.C. Code § 46-55-10, et seq. *2018. Currently CBD oil is freely sold throughout the State in stores, gas stations and big box stores.

the Mayor Pro Tem of Myrtle Beach, Brenda Bethune. The first reading ordinance on May 9, 2017 did not define alternative nicotine product, cannabis dispensing business, CBD, e-cigarette, smoke or smoking, smoke shop and tobacco store, tobacco and tobacco related products, tobacco paraphernalia, vapor product, or family friendly. Further, the 2017 ordinance which was presented at first reading required businesses in the OBEOD to maintain working surveillance camera systems which were capable of interconnection with the City's surveillance camera system and also provided for a twelve-month period of time from the date of second reading to amortize those businesses that were nonconforming.

In sum, because the ordinance presented at first reading and the ordinance presented at second reading are completely different ordinances, the adopted ordinance signed by the Mayor on August 14, 2018 violates the provisions of S.C. Code § 5-7-270 which requires that the ordinance shall have been read two times on two separate days. The first reading was May 9, 2017. The second reading was August 14, 2018 and the ordinances are completely different in form, in structure and in substance. The Court need only look at the first reading ordinance of May 9, 2017 and the second approved ordinance of August 14, 2018 to come to the conclusion that the ordinance approved at second reading does not comply with the legislative intent in S.C. Code § 5-7-270.

Finally, there is nothing in the City of Myrtle Beach general ordinances which allows for the drastic changes in the OBEOD Ordinance as in this case between the first reading and the second reading. Appellants were entitled as a matter of law to be given two readings of the ordinance prior to implementation. The ordinance which was approved on August 14, 2018 did not provide the public the two necessary readings and accordingly is defective as a matter of law.

XI. THE CITY OF MYRTLE BEACH BY THIS ORDINANCE IS ENGAGED IN ILLEGAL REVERSE SPOT ZONING.

As the Court is aware, spot zoning and reverse spot zoning are illegal forms of zoning by a municipality. The *City of Miami Beach v. Robbins*, 702 So.2d 1329 (Fla. 3d DCA 1997) is an example of reverse spot zoning. The *Robbins* Court stated, "Reverse spot zoning occurs when a zoning ordinance prevents a property owner from utilizing his or her property in a certain way when virtually all the adjoining neighbors are not subject to such a restriction, creating in effect, a veritable zoning island or zoning peninsula in a surrounding sea of contrary zoning classification. Reverse spot zoning is invalid, as it is confiscatory." *City of Miami Beach v. Robbins*, 702 So.2d 1329 (Fla. 3d DCA 1997)

In Miami Beach, the Miami Beach City Commission passed an ordinance which rezoned Robbins' property as well as the two blocks adjacent to his property, in effect singling out three block for the ordinance in question, while the surrounding and/or adjoining property was not subject to the same zoning restriction. The Florida Court found that such a scheme and/or restriction was illegal.

While South Carolina case law has not addressed the issue of reverse spot zoning, South Carolina has found that spot zoning is illegal. Certainly if spot zoning is illegal, then so is reverse spot zoning such as what we have in this case. The City of Myrtle Beach prohibits the sale of legal consumer goods in the OBEOD of the City of Myrtle Beach while those same goods may be freely sold throughout the rest of the city. This is an unreasonable attempt by the City to restrict the merchants who have their businesses in the OBEOD from selling the same products which are perfectly legal throughout the rest of the city and indeed the State. It defies all logic and is irrational to allow the same consumer products to be sold across the street from the OBEOD. Appellants produced photographic evidence which shows that these consumer products are sold throughout the city. The OBEOD merchants are held to a different standard than other merchants in the city. CBD oil, cigarettes, t-shirts, novelty gifts, pipes and tobacco are allowed to be sold everywhere except in a

small ten block section of the city. This is despite the fact that all of the adjoining and surrounding neighbors to the OBEOD are free to sell the same products with no restriction whatsoever. Appellants believe that such a scheme violates this Court's prohibition against spot zoning and is indeed a form of reverse spot zoning which is impermissible as a matter of law. See *Debes v. City of Key West*, 690 So.2 700 (Fla. 3d DCA 1997), *Richard Road Estates, LLC v. Miami-Dade County Board of County Commissioners*, 2 So. 3d 1117, 1118 (Fla. 3d DCA 2009) (county's refusal to grant a change in zoning resulted in impermissible reverse spot zoning).

In sum, the City's actions by creating the OBEOD is a form of spot zoning which prohibits and defies logic and take away vested rights which the Appellants had in selling the same products prior to the passing of the OBEOD Ordinance. This, of course, is unconstitutional as a matter of law and the City's scheme must fail. See *Hampton v. Richland County*, 292 S.C. at 503, 357 S.E.2d at 465 (Ct. App. 1987) and *Bob Jones University v. City of Greenville*, 243 S.C. 351, 133 S.E.2d 843 (1963), 378 U.S. 581, 84 S.Ct. 1913 (1964).

CONCLUSION

Appellants in this case face a Hobson's choice. They can sell the banned products and be threatened with loss of business license, or their employees arrested, or they can comply with the City of Myrtle Beach ordinance and suffer drastic losses of income and devaluation of their properties. If the Appellants comply with the City's ban on these consumer products, they can watch as their competitors offer the same product directly adjacent to Appellants' businesses. The City offers no rational basis or empirical data or evidence as to why these consumer products can't be sold in a ten-block area of Myrtle Beach while those same products can be sold throughout the city and throughout the state. If the City wants to ban the sale of these products, which Appellants believe would not be legal, it must not discriminate against certain businesses while allowing other businesses to sell the

exact same product. If indeed the consumer products which the Appellants sell create public safety issues, devalue property, threaten tourism or are unseemly, then the City of Myrtle Beach should ban those products throughout the entire city and not just in a small area of the city.

Appellants also suffered a regulatory taking when the City of Myrtle Beach announced on August 14, 2018 that the consumer products the Appellants sold would become illegal as of December 31, 2018. Appellants have in their stores hundreds of thousands of dollars of this merchandise and their revenues would be greatly affected by the City's OBEOD designation.

Appellants request the Court find the OBEOD is irrational and that to prohibit the Appellants from selling the consumer products in their own businesses in this small geographic part of Ocean Boulevard while businesses outside the OBEOD on Ocean Boulevard and throughout the city can freely sell those products does not support the City's argument that the OBEOD must be family friendly. Appellants request that the Court invalidate the OBEOD ordinance and find as a matter of law it violates Appellants' equal protection and due process rights. This Court said it best in the case of *First Baptist Church of Mauldin v. City of Mauldin*, 308 S.C. 226, 417 S.E. 2d 592 (1992): "Ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose." *Purdy v. Moise*, 223 S.C. 298, 302 S.E. 2d 605, 607 (1953). In this case, when the OBEOD ordinance is construed strictly as this Court must do in reviewing it, the ordinance cannot pass constitutional muster and thus this Court should declare it null and void or in the alternative if the Court finds it passes constitutional muster, this Court must find as a matter of law a regulatory taking has occurred as to Appellants' businesses.

Respectfully submitted,

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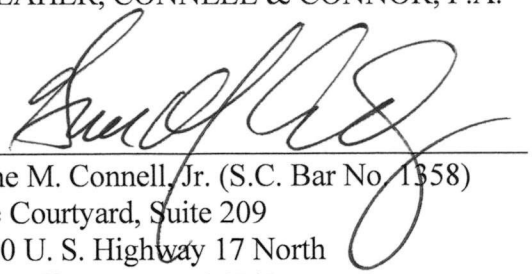

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May 19, 2022

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 Surf's Up, Petitioners,

Appellants

vs.

CITY OF MYRTLE BEACH BOARD OF ZONING APPEALS and KEN MAY, ZONING ADMINISTRATOR FOR CITY OF MYRTLE BEACH, Respondents,

Respondents

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellants complies with Rule 211(b) SCACR.

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