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The Supreme Court of South Carolina

Ani Creation, Inc. d/b/a Rasta: Ani Creation, Inc. d/b/a Wacky T's; Blue Smoke, LLC d/b/a Doctor Vape: Blue Smoke, LLC d/b/a Blue Smoke Vape Shop; ABNME, LLC d/b/a Best for Less; Koretzky, LLC d/b/a Grasshopper; Red Hot Shoppe, Inc.; E.T. Sportswear, Inc, d/b/a Pacific Beachwear; Myrtle Beach General Store, LLC; I Am It, Inc. d/b/a T-Shirt King; and Blue Bay Retail, Inc. d/b/a Surfs Up, Appellants,

v.

City of Myrtle Beach Board of Zoning Appeals and Ken May, Zoning Administrator for City of Myrtle Beach, Respondents.

Appellate Case No. 2021-001074

ORDER

After careful consideration of Appellants' petition for rehearing, the Court grants the petition for rehearing, dispenses with further briefing, and substitutes the attached opinion for the opinion previously filed in this matter.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ Kaye G. Hearn A.J.

Columbia, South Carolina
June 28, 2023

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ani Creation, Inc. d/b/a Rasta: Ani Creation, Inc. d/b/a Wacky T's; Blue Smoke, LLC d/b/a Doctor Vape: Blue Smoke, LLC d/b/a Blue Smoke Vape Shop; ABNME, LLC d/b/a Best for Less; Koretzky, LLC d/b/a Grasshopper; Red Hot Shoppe, Inc.; E.T. Sportswear, Inc, d/b/a Pacific Beachwear; Myrtle Beach General Store, LLC; I Am It, Inc. d/b/a T-Shirt King; and Blue Bay Retail, Inc. d/b/a Surfs Up, Appellants,

v.

City of Myrtle Beach Board of Zoning Appeals and Ken May, Zoning Administrator for City of Myrtle Beach, Respondents.

Appellate Case No. 2021-001074

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge

App. 3

Opinion No. 28151
Heard February 9, 2023—Filed April 19, 2023
Re-filed June 28, 2023

AFFIRMED

Reese R. Boyd III, of Davis & Boyd, LLC, of Myrtle Beach, and Gene McCain Connell Jr., of Kelaher, Connell, & Connor, PC, of Surfside Beach, both for Appellants.

Michael Warner Battle, of Battle Law Firm, LLC, of Conway, for Respondents.

JUSTICE KITTREDGE: The City of Myrtle Beach (the city) is a town economically driven and funded by tourism. After receiving frequent criticism from tourists and residents alike, the city became concerned that the proliferation of smoke shops and tobacco stores were repelling families from the area due to those stores' merchandise and advertising practices. More specifically, the city was troubled with those shops' sale of sexually explicit items, cannabidiol (CBD)-infused products, and tobacco paraphernalia. Therefore, in an effort to improve the "family friendly" nature of the downtown area, the city created a zoning overlay district[1] that prohibited the operation of smoke

[1] *See* S.C. Code Ann § 6-29-720(C)(5) (Supp. 2022) (defining an overlay zone as "a zone which imposes a set of requirements or relaxes a set of requirements imposed by the underlying zoning

shops and tobacco stores, among others, in the city's downtown.

Appellants are nine of the twenty-five affected stores located in the area, and each was issued a citation by the city's zoning administrator for failing to comply with the zoning overlay ordinance. Following a complicated legal battle, appellants raised a host of constitutional challenges to the zoning overlay ordinance. However, the circuit court found the ordinance survived appellants' veritable barrage. Appellants directly appealed that decision to this Court. We now hold that, under this Court's long-standing precedent, the overlay ordinance did not impermissibly spot zone the city's historic downtown area. We additionally find the overlay ordinance is a constitutional exercise of the city's police powers. We therefore affirm the decision of the circuit court and uphold the validity of the ordinance.

I.

A.

In 2011, the city adopted a comprehensive plan that, among other things, set forth future objectives aimed at increasing tourism and revenue. In the comprehensive plan, the city noted that tourists and residents had repeatedly expressed concern over the "noise and behavior of certain groups visiting the area," resulting

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district when there is a special public interest in a particular geographic area that does not coincide with the underlying zone boundaries").

in "negative perceptions about Myrtle Beach." Likewise, the city determined that "[c]rime and the perception of crime [was] a problem that need[ed] addressing." The city concluded all businesses needed to encourage and support a "family beach image" and determined that a positive "city image" would foster more tourism. To that end, the city outlined a number of specific objectives, including its desires to (1) "define and maintain Myrtle Beach as a family beach"; (2) "revitalize the downtown area of Myrtle Beach"; and (3) "create an environment[ ] which ensures that visitors and residents are safe."

Ultimately, the Myrtle Beach city council effectuated those objectives by enacting Ordinance 1807 (the ordinance), which created a zoning overlay district—known as the Ocean Boulevard Entertainment Overlay District (OBEOD)—that encompassed the historic downtown area of the city. Myrtle Beach, S.C., Code of Ordinances app. A § 1807 (2019). In creating the OBEOD, the ordinance extensively set forth its purpose and intent, emphasizing, among other things, the importance of fostering more family tourism and discouraging things that were "repulsive" to families, including "unhealthy tobacco use, crudity and the stigma of drug use and paraphernalia." *Id.* § 1807.A. As a result, the city council found the displacement of smoke shops and tobacco stores from the historic downtown area was "in the interests of the public health, safety, and general welfare." *Id.* Likewise, city council stated the presence of smoke shops and tobacco stores heightened the risk of "negative aesthetic impacts, blight,

and loss of property values of residential neighborhoods and businesses in close proximity to such uses." *Id.* Finally, city council noted that despite the creation of the OBEOD, there were numerous other locations throughout the city available for the continued operation of smoke shops and tobacco stores. *Id.*

Following the city council's lengthy recitation of the purpose and rationale underlying the ordinance, the ordinance prohibited certain retail businesses and offerings within the OBEOD, including (1) smoke shops and tobacco stores; (2) any merchandising of tobacco paraphernalia or products containing CBD, such as lotions, oils, and food; (3) any merchandising of tobacco products more than that of an incidental nature (i.e., more than 10% of store's inventory); and (4) any merchandising of sexually oriented material (collectively, the prohibited retail uses). *Id.* § 1807.D.

The prohibited retail uses were declared immediately nonconforming upon passage of the ordinance on August 14, 2018. *Id.* § 1807.E. However, the ordinance provided for an amortization period that gave affected businesses until December 31, 2018, to cease the nonconforming part of their retail offerings. *Id.* The ordinance likewise stated that, should a business continue engaging in the prohibited retail uses, it would be subject to suspension or revocation of its business license. *Id.* § 1807.F.

B.

Shortly before the end of the amortization period, on December 19, 2018, appellants filed suit in federal court seeking damages, injunctive relief, and a declaration that the ordinance was unconstitutional.[2] Two days later, appellants filed a motion for a temporary restraining order, but the parties resolved the motion by consent, agreeing the city would enforce the ordinance "through use of [the city's] zoning ordinance administrative procedures."

Six months later, the city's zoning administrator issued individual citations to each of the appellants for continuing to engage in the prohibited retail uses in violation of the ordinance. The zoning administrator also requested that each of the businesses comply with the ordinance. No penalties were imposed on

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[2] The federal lawsuit alleged the ordinance amounted to an unconstitutional taking and violated appellants' rights to free speech, due process, and equal protection. Eventually, the federal court dismissed appellants' due process claim, citing the *Burford* abstention doctrine. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726–27 (1996) (explaining the *Burford* abstention doctrine allows a federal court to dismiss a case "only if it presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar, or if its adjudication in a federal forum would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern" (citation omitted) (internal quotation marks omitted)). The federal court also dismissed the takings claim without prejudice, finding the claim was not yet ripe. The court stayed the remaining claims (free speech and equal protection) pending resolution of this state court proceeding.

appellants at that time; rather, the letters were merely the zoning administrator's determination that appellants' businesses were nonconforming under the ordinance.

Appellants appealed the zoning administrator's determination to the city's Board of Zoning Appeals (BZA). At the BZA hearing, the zoning administrator set forth evidence as to how each appellant was engaged in the prohibited retail uses, submitting photographs of appellants' stores and merchandise. Appellants' only witness, Tim Wilkes, conceded each of appellants' stores was engaged in one or more of the prohibited retail uses. Nonetheless, appellants requested the BZA either declare the ordinance unconstitutional or grant variances to appellants so that they could continue engaging in the prohibited retail uses. Ultimately, the BZA found (1) it did not have jurisdiction to declare the ordinance unconstitutional;[3] (2) it could not grant a use variance because it would allow the continuation of a use not otherwise allowed in the OBEOD;[4] and (3)

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[3] *See* S.C. Code Ann. § 6-29-800(E) (Supp. 2022) (explaining that in exercising its statutory authority, as outlined in subsection (A), the BZA "has all the powers of the officer from whom the appeal is taken"). No one contends the zoning administrator here—the "officer from whom the appeal [was] taken"—would have had the authority to declare a zoning ordinance unconstitutional.

[4] *See* S.C. Code Ann § 6-29-800(A)(2)(d)(i) ("The [BZA] may not grant a variance, the effect of which would be to allow the establishment of a use not otherwise permitted in a zoning district, to extend physically a nonconforming use of land or to change the zoning district boundaries shown on the official zoning map. The fact that property may be utilized more profitably, if a

appellants' businesses were engaged in one or more of the prohibited retail uses.

Appellants appealed the BZA's decision to the circuit court, but the circuit court affirmed the BZA's decision and found meritless appellants' twenty-five grounds for challenging the ordinance. In relevant part, the circuit court held the boundaries of the OBEOD were not arbitrary and capricious, citing to the city council's extensive recitation of the rationale for adopting the OBEOD and locating the boundaries where it did. *See* Myrtle Beach, S.C., Code of Ordinances app. A § 1807.A. The circuit court also found that whether the ordinance promoted the public welfare was "fairly debatable." In support, the circuit court cited to the zoning administrator's testimony regarding a number of complaints he had received regarding the sale of tobacco paraphernalia and sexually oriented merchandise in the historic downtown where there was a high level of pedestrian traffic by families with young children. The court thus concluded appellants had failed to meet their burden to show the ordinance was unconstitutional.

Appellants directly appealed to this Court pursuant to Rule 203(d)(1)(A)(ii), SCACR, raising five issues challenging the validity of the ordinance on both

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variance is granted, may not be considered grounds for a variance. Other requirements may be prescribed by the zoning ordinance.").

procedural and constitutional grounds.[5] We address each in turn.

II.

"A municipal ordinance is a legislative enactment and is presumed to be constitutional." *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991) (per curiam); *see also Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965) ("There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application. . . ."). Courts must make every presumption in favor of the constitutionality of a legislative enactment. *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) (per curiam) (quoting *City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011)). Thus, courts may only declare a municipal ordinance unconstitutional "when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution." *Id.* at 504, 719 S.E.2d at 663 (quoting *Harris*, 391 S.C. at 154, 705 S.E.2d at 55).

More specifically, "The Court will not overturn the action of the City if the decision is fairly debatable because the City's action is presumed to have been a valid exercise of power and it is not the prerogative of

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[5] To be more precise, appellants' brief listed eleven issues on appeal, but because some of the issues overlapped, we have condensed them to five.

the Court to pass upon the wisdom of the decision." *Rushing v. City of Greenville*, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975); *see also Rush*, 246 S.C. at 276, 143 S.E.2d at 531 (explaining the Court must exercise "carefully and cautiously" its power to declare a challenged ordinance invalid on the basis that the ordinance unreasonably impaired or destroyed a constitutional right). Thus, when a local city council enacts a zoning ordinance after considering all of the relevant facts, the Court should not disturb the council's action unless the council's findings were arbitrary and capricious or had no reasonable relation to a lawful purpose. *Rush*, 246 S.C. at 276, 143 S.E.2d at 531; *Rest. Row Assocs. v. Horry Cnty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999); *see also Willoughby*, 306 S.C. at 422, 412 S.E.2d at 425 ("The exercise of police power under a municipal ordinance is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose." (citation omitted)); *Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 133, 694 S.E.2d 213, 215 (2010) ("This State's constitution provides that the powers of local governments should be liberally construed." (citing S.C. Const. art. VIII, § 17)).

The burden of establishing the invalidity of a zoning ordinance is on the party attacking it to establish by clear and convincing evidence that the acts of the city council were arbitrary, unreasonable, and unjust. *Bibco Corp. v. City of Sumter*, 332 S.C. 45, 52, 504 S.E.2d 112, 116 (1998) (citing *Willoughby*, 306 S.C. at 422, 412 S.E.2d at 425); *Rush*, 246 S.C. at 276, 143 S.E.2d at 531.

III.

Appellants first argue the ordinance is defective as a matter of law because it was not adopted following the procedure set forth in section 5-7-270 of the South Carolina Code. *See* S.C. Code Ann. § 5-7-270 (2004) (requiring generally that municipal ordinances be "read two times on two separate days with at least six days between each reading" prior to being adopted and having the force of law). Specifically, appellants contend the versions of the ordinance introduced for the first and second readings were so different from one another that the city council was required to conduct a third reading prior to enacting the ordinance. We disagree.

Because appellants failed to timely challenge the efficacy of the two readings of the ordinance, they are statutorily barred from raising this issue. Section 6-29-760(D) of the South Carolina Code (2004) requires parties to challenge the validity of an ordinance within sixty days of the decision of the governing body, provided "there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission." The ordinance was formally adopted and went into effect upon the second reading on August 14, 2018. Appellants did not file their federal suit or take any other formal action to challenge the validity of the ordinance until December 19, 2018—well over sixty days later. As a result, appellants can no longer challenge the validity of the ordinance under section 5-7-270. *See Quail Hill, L.L.C. v. Cnty. of Richland*, 379 S.C. 314, 320–21, 665 S.E.2d 194, 197 (Ct. App. 2008)

(holding a challenge to the validity of the enactment of a county ordinance was untimely because the challenge was made long after the sixty-day window had closed), *aff'd in part on this ground and rev'd in part on other grounds*, 387 S.C. 223, 692 S.E.2d 499 (2010).

Even were we to overlook the untimeliness of appellants' challenge and address the merits of their argument, appellants' suggestion that the two readings of the ordinance were vastly different is simply untrue. While the city council expanded the "purpose and intent" section of the original version of the ordinance and added a number of definitions, the prohibited retail uses in the final version were identical to those in the original version. If anything, the amendments merely better-defined the terms used to describe actions or merchandise that qualified as a prohibited retail use. There is no basis on which to conclude the amendments to the ordinance were so drastic as to trigger the need for a new first reading. *Cf. Brown v. Cnty. of Charleston*, 303 S.C. 245, 247, 399 S.E.2d 784, 785–86 (Ct. App. 1990) (explaining the purpose of providing public notice related to zoning amendments is to satisfy the "general principles of due process that require notice which fairly and reasonably apprises those whose rights may be affected of the nature and character of the action proposed"). We therefore affirm the circuit court's decision as to this issue.

IV.

Appellants next argue the ordinance violates the Equal Protection Clause of the Fourteenth Amendment to the

United States Constitution. Specifically, appellants broadly contend the creation of the OBEOD was unfair to them because they cannot sell certain merchandise that similar stores can continue selling in other areas of the city. Appellants therefore claim the creation of the OBEOD was arbitrary and capricious because it treated them differently from other, similarly situated businesses throughout the city. Appellants point to three specific concerns as evidencing the arbitrary and capricious nature of the ordinance: (1) city council reverse spot zoned the OBEOD; (2) the boundaries of the OBEOD are not drawn in straight lines or with any discernable reasoning behind them; and (3) there is no evidence that the prohibited retail uses affect public safety. We will address each of these concerns below.[6]

A.

Appellants first contend the ordinance constitutes impermissible reverse spot zoning—a novel issue in South Carolina. We disagree.

There are two types of spot zoning Traditional spot zoning occurs when a small parcel of land is singled

[6] Amongst their eleven issues on appeal, appellants raise two takings claims. The first is a traditional takings claim arising under the Fifth Amendment to the United States Constitution, which we address further below. The second is a claim that because the ordinance violated appellants' right to equal protection, the ordinance took their business without just compensation. Appellants' Br. at 10. We find such an argument meritless and do not address it further other than to note that takings and equal protection are two distinct constitutional doctrines with wholly separate requirements and bodies of case law.

out for a use classification different from that of the surrounding area, for the benefit of the parcel's owner(s) and to the detriment of others. *Bob Jones Univ. v. City of Greenville*, 243 S.C. 351, 361, 133 S.E.2d 843, 848 (1963); *see also id.* at 362, 133 S.E.2d at 848 (noting it is "not [] considered [] spot zoning where the proposed change is from one use to another and there was already a considerable amount of property adjoining the property sought to be reclassified falling within the proposed [new use] classification" (citing *Eckes v. Bd. of Zoning Appeals*, 121 A.2d 249 (Md. 1956))). Typically, traditional spot zoning singles out and reclassifies a relatively small tract that is owned by a single person and surrounded by a much larger, uniformly zoned area, such that the small tract is relieved from restrictions to which the rest of the area is subjected. *See Talbot v. Myrtle Beach Bd. of Adjustment*, 222 S.C. 165, 175, 72 S.E.2d 66, 71 (1952) (citation omitted); Mark S. Dennison, Annotation, *Determination whether zoning or rezoning of particular parcel constitutes illegal spot zoning*, 73 A.L.R.5th 223 (1999) ("The zoning or rezoning of a single tract of land, usually small in size, such that it is zoned differently from surrounding property may be invalidated as illegal spot zoning.").

In contrast, reverse spot zoning occurs when a zoning ordinance restricts the use of a property when virtually all the property's adjoining neighbors are not subject to the use restriction. 83 Am. Jur. 2d *Zoning and Planning* § 89 (2013). Oftentimes, reverse spot zoning occurs where a zoning "island" develops as the result of a municipality's failure to rezone a portion of land to

bring it into conformity with similar surrounding parcels that are otherwise indistinguishable. *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 731 (Pa. 2003); *Palmer Trinity Priv. Sch., Inc. v. Vill. of Palmetto Bay*, 31 So. 3d 260, 262 (Fla. Dist. Ct. App. 2010) ("The properties surrounding Parcel B were all originally zoned AU or EU-2, but they have been changed to less restrictive zoning classifications as the agricultural character of the area has changed over the years.").

Thus, spot zoning may arise in two ways: (1) by an affirmative legislative act that affects the parcel at issue (traditional spot zoning); or (2) by changes to the zoning map around the parcel at issue (reverse spot zoning). *See* 39 Am. Jur. Proof of Facts 3d 433, § 3 (West 2023) (describing types of spot zoning challenges).

Spot zoning is not impermissible per se in South Carolina. Rather, as this Court has previously explained,

> [W]here an ordinance establishes a small area within the limits of a zone in which are permitted uses different from or inconsistent with those permitted within the larger, such "spot zoning" is invalid where the ordinance does not form a part of a comprehensive plan of zoning or is for mere private gain as distinguished from the good of the common welfare.

Talbot, 222 S.C. at 175, 72 S.E.2d at 71 (citation omitted); *see also id.* at 175, 72 S.E.2d at 70 (cautioning that courts should not "become city planners but [should only] correct injustices when they are clearly shown to result from the municipal action"). Thus, when the

Court finds an ordinance constitutes spot zoning, "the appropriate analysis is to closely scrutinize the following factors: (1) the adherence of the zoning to the City's comprehensive plan; and (2) promotion of the good of the common welfare but to only correct injustices which are clearly shown." *Knowles v. City of Aiken*, 305 S.C. 219, 223, 407 S.E.2d 639, 642 (1991); *see also* 39 Am. Jur. Proof of Facts 3d 433 ("Legal challenges to [spot zoning] are generally based on allegations and proof of discriminatory treatment of a single landowner, inconsistency with the comprehensive plan, incompatibility with neighboring uses, and harm to the general welfare of the community.").

Here, despite Appellants' contentions, the creation of the OBEOD does not fit within the accepted definition of reverse spot zoning. The prohibited retail uses in the OBEOD were not the result of a zoning "island" that developed as the surrounding area was rezoned while the OBEOD was left behind; rather, the OBEOD was created by an affirmative legislative act by the city. In other words, if anything, the creation of the OBEOD more closely resembles traditional spot zoning.

However, we find it equally doubtful the creation of this overlay district constituted traditional spot zoning. The OBEOD is a fairly large area: it overlays at least twenty distinct zones; it comprises an approximate rectangle measuring slightly less than two miles by one-quarter mile; and it encompasses over fifty city blocks which are, of course, further divided into a significant number of individual properties owned by separate property owners. It goes without saying that

creating an overlay zoning district over such a large, diverse area is distinct from the typical, traditional spot zoning factual scenario. *See Talbot*, 222 S.C. at 175, 72 S.E.2d at 71 (noting spot zoning occurs when an ordinance affects a small area within the limits of a single zone); Dennison, *supra*, 73 A.L.R.5th at 223 (explaining spot zoning involves a single, small tract of land); 39 Am. Jur. Proof of Facts 3d 433 (stating spot zoning challenges generally require proof the ordinance has affected a single landowner).

Even were we to accept appellants' argument that the creation of the OBEOD constituted spot zoning in some fashion, we find that argument unavailing. Specifically, applying the test outlined in *Knowles* and *Talbot*, we find any spot zoning caused by the ordinance was legally permissible. *See Knowles*, 305 S.C. at 223, 407 S.E.2d at 642; *Talbot*, 222 S.C. at 175, 72 S.E.2d at 70. First, the ordinance was consistent with the city's comprehensive plan. Second, as we discuss further below, it is "fairly debatable" that city council enacted the ordinance to promote the public welfare. *See Rushing*, 265 S.C. at 288, 217 S.E.2d at 799 (explaining the Court will not overturn a municipality's action if the decision is "fairly debatable" because the action is presumed to be a valid exercise of power, and it is not the Court's prerogative to weigh in on the wisdom of the decision). Third, the ordinance did not result in clear injustice to appellants: even after the creation of the OBEOD, appellants retained ownership of their property—the real estate and the merchandise—and they presented no evidence that they could not pivot to

another business model. *See Helena Sand & Gravel, Inc. v. Lewis & Clark Cnty. Plan. & Zoning Comm'n*, 290 P.3d 691, 699–700 (Mont. 2012) (applying the state's traditional spot zoning test under a similar factual scenario, rather than some separate reverse-spot-zoning test, and concluding that because the zoning regulation was consistent with the county's comprehensive plan, it was not impermissible spot zoning); *cf.* S.C. Code Ann. § 6-29-800(A)(2)(d)(i) (noting the BZA may not grant a variance if the effect of the variance would be to allow a use not otherwise permitted in a zoning district, and "[t]he fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance"). We therefore reject appellants' equal protection challenge on the basis of impermissible spot zoning.

B.

Second, appellants contend the OBEOD's boundaries are irrational and, to be constitutional, must ban the prohibited retail uses throughout the entire city. We disagree.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Where, as here, "there is no suspect or quasi-suspect class and no fundamental right is involved, zoning ordinances should be tested under the

'rational basis' standard." *Bibco Corp.*, 332 S.C. at 52, 504 S.E.2d at 116.

Under rational basis review, the Equal Protection Clause is satisfied so long as (1) there is a plausible policy reason for the classification; (2) the facts on which the classification is based rationally may have been considered to be true by the decision maker; and (3) the relationship of the classification to the goal is not so attenuated as to render the distinction arbitrary or irrational. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992); *see also Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004) ("Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and[] (3) the classification rests on some reasonable basis."). A party challenging a legislative enactment under rational basis review "must negate every conceivable basis which might support" the enactment and, therefore, has a "steep hill to climb." *Bodman v. State*, 403 S.C. 60, 69–70, 742 S.E.2d 363, 367–68 (2013) (quoting *Lee v. S.C. Dep't of Nat. Res.*, 339 S.C. 463, 470 n.4, 530 S.E.2d 112, 115 n.4 (2000)) (internal quotation marks omitted)).

Here, the ordinance explicitly states the city council enacted the ordinance to foster a more "family friendly" atmosphere in the historic downtown area and encourage more tourism by families. *See* Myrtle Beach, S.C., Code of Ordinances app. A § 1807.A. The zoning

administrator testified that he had received complaints from families about the prohibited retail uses. The city council found the prohibited retail uses "repelled" families from the area. We find it is, at the very least, "fairly debatable" that prohibiting the sale of sexually oriented merchandise and tobacco paraphernalia would encourage a more "family friendly" atmosphere in the historic downtown area. *See Rushing*, 265 S.C. at 288, 217 S.E.2d at 799 (stating the Court should not overturn a municipality's decision if the action is "fairly debatable").

Moreover, the zoning administrator stated the boundaries for the OBEOD corresponded with the boundaries of the historic downtown area of the city as much as was practical. Those boundaries were set long ago based on pedestrian travel patterns, family-friendly attractions, and historical uses that preexisted the ordinance. There are two deviations from the historic downtown's boundary lines, both of which have rational explanations. First, the northwestern edge of the OBEOD is shifted half a block away from US-17 Business (the boundary for the historic downtown). Because the OBEOD was created in part to foster more pedestrian traffic in the historic downtown, and because the city council did not believe families of pedestrians would readily walk along a busy road such as US-17 Business, the city council felt it unnecessary to include that portion of the historic downtown in the OBEOD. Second, and relatedly, the boundary line does not run in a completely straight line along the backs of *every* property that fronts US-17 Business because it

cannot: two properties in the OBEOD are large enough that they comprise several city blocks, stretching from US-17 Business all the way to Ocean Boulevard.[7] In those two places, the boundary line runs on the US-17 Business side of the property rather than the ocean-side of the property. The city's decision regarding where to set the boundaries of the OBEOD is certainly not irrational or without basis.

Appellants have failed to show by clear and convincing evidence that the location of or rationale behind the boundaries of the OBEOD is arbitrary and capricious. Consequently, the boundaries of the OBEOD are valid. *See McMaster*, 395 S.C. at 504, 719 S.E.2d at 663 (quoting *Harris*, 391 S.C. at 154, 705 S.E.2d at 55); *Knowles*, 305 S.C. at 224, 407 S.E.2d at 642. As the circuit court found, "Zones must have beginning and terminating points. If the existence of divergent uses across zone boundary lines were taken *per se* as an appropriate basis for a constitutional violation, the entire zone plan in any municipality might well crumble by chain reaction." (Citations omitted.) The disparate treatment of similarly situated businesses on either side of the OBEOD boundary line is not a basis on which to find an equal protection violation. *Cf. Bibco Corp.*, 332 S.C. at 52–54, 504 S.E.2d at 116–17 (finding a zoning ordinance that prohibited mobile homes from some residential districts in the city—but not all—survived rational basis review).

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[7] One property contains Pavilion Park, and the other contains Family Kingdom Amusement Park.

C.

Finally, appellants argue the creation of the OBEOD was arbitrary and capricious because the city did not submit any evidence that the prohibited retail uses impacted public safety. We summarily dismiss this argument, as appellants—not the city—had the burden of proof. *Rush*, 246 S.C. at 276, 143 S.E.2d at 531. The city did not need to submit anything affirmatively proving its policy decision was correct. *Cf. Nordlinger*, 505 U.S. at 11 (noting that the Equal Protection Clause requires only that the legislative fact on which the classification is apparently based rationally *may* have been considered to be true by the governmental decisionmaker). Rather, it was incumbent upon appellants to submit evidence that the city's policy decision was based on a faulty factual premise, and the prohibited retail uses had no impact on public safety. Appellants failed to do so.

Accordingly, we hold appellants have failed to demonstrate the ordinance violated their right to equal protection, and we affirm the circuit court's decision on this basis.

V.

Next, appellants raise two due process arguments. First, appellants argue the ordinance does not explicitly provide for a hearing in which an affected vendor could challenge the zoning administrator's finding that certain merchandise fits within the ordinance's definition of sexually oriented merchandise. Second,

appellants contend the ordinance imposes an arbitrary and unreasonable amortization period. We disagree with both arguments.

We reject appellants' first argument as it is based on a faulty factual premise. Rather, section 6-29-800(A)(1) of the South Carolina Code explicitly provides the BZA has the authority to hear any appeal "where it is alleged there is error in . . . [a] determination made by an administrative official in the enforcement of the zoning ordinance." Section 6-29-800(E) additionally provides the BZA "has all the powers of the officer from whom the appeal is taken" and, therefore, may determine—just as the zoning administrator does in the first instance—whether the challenged merchandise fits within the ordinance's definition of "sexually oriented merchandise." Further, as occurred here, should an affected property owner disagree with the BZA's decision, it can appeal the decision to the circuit court and, if necessary, this Court.[8]

Turning to appellants' second due process argument, we find any contention that the amortization period was too draconian is moot. *See Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) ("An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. . . . A case becomes moot when judgment, if rendered, will have no practical legal effect upon the

[8] Of course, here, appellants conceded they were engaged in the prohibited retail uses, so there would be no need for an additional hearing challenging the determination of the zoning administrator.

existing controversy." (cleaned up)). Any attempts by the city to enforce the ordinance and actually impose the provided-for civil penalties were stymied by the pendency of this appeal. As a result, appellants have had nearly five years to come into compliance with the ordinance and, apparently, have failed to do so. We cannot say an effective five-year amortization period is per se unreasonable.

We therefore reject both of appellants' due process claims.

VI.

Appellants additionally claim the ordinance effects a taking of their property without just compensation, specifically citing the three-factor test set forth by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) (explaining that, in regulatory takings cases, courts should examine (1) the economic impact of the regulation on the affected property; (2) the extent to which the regulation interfered with the property owner's investment-backed expectations; and (3) the character of the government action). We disagree.

Takings claims are "essentially ad hoc, factual inquiries" that "depend[ ] largely upon the particular circumstances in that case." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg? Plan. Agency*, 535 U.S. 302, 322, 336 (2002) (cleaned up); *see also Dunes W. Golf Club, L.L.C. v. Town of Mt. Pleasant*, 401 S.C. 280, 314, 737 S.E.2d 601, 619 (2013) (explaining the question of whether a

taking has occurred is a question of law that this Court must review de novo (citations omitted)). Appellants, however, have not developed any of the facts necessary to support a takings claim. For example, they do not quantify the economic impact of the ordinance on their properties—the first *Penn Central* factor. *See Penn Cent.*, 438 U.S. at 124. Rather, appellants merely claim the impact is a "significant amount" that is "dire" and "severe."[9]

We are left to speculate about the facts necessary to support appellants' takings claim.[10] We therefore reject

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[9] This lack of specificity stands in stark contrast to other takings cases, where parties typically quibble over the appropriate numbers to enter into the takings fraction, as well as the exact percentage necessary to amount to an unconstitutional taking. *See*, *e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1941 (2017) (explaining the parties submitted competing appraisals for the value of the affected properties, including figures corresponding to the values of the properties with and without the challenged regulation); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 534 (2005) (discussing the exact figures corresponding to the impact of the challenged regulation on each of sixty-four affected properties owned by the claimant); *Tahoe-Sierra Pres. Council*, 535 U.S. at 302, 316 n.12 (involving a dispute over how to define and calculate the denominator of the takings fraction, and detailing the average values of the over-400 affected properties); *Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (2001) (explaining the plaintiff in a takings action submitted an appraiser's report to quantify the amount of damages sought).

[10] In fact, appellants make no argument at all regarding the second and third *Penn Central* factors, i.e., the extent to which the ordinance impacted their investment-backed expectations or the character of the government action. We therefore find appellants have abandoned any argument regarding those two factors. *See Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 42 n.7, 535 S.E.2d 642, 646 n.7 (2000) (stating an issue is

appellants' claim that the ordinance took their property without just compensation in violation of the Fifth Amendment to the United States Constitution.

VII.

Finally, appellants claim the ordinance criminalizes the sale of consumer products that are otherwise legal under state law, and it therefore conflicts with—and must be preempted by—the State's criminal laws. This argument, too, rests on a faulty factual premise.

The ordinance does not impose any criminal penalties for continuing to engage in the prohibited retail uses after the amortization period; rather, the penalty provided for in the ordinance is the suspension or revocation of the nonconforming business's business license. Myrtle Beach, S.C., Code of Ordinances app. A § 1807.F. Thus, the ordinance does not criminalize the sale of legal products in contravention of the State's criminal laws. *Compare, e.g.*, *Foothills Brewing Concern, Inc. v. City of Greenville*, 377 S.C. 355, 660 S.E.2d 264 (2008) (upholding the validity of a municipal ordinance banning smoking in bars and restaurants despite the fact that smoking was legal throughout the State, and finding significant the fact that the no-smoking ordinance imposed only civil penalties), *with Beachfront Ent., Inc. v. Town of Sullivan's Island*, 379 S.C. 602, 666 S.E.2d 912 (2008) (striking down a municipal ordinance banning smoking in the workplace

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deemed abandoned if a party fails to make an argument as to the merits of the issue).

because it imposed significant criminal penalties for violations and, therefore, conflicted with State law that otherwise allowed smoking in the workplace). We therefore reject this argument as a basis on which to find the ordinance invalid.

VIII.

After examining the host of appellants' constitutional and procedural challenges to the ordinance, we hold the ordinance was a valid exercise of the city's police powers. *See Rush*, 246 S.C. at 276, 143 S.E.2d at 530–31 ("The authority of a municipality to enact zoning ordinances, restricting the use of privately owned property[,] is founded in the police power. The governing bodies of municipalities clothed with authority to determine residential and industrial districts are better qualified by their knowledge of the situation to act upon such matters than are the Courts, and they will not be interfered with in the exercise of their police power to accomplish [their] desired end unless there is [a] plain violation of the constitutional rights of [the] citizens."). We therefore affirm the decisions of the circuit court and BZA.[11]

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[11] As a final matter, appellants contend that our decision today overrules three of our prior decisions: *Pure Oil Division v. City of Columbia*, 254 S.C. 28, 173 S.E.2d 140 (1970); *Kerr v. City of Columbia*, 232 S.C. 405, 102 S.E.2d 364 (1958); and *James v. City of Greenville*, 227 S.C. 565, 88 S.E.2d 661 (1955). We find those cases manifestly distinguishable from the present case. *See*, *e.g.*, *Pure Oil*, 254 S.C. at 34, 173 S.E.2d at 143 ("We have recognized the rule that, when a zoning or building permit has been

AFFIRMED.

BEATTY, C.J., FEW, JAMES, JJ., and Acting Justice Kaye G. Hearn, concur.

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properly issued and the owner has incurred expenses in reliance thereon, he acquires a vested properly right therein of which he cannot be deprived without cause *or in the absence of public necessity. . . . There are no intervening considerations of public necessity involved under the facts of this case*." (emphasis added)). Here, of course, the city believed the creation of the OBEOD was a matter of public necessity, as it explained in detail in the purpose and intent section of the ordinance. *See generally* Myrtle Beach, S.C., Code of Ordinances app. A § 1807.A. Thus, our decision today in no way overrules *Pure Oil*, *James*, or *Kerr*.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ani Creation, Inc. d/b/a Rasta: Ani Creation, Inc. d/b/a Wacky T's; Blue Smoke, LLC d/b/a Doctor Vape: Blue Smoke, LLC d/b/a Blue Smoke Vape Shop; ABNME, LLC d/b/a Best for Less; Koretzky, LLC d/b/a Grasshopper; Red Hot Shoppe, Inc.; E.T. Sportswear, Inc, d/b/a Pacific Beachwear; Myrtle Beach General Store, LLC; I Am It, Inc. d/b/a T-Shirt King; and Blue Bay Retail, Inc. d/b/a Surfs Up, Appellants,

v.

City of Myrtle Beach Board of Zoning Appeals and Ken May, Zoning Administrator for City of Myrtle Beach, Respondents.

Appellate Case No. 2021-001074

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 28151
Heard February 9, 2023—Filed April 19, 2023

AFFIRMED

Reese R. Boyd III, of Davis & Boyd, LLC, of Myrtle Beach, and Gene McCain Connell Jr., of Kelaher, Connell, & Connor, PC, of Surfside Beach, both for Appellants.

Michael Warner Battle, of Battle Law Firm, LLC, of Conway, for Respondents.

JUSTICE KITTREDGE: The City of Myrtle Beach (the city) is a town economically driven and funded by tourism. After receiving frequent criticism from tourists and residents alike, the city became concerned that the proliferation of smoke shops and tobacco stores were repelling families from the area due to those stores' merchandise and advertising practices. More specifically, the city was troubled with those shops' sale of sexually explicit items, cannabidiol (CBD)-infused products, and tobacco paraphernalia. Therefore, in an effort to improve the "family friendly" nature of the downtown area, the city created a zoning overlay district[1] that prohibited the operation of smoke shops and tobacco stores, among others, in the city's downtown.

Appellants are nine of the twenty-five affected stores located in the area, and each was issued a citation by the city's zoning administrator for failing to comply with the zoning overlay ordinance. Following a complicated legal battle, appellants raised a host of

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[1] *See* S.C. Code Ann § 6-29-720(C)(5) (Supp. 2022) (defining an overlay zone as "a zone which imposes a set of requirements or relaxes a set of requirements imposed by the underlying zoning district when there is a special public interest in a particular geographic area that does not coincide with the underlying zone boundaries").

constitutional challenges to the zoning overlay ordinance. However, the circuit court found the ordinance survived appellants' veritable barrage. Appellants directly appealed that decision to this Court. We now hold that, under this Court's long-standing precedent, the overlay ordinance did not impermissibly spot zone the city's historic downtown area. We additionally find the overlay ordinance is a constitutional exercise of the city's police powers. We therefore affirm the decision of the circuit court and uphold the validity of the ordinance.

I.

A.

In 2011, the city adopted a comprehensive plan that, among other things, set forth future objectives aimed at increasing tourism and revenue. In the comprehensive plan, the city noted that tourists and residents had repeatedly expressed concern over the "noise and behavior of certain groups visiting the area," resulting in "negative perceptions about Myrtle Beach." Likewise, the city determined that "[c]rime and the perception of crime [was] a problem that need[ed] addressing." The city concluded all businesses needed to encourage and support a "family beach image" and determined that a positive "city image" would foster more tourism. To that end, the city outlined a number of specific objectives, including its desires to (1) "define and maintain Myrtle Beach as a family beach"; (2) "revitalize the downtown area of Myrtle Beach"; and (3) "create an

environment[] which ensures that visitors and residents are safe."

Ultimately, the Myrtle Beach city council effectuated those objectives by enacting Ordinance 1807 (the ordinance), which created a zoning overlay district—known as the Ocean Boulevard Entertainment Overlay District (OBEOD)—that encompassed the historic downtown area of the city. Myrtle Beach, S.C., Code of Ordinances app. A § 1807 (2019). In creating the OBEOD, the ordinance extensively set forth its purpose and intent, emphasizing, among other things, the importance of fostering more family tourism and discouraging things that were "repulsive" to families, including "unhealthy tobacco use, crudity and the stigma of drug use and paraphernalia." *Id.* § 1807.A. As a result, the city council found the displacement of smoke shops and tobacco stores from the historic downtown area was "in the interests of the public health, safety, and general welfare." *Id.* Likewise, city council stated the presence of smoke shops and tobacco stores heightened the risk of "negative aesthetic impacts, blight, and loss of property values of residential neighborhoods and businesses in close proximity to such uses." *Id.* Finally, city council noted that despite the creation of the OBEOD, there were numerous other locations throughout the city available for the continued operation of smoke shops and tobacco stores. *Id.*

Following the city council's lengthy recitation of the purpose and rationale underlying the ordinance, the ordinance prohibited certain retail businesses and offerings within the OBEOD, including (1) smoke shops

and tobacco stores; (2) any merchandising of tobacco paraphernalia or products containing CBD, such as lotions, oils, and food; (3) any merchandising of tobacco products more than that of an incidental nature (i.e., more than 10% of store's inventory); and (4) any merchandising of sexually oriented material (collectively, the prohibited retail uses). *Id.* § 1807.D.

The prohibited retail uses were declared immediately nonconforming upon passage of the ordinance on August 14, 2018. *Id.* § 1807.E. However, the ordinance provided for an amortization period that gave affected businesses until December 31, 2018, to cease the nonconforming part of their retail offerings. *Id.* The ordinance likewise stated that, should a business continue engaging in the prohibited retail uses, it would be subject to suspension or revocation of its business license. *Id.* § 1807.F.

B.

Shortly before the end of the amortization period, on December 19, 2018, appellants filed suit in federal court seeking damages, injunctive relief, and a declaration that the ordinance was unconstitutional.[2] Two

[2] The federal lawsuit alleged the ordinance amounted to an unconstitutional taking and violated appellants' rights to free speech, due process, and equal protection. Eventually, the federal court dismissed appellants' due process claim, citing the *Burford* abstention doctrine. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726–27 (1996) (explaining the *Burford* abstention doctrine allows a federal court to dismiss a case "only if it presents difficult questions

days later, appellants filed a motion for a temporary restraining order, but the parties resolved the motion by consent, agreeing the city would enforce the ordinance "through use of [the city's] zoning ordinance administrative procedures."

Six months later, the city's zoning administrator issued individual citations to each of the appellants for continuing to engage in the prohibited retail uses in violation of the ordinance. The zoning administrator also requested that each of the businesses comply with the ordinance. No penalties were imposed on appellants at that time; rather, the letters were merely the zoning administrator's determination that appellants' businesses were nonconforming under the ordinance.

Appellants appealed the zoning administrator 's determination to the city's Board of Zoning Appeals (BZA). At the BZA hearing, the zoning administrator set forth evidence as to how each appellant was engaged in the prohibited retail uses, submitting photographs of appellants' stores and merchandise. Appellants' only witness, Tim Wilkes, conceded each of appellants' stores was engaged in one or more of the prohibited retail

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of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar, or if its adjudication in a federal forum would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern" (citation omitted) (internal quotation marks omitted)). The federal court also dismissed the takings claim without prejudice, finding the claim was not yet ripe. The court stayed the remaining claims (free speech and equal protection) pending resolution of this state court proceeding.

uses. Nonetheless, appellants requested the BZA either declare the ordinance unconstitutional or grant variances to appellants so that they could continue engaging in the prohibited retail uses. Ultimately, the BZA found (1) it did not have jurisdiction to declare the ordinance unconstitutional;[3] (2) it could not grant a use variance because it would allow the continuation of a use not otherwise allowed in the OBEOD;[4] and (3) appellants' businesses were engaged in one or more of the prohibited retail uses.

Appellants appealed the BZA's decision to the circuit court, but the circuit court affirmed the BZA's decision and found meritless appellants' twenty-five grounds for challenging the ordinance. In relevant part, the circuit court held the boundaries of the OBEOD were not arbitrary and capricious, citing to the city council's extensive recitation of the rationale for adopting the OBEOD and locating the boundaries where it did. *See*

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[3] *See* S.C. Code Ann. § 6-29-800(E) (Supp. 2022) (explaining that in exercising its statutory authority, as outlined in subsection (A), the BZA "has all the powers of the officer from whom the appeal is taken"). No one contends the zoning administrator here—the "officer from whom the appeal [was] taken"—would have had the authority to declare a zoning ordinance unconstitutional.

[4] *See* S.C. Code Ann § 6-29-800(A)(2)(d)(i) ("The [BZA] may not grant a variance, the effect of which would be to allow the establishment of a use not otherwise permitted in a zoning district, to extend physically a nonconforming use of land or to change the zoning district boundaries shown on the official zoning map. The fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance. Other requirements may be prescribed by the zoning ordinance.").

Myrtle Beach, S.C., Code of Ordinances app. A § 1807.A. The circuit court also found that whether the ordinance promoted the public welfare was "fairly debatable." In support, the circuit court cited to the zoning administrator's testimony regarding a number of complaints he had received regarding the sale of tobacco paraphernalia and sexually oriented merchandise in the historic downtown where there was a high level of pedestrian traffic by families with young children. The court thus concluded appellants had failed to meet their burden to show the ordinance was unconstitutional.

Appellants directly appealed to this Court pursuant to Rule 203(d)(1)(A)(ii), SCACR, raising five issues challenging the validity of the ordinance on both procedural and constitutional grounds.[5] We address each in turn.

"A municipal ordinance is a legislative enactment and is presumed to be constitutional." *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991) (per curiam); *see also Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965) ("There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application. . . ."). Courts must make every presumption in favor of the constitutionality of a legislative enactment. *McMaster v. Columbia Bd. of Zoning*

[5] To be more precise, appellants' brief listed eleven issues on appeal, but because some of the issues overlapped, we have condensed them to five.

Appeals, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) (per curiam) (quoting *City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011)). Thus, courts may only declare a municipal ordinance unconstitutional "when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution." *Id.* at 504, 719 S.E.2d at 663 (quoting *Harris*, 391 S.C. at 154, 705 S.E.2d at 55).

More specifically, "The Court will not overturn the action of the City if the decision is fairly debatable because the City's action is presumed to have been a valid exercise of power and it is not the prerogative of the Court to pass upon the wisdom of the decision." *Rushing v. City of Greenville*, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975); *see also Rush*, 246 S.C. at 276, 143 S.E.2d at 531 (explaining the Court must exercise "carefully and cautiously" its power to declare a challenged ordinance invalid on the basis that the ordinance unreasonably impaired or destroyed a constitutional right). Thus, when a local city council enacts a zoning ordinance after considering all of the relevant facts, the Court should not disturb the council's action unless the council's findings were arbitrary and capricious or had no reasonable relation to a lawful purpose. *Rush*, 246 S.C. at 276, 143 S.E.2d at 531; *Rest. Row Assocs. v. Horry Cnty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999); *see also Willoughby*, 306 S.C. at 422, 412 S.E.2d at 425 ("The exercise of police power under a municipal ordinance is subject to judicial correction only if the action is arbitrary and has no reasonable

relation to a lawful purpose." (citation omitted)); *Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 133, 694 S.E.2d 213, 215 (2010) ("This State's constitution provides that the powers of local governments should be liberally construed." (citing S.C. Const. art. VIII, § 17)).

The burden of establishing the invalidity of a zoning ordinance is on the party attacking it to establish by clear and convincing evidence that the acts of the city council were arbitrary, unreasonable, and unjust. *Bibco Corp. v. City of Sumter*, 332 S.C. 45, 52, 504 S.E.2d 112, 116 (1998) (citing *Willoughby*, 306 S.C. at 422, 412 S.E.2d at 425); *Rush*, 246 S.C. at 276, 143 S.E.2d at 531.

Appellants first argue the ordinance is defective as a matter of law because it was not adopted following the procedure set forth in section 5-7-270 of the South Carolina Code. *See* S.C. Code Ann. § 5-7-270 (2004) (requiring generally that municipal ordinances be "read two times on two separate days with at least six days between each reading" prior to being adopted and having the force of law). Specifically, appellants contend the versions of the ordinance introduced for the first and second readings were so different from one another that the city council was required to conduct a third reading prior to enacting the ordinance. We disagree.

Because appellants failed to timely challenge the efficacy of the two readings of the ordinance, they are statutorily barred from raising this issue. Section 6-29-760(D) of the South Carolina Code (2004) requires parties to challenge the validity of an ordinance within

sixty days of the decision of the governing body, provided "there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission." The ordinance was formally adopted and went into effect upon the second reading on August 14, 2018. Appellants did not file their federal suit or take any other formal action to challenge the validity of the ordinance until December 19, 2018—well over sixty days later. As a result, appellants can no longer challenge the validity of the ordinance under section 5-7-270. *See Quail Hill, L.L.C. v. Cnty. of Richland*, 379 S.C. 314, 320–21, 665 S.E.2d 194, 197 (Ct. App. 2008) (holding a challenge to the validity of the enactment of a county ordinance was untimely because the challenge was made long after the sixty-day window had closed), *affd in part on this ground and rev'd in part on other grounds*, 387 S.C. 223, 692 S.E.2d 499 (2010).

Even were we to overlook the untimeliness of appellants' challenge and address the merits of their argument, appellants' suggestion that the two readings of the ordinance were vastly different is simply untrue. While the city council expanded the "purpose and intent" section of the original version of the ordinance and added a number of definitions, the prohibited retail uses in the final version were identical to those in the original version. If anything, the amendments merely better-defined the terms used to describe actions or merchandise that qualified as a prohibited retail use. There is no basis on which to conclude the amendments to the ordinance were so drastic as to

trigger the need for a new first reading. *Cf. Brown v. Cnty. of Charleston*, 303 S.C. 245, 247, 399 S.E.2d 784, 785–86 (Ct. App. 1990) (explaining the purpose of providing public notice related to zoning amendments is to satisfy the "general principles of due process that require notice which fairly and reasonably apprises those whose rights may be affected of the nature and character of the action proposed"). We therefore affirm the circuit court's decision as to this issue.

IV.

Appellants next argue the ordinance violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Specifically, appellants broadly contend the creation of the OBEOD was unfair to them because they cannot sell certain merchandise that similar stores can continue selling in other areas of the city. Appellants therefore claim the creation of the OBEOD was arbitrary and capricious because it treated them differently from other, similarly situated businesses throughout the city. Appellants point to three specific concerns as evidencing the arbitrary and capricious nature of the ordinance: (1) city council reverse spot zoned the OBEOD; (2) the boundaries of the OBEOD are not drawn in straight lines or with any discernable reasoning behind them; and (3) there is no evidence that the prohibited retail uses affect public safety. We will address each of these concerns below.[6]

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[6] Amongst their eleven issues on appeal, appellants raise two takings claims. The first is a traditional takings claim arising

A.

Appellants first contend the ordinance constitutes impermissible reverse spot zoning—a novel issue in South Carolina. We disagree.

There are two types of spot zoning Traditional spot zoning occurs when a small parcel of land is singled out for a use classification different from that of the surrounding area, for the benefit of the parcel's owner(s) and to the detriment of others. *Bob Jones Univ. v. City of Greenville*, 243 S.C. 351, 361, 133 S.E.2d 843, 848 (1963); *see also id.* at 362, 133 S.E.2d at 848 (noting it is "not [] considered [] spot zoning where the proposed change is from one use to another and there was already a considerable amount of property adjoining the property sought to be reclassified falling within the proposed [new use] classification" (citing *Eckes v. Bd. of Zoning Appeals*, 121 A.2d 249 (Md. 1956))). Typically, traditional spot zoning singles out and reclassifies a relatively small tract that is owned by a single person and surrounded by a much larger, uniformly zoned area, such that the small tract is relieved from restrictions to which the rest of the area is subjected. *See Talbot v. Myrtle Beach Bd. of Adjustment*, 222 S.C. 165, 175, 72 S.E.2d 66, 71 (1952) (citation omitted); Mark S.

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under the Fifth Amendment to the United States Constitution, which we address further below. The second is a claim that because the ordinance violated appellants' right to equal protection, the ordinance took their business without just compensation. Appellants' Br. at 10. We find such an argument meritless and do not address it further other than to note that takings and equal protection are two distinct constitutional doctrines with wholly separate requirements and bodies of case law.

Dennison, Annotation, *Determination whether zoning or rezoning of particular parcel constitutes illegal spot zoning*, 73 A.L.R.Sth 223 (1999) ("The zoning or rezoning of a single tract of land, usually small in size, such that it is zoned differently from surrounding property may be invalidated as illegal spot zoning.").

In contrast, reverse spot zoning occurs when a zoning ordinance restricts the use of a property when virtually all the property's adjoining neighbors are not subject to the use restriction. 83 Am. Jur. 2d *Zoning and Planning* § 89 (2013). Oftentimes, reverse spot zoning occurs where a zoning "island" develops as the result of a municipality's failure to rezone a portion of land to bring it into conformity with similar surrounding parcels that are otherwise indistinguishable. *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 731 (Pa. 2003); *Palmer Trinity Priv. Sch., Inc. v. Vill. of Palmetto Bay*, 31 So. 3d 260, 262 (Fla. Dist. Ct. App. 2010) ("The properties surrounding Parcel B were all originally zoned AU or EU-2, but they have been changed to less restrictive zoning classifications as the agricultural character of the area has changed over the years.").

Thus, spot zoning may arise in two ways: (1) by an affirmative legislative act that affects the parcel at issue (traditional spot zoning); or (2) by changes to the zoning map around the parcel at issue (reverse spot zoning). *See* 39 Am. Jur. Proof of Facts 3d 433, § 3 (West 2023) (describing types of spot zoning challenges).

Spot zoning is not impermissible per se in South Carolina. Rather, as this Court has previously explained,

> [W]here an ordinance establishes a small area within the limits of a zone in which are permitted uses different from or inconsistent with those permitted within the larger, such "spot zoning" is invalid where the ordinance does not form a part of a comprehensive plan of zoning or is for mere private gain as distinguished from the good of the common welfare.

Talbot, 222 S.C. at 175, 72 S.E.2d at 71 (citation omitted); *see also id*. at 175, 72 S.E.2d at 70 (cautioning that courts should not "become city planners but [should only] correct injustices when they are clearly shown to result from the municipal action"). Thus, when the Court finds an ordinance constitutes spot zoning, "the appropriate analysis is to closely scrutinize the following factors: (1) the adherence of the zoning to the City's comprehensive plan; and (2) promotion of the good of the common welfare but to only correct injustices which are clearly shown." *Knowles v. City of Aiken*, 305 S.C. 219, 223, 407 S.E.2d 639, 642 (1991); *see also* 39 Am. Jur. Proof of Facts 3d 433 ("Legal challenges to [spot zoning] are generally based on allegations and proof of discriminatory treatment of a single landowner, inconsistency with the comprehensive plan, incompatibility with neighboring uses, and harm to the general welfare of the community.").

Here, despite Appellants' contentions, the creation of the OBEOD does not fit within the accepted definition of reverse spot zoning. The prohibited retail uses in the OBEOD were not the result of a zoning "island" that developed as the surrounding area was rezoned while

the OBEOD was left behind; rather, the OBEOD was created by an affirmative legislative act by the city. In other words, if anything, the creation of the OBEOD more closely resembles traditional spot zoning.

However, we find it equally doubtful the creation of this overlay district constituted traditional spot zoning. The OBEOD is a fairly large area: it overlays at least twenty distinct zones; it comprises an approximate rectangle measuring slightly less than two miles by one-quarter mile; and it encompasses over fifty city blocks which are, of course, further divided into a significant number of individual properties owned by separate property owners. It goes without saying that creating an overlay zoning district over such a large, diverse area is distinct from the typical, traditional spot zoning factual scenario. *See Talbot*, 222 S.C. at 175, 72 S.E.2d at 71 (noting spot zoning occurs when an ordinance affects a small area within the limits of a single zone); Dennison, *supra*, 73 A.L.R.5th at 223 (explaining spot zoning involves a single, small tract of land); 39 Am. Jur. Proof of Facts 3d 433 (stating spot zoning challenges generally require proof the ordinance has affected a single landowner).

Even were we to accept appellants' argument that the creation of the OBEOD constituted spot zoning in some fashion, we find that argument unavailing. Specifically, applying the test outlined in *Knowles* and *Talbot*, we find any spot zoning caused by the ordinance was legally permissible. *See Knowles*, 305 S.C. at 223, 407 S.E.2d at 642; *Talbot*, 222 S.C. at 175, 72 S.E.2d at 70. First, the ordinance was consistent with the city's

comprehensive plan. Second, as we discuss further below, it is "fairly debatable" that city council enacted the ordinance to promote the public welfare. *See Rushing*, 265 S.C. at 288, 217 S.E.2d at 799 (explaining the Court will not overturn a municipality's action if the decision is "fairly debatable" because the action is presumed to be a valid exercise of power, and it is not the Court's prerogative to weigh in on the wisdom of the decision). Third, the ordinance did not result in clear injustice to appellants: even after the creation of the OBEOD, appellants retained ownership of their property—the real estate and the merchandise—and they presented no evidence that they could not pivot to another business model. *See Helena Sand & Gravel, Inc. v. Lewis & Clark Cnty. Plan. & Zoning Comm'n*, 290 P.3d 691, 699–700 (Mont. 2012) (applying the state's traditional spot zoning test under a similar factual scenario, rather than some separate reverse-spot-zoning test, and concluding that because the zoning regulation was consistent with the county's comprehensive plan, it was not impermissible spot zoning); *cf.* S.C. Code Ann. § 6-29-800(A)(2)(d)(i) (noting the BZA may not grant a variance if the effect of the variance would be to allow a use not otherwise permitted in a zoning district, and "[t]he fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance"). We therefore reject appellants' equal protection challenge on the basis of impermissible spot zoning.

B.

Second, appellants contend the OBEOD's boundaries are irrational and, to be constitutional, must ban the prohibited retail uses throughout the entire city. We disagree.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Where, as here, "there is no suspect or quasi-suspect class and no fundamental right is involved, zoning ordinances should be tested under the 'rational basis' standard." *Bibco Corp.*, 332 S.C. at 52, 504 S.E.2d at 116.

Under rational basis review, the Equal Protection Clause is satisfied so long as (1) there is a plausible policy reason for the classification; (2) the facts on which the classification is based rationally may have been considered to be true by the decision maker; and (3) the relationship of the classification to the goal is not so attenuated as to render the distinction arbitrary or irrational. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992); *see also Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004) ("Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and[] (3) the classification rests on some reasonable basis."). A

party challenging a legislative enactment under rational basis review "must negate every conceivable basis which might support" the enactment and, therefore, has a "steep hill to climb." *Bodman v. State*, 403 S.C. 60, 69–70, 742 S.E.2d 363, 367–68 (2013) (quoting *Lee v. S.C. Dep't of Nat. Res.*, 339 S.C. 463, 470 n.4, 530 S.E.2d 112, 115 n.4 (2000)) (internal quotation marks omitted)).

Here, the ordinance explicitly states the city council enacted the ordinance to foster a more "family friendly" atmosphere in the historic downtown area and encourage more tourism by families. *See* Myrtle Beach, S.C., Code of Ordinances app. A § 1807.A. The zoning administrator testified that he had received complaints from families about the prohibited retail uses. The city council found the prohibited retail uses "repelled" families from the area. We find it is, at the very least, "fairly debatable" that prohibiting the sale of sexually oriented merchandise and tobacco paraphernalia would encourage a more "family friendly" atmosphere in the historic downtown area. *See Rushing*, 265 S.C. at 288, 217 S.E.2d at 799 (stating the Court should not overturn a municipality's decision if the action is "fairly debatable").

Moreover, the zoning administrator stated the boundaries for the OBEOD corresponded with the boundaries of the historic downtown area of the city as much as was practical. Those boundaries were set long ago based on pedestrian travel patterns, family-friendly attractions, and historical uses that preexisted the ordinance. There are two deviations from the historic

downtown's boundary lines, both of which have rational explanations. First, the northwestern edge of the OBEOD is shifted half a block away from US-17 Business (the boundary for the historic downtown). Because the OBEOD was created in part to foster more pedestrian traffic in the historic downtown, and because the city council did not believe families of pedestrians would readily walk along a busy road such as US-17 Business, the city council felt it unnecessary to include that portion of the historic downtown in the OBEOD. Second, and relatedly, the boundary line does not run in a completely straight line along the backs of *every* property that fronts US-17 Business because it cannot: two properties in the OBEOD are large enough that they comprise several city blocks, stretching from US-17 Business all the way to Ocean Boulevard.[7] In those two places, the boundary line runs on the US-17 Business side of the property rather than the ocean-side of the property. The city's decision regarding where to set the boundaries of the OBEOD is certainly not irrational or without basis.

Appellants have failed to show by clear and convincing evidence that the location of or rationale behind the boundaries of the OBEOD is arbitrary and capricious. Consequently, the boundaries of the OBEOD are valid. *See McMaster*, 395 S.C. at 504, 719 S.E.2d at 663 (quoting *Harris*, 391 S.C. at 154, 705 S.E.2d at 55); *Knowles*, 305 S.C. at 224, 407 S.E.2d at 642. As the circuit court found, "Zones must have beginning and

[7] One property contains Pavilion Park, and the other contains Family Kingdom Amusement Park.

terminating points. If the existence of divergent uses across zone boundary lines were taken *per se* as an appropriate basis for a constitutional violation, the entire zone plan in any municipality might well crumble by chain reaction." (Citations omitted.) The disparate treatment of similarly situated businesses on either side of the OBEOD boundary line is not a basis on which to find an equal protection violation. *Cf. Bibco Corp.*, 332 S.C. at 52–54, 504 S.E.2d at 116–17 (finding a zoning ordinance that prohibited mobile homes from some residential districts in the city—but not all—survived rational basis review).

C.

Finally, appellants argue the creation of the OBEOD was arbitrary and capricious because the city did not submit any evidence that the prohibited retail uses impacted public safety. We summarily dismiss this argument, as appellants—not the city—had the burden of proof. *Rush*, 246 S.C. at 276, 143 S.E.2d at 531. The city did not need to submit anything affirmatively proving its policy decision was correct. *Cf. Nordlinger*, 505 U.S. at 11 (noting that the Equal Protection Clause requires only that the legislative fact on which the classification is apparently based rationally *may* have been considered to be true by the governmental decisionmaker). Rather, it was incumbent upon appellants to submit evidence that the city's policy decision was based on a faulty factual premise, and the prohibited retail uses had no impact on public safety. Appellants failed to do so.

Accordingly, we hold appellants have failed to demonstrate the ordinance violated their right to equal protection, and we affirm the circuit court's decision on this basis.

V.

Next, appellants raise two due process arguments. First, appellants argue the ordinance does not explicitly provide for a hearing in which an affected vendor could challenge the zoning administrator's finding that certain merchandise fits within the ordinance's definition of sexually oriented merchandise. Second, appellants contend the ordinance imposes an arbitrary and unreasonable amortization period. We disagree with both arguments.

We reject appellants' first argument as it is based on a faulty factual premise. Rather, section 6-29-800(A)(1) of the South Carolina Code explicitly provides the BZA has the authority to hear any appeal "where it is alleged there is error in . . . [a] determination made by an administrative official in the enforcement of the zoning ordinance." Section 6-29-800(E) additionally provides the BZA "has all the powers of the officer from whom the appeal is taken" and, therefore, may determine—just as the zoning administrator does in the first instance—whether the challenged merchandise fits within the ordinance's definition of "sexually oriented merchandise." Further, as occurred here, should an affected property owner disagree with the BZA's

decision, it can appeal the decision to the circuit court and, if necessary, this Court.[8]

Turning to appellants' second due process argument, we find any contention that the amortization period was too draconian is moot. *See Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) ("An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. . . . A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy." (cleaned up)). Any attempts by the city to enforce the ordinance and actually impose the provided-for civil penalties were stymied by the pendency of this appeal. As a result, appellants have had nearly five years to come into compliance with the ordinance and, apparently, have failed to do so. We cannot say an effective five-year amortization period is per se unreasonable.

We therefore reject both of appellants' due process claims.

VI.

Appellants additionally claim the ordinance effects a taking of their property without just compensation, specifically citing the three-factor test set forth by the United States Supreme Court in *Penn Central*

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[8] Of course, here, appellants conceded they were engaged in the prohibited retail uses, so there would be no need for an additional hearing challenging the determination of the zoning administrator.

Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978) (explaining that, in regulatory takings cases, courts should examine (1) the economic impact of the regulation on the affected property; (2) the extent to which the regulation interfered with the property owner's investment-backed expectations; and (3) the character of the government action). We disagree.

Takings claims are "essentially ad hoc, factual inquiries" that "depend[ ] largely upon the particular circumstances in that case." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg? Plan. Agency*, 535 U.S. 302, 322, 336 (2002) (cleaned up); *see also Dunes W. Golf Club, L.L.C. v. Town of Mt. Pleasant*, 401 S.C. 280, 314, 737 S.E.2d 601, 619 (2013) (explaining the question of whether a taking has occurred is a question of law that this Court must review de novo (citations omitted)). Appellants, however, have not developed any of the facts necessary to support a takings claim. For example, they do not quantify the economic impact of the ordinance on their properties—the first *Penn Central* factor. *See Penn Cent.*, 438 U.S. at 124. Rather, appellants merely claim the impact is a "significant amount" that is "dire" and "severe."[9]

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[9] This lack of specificity stands in stark contrast to other takings cases, where parties typically quibble over the appropriate numbers to enter into the takings fraction, as well as the exact percentage necessary to amount to an unconstitutional taking. *See*, *e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1941 (2017) (explaining the parties submitted competing appraisals for the value of the affected properties, including figures corresponding to the values of the properties with and without the challenged regulation); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 534 (2005)

We are left to speculate about the facts necessary to support appellants' takings claim.[10] We therefore reject appellants' claim that the ordinance took their property without just compensation in violation of the Fifth Amendment to the United States Constitution.

VII.

Finally, appellants claim the ordinance criminalizes the sale of consumer products that are otherwise legal under state law, and it therefore conflicts with—and must be preempted by—the State's criminal laws. This argument, too, rests on a faulty factual premise.

The ordinance does not impose any criminal penalties for continuing to engage in the prohibited retail uses after the amortization period; rather, the penalty

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(discussing the exact figures corresponding to the impact of the challenged regulation on each of sixty-four affected properties owned by the claimant); *Tahoe-Sierra Pres. Council*, 535 U.S. at 302, 316 n.12 (involving a dispute over how to define and calculate the denominator of the takings fraction, and detailing the average values of the over-400 affected properties); *Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (2001) (explaining the plaintiff in a takings action submitted an appraiser's report to quantify the amount of damages sought).

[10] In fact, appellants make no argument at all regarding the second and third *Penn Central* factors, i.e., the extent to which the ordinance impacted their investment-backed expectations or the character of the government action. We therefore find appellants have abandoned any argument regarding those two factors. *See Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 42 n.7, 535 S.E.2d 642, 646 n.7 (2000) (stating an issue is deemed abandoned if a party fails to make an argument as to the merits of the issue).

provided for in the ordinance is the suspension or revocation of the nonconforming business's business license.[11] Myrtle Beach, S.C., Code of Ordinances app. A § 1807.F. Thus, the ordinance does not criminalize the sale of legal products in contravention of the State's criminal laws. *Compare, e.g.*, *Foothills Brewing Concern, Inc. v. City of Greenville*, 377 S.C. 355, 660 S.E.2d 264 (2008) (upholding the validity of a municipal ordinance banning smoking in bars and restaurants despite the fact that smoking was legal throughout the State, and finding significant the fact that the no-smoking ordinance imposed only civil penalties), *with Beachfront Ent., Inc. v. Town of Sullivan's Island*, 379 S.C. 602, 666 S.E.2d 912 (2008) (striking down a municipal ordinance banning smoking in the workplace because it imposed significant criminal penalties for violations and, therefore, conflicted with State law that otherwise allowed smoking in the workplace). We therefore reject this argument as a basis on which to find the ordinance invalid.

VIII.

After examining the host of appellants' constitutional and procedural challenges to the ordinance, we hold the ordinance was a valid exercise of the city's police

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[11] We note appellants did not specify from which section of the Myrtle Beach Code of Ordinances they believed the criminal penalty arose. Thus, to the extent appellants believed the criminal penalty arose from another ordinance distinct from the ordinance at issue here (Ordinance 1807), we find that portion of their argument abandoned.

powers. *See Rush*, 246 S.C. at 276, 143 S.E.2d at 530–31 ("The authority of a municipality to enact zoning ordinances, restricting the use of privately owned property[,] is founded in the police power. The governing bodies of municipalities clothed with authority to determine residential and industrial districts are better qualified by their knowledge of the situation to act upon such matters than are the Courts, and they will not be interfered with in the exercise of their police power to accomplish [their] desired end unless there is [a] plain violation of the constitutional rights of [the] citizens."). We therefore affirm the decisions of the circuit court and BZA.

AFFIRMED.

BEATTY, C.J., FEW, JAMES, JJ., and Acting Justice Kaye G. Hearn, concur.

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CASE NUMBER 2020CP2600785
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. Appellants, v. CITY OF MYRTLE BEACH BOARD OF ZONING APPEALS and KEN MAY, ZONING ADMINISTRATOR FOR CITY OF MYRTLE BEACH Respondents.	)	ORDER DENYING APPEAL AND AFFIRMING ORDER OF CITY OF MYRTLE BEACH BOARD OF ZONING APPEALS (Filed Apr. 22, 2021)

STATEMENT OF THE CASE

This case involves the above business owners (Appellants) in the City of Myrtle Beach, South Carolina, who seek judicial invalidation of City of Myrtle Beach's zoning ordinance § 1807 which is a zoning ordinance creating an overlay zone and which Appellants claim violates their due process rights. The appeal was first heard by the City's Board of Zoning Appeals (BZA) who affirmed a decision by the zoning administrator and who found the appellants engaged in certain uses that violated §1807. The BZA affirmed the zoning administrator's decision by finding that Appellants were engaging in uses that were prohibited by § 1807. Appellants also attacked the zoning administrator's decision on the ground that §1807 was invalid. However, the BZA found that it did not have authority to consider the validity of §1807 because the BZA does not have the authority to overrule the City ordinance's presumption of validity. See *Southern Bell Tel. & Tel. Co. v. City of Spartanburg*, 285 S.C. 495, 331 S.E.2d 333 (1985). The matter is now before this court on the issue of whether §1807 is contrary to law. See *S.C. Code §6-29-820*; *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 719 S.E.2d 660 (2011).

FACTS

§1807 creates an overlay zoning district named the Ocean Boulevard Entertainment Overlay District (OBEOD) for most of the original historic downtown area of the City. *Exhibit A*. The boundaries of the

OBEOD are the Atlantic Ocean on the east, 6th Avenue South on the south, Chester Street (one block east of U.S. Highway Business 17) on the West, and 16th Avenue North on the north. The OBEOD is a narrow strip of land bordering the Atlantic Ocean. It encompasses two amusement zoning districts, a mixed use high density district, and a downtown commercial district. See *Exhibit A.*

City Council's purpose in creating the OBEOD was to establish a family friendly entertainment and retail land use, and encourage compatible land uses, ensure higher quality development and business uses and functions in order to protect property values and provide safe and efficient pedestrian and automobile access. *§1807 A. 8.* City Council found that certain retail offerings created an atmosphere that was repulsive to mothers and fathers in the care of their children, in that retail outlets are promoting crudity and sexually explicit apparel, drug paraphernalia, and consumables that mimic and promote drug and substance consumption. *§1807 A. 7.* City Council's findings are consistent with its comprehensive General Plan.[1]

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[1] The family beach image needs to be encouraged and supported by all businesses. Negative national publicity about the congestion and behavior during motorcycle rallies hurts the family business. City image is very important to these banking representatives. Crime and the perception of crime is a problem that needs addressing such as beach and street robberies reported in the daily newspapers and on television. The panel discussed the problem with balancing the need to address crime without giving the image of becoming a police state. *Comprehensive General Plan 2011*

The following retail business uses are prohibited in the OBEOD:

1) Smoke shops and tobacco stores.

2) Retail merchandising of alternative nicotine, 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.

4) Retail merchandising or display of sexually oriented merchandise, as defined herein. Any display of sexually oriented merchandise qualifies the retail operation as a sexually oriented business, which must be located in a permitted zone.

5) Providing space for a "barker" for a business not located at the premises.

§1807 D.

All of the Appellants are located in the OBEOD and their representative admitted they engaged in one or more of the prohibited uses in the OBEOD. [Tr. P. 78] Further the BZA found that based on the evidence presented all the appellants engaged in one or more of the prohibited uses in the OBEOD.

DISCUSSION

Standard of Review

Appellants have the burden of proof. The Appellants must prove that the City's rationale for creating the OBEOD is not even fairly debatable. If the City's rationale is fairly debatable, the OBEOD is valid. *Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009), as amended (May 4, 2009). Zoning is a legislative at which will not be interfered with by the courts unless there is a clear violation of citizen's constitutional rights. In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and unreasonable. *Byrd, et al. v. City of North Augusta*, 261 S.C. 591, 201 S.E.2d 744 (1974). Courts have no prerogative to pass upon the wisdom of the municipality's decision unless such decision is "so unreasonable as to impair or destroy citizen's constitutional rights." *Hampton v. Richland County*, 292 S.C. at 503, 357 S.E.2d at 465 (Ct.App.1987) [quoting *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965)]; and the decision should not be overturned by a court so long as the decision is "fairly debatable." Ibid. [quoting *Rushing v. City of Greenville*, 265 S.C. at 288, 217 S.E.2d at 799

Arguments

Appellants' main attack on §1807 is that the OBEOD prohibits uses that are allowed to businesses surrounding the OBEOD. In other words. Appellants

claim the City's overlay zone constitutes illegal spot zoning. *Knowles v. City of Aiken*, 305 S.C. 219, 219–24, 407 S.E.2d 639, 639–43 (1991).

In *Talbot v. Myrtle Beach Board of Adjustment*, 222 S.C. 165, 72 S.E.2d 66 (1952), the South Carolina Supreme Court stated that where an ordinance establishes a small area within the limits of a zone in which are permitted uses different from or inconsistent with those permitted within the larger, such "spot zoning" is invalid where the ordinance does not form a part of a comprehensive plan of zoning or is for mere private gain as distinguished from the good of the common welfare. *Id.* However, with respect to judicial review of spot zoning issues, the Court also cautioned in *Talbot* that "Courts cannot become city planners but can only correct injustices when they are clearly shown to result from the municipal action." *Id.* Hence, in reviewing spot zoning issues, upon a finding that there was in fact spot zoning, the appropriate analysis is to closely scrutinize the following factors: (1) the adherence of the zoning to the City's comprehensive plan; and (2) promotion of the good of the common welfare but to only correct injustices which are clearly shown. *Knowles v. City of Aiken*, 407 S.E.2d at 642.

The OBED is an overlay zone which is a statutorily permitted zoning technique that is defined as a zone which imposes a set of requirements or relaxes a set of requirements imposed by the underlying zoning district when there is a special public interest in a particular geographic area that does not coincide with the underlying zone boundaries. *SC Code Ann.*

§6-29-720(C)(5). The City's special public interest is stated in the text of §1807. City Council expressly found the purpose of the OBEOD was to establish a family friendly entertainment and retail land use, and encourage compatible land uses, ensure higher quality development and business uses and function in order to protect property values and provide safe and efficient pedestrian and automobile access. *§1807(8).* Such a purpose is legitimate. *Bellis Circle, Inc. v. City of Cambridge*, 86 Mass. App. Ct. 1105, 12 N.E.3d 1052 (2014).

At the request of the City, the Court takes judicial notice of portions of the City's Comprehensive General Plan. *Exhibit 2. . DiMattio v. Millcreek Township Zoning Hearing Board*, 147 A.3d 969 (Pa. Commw. Ct. 2016). The City's Comprehensive General Plan makes development of tourism in the original historic downtown area as one of its main features. One objective of the Comprehensive General Plan is to continue to define and maintain the City as a family beach. *Exhibit 2.*

The Court further takes judicial notice of the City of Myrtle Beach Downtown Master Plan March 2019 by Benchmark at the request of the City. *Exhibit 3. Id.* The plans show that revitalization of the original historic downtown area of the City is a major part of the City's general planning process. The provisions of §1807 do adhere to purposes of the zoning plans of the City since the City began focusing its attention on the original historic downtown area of the City in the 1990's.

The downtown master plan states the City's downtown is a unique fabric of historic properties. The downtown was once like any other downtown with department store style shopping offering all the goods and services available to support the community. Over time these uses moved out of the historic core to the US Highway 17 bypass and commercial shopping malls, leaving much of the historic shopping area vacant. At the same time, the ocean front of the City continued to develop and attracted amusement and entertainment uses to support a flourishing tourism industry. The OBEOD limits uses that are found by City Council to be contrary to the support of the flourishing tourism industry that is being developed in the original historic downtown area *§1807 A. & Exhibit 2.* The Court finds that the provisions and purposes of the OBEOD are fairly debatable on promoting the public good of the original historic downtown area of the City. The provisions and purposes of the OBEOD are harmonious to the flourishing tourism industry that is being developed to maintain the original historic downtown area as a family beach. *Town of Iva ex rel. Zoning Adm'r v. Holley*, 374 S.C. 537, 649 S.E.2d 108 (Ct. App. 2007).

City Council found that the limitations on retail offerings prevented an atmosphere that is repulsive to mothers and fathers in the care of their children, in that a growing number of retail outlets in the OBEOD are promoting crudity and sexually explicit apparel, drug paraphernalia, and consumables that mimic and promote drug and substance consumption. §1807 (7). City Council's finding is fairly debatable and

consistent with studies and zoning ordinances around the United States. See *Bellis Circle, Inc. v. City of Cambridge*, 86 Mass. App. Ct. 1105, 12 N.E.3d 1052 (2014); Also See *Fla. Stat. Ann. § 569.0073 (West)*; "Local Land Use Regulation for the Location and Operation of Tobacco Retailers" by Randolph Kline Copyright © 2004 by the Tobacco Control Legal Consortium; "Local Strategies to Regulate Vape Shops & Lounges" September 2014, changelabsolutions.org/tobacco-control.

Appellants attack the City's choice of the particular geographic area where the OBEOD overlay zone is located. Appellants claim the OBEOD is bordered by several commercial businesses which are similar to the businesses limited in the particular geographic area where the OBEOD is located. In oral argument Appellants' attorney argued that the City's position would be stronger if the OBEOD covered the entire City. Appellants claim is that limiting the sale of certain items in a geographic area which borders on a geographic area which does not contain those same limitations is unfair and unconstitutional.

Appellants' claim lacks merit. Zones must have beginning and terminating points. If the existence of divergent uses across zone boundary lines were taken *per se* as an appropriate basis for a constitutional violation, the entire zone plan in any municipality might well crumble by chain reaction. *Scaduto v. Town of Bloomfield*, 127 N.J.L. 1, 4, 20 A.2d 649 (N.J. Sup. Ct. 1941); *Rexon v. Board of Adjustment of Borough of Haddonfield*, 10 N.J. 1, 9, 89 A.2d 233 (1952); *Ward v. Scott*, 11 N.J. 117, 128, 93 A.2d 385 (1952).

Izenberg v. Board of Adjustment of City of Paterson, 35 N.J. Super. 583, 114 A.2d 732, 736 (App. Div. 1955). See § 10:23.*Neighbor's greener pasture lawsuits*, 1 *Rathkopf's The Law of Zoning and Planning* § 10:23 (4th ed.).

The City contends that the interest of the public good for the location of the OBEOD is fairly debatable. The geographic area of the OBEOD is the original historic downtown area of the City. The boundaries of the OBEOD with one exception follows the boundaries of the Downtown Redevelopment District established in the 1990's. [Dep. Ken May p.7, l. 15-21] The exception is the western boundary of the OBEOD which mainly runs on Chester Street, one block south of the four lane highway U.S. Highway 17, Business. The one block separation acts as a buffer between the main commercial businesses along US Highway 17 Business and the historic downtown tourism area which experiences heavy pedestrian traffic. [Dep. Ken May p.26, l. 11-24] The reason for the choice of the geographic area is shown by the testimony of the Zoning Administrator Ken May who testified: "I can give you one item that I know was a true concern, and that was the display of the bongs and all that stuff that was out there on the streets whenever you got the pedestrian traffic such as the children." [Dep. Ken May p.26, l 11-24]

Appellants included a list of 17 shops similar to the ones regulated in the OBEOD which they claim border the OBEOD. However, the OBEOD map shows that only five of the listed shops border the western boundary of the OBEOD. All of those shops are located

on U.S. Highway 17 Business which is mainly used by automobiles and those shops face toward the west. The shops inside the OBEOD shown on Appellants' map appear to be two streets over on Flagg Street facing toward the east. The remaining shops listed in Appellants' list of similar shops are located in other parts of the City. Appellants also list 55 Beachwear Stores and gas stations located all over the City and outside the OBEOD. Appellants have not shown that these shops would be affected by the definitions or limitations stated in the OBEOD if they were located in the OB EOD. For example, the incidental sale of cigarettes is not prohibited in the OB EOD. However, a smoke shop as defined in §1807 is prohibited in the OBEOD.[2]

Appellants claim the arbitrary and capricious elements of the geographical boundaries are demonstrated in the testimony of Zoning Administrator. Appellants claim the Zoning Administrator could not answer questions about how the geographical boundaries were chosen. Appellants have mischaracterized the Zoning Administrator's testimony. Appellants' attorney asked the Zoning Administrator about why City

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[2] SMOKE SHOP AND TOBACCO STORE. Any premises with more than an incidental display, sale, distribution, delivery, offering, furnishing, or marketing of alternative nicotine, alternative nicotine delivery product, vapor product, e-cigarette, single cigarette tobacco, tobacco products, or tobacco paraphernalia; provided however the incidental retail of commonly available packaged packs. cartons or boxes of cigarettes and cigars are not regulated herein. Incidental retail means accounting for Less than ten (10) % of the retail offerings.

§1807 Code of Ordinances.

Council made the choices it made when creating the OBEOD and its boundaries. The Zoning Administrator answered by referring the Appellants attorney to the minutes of the City Council meetings which speak for themselves. [Dep. Ken May p.24, l. 15-22; *passim*] The Zoning Administrator's deferral to City Council minutes was appropriate. See *Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 417 S.E.2d 579 (1992) (parol evidence was improperly admitted to contradict minutes of town council which were complete and unambiguous on their face).

In addition, City Council's reasons for the creation of the OB EOD are clearly stated in the purpose and intent section of § 1807 A of the City's zoning ordinance. For those reasons, the Court finds that reasonableness of the geographical boundaries of the OB EOD is fairly debatable and therefore valid. Courts have no prerogative to pass upon the wisdom of the municipality's zoning decisions. *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965).

CONCLUSION

The Court finds that Appellants have not met their burden of proving that the City's rationale for creating the OBEOD is arbitrary or capricious under the fairly debatable standard of review. The OBEOD is located in the heart of the original historic entertainment area of the City. The City's comprehensive plan calls for City Council to continue to define and maintain the City as a family beach. §1807 reasonably

furthers that general purpose and it is in the interest of the City's public good.

NOW, THEREFORE, it is hereby

ORDERED, that the decision of the City of Myrtle Beach Board of Zoning Appeals is affirmed.

AND IT IS SO ORDERED.

Honorable Benjamin Culbertson
Presiding Judge 15th Judicial Circuit

April 22, 2021
Georgetown, South Carolina

ORDER OF BOARD OF ZONING APPEALS FOR THE CITY OF MYRTLE BEACH

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.

Appellants

v.

KEN MAY, Zoning Administrator for the City of Myrtle Beach

Respondent

(Filed Jan. 16, 2020)

The above captioned appeal was heard by the Board of Zoning Appeals for the City of Myrtle Beach during its regularly scheduled meeting on October 10, 2019. After the meeting was called to order, the Clerk called the roll and it was determined that a quorum was present. Board members who were present were: Michael J. Schwartz, Chairman, Rock Smith, William Dickson, Allen R. Lee, Edgar Wilson, James Cameron, and Robert Shelley.

The above captioned appeal was made to overturn the City of Myrtle Beach's Zoning Administrator's citations of the above appellants for engaging in

nonconforming uses of their businesses located in the City's Ocean Boulevard Entertainment Overlay District (OBEOD). Section 1807 (3) of the Zoning Ordinances of the City of Myrtle Beach states the following retail business uses are prohibited in the OBEOD: (a) Smoke shops and tobacco stores; (b) Retail merchandising or of alternative nicotine, alternative nicotine delivery product, vapor product, e-cigarette, tobacco paraphernalia or cannabis products; and (c) Retail merchandising of tobacco or tobacco products of more than an incidental nature. The zoning administrator determined that each of the appellants operated their businesses in violation of Section 1807 inside the OBEOD.

Gene Connell as attorney for the Appellants appeared and presented the case for overturning the zoning administrator's citations of each of the above named appellants for violation of Section 1807 of the Zoning Ordinances for the City of Myrtle Beach. Ken May, Zoning Administrator for the City of Myrtle Beach presented the case for the affirming the citations for appellants' violation of Section 1807 of the zoning ordinance. Mike Battle, as attorney for the zoning administrator, assisted with the presentation of the case for affirming the citations. Court Reporter Lauren A. Balogh, AWR Roberts Court Reporters, recorded the appeal.

After duly considering the evidence presented together with arguments of both appellants and the zoning administrator, the Board Zoning Appeals for the City of Myrtle Beach voted to affirm the decisions of

the Zoning Administrator in connection with each citation of Appellants and the BZA makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Request 19-11 Gene Connell, Jr., Attorney: The applicant requested an appeal from a decision of the zoning administrator pertaining to the operation of prohibited business uses within the Ocean Boulevard Entertainment Overlay District (OBEOD) per Section 1807 of The City of Myrtle Beach Zoning Ordinance. The property is located at 1103 N. Ocean Blvd., Unit B and is identified by TMS # 18107-18-002.

2. Request 19-12 Gene Connell, Jr., Attorney: The applicant is requested an appeal from a decision of the zoning administrator pertaining to the operation of prohibited business uses within the Ocean Boulevard Entertainment Overlay District (OBEOD) per Section 1807 of The City of Myrtle Beach Zoning Ordinance. The property is located at 1001 N. Ocean Blvd., Unit A and is identified by TMS # 18107-09-009.

3. Request 19-13 Gene Connell, Jr., Attorney: The applicant is requested an appeal from a decision of the zoning administrator pertaining to the operation of prohibited business uses within the Ocean Boulevard Entertainment Overlay District (OBEOD) per Section 1807 of The City of Myrtle Beach Zoning

Ordinance. The property is located at 1001 N. Ocean Blvd., Unit B and is identified by TMS # 18107-09-009.

4. Request 19-14 Gene Connell, Jr., Attorney: The applicant is requested an appeal from a decision of the zoning administrator pertaining to the operation of prohibited business uses within the Ocean Boulevard Entertainment Overlay District (OBEOD) per Section 1807 of The City of Myrtle Beach Zoning Ordinance. The property is located at 1103 N. Ocean Blvd., Unit A and is identified by TMS # 18107-18-002.

5. Request 19-15 Gene Connell, Jr., Attorney: The applicant is requested an appeal from a decision of the zoning administrator pertaining to the operation of prohibited business uses within the Ocean Boulevard Entertainment Overlay District (OBEOD) per Section 1807 of The City of Myrtle Beach Zoning Ordinance. The property is located at 913 N. Ocean Blvd., Unit B and is identified by TMS # 18107-09-013.

6. Request 19-16 Gene Connell, Jr., Attorney: The applicant is requested an appeal from a decision of the zoning administrator pertaining to the operation of prohibited business uses (within the Ocean Boulevard Entertainment Overlay District (OBEOD) per Section 1807 of The City of Myrtle Beach Zoning Ordinance. The property is located at 911 N. Ocean Blvd., Unit B and is identified by TMS # 181-09-014.

7. Request 19-17 Gene Connell, Jr., Attorney: The applicant is requested an appeal from a decision of the zoning administrator pertaining to the operation of prohibited business uses within the Ocean Boulevard Entertainment Overlay District (OBEOD) per Section 1807 of The City of Myrtle Beach Zoning Ordinance. The property is located at 210 S. Ocean Blvd. and is identified by TMS # 181-10-43-004.

8. Request 19-18 Gene Connell, Jr., Attorney: The applicant is requested an appeal from a decision of the zoning administrator pertaining to the operation of prohibited business uses within the Ocean Boulevard Entertainment Overlay District (OBEOD) per Section 1807 of The City of Myrtle Beach Zoning Ordinance. The property is located at 304 S. Ocean Blvd. and is identified by TMS # 181-14-02015.

9. Request 19-19 Gene Connell, Jr., Attorney: The applicant is requested an appeal from a decision of the zoning administrator pertaining to the operation of prohibited business uses within the Ocean Boulevard Entertainment Overlay District (OBEOD) per Section 1807 of The City of Myrtle Beach Zoning Ordinance. The property is located at 701 N. Ocean Blvd. and is identified by TMS # 181-11-05-001.

10. By consent of the nine appellants and the zoning administrator, all of the appeals were consolidated into one appeal on behalf of each

appellant. The remaining findings of fact in within order will be applicable to each of the appellants.

11. Each of the nine appellants' operated businesses located in the OBEOD.

12. The zoning administrator determined that each of the appellants' businesses was operated and used prohibited business uses within the Ocean Boulevard Entertainment Overlay District (OBEOD) per Section 1807 of The City of Myrtle Beach Zoning Ordinance.

13. Each of the nine appellants were duly notified and issued citations that their businesses were operated and used prohibited business uses within the Ocean Boulevard Entertainment Overlay District (OBEOD) per Section 1807 of The City of Myrtle Beach Zoning Ordinance.

14. Gene Connell is the attorney representing all nine appellants and he duly appealed the citations issued by the zoning administrator.

15. The Board of Zoning Appeals finds as a matter of fact that that each of the appellants' businesses was operated and used prohibited business uses within the Ocean Boulevard Entertainment Overlay District (OBEOD) per Section 1807 of The City of Myrtle Beach Zoning Ordinance.

CONCLUSIONS OF LAW

1. Appellants' appeals were properly consolidated and heard by the Board of Zoning Appeals.

2. Smoke shops and tobacco stores; retail merchandising or of alternative nicotine, alternative nicotine delivery product, vapor product, e-cigarette, tobacco paraphernalia or cannabis products; and retail merchandising of tobacco or tobacco products of more than an incidental nature are prohibited uses in the OBEOD pursuant to § 1807 of the Zoning Ordinances of the City of Myrtle Beach.

3. Each of the appellants has engaged and presently engages in business uses that are in violation of one or more of the prohibited uses contained in § 1807 of the Zoning Ordinances of the City of Myrtle Beach.

4. The Appellants have requested a variance pursuant S.C. Code Ann. §6-29-800(2) on the grounds that the application of the ordinance to their ordinance will result in unnecessary economic hardship, devaluation of their property and loss of tenants.

5. Appellants' request for a variance is denied on the grounds that the Board of Zoning Appeals may not grant a variance, the effect of which would be to allow the establishment of a use not otherwise permitted in a zoning district, to extend physically a nonconforming use of land or to change the zoning district boundaries shown on the official zoning map. The fact

that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance. See S.C. Code Ann. § 6-29-800(d)(i).

6. Appellants challenged the legality of §1807 of the Zoning Ordinances of the City of Myrtle Beach on several grounds which were set forth in a letter dated July 1, 2019, sent to the zoning administrator and attached to Appellants' application for appeal. The ground/request for a variance is denied as stated above. The remaining grounds stated are:

    a. The Zoning Administrator cannot limit what the Zoning Board of Appeals considers during a hearing. Specifically, the Board of Zoning Appeals can hear all issues raised by these businesses, including all legal issues as to how the Overlay District was approved by Council, to include whether the Planning Commission ever approved the Overlay District.

    b. The Myrtle Beach City Council, by passing this Ordinance, has done so illegally. The first reading of the Ordinance is different than the text in the second reading. Specifically, the Council has added products to the list of banned products in the second reading which were not listed in the first reading.

    c. The notice of the adopted OBEOD Ordinance was not proper under state

law in light of the Council's failure to allow the public to comment on the changes made to the Ordinance after first reading. Such actions are contrary to state law and federal law and unconstitutional.

d. The OBEOD Ordinance is "spot zoning" and illegal since the banned products may be sold directly across the street from Plaintiffs' businesses who cannot sell the very same products. This type of zoning violates U.S. and South Carolina constitutional law.

e. The products that are not allowed to be sold in the OBEOD area are sold all over the City and the ordinance only bans the sale of those products in the OBEOD area. This decision by the City has no rational basis nor is there any factual information which may be presented to show the Board of Zoning Appeals that the banning of the products in the OBEOD area is any different from banning the products in any other area of the City. In sum, if the products discussed in the OBEOD Ordinance affect safety and public welfare, then they must affect safety and public welfare throughout the City and all other businesses in the City should be barred from selling those products.

f. The Ordinance does not grandfather in existing business such as the Plaintiffs' who sell the products and have been selling those products in the OBEOD area. This is unconstitutional and a taking of those businesses' property.

g. The City has no power to ban or regulate the sale of legal products and only the State of South Carolina can do that statewide. As an example, the State of South Carolina regulates smoking products and the City may not ban the sale of smoking products in a specific area of the City as this is the province of the State.

h. There is no proof that the public health, safety, or general welfare are affected and thus, the City's adoption of the OBEOD Ordinance is void as a matter of law. The City can offer no proof or evidence to the contrary and has not done so as of this date.

i. The City of Myrtle Beach Planning Commission did not authorize or recommend the OBEOD Ordinance to the Myrtle Beach City Council pursuant to S.C. Code §6-29-740. Accordingly, the OBEOD Ordinance cannot be sustained by the Board of Zoning Appeals.

j. The same products banned in the OBEOD area are offered for sale

citywide and, thus, the intent of the Ordinance is subverted because the same products can be offered across the street from the OBEOD area.

k. The OBEOD Ordinance was not adopted according to S.C. Code §6-29-760 et seq.

l. The businesses in this letter have challenged the OBEOD Ordinance pursuant to S.C. Code §6-29-760(D) in a timely manner and continue to do so.

m. The businesses challenged the OBEOD Ordinance pursuant to S.C. Code §6-29-760(D) in that it was not accomplished in a timely manner.

n. The Zoning Administrator offers no evidence that anything in the pictures taken in any of these stores are banned products.

o. It is an impermissible taking of these businessowners' livelihoods while allowing other businessowners outside the OBEOD area to sell the same products.

p. The products that are banned in the OBEOD area are legal products and may be sold anywhere in the state of South Carolina. The City may not contravene state law and ban those products within their City.

7. With the exception of the claim that the Zoning Administrator offered no evidence that anything in the pictures taken in any of these stores are banned products, the Board of Zoning Appeals determines that it does not have the authority or jurisdiction to decide matters that are collateral attacks on the legality of §1807 of the Zoning Ordinances of the City of Myrtle Beach. See S.C. Code § 6029-800.

8. In connection with Appellants' claim that the Zoning Administrator offers no evidence that anything in the pictures taken in any of these stores are banned products, the board disagrees. The pictures clearly show evidence of retail uses that are banned by §1807 of the Zoning Code of Ordinances for the City of Myrtle Beach. Further, Appellants' own witness admitted that each of appellants engaged in retail uses that violated §1807.

CONCLUSION

For the reasons stated above the Board of Zoning Appeals affirms the decisions of the zoning administrator in connection with the above referenced appeals and /or requests R19-11 through R19-19.

Date of Hearing 10/10/2019

/s/ M.J. Schwartz — 1/16/2020

M.J. Schwartz — Date

Chairman Board of Zoning Appeals

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

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, Plaintiffs, v. City of Myrtle Beach, Myrtle Beach City Council, Brenda Bethune, Individually and as Mayor of the City of Myrtle Beach, Michael Chestnut, Individually and as a Member of the Myrtle Beach City Council, Mary Jeffcoat, Individually and as a Member of the Myrtle Beach City Council, Clyde H. Lowder, Individually and as a Member of the Myrtle Beach City Council, Philip N. Render, Individually and as a Member of the Myrtle Beach City	C/A No. 4:18-cv-03517-SAL **OPINION & ORDER** (Filed Aug. 17, 2020)

Council, Gregg Smith, Individually and as a Member of the Myrtle Beach City Council, Jackie Vereen, Individually and as a Member Of the Myrtle Beach City Council,

Defendants.

This matter is before the court on Defendants' Motion to Dismiss Pursuant to *Burford* Abstention. [ECF No. 36.] After a thorough review of the relevant case law and the arguments of the parties, the court grants the motion in part, denies the motion in part, and stays the case pending resolution of the state proceedings.

PROCEDURAL BACKGROUND

Plaintiffs are businesses located along Ocean Boulevard in Myrtle Beach, South Carolina. They filed this suit on December 19, 2018, seeking damages, injunctive relief, and a declaration that a zoning ordinance passed by Myrtle Beach City Council in August 2018 (the "Ordinance") is unconstitutional. [ECF No. 1.]

The Ordinance established the "Ocean Boulevard Entertainment Overlay District" (the "District") and prohibits the sale of certain products with the District, including those related to tobacco, alternative nicotine, vapor, and cannabis, as well as retail or merchandise displaying sexually oriented materials. Plaintiffs are

businesses within the District and, as a result, are banned from selling the prohibited products.

In the Complaint, Plaintiffs assert six causes of action: (1) violation of free speech and due process under the First and Fourteenth Amendments; (2) violation of the Equal Protection Clause of the Fourteenth Amendment; (3) regulatory taking; (4) violation of procedural and substantive due process guaranteed by the Fifth and Fourteenth Amendments; (5) violation of equal protection and due process under the South Carolina constitution; and (6) violation of free speech under the South Carolina constitution.

On December 21, 2018, Plaintiffs filed a motion for temporary restraining order and preliminary injunction. [ECF Nos. 6, 7.] A hearing on the motion was set for January 9, 2019. [ECF Nos. 8, 9.] The parties resolved the motion through a consent order, and the hearing was canceled. [ECF Nos. 13, 17.] The consent order provides that the "City of Myrtle Beach [] agreed to enforce the OBEOD Ordinance . . . solely through use of its zoning ordinance administrative procedures." [ECF No. 17 at p.2.] As a result, the "[p]arties together [] reached an agreement to allow for administrative proceedings under the OBEOD Ordinance during the pendency of these proceedings." *Id.* The consent order goes on to outline the process for the City Zoning Administrator to decide whether the use of the premises is conforming or nonconforming and the process to appeal the decision. *See id.* The motion for temporary restraining order and preliminary injunction was withdrawn, without prejudice to re-file. *Id.* at p.3.

Thereafter, the Myrtle Beach City Zoning Administrator issued citations to Plaintiffs for engaging in nonconforming uses in violation of the Ordinance. [*See* ECF No. 36-2 at pp.2–3 (outlining citations on appeal to the Board of Zoning Appeals for the City of Myrtle Beach).] Plaintiffs appealed the citations to the Board of Zoning Appeals, which affirmed the citations. *See id.* Plaintiffs then appealed the Board of Zoning Appeals' decision to the South Carolina circuit court. [ECF No. 36-1.] The circuit court appeal remains pending.

Following Plaintiffs' appeal to the South Carolina circuit court, Defendants filed the abstention motion currently pending before this court. [ECF No. 36.] Plaintiffs filed a response, and the matter is now ripe for this court's review. [ECF No. 37.]

DISCUSSION

Defendants ask the court to abstain from exercising its jurisdiction over the case pursuant to *Burford* abstention. Defendants argue that the dispute is one "over local zoning regulations" and "the federal claims cannot be untangled from the local zoning laws." [ECF No. 36 at pp.5, 6.] Further, Defendants argue that the takings claim is not ripe where Plaintiffs failed to adjudicate an inverse condemnation suit in state court. *Id.* at p.8. Defendants conclude that "[t]he parallel actions in two separate courts could lead to conflicting findings of fact and contradictory rulings on the application of the City's zoning laws." *Id.*

In opposition, Plaintiffs ask the court to stay the case pending resolution of the state-court appeal and to certify certain unidentified questions to the South Carolina Supreme Court. [ECF No. 37.] For the reasons set forth below, the court agrees with Defendants that the substantive and procedural due process claims are encompassed by *Burford*. The remaining claims are not. And, finally, the takings claim is not ripe. The analysis of each issue is provided below.

A. Burford Abstention Generally.

The United States Supreme Court has "often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). "This duty is not, however, absolute." Id. In certain "exceptional" instances, federal courts have the power to refrain from hearing cases. *See id.* at 717–18 (outlining history of abstention doctrines); *see also id.* at 722 ("In rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum."). Even in these rare instances, however, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976).

The abstention doctrine currently before the court takes its name from the case of *Burford v. Sun Oil Company*, 319 U.S. 315 (1943). In *Burford*, the underlying issue was the "reasonableness" of a Texas Railroad

Commission's order, which the plaintiff in that case sought to enjoin. 319 U.S. at 317. Pursuant to Texas law, the Texas Railroad Commission was given exclusive regulatory authority over permits for oil drilling, and state courts were given the authority to review the Commission's orders. *Id.* at 326. The purpose of this arrangement was to "permit an experienced cadre of state judges to obtain 'specialized knowledge' in the field." *Quackenbush*, 517 U.S. at 724 (citing Burford, 319 U.S. at 327). The Supreme Court affirmed the district court's dismissal of the complaint, concluding that "the availability of an alternative, federal forum threatened to frustrate the purpose of the complex administrative system that Texas had established." *Id.* at 725 (citing *Burford*, 319 U.S. at 332). In reaching this conclusion, the Supreme Court noted the difficulty of the regulatory issues presented, the need for uniform regulation in that area, the existence of unified procedures to prevent confusion, and important state interests in the uniform system of review. *Burford*, 319 U.S. at 318–19, 325–26, 319–20. And, "[m]ost importantly, [the Court] also described the detrimental impact of ongoing federal court review of the Commission's orders, which review had already led to contradictory adjudications by the state and federal courts." *Quackenbush*, 517 U.S. at 725 (citing *Burford*, 319 U.S. at 327–28).

Since *Burford*,[1] the Supreme Court has further developed the doctrine to "allow[] a federal court to

[1] In *Quackenbush*, the Supreme Court clarified when a court can decline to hear cases pursuant to the *Burford* abstention

dismiss a case only if it presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar, or if its adjudication in a federal forum would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Id.* at 726–27 (citation omitted; emphasis added); *see also NOPSI v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989); *Martin v. Stewart*, 499 F.3d 360, 365 (4th Cir. 2007) (permitting abstention where "federal adjudication would 'unduly intrude' upon 'complex state administrative processes' because either (1) there are difficult questions of state law or (2) federal review would disrupt state efforts to establish a coherent policy (citing *NOPSI*, 491 U.S. at 361–63)). While this is not a "formulaic test for determining when dismissal under *Burford* is appropriate," it demonstrates that the "exercise of this discretion must reflect 'principles of federalism and comity.'" *Quackenbush*, 517 U.S. at 728 (citing *Growe v. Emison*, 507 U.S. 25, 32 (1993)). Ultimately, "[t]he purpose *of Burford* abstention is to prevent a federal court from interfering with a 'complex state regulatory scheme concerning important matters of state policy for which impartial and fair administrative determinations subject to expeditious and adequate judicial review are afforded.'" *Browning-Ferris, Inc. v. Baltimore Cty., Md.*,

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doctrine. It also confirmed that a court may only dismiss cases under *Burford* if the relief sought is equitable or otherwise discretionary. 517 U.S. at 730. If the claims are legal, a stay is appropriate. *Id.*

774 F.2d 77, 79 (4th Cir. 1985) (citing *Aluminum Co. v. Utilities Comm'n of N.C.*, 713 F.2d 1024 (4th Cir. 1983)).

B. *Burford* Abstention and Zoning.

Of particular importance to this case is the relationship between *Burford* abstention and zoning laws. The seminal case in the Fourth Circuit is the en banc decision in *Pomponio v. Fauquier County Board of Supervisors*, 21 F.3d 1319 (4th Cir. 1994).[2] There, the plaintiff brought a section 1983 action against the county, arguing "arbitrary behavior, false statements, abuse of authority, and misconduct by local officials during consideration of a preliminary subdivision plan submitted by" the plaintiff. *Id.* at 1320. The plaintiff argued violation of his federal substantive and procedural due process rights and equal protection. The dispute, at its core however, centered around a "difference of opinion about the correct *interpretation of* the applicable . . . zoning and subdivision ordinances." *Id.* at 1320 (emphasis added); *see also id.* at 1322 ("Whether the zoning ordinance was incorrectly construed is the central question in the case."); *id.* at 1323 ("Because

[2] To the extent *Pomponio* permitted a district court to dismiss an action for damages, it was partially overruled by *Quackenbush*. *See Front Royal & Warran Cty. Indust. Park Corp. v. Town of Front Royal, Va.*, 135 F.3d 275, 282 (4th Cir. 1998) ("Although not squarely before us, we note that *Quackenbush* appears to have implicitly overruled our holding on [the dismissal] issue in *Pomponio*, a damages action."). *Quackenbush* did not affect *Pomponio's* conclusion that federal courts should abstain from adjudicating equitable actions involving questions of state zoning and land use.

Pomponio's dispute with the Commission hinged on the interpretation of the local ordinance. . . ."); *id.* ("The Board of Zoning Appeals relied on its own interpretation of the local zoning ordinances[.]"). The district court abstained *sua sponte*, relying on *Burford* abstention.

On appeal, the Fourth Circuit outlined the history of *Burford* abstention and its application of the doctrine in various cases. *Id.* at 1324–27. The court explained that "cases involving questions of state and local land use and zoning law are a classic example of situations in which the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern"—the second available avenue for application of *Burford* abstention.[3] *Id.* at 1327 (citing *NOPSI*, 491 U.S. at 361). The Fourth Circuit could "conceive of few matters of public concern more substantial than zoning and land use laws." *Id.* Thus, the rule became:

> In cases in which Plaintiffs' federal claims stem *solely from construction of* state or local land use or zoning law, *not involving the constitutional validity of* the same and absent

[3] As noted above, there are two avenues for application of *Burford*: (1) difficult questions of state law bearing on public policy problems of substantial public import and (2) adjudication in a federal forum is disruptive of state efforts to establish a coherent state policy on a matter of substantial public concern. *See Quackenbush*, 517 U.S. at 725–27. The *Pomponio* court concluded that it was the latter that was traditionally invoked in cases involving zoning and land use laws.

> exceptional circumstances not present here, the district courts should abstain under the *Burford* doctrine to avoid interference with the State's or locality's land use policy.

Id. at 1328 (emphasis added). The purpose of the rule is to avoid having a federal court sit as a board of zoning appeals. *See id.* at 1327 ("[F]ederal courts should not leave their indelible print on local and state land use and zoning law by entertaining these cases and, in effect, sitting as a zoning board of appeals[.]" (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974)).

The rule articulated by the Fourth Circuit does not require blanket application of *Burford* to every case involving a zoning ordinance or land law, however. If a party's claims are state claims in federal clothing, *Burford* applies. *See id.* at 1326 (examining prior decisions and concluding that "when [the claims are] stripped of the cloak of their federal constitutional claims, [they] are state law cases"). In contrast, if there is the "presence of a genuine and independent federal claim," *Burford* does not apply. Therefore, in analyzing whether *Burford* applies to a given case, this court must determine whether the case "aris[es] solely out of state or local zoning or land use law, despite attempts to disguise the issues as federal claims." *Id.* at 1327.

In *Pomponio*, the Fourth Circuit concluded that the plaintiffs "argument boil[ed] down to an assertion that his plan complied with the zoning laws, and the local authorities wrongfully disapproved of his plan by *misapplying the law* and by *abusing their authority in*

the decision-making process." *Id.* at 3128 (emphasis added). The Fourth Circuit, as a result, affirmed dismissal of the claims under *Burford.*

C. Application of *Burford* and Fourth Circuit Precedent to Plaintiffs' Claims.

Turning to the present case, it unquestionably bears some relationship to zoning. Plaintiffs challenge the constitutionality of a specific zoning ordinance under both the U.S. and South Carolina Constitutions. [ECF No. 1 at ¶¶ 36–45 (section 1983; free speech and due process U.S. Constitution); ¶¶ 46–51 (section 1983; equal protection U.S. Constitution); ¶¶ 57–60 (procedural and substantive due process U.S. Constitution); ¶¶ 61–65 (equal protection and free speech; S.C. Constitution). And as part of the procedural claims, Plaintiffs challenge the process followed by local officials when the ordinance was enacted. *Id.* at ¶¶ 12–21 (outlining process followed by local officials); ¶ 29 ("The resulting Ordinance has been enacted by the City in a manner that has failed to adhere to the procedural and legislative guidelines that have customarily been followed by the Council[.]"). Thus, in line with the foregoing precedent, this court must determine whether Plaintiffs' claims "stem solely from construction of the Ordinance or whether they involve an independent constitutional challenge. *Pomponio*, 21 F.3d at 1328.

Defendants argue this court should follow the analysis in *County of Charleston, South Carolina v.*

Finish Line Foundation II, Inc.[4] to answer this question. According to Defendants, *Finish Line* and the present case are "factually similar." [ECF No. 36 at p.3.] And, if this court follows that reasoning, it will conclude that it must abstain from hearing all[5] of Plaintiffs' claims. *Id.* The court disagrees.[6]

In *Finish Line*, the county filed a state court lawsuit against defendants who were engaged in land development activities without permits. The county sought an injunction to prevent further development, as well as a declaration that defendants were in violation of the zoning regulation. The defendants removed the action to federal court on the basis of diversity jurisdiction, answered, and asserted counterclaims for an unconstitutional taking, violation of due process, and violation of equal protection. The county filed a motion for abstention, relying on *Burford.*

This district court noted that the action before it was one involving zoning enforcement. The county sought to "enforce its zoning regulations and to have defendants adhere to citations it issued regarding those regulations." 2018 WL 2002070, at *3. The defendants, in response, argued that their conduct did not violate the "terms and definitions of the regulations." *Id.* Much like *Pomponio*, the *interpretation* of

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[4] No. 2:17-cv-03496, 2018 WL 2002070 (D.S.C. Apr. 30, 2018).

[5] The court addresses Defendants' separate argument regarding the takings claim below.

[6] At best, *Finish Line* provides limited additional support for this court's decision to abstain from hearing the federal procedural and substantive due process claim.

the zoning regulations was the ultimate issue attached to all claims in *Finish Line*. Consequently, the court chose to abstain. It concluded: "South Carolina courts have a greater interest in resolving this dispute over *the interpretation* and application of the county's zoning regulations[.]" *Id.* (emphasis added).

The federal constitutional counterclaims did not change the result. The counterclaims related to a lack of notice regarding the penalty and the vagueness of the regulation. Both issues stemmed from "the local government's enforcement of its zoning regulations" and, therefore, could not be "untangled from the local zoning laws." *Id.* Stated simply, the counterclaims were not "independent constitutional claim[s] on par with religious prejudice or first-amendment violations." *Id.*

The present case differs from *Finish Line* in two important respects. First, Plaintiffs' constitutional claims were not brought in response to an enforcement action by Defendants. If anything, this case is the exact opposite of *Finish Line* in its procedural posture—Defendants' enforcement action was instituted in response to Plaintiffs' federal lawsuit. Specifically, it was not until the federal action was filed, the motion or preliminary injunction was resolved by consent order, and the City of Myrtle Beach issued citations to Plaintiffs that Defendants raised *Burford* abstention in this case.[7] Thus, this is not a straightforward case of "local

[7] Notably, Plaintiffs' claims have not changed since the action was filed on December 19, 2018. Yet, Defendants waited until February 24, 2020—14 months later—to argue that *Burford* applies to this case. It seems Defendants are using the consent order

government's enforcement of its zoning regulations," as existed in *Finish line*.

Second, the entirety of the *Finish Line* dispute surrounded the "interpretation of the zoning regulations by the zoning authorities. Again, that does not exist here. Plaintiffs are not challenging Defendants' interpretation of the Ordinance. Stated differently, the court is not faced with differing interpretations of the same law—Plaintiffs' interpretation versus Defendants' interpretation—and being asked to decide which interpretation is the correct one. The parties in this case do not dispute the scope of the Ordinance. Rather, Plaintiffs contend the ordinance is unconstitutional and results in an unconstitutional taking.

Field Line is not the only case highlighting these important distinctions. In those instances where courts in this District abstain pursuant to *Burford*, the claims either seek equitable relief related to a previously rendered zoning decision (none exists here) or require construction of the zoning ordinance to resolve the federal claim. *See*, *e.g.*, *I-77 Props., LLC v. Fairfield Cty.*, No. 3:07-cv-1524, 2007 WL 9753900 (D.S.C. Aug. 6, 2007), *aff'd*, 288 F. App'x 108 (4th Cir. 2008) (dismissing claim for injunctive relief, which asked the court to require defendant to issue a zoning certificate and staying damages claims pending resolution of

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and the events that followed as a way to bolster their *Burford* argument. The attempt is unavailing. *Burford* abstention does not hinge on the presence or absence of any underlying state administrative proceeding. *See First Penn-Pacific Life Ins. Co. v. Evans*, 162 F. Supp. 2d 423, 428 (D. Md. 2001).

state administrative process); *Bannum, Inc. v. City of Columbia*, 201 F.3d 435 (4th Cir. 1999) (table decision) (affirming district court's decision to abstain in case that was "primarily an equitable action challenging the ZBA's [Zoning Board of Adjustments] *interpretation of* state law" (emphasis added)).[8]

As outlined below, this court must look at each claim to determine whether it must construe local zoning laws to resolve the federal claim. If it does, *Burford* abstention is appropriate. If not, this court must exercise its "virtually unflagging obligation to exercise [its] jurisdiction." *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988); *see also Singletary v. City of N Charleston*, No. 2:09-cv-1612, 2010 WL 680326 (D.S.C. Feb. 23, 2010)

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[8] All of these decisions are in keeping with *Pomponio* and other Fourth Circuit precedent on *Burford* abstention. *See*, *e.g.*, *MLC Automotive, LLC v. Town of S. Pines*, 532 F.3d 269 (4th Cir. 2008) (concluding district court did not abuse its discretion in concluding that *Burford* abstention applied where all claims were "dependent on resolution of [a] state law claim" on vested property rights); *Fourth Quarter Props. IV, Inc. v. City of Concord, N.C.*, 127 F. App'x 648 (4th Cir. 2005) (affirming district court's application of *Burford* abstention to federal due process claim, the resolution of which would require "adjudicating the rights and duties of the parties pursuant to the state zoning law at issue); *Johnson v. Collins Entm't Co., Inc.*, 199 F.3d 710 (4th Cir. 1999) (reversing district court's injunction and concluding court should have abstained pursuant to *Burford* in case involving "state policy concerns" and "disputed questions of state gaming law" unanswered by South Carolina courts); *Neufeld v. City of Baltimore*, 964 F.2d 347 (4th Cir. 1992) (concluding district court erred in abstaining on a preemption claim where the plaintiff "did not attack the substantive basis of the Board's denial of his conditional use permit, but rather asserted that the application of the zoning ordinance as a whole was preempted by a FCC regulation").

(declining to abstain from hearing substantive due process and equal protection claims in case related to zoning because "federal review . . . would not disrupt any state effort to establish a coherent policy with respect to any zoning law"). The fact remains that *Burford* abstention is inappropriate where a claim is "not that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors." *Pomponio*, 21 F.3d at 1328 (citing *NOPI*, 491 U.S. at 362).

While this court does not agree with Defendants that *Finish Line* supports abstention in this case, the court is constrained to agree that the substantive and procedural due process claim implicates *Burford.* [ECF No. 1 at ¶¶ 57–60 (Violation of Procedural and Substantive Due Process, U.S. Constitution).] Plaintiff claims that the "enactment of the Ordinance . . . was arbitrary and capricious," *id.* at ¶ 58, "Defendants failed to follow the City's own well-established practices for legislative procedure in enacting the Ordinance in question," *id.* at ¶ 59, and they were "deprived . . . of any reasonable means to object to the enactment of the Ordinance in question," *id.* at ¶ 60. Similar to the substantive due process claim at issue in another *Burford* case, *Fourth Quarter Properties*, this claim is "simply a state law claim disguised as a federal claim." 127 F. App'x at 655. In *Fourth Quarter Properties*, the Fourth Circuit agreed with the district court that the due process claim was "not an independent federal claim sufficient to survive *Burford* abstention" because it required the court to determine what pre-enactment

"protections and remedies" existed under state law. *Id.* The due process claim in this case suffers from the same problem.

This court cannot determine whether the City of Myrtle Beach complied with its own practices and procedures without examining the practices and procedures provided by state zoning law. Therefore, the court must abstain from hearing the due process claim.

Plaintiffs' free speech and equal protection claims, in contrast, are independent federal claims unaffected by *Burford*. [ECF No. 1 at ¶¶ 36–45 (free speech); ¶¶ (equal protection).] These claims attack the Ordinance as a whole and are "precisely the sort of [claims] federal courts often and expertly entertain." *Martin*, 499 F.3d at 367.

When a federal claim does "not rest on finding a violation of state law," "[s]uch claims are 'plainly federal in origin and nature,' are independent of any state law violation, and do not threaten *uniform* state regulation." *Id.* at 368 (emphasis added). If this court ultimately concludes that the Ordinance is unconstitutional, the Ordinance in its entirety would be enjoined—a uniform result.[9]

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[9] While *Martin* was a facial challenge, courts in other circuits have concluded that it is "irrelevant to the *Burford* abstention analysis" that a plaintiff "mount[s] an 'as-applied' challenge to a statute, as opposed to a facial one." *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 475 (1st Cir. 1989); *Dittmer v. County of Suffolk*, 146 F.3d 113, 117 (2d Cir. 1998) ("Likewise, this court's examination is limited to facial and as applied challenges under First and Fourth Amendment principles; the court is not

Much like *Martin*, Plaintiffs here do "not 'collateral[ly] attack . . . a final determination' made by any state administrative agency 'or seek to influence a state administrative proceeding.'" *Id.* at 369 (citing *Dittmer v. County of Suffolk*, 146 F.3d 113, 117 (2d Cir. 1998)). Instead, Plaintiffs directly attack the constitutionality of the Ordinance, which creates the "kind of 'controversy federal courts are particularly suited to adjudicate.'" *Id.* (citing *Dittmer*, 146 F.3d at 117). For these reasons, "the danger which *Burford* abstention seeks to avoid—creating an opportunity to overturn a prior state court or agency determination by seeking federal court review, thereby disrupting a state administrative apparatus—is simply not present" in Plaintiffs' free speech and equal protection claims. *Dittmer*, 146 F.3d at 117; *see also Town of Nags Head v. Toloczko*, 728 F.3d 391, 398 (4th Cir. 2013) (reversing district court's decision to abstain where the "constitutional claim intersects with the Town's land use and zoning laws," but is "not merely state law in federal law clothing" (internal citation omitted)). As a result, the court will not abstain from hearing Plaintiffs' free speech and equal protection claims.

The final federal claim at issue is one for regulatory taking. [ECF No. 1 at ¶¶ 52–56.] Defendants ask the court to dismiss the regulatory takings claim because Plaintiffs have not obtained an inverse condemnation adjudication in state court. [ECF No. 36 at p.7.]

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weighing in upon a complex and unsettled administrative regime."). The court is not taking a position, however, on whether the purported as-applied challenges are ripe.

Where "a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985). "[T]o satisfy *Williamson County*, plaintiffs must not only file a state law inverse condemnation claim—they must also be 'denied just compensation' through a final adjudication in state court." *Toloczko*, 728 F.3d at 399 (citing *Williamson County*, 473 U.S. at 195). Similar to *Burford*, "[t]he limitation imposed by the state-litigation requirement is grounded on the idea that 'state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.'" *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013) (citing *San Remo Hotel, L.P. v. City & Cty. of San Francisco, Cal.*, 545 U.S. 323, 346 (2005)).

In response, Plaintiffs concede that they "don't have an inverse condemnation pending in state court," but ask the court decline to apply the rule and simply stay the claim pending resolution of the state circuit court appeal. [ECF No. 37 at pp.6–7.] The court declines Plaintiffs' request.

The court agrees with Plaintiffs that *Williamson County* is a prudential rather than a jurisdictional rule, meaning that "in some instances, the rule should not apply and [the district court] still [has] the power to decide the case." *Sansotta v. Town of Nags Head*, 724

F.3d 533, 545 (4th Cir. 2013). The court disagrees that the present case is one in which the rule should not apply.

There are limited instances in which the Fourth Circuit has recognized an exception to the *Williamson County* rule. *Sansotta* and *Toloczko* are two such cases.

In *Sansotta*, the property owners filed their takings and inverse condemnation claims in state court. 724 F.3d at 544–45. The local government then removed the case to federal court, which it was permitted to do because the complaint included a federal question. *Id.* at 545. But, the local government also raised the *Williamson County* rule, arguing that the takings claim was not ripe. *Id.* Relying on the prudential nature of the rule, the Fourth Circuit concluded that to allow the local government "to invoke the *Williamson County* state-litigation requirement after removing the case to federal court would fail to fulfill the rationale for this prudential rule and would create the possibility for judicially condoned manipulation of litigation." *Id.* Thus, when the local government removed the case to federal court, it "implicitly agree[d]" to have the federal court litigate the takings claim. *See id.* ("[R]efusing to apply the state-litigation requirement in this instance ensures that a state or its political subdivision cannot manipulate litigation to deny a plaintiff a forum for his claim.").

The present case differs from *Sansotta*. The court is not faced with a situation where a local government is engaged in procedural gamesmanship. Plaintiffs

made the calculated decision to assert the takings claim in federal court before pursuing the state-litigation requirement.

Similarly, in *Toloczko*, the district court declined to abstain from hearing the federal claims pursuant to *Burford* and also agreed to retain the takings claim. The procedural history of *Toloczko* differs from *Sansotta* in that the local government—as opposed to the property owners—brought the action in state court. In *Toloczko*, the property owners removed the case to federal court and asserted a counterclaim for violation of the Takings Clause. The local government moved for abstention pursuant to *Burford* and to dismiss the takings claim for failure to comply with the *Williamson County* rule. The district court abstained, but the Fourth Circuit reversed. As to the takings claim, the Fourth Circuit concluded that it was "a proper case to exercise [its] discretion to suspend the state-litigation requirement of *Williamson County*." 728 F.3d at 399. The rationale was that the property owner's decision to remove the case was one of "litigation strategy," not "procedural gamesmanship or forum manipulation." *Id.* (citation omitted). Because all claims were remaining in federal court, the "interests of fairness and judicial economy" necessitated an exception to the *Williamson County* rule. *Id.*

In sum, the recognized exceptions protect "an innocent plaintiff who [seeks] to comply with *Williamson County,"* but is "thwarted by the state or political subdivision's decision to remove the case." *Sansotta*, 724 F.3d at 546–47. It serves to avoid "piecemeal litigation"

that would not otherwise exist absent application of the rule. *Toloczko*, 728 F.3d at 399.

The court is unable to conclude that these same interests and protections necessitate an exception to the rule in this case. *Id.* Plaintiffs acknowledge that the claim is not ripe and yet ask the court to retain jurisdiction as some sort of protective placeholder. [ECF No. 37 at p.7 ("Plaintiffs need the protection of this court so that their employees are not arrested and they do not receive numerous citations during the course of operating their businesses.").] Staying an admittedly unripe claim based on Plaintiffs' own litigation strategy is not an appropriate use of the district court's discretion in excusing the *Williamson County* rule. Plaintiffs made the strategical litigation decision to bring the case in federal court based on federal question, presumably knowing the takings claim is not ripe. To recognize an exception in this instance would almost swallow the rule: A plaintiff would be allowed to avoid the *Williamson County* rule in every instance in which they have another federal claim that allows it to bring the action in federal court.

Further, this court recognizes that its decision may result in piecemeal litigation, which it often seeks to avoid. In this particular instance, however, the potential for "piecemeal litigation" is one solely of the parties' own making. Plaintiffs made a strategical decision to preemptively attack the Ordinance in federal

court.[10] But then to resolve the motion for preliminary injunction, Plaintiffs agreed to follow the state administrative process. [*See* ECF No. 17 at p. 2 ("[T]he Parties together have reached an agreement to allow for administrative proceedings under the OBEOD Ordinance during the pendency of these proceedings").] This second decision ultimately led to the motion presently before the court. Because the parties effectively "impose[d] further rounds of litigation," *Toloczko*, 728 F.3d at 399, this court is not inclined to excuse the lack of compliance with *Williamson County.*

In accordance with the foregoing, the court declines to apply the exception to *Williamson County* to this case; concludes the takings claim is not ripe for adjudication by this court; and, therefore, dismisses the claim without prejudice.

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[10] This was a decision, of course, that Plaintiffs had the right to make They are asserting federal constitutional claims and have the right to assert those claims either in federal court or state court. *See Bonner v. Circuit Court of St. Louis*, 526 F.2d 1331, 1336 (8th Cir. 1975) (en banc) ("Congress and the federal judiciary have consistently recognized that federal courts should permit state courts to try state case and that, where constitutional issues arise, state court judges are fully competent to handle them subject to Supreme Court review."); *Simmons v. Charleston Cty. Sheriff's Off.*, No. 2:19-cv-1754, 2019 WL 7195601, at *4 (D.S.C. Sept. 26, 2019) ("Plaintiff may also elect to pursue that one remaining federal claim . . . in state court as well."), *report and recommendation adopted by* 2019 WL 5387911 (D.S.C. Oct. 22, 2019); *Martin*, 499 F.3d at 370 ("Martin chose to file his claims in a federal forum created by Congress—we cannot deny him that choice even if we disagree with it.").

D. Stay v. Dismissal.[11]

This court is left to decide whether the decision to abstain from hearing Plaintiffs' procedural and substantive due process claim results in dismissal or a stay of that claim and, correspondingly, how the court will proceed as to the remaining claims.

Looking to the relief portion of Plaintiffs' Complaint, it seems the overarching relief sought is equitable—declaratory and injunctive relief. [*See* ECF No. 1 at "WHEREFORE" (a)–(e).] However, Paintiffs also make a blanket contention that they are seeking "legal . . . damages, including any punitive damages as may be appropriate." *Id.* at (g). Thus, to the extent Plaintiffs are seeking damages in conjunction with their procedural and substantive due process claim, the claim is stayed. To the extent Plaintiff is seeking equitable relief, the claim is dismissed. In the interest of judicial economy and efficiency, all remaining claims are stayed pending resolution of the state proceedings. *See Fourth Quarter Properties*, 127 F. App'x at 657 (affirming dismissal of takings claim as unripe and stay of

[11] The South Carolina constitutional claims contain scant factual allegations, but they seem to mirror the equal protection and free speech claims asserted with respect to the U.S. Constitution. This court has supplemental jurisdiction over the claims in accordance with 28 U.S.C. § 1367(a). Because the court concludes that *Burford* does not apply to Plaintiffs' equal protection and free speech claims under the U.S. Constitution, and it is retaining jurisdiction over the federal claims, it is staying the corresponding state law claims.

state law claims and federal due process claim under *Burford*).

CONCLUSION

For the reasons outlined herein, Defendants' Motion to Dismiss Pursuant to *Burford* Abstention Doctrine, ECF No. 36, is **GRANTED in part**, as to the Plaintiffs' procedural and substantive due process claim ("Fourth Cause of Action") and Plaintiffs' takings claim ("Third Cause of Action"). The due process claim is **DISMISSED** to the extent it seeks equitable relief and **STAYED** to the extent it seeks damages. The takings claim is **DISMISSED, *without* prejudice,** as unripe. Further, the Motion is **DENIED in part** as to the remaining claims, which are **STAYED** pending resolution of the state court proceedings.

IT IS SO ORDERED.

/s/ Sherri A. Lydon
United States District Judge

August 17, 2020
Florence, South Carolina

US DISTRICT COURT
DISTRICT OF SOUTHERN CAROLINA
FLORENCE DIVISION

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. Plaintiffs, v. CITY OF MYRTLE BEACH, MYRTLE BEACH CITY COUNCIL, BRENDA BETHUNE, Individually and as Mayor of the City of Myrtle Beach, MICHAEL CHESTNUT, Individually and as a member of the Myrtle Beach City Council, MARY JEFFCOAT, Individually and as a member of the Myrtle	CASE NO: 4:18-CV-03517-RBH Consent Order on Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Filed Jan. 15, 2019)

Beach City Council, CLYDE H. LOWDER, Individually and as a member of the Myrtle Beach City Council, PHILIP N. RENDER, Individually and as a member of the Myrtle Beach City Council, GREGG SMITH, Individually and as a member of the Myrtle Beach City Council, JACKIE VEREEN, Individually and as a member of the Myrtle Beach City Council.

Defendants.

Whereas the City of Myrtle Beach has enacted Ordinance 2017-23 (the "OBEOD Ordinance") to amend Appendix A, Zoning through Article 18, Section 1806, to enact and establish the Ocean Boulevard Entertainment Overlay District (the "OBEOD");

Whereas the Plaintiffs have challenged the validity of the OBEOD ordinance as stated in its complaint in the above captioned lawsuit;

Whereas the OBEOD ordinance may impact the business operations of one or more of the Plaintiffs together with the business operations of other businesses who are not parties to the lawsuit but are located in the OBEOD;

Whereas, the Parties together have reached an agreement to allow for administrative proceedings under

the OBEOD Ordinance during the pendency of these proceedings;

Whereas the City of Myrtle Beach has agreed to enforce the OBEOD Ordinance and or any amendments solely through use of its zoning ordinance administrative procedures. The City of Myrtle Beach's enforcement commitment means that the City Zoning Administrator or his designee may inspect any premises in the overlay zone to make a determination on whether the use of the premises is a conforming or nonconforming use under the OBEOD. If the Zoning Administrator determines that the use of the premises constitutes a nonconforming use for the overlay district, he will notify the business owner in writing. The business owner may then appeal the zoning administrator's decision in accordance with Title 6, Chapter 28 of the S.C. Code of Laws. If the business owner who has been notified in writing by the Zoning Administrator chooses to not appeal the Zoning Administrator's determination of nonconformity within the 30 day time allowed for making an appeal, the determination of the Zoning Administrator shall then become a final determination of nonconformity and may be enforced by the Zoning Administrator according to the terms of the Ordinance. However, if the business owner who has been notified by the Zoning Administrator of a nonconformity under the OBEOD Ordinance chooses to appeal the Zoning Administrator's determination of nonconformity within the 30 day time allowed for making an appeal, the City's administrative procedures will then be observed until such time as a final determination is

made and all appeals have been exhausted in connection with the Zoning Administrator's determination of nonconformity of the particular business.

NOTE THIS ENFORCEMENT COMMITTMENT APPLIES ONLY TO THE OBEOD ORDINANCE AND ANY AMENDMENTS TO THAT ORDINANCE. ALL OTHER LAWS OR STATUTES REGULATING THE SALE OF CBD PRODUCTS, DRUG PARAPHENALIA, OR OTHER CRIMINAL OFFENSES WILL BE ENFORCED IN ACCORDANCE WITH THE TERMS OF THOSE LAWS OR STATUTES.

WHEREAS, Plaintiffs, in reliance on the City of Myrtle Beach's enforcement commitment as set forth herein above, have agreed to withdraw, without prejudice to their rights to reapply for any temporary injunctive relief remedies, their pending Motion for a Temporary Restraining Order and their pending Motion for a Preliminary Injunction.

NOW THEREFORE, based upon the forgoing and the consent of the parties in the above captioned lawsuit, the Court permits the Plaintiffs to withdraw their pending Motion for a Temporary Restraining Order and their pending Motion for a Preliminary Injunction without prejudice to their rights to reapply for any temporary injunctive relief remedies.

THIS ORDER is intended to address Plaintiffs' pending Motions for Temporary Restraining Order and for Preliminary Injunction. It is not intended to address the merits of Plaintiffs' underlying claims in this litigation, which claims are specifically reserved by the

Plaintiffs. Nor do the Defendants waive any defenses thereto by entering into this Consent Order.

AND IT IS SO ORDERED.

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

Florence, South Carolina

January 15, 2019

WE CONSENT:

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