

The Supreme Court of South Carolina

RE: Interest Rate on Money Decrees and Judgments

ORDER

S.C. Code Ann. § 34-31-20 (B) (Supp. 2011) provides that the legal rate of interest on money decrees and judgments “is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points.”

The Wall Street Journal for January 2, 2013, the first edition after January 1, 2013, listed the prime rate as 3.25%. Therefore, for the period January 15, 2013, through January 14, 2014, the legal rate of interest for judgments and money decrees is 7.25% compounded annually.

s/ Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina
January 3, 2013



OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA

ADVANCE SHEET NO. 2
January 9, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State of South Carolina, Petitioner,

v.

Syllester D. Taylor, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Florence County
Thomas A. Russo, Circuit Court Judge

Opinion No. 27207
Heard November 2, 2011 - Filed January 9, 2013

REVERSED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley E. Elliott, and Assistant Attorney General Christina J. Catoe, all of Columbia, and Solicitor Edgar Lewis Clements, III, of Florence, for Petitioner.

Appellate Defender Robert M. Pachak, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: The State contests the court of appeals' decision holding the police search and seizure of Syllester Taylor (Respondent) improper under the Fourth Amendment to the United States Constitution.¹ We reverse.

Facts/Procedural History

On July 25, 2006, at approximately 11:00 p.m., the Florence County Sheriff's Office received a dispatch regarding suspected drug activity. The anonymous call indicated that a black male on a bicycle appeared to be selling drugs in an area well known to law enforcement for its high incidence of crime and drug traffic. Sheriff's deputies responded to the call and, from their vehicles, observed Respondent alone at a road intersection. Respondent is an African-American male and was on a bicycle. The officers parked their vehicles and approached Respondent's position on foot. Officers then observed Respondent "huddled up" with another male. Suspecting an illegal drug transaction, officers approached Respondent. Upon realizing that the officers were approaching, Respondent and his associate "immediately" split up, and Respondent rode the bicycle towards the officers in an apparent attempt to flee the area. Police called out to Respondent to stop, but Respondent continued his movement. Believing that he had reasonable suspicion under the circumstances, an officer conducted a takedown of Respondent and patted him down for weapons. During the search for weapons the deputy discovered crack cocaine.

Respondent was indicted for possession with intent to distribute crack cocaine. The case proceeded to trial, and the sheriff's deputy that conducted the search testified *in camera* regarding the discovery of the crack cocaine:

I then push [sic] the subject to the top of his pocket without entering the pocket. It rolled out on the ground beside him with [sic] a green tennis ball. At the time, I picked the tennis ball up. As I picked it up, I squeezed it. It had a slit in the top of it. And inside the tennis ball, you could actually see the bag of what was believed to be crack cocaine at the time.

The officer later testified during the trial:

¹ U.S. Const. amend. IV.

I worked the item up until it dropped out on the ground beside him. I picked the object up. It was a green tennis ball. It did have a cut in the top of it. And as I pick the ball up, I could see the plastic bag what appeared to this deputy to be crack cocaine inside.

Respondent was found guilty and sentenced, as a third-time drug offender, to thirty years' imprisonment. The court of appeals overturned the conviction, finding that police did not have reasonable suspicion to stop Respondent. *State v. Taylor*, 388 S.C. 101, 694 S.E.2d 60 (Ct. App. 2010). The State sought review of this decision, and this Court granted certiorari.

Issues Presented

- I. Whether police had reasonable suspicion to detain Respondent and conduct an investigatory search.
- II. Whether police had probable cause to search the tennis ball discovered during the search of Respondent.

Standard of Review

A trial court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence, and an appellate court may reverse only when there is clear error. *State v. Groome*, 378 S.C. 615, 618, 664 S.E.2d 460, 461 (2008).

Law/Analysis

- I. Whether police had reasonable suspicion to detain Respondent and conduct an investigatory search.**

The State argues the court of appeals erred in reversing Respondent's conviction. We agree. Under the totality of the circumstances, officers had reasonable suspicion to conduct an investigatory stop.

An investigative detention is constitutional if supported "by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid v. Georgia*, 448 U.S. 438, 440 (1980). The required reasonable suspicion can arise

from an anonymous tip provided that the totality of the surrounding circumstances justifies acting on the tip. *United States v. Perrin*, 45 F.3d 869, 871 (4th Cir. 1995). Courts must look at the cumulative information available to the officer . . . and not find a stop unjustified based merely on a "piecemeal refutation of each individual fact and inference." *United States v. Branch*, 537 F.3d 328, 337 (4th Cir. 2008). "Just as one corner of a picture might not reveal the picture's subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion." *United States v. Mason*, 628 F.3d 123, 129 (4th Cir. 2010).

Two cases decided by the United States Court of Appeals for the Fourth Circuit, *United States v. Lender*, 985 F.2d 151 (4th Cir. 1993), and *United States v. Sprinkle*, 106 F.3d 613 (4th Cir. 1997), are instructive.

In *Lender*, at approximately 12:50 a.m., officers observed four to five men, including the defendant, huddled together in an area known for heavy drug traffic. *Lender*, 985 F.2d at 153. The defendant had his hand stuck out with his palm up, and the other men were looking down toward his palm. *Id.* Suspecting a drug transaction, the officers stopped their car, got out, and approached the men. *Id.* As the officers approached, the group began to disperse, and the defendant walked away from the officers with his back to them. *Id.* The officers called out for the defendant to stop, but he refused. After the officers again called out for defendant to stop, he did, and a semi-automatic pistol fell from his waist to the ground. *Id.* The officers subdued the defendant and placed him under arrest for carrying a concealed weapon. *Id.* The defendant was eventually indicted for one count of possessing a firearm after having been convicted of a crime punishable by a term exceeding one year. *Id.* at 153.

The defendant moved to suppress the gun on the grounds that it had been discovered after police unlawfully seized him. *Id.* He argued that the officers had no reasonable suspicion to justify stopping him, and that he was seized from the moment he came to a stop after the officers' second call for him to do so. *Id.* The district court denied the motion, finding that although the officers had no reasonable suspicion to stop the defendant, he had not been seized at the time the gun fell into plain view. *Id.*

The Fourth Circuit disagreed:

Here the officers personally knew that the area they were patrolling had a large amount of drug traffic. While the defendant's mere presence in a high crime area is not by itself enough to raise reasonable suspicion, an area's propensity toward criminal activity is something an officer may consider. Additionally, the officers observed the defendant engaged in behavior that they suspected to be a drug transaction We cannot say that a reasonable police officer was required to regard such conduct as innocuous [T]he officers were not required in the absence of probable cause simply to "shrug their shoulders and allow a crime to occur."

Id. at 154 (citation omitted).

The court explicitly addressed the defendant's attempt to flee the scene:

When the officers tried to approach Lender, he attempted to evade them by turning his back and walking away. Evasive conduct, although stopping short of headlong flight, may inform an officer's appraisal of a street corner encounter. Given the factors present here, we think Officer Hill had reasonable suspicion to stop the defendant.

Id. (citation omitted).

In *Sprinkle*, the Fourth Circuit found that police did not have reasonable suspicion to justify an investigative stop. *Sprinkle*, 106 F.3d at 619. Police officers observed Victor Poindexter sitting in the driver's seat of a vehicle parked directly across the street from their position. *Id.* at 615. It was 5:30 p.m. on a "fairly bright day" with "plenty of light." Police knew that Poindexter had served time for narcotics violations, but had no reports of any criminal activity by Poindexter since his release. *Id.* at 615–16. The street where Poindexter was parked was in a neighborhood known by police for considerable narcotics trafficking, and one of the officers had personally made numerous drug arrests in the area. *Id.* at 616.

A few seconds after police began observing Poindexter, the officers saw Carl Sprinkle get in the passenger side of the vehicle. *Id.* The officers then walked by the driver side of the car and noticed Sprinkle and Poindexter "huddled to the center of the console of the vehicle," with their hands "close together." *Id.* The

officers believed that Sprinkle was passing or about to pass something to Poindexter, and when Poindexter saw police he "put his head down and put his hand to the left side of his face as if to conceal his face . . ." *Id.* Police later testified that they could see inside the car, and "everybody's hands," and yet did not see any drugs, money, guns, or drug paraphernalia. *Id.*

Shortly thereafter, Poindexter started the car and pulled onto the street. He drove in a normal, unsuspecting fashion; he did not speed, drive erratically, or commit any traffic violations. *Id.* After driving only 150 feet, an unrelated traffic stop completely blocked Poindexter's way, and police activated their blue lights. *Id.* Sprinkle stepped out of the car and ran away as police attempted to initiate a pat-down search. *Id.* As officers pursued him, Sprinkle pulled out a handgun which was later recovered by police. *Id.* Sprinkle was then indicted for possessing a firearm after conviction for a felony. Sprinkle moved to suppress evidence of the gun as the product of an unlawful stop. *Id.* The district court granted Sprinkle's motion to suppress, concluding that officers did not have a "reasonable articulable suspicion" to justify the stop. *Id.*

The government appealed, arguing that five facts, taken together, provided police the basis for a reasonable suspicion of criminal activity; (1) knowledge that Poindexter had a criminal record for narcotics violations, (2) the subjects were spotted in a neighborhood known for high crime, (3) the two men huddled toward the vehicle's center console with their hands close together, (4) Poindexter tried to place his hands close to his face in order to avoid recognition, and (5) Poindexter drove away as soon as officers walked by the car. *Id.* at 616–17. The government also relied heavily on the court's previous opinion in *Lender*. *Id.* at 619, n.3. The court distinguished the facts of *Lender* from those of *Sprinkle* in rejecting the government's argument:

Several factors distinguish *Lender*. First, although police could not see into Lender's open hand, the fact that several men were looking into his hand indicated there was actually something in it. Here, although Poindexter and Sprinkle had their hands close together, [police] were able to see that their hands appeared empty. Thus . . . initial suspicion that Sprinkle was about to pass something to Poindexter was simply not confirmed by what [police] actually saw. Second, Lender engaged in what we considered evasive conduct when he turned his back on approaching officers and walked away. Here

the district court found that Poindexter was not being evasive. Third, in *Lender* we determined that the lateness of the hour (1:00 a.m.) properly contributed to reasonable suspicion. Poindexter was parked in broad daylight on a busy street with people all around. In sum, *Lender* is distinguishable to the point that it is not controlling.

Id.

The circumstances of the instant case closely mirror the facts of *Lender*. Police received an anonymous tip that a black male, on a bicycle, was possibly selling "dope" at an unpaved portion of a local street known for a high incidence of drug traffic. At approximately 11:00 p.m., police officers observed Respondent, an African-American male, on a bicycle in this same area. Respondent was "huddled up" with another male. Police testified that according to past experience, "ninety percent of the time," this sort of behavior indicated the presence of illegal activity. Unlike the scenario in *Sprinkle*, the Record does not reflect that police were unable to observe Respondent's hands, and thus nothing contradicted their suspicion that illegal activity was taking place. As the officers approached, Respondent pedaled toward them in an undisputed attempt to avoid them.² Evasive conduct may inform an officer's appraisal of a street corner encounter. *Lender*, 985 F.2d at 154 (citing *United States v. Sharpe*, 470 U.S. 675, 683 n.3 (1985)). Given the totality of the circumstances, it was proper for police to conduct a pat down of Respondent. The officers in this case suspected illegal activity and established law does not require them to simply "shrug their shoulders and allow a crime to occur." *Id.*

In the instant case, the court of appeals explained why each individual circumstance could not provide a basis for reasonable suspicion. *State v. Taylor*, 388 S.C. 101, 119–20, 694 S.E.2d 60, 69–70 (2010). This approach directly contravenes the principles underlying a totality of the circumstances analysis. Courts may not find a stop unjustified based merely on a piecemeal refutation of each individual fact and inference. *United States v. Whitehead*, 849 F.2d 849, 858 (4th Cir. 1988), *abrogated on other grounds by Gozlon-Peretz v. United States*,

² According to the officer's testimony, police observed Respondent in an isolated and unpaved portion of the street. The road leads to a "dead end" wooded area and intersects with another unpaved road. It is most likely that Respondent would have had to pedal towards the officers in order to avoid them and remain on the bicycle.

498 U.S. 395 (1991). Moreover, the court of appeals held that the officers were present at the scene "based solely on the anonymous and unreliable tip and made no supplemental observations suggesting any illegal activity was afoot." *Taylor*, 388 S.C. at 120, 694 S.E.2d at 70. This view of the facts ignores the testimony of the officers regarding their observations, and the well-settled principle that courts must give due weight to common sense judgments reached by officers in light of their experience and training. *United States v. Perkins*, 363 F.3d 317, 321 (4th Cir. 2004).

Therefore we hold that the court of appeals erred in finding that police did not have reasonable suspicion to justify an investigatory stop of Respondent. Our appellate courts must only reverse where there is *clear* error, and in this case sufficient evidence in the Record supported the trial court's conclusion.

Having found that police lawfully stopped Respondent, we now turn to whether police lawfully seized the drug evidence in this case.

II. Whether police had probable cause to search the tennis ball discovered during the search of Respondent.

Respondent argues that police lacked probable cause to search the tennis ball in his possession "when there was nothing inherently incriminating about the tennis ball," and that the officer's initial frisk removed any concern that weapons were present. We hold that the police officer's conduct did not exceed the constitutionally permissible scope of a pat-down search as explained by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

In *Terry*, the Supreme Court explained the contours of a search based on reasonable suspicion:

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear

for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Terry, 392 U.S. at 30.

In *Dickerson*, the Supreme Court granted certiorari to resolve a conflict among state and federal courts over whether contraband detected through the sense of touch during a pat down search could be admitted into evidence. *Dickerson*, 508 U.S. at 370. This case controls our analysis of the instant case, and thus a brief recitation of the facts and analysis is necessary.

In that case, two police officers patrolling in a marked squad car observed Dickerson leaving an apartment building. *Id.* at 368. The officers, having responded to complaints of drug sales in the building, considered it to be a notorious "crack house." *Id.* Dickerson began walking toward police, but upon spotting the officers, abruptly halted and began walking in the opposite direction. *Id.* at 368–69. Based on this seemingly evasive action and the fact that he had just left a building known for cocaine traffic, the officers decided to stop Dickerson and investigate further. *Id.* at 369. The officers ordered Dickerson to stop and submit to a pat-down search. *Id.* The search revealed no weapons, but one of the officers conducting the search took an interest in a small lump in Dickerson's nylon jacket. *Id.* The officer later testified, "As I pat-searched the front of his body, I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane." *Id.* The officer then reached into Dickerson's pocket and retrieved a small plastic bag containing one fifth of one gram of crack cocaine. *Id.*

The Supreme Court analogized the facts of *Dickerson* to those of *Arizona v. Hicks*, 480 U.S. 321 (1987). In *Hicks*, the Supreme Court invalidated the seizure of stolen stereo equipment found by police while executing a valid search for other evidence. *Id.* at 327–29. Although police were lawfully on the premises, they obtained probable cause to believe that the stereo equipment was contraband only after moving the equipment to permit officers to read its serial numbers. *Id.* at 323–24. Thus, the incriminating character of the stereo equipment was not immediately apparent; rather, probable cause to believe that the equipment was

stolen arose only as a result of a further search—the moving of the equipment—that was not authorized by the search warrant. *Id.* at 325–27.

In *Dickerson*, the officer was in the lawful position to feel the lump in Dickerson's pocket. *Dickerson*, 508 U.S. at 379. However, the officer determined the item was contraband only after conducting a further search. The Supreme Court held that this further search was not authorized by *Terry* or by any other exception to the warrant requirement. *Id.* Because this further search was constitutionally invalid, the seizure of the cocaine was likewise unconstitutional. *Id.*

The police officer's conduct in the case presently before us is not similar to that found in *Dickerson*, and did not exceed the constitutionally permissible scope of a pat-down search. Here, the officer testified regarding his impressions and Respondent's behavior at the time of the search:

After having the subject down, he was explain [sic] – I explain to the subject why he was being detained . . . [T]he whole time he was trying to wriggle free stating that he didn't do it. At that time, I then patted his right hand pocket and could feel a large bulge in his pocket. It was unknown at this time . . . if it was a weapon or what. I then explain to him that he was—the whole purpose of stopping to [sic] him start with because the whole time he was asking why you stopping me. At that time he started wiggling trying to break free. At that time, due to the fact that he did have a large item in his pocket this deputy thought it might have been some sort of a weapon.

The officer initially testified *in camera* regarding his search of Respondent and subsequent discovery of crack cocaine:

I then push [sic] the subject to the top of his pocket without entering the pocket. It rolled out on the ground beside him with [sic] a green tennis ball. At the time, I picked the tennis ball up. As I picked it up, I squeezed it. It had a slit in the top of it. And inside the tennis ball, you could actually see the bag of what was believed to be crack cocaine at the time.

The officer later testified during the trial:

I worked the item up until it dropped out on the ground beside him. I picked the object up. It was a green tennis ball. It did have a cut in the top of it. And as I pick the ball up, I could see the plastic bag what appeared to this deputy to be crack cocaine inside.

It is clear from the officer's statements that he had not yet determined whether Respondent had a weapon when he manipulated the tennis ball out of Respondent's pocket. The officer then noticed the drugs inside the tennis ball through a slit on its surface as he squeezed the tennis ball when he picked it up from the ground. Thus, the incriminating nature of the contents of the tennis ball became apparent while police were still in the process of ensuring that Respondent was unarmed. *See Taylor*, 388 S.C. at 128, 694 S.E.2d at 74 (Thomas, J., dissenting). The tennis ball could have easily contained a razor, or other sharp object, which could be used alone or in conjunction with the tennis ball as a handle. Moreover, unlike the sequence of events in *Dickerson*, nothing in the record indicates that the police officer in the instant case manipulated the tennis ball any more than was necessary in order to pick it up from the ground.³

³ The facts and analysis of *State v. Scott*, 518 N.W.2d 347 (Iowa 1994), are illuminating. In that case, police stopped a vehicle carrying the defendant due to reports that the vehicle recently left an area where gunshots had been fired. *Id.* at 348. A police officer conducted a pat-down search of the defendant's outer clothing and felt an object that she thought was narcotics. *Id.* at 349. The police officer knew that the object was not a weapon, and asked the defendant what he had in his pocket. *Id.* The defendant replied, "I don't want no trouble, I ain't going to lie, it's marijuana." *Id.* The defendant later sought to suppress the drug evidence. *Id.* The trial court concluded that the seizure of the marijuana exceeded the scope of a *Terry* stop because the police officer asked the defendant to identify the object. *Id.* The Iowa Supreme Court held that asking the defendant a question did not constitute a search and thus did not exceed the scope of an investigatory stop and weapons search. *Id.* at 350. The instant case presents an analogous situation. There is little difference between an officer questioning a suspect as to the nature of an object, and merely picking up an object that falls to the ground. The officer's alleged manipulation or "squeezing" of the tennis ball involved nothing more than was needed to retrieve it from the ground, and did not constitute an impermissible search of Respondent.

We greatly respect the perspective of the concurring and dissenting views in this case. However, we simply disagree on the contours and limitations of the Fourth Amendment. In our view, Respondent urges this Court to adopt a rule that will potentially lead to unintended results. Simply put, if police officers execute a valid pat-down search, and an object which is not facially incriminating falls to the ground, any drug evidence that results from the police officer no more than retrieving that object from the ground must be suppressed. It cannot be the case that *Dickerson* requires this conclusion, and thus, the trial court properly admitted the evidence seized by police.

REVERSED.

HEARN, J., and Acting Justice James E. Moore, concur. BEATTY, J., dissenting in a separate opinion. KITTREDGE, J. concurring in part and dissenting in part in a separate opinion.

JUSTICE BEATTY: I dissent. I would affirm the well- reasoned opinion of Judge Short. In my view the majority's opinion eviscerates the constitutional protection of the Fourth Amendment to the United States Constitution and Article 1, section 10 of the South Carolina Constitution. This record is totally devoid of any facts that would legally justify the stop, let alone the search.

The unadulterated facts are these: The police receive an unreliable anonymous tip of a man on a bicycle possibly selling drugs. A policeman initially observes a cyclist riding his bicycle and subsequently observes him stationary and talking to another male. The policeman does not observe any indication of illegal activity. The two men notice the policeman and discontinue their conversation and proceed to leave. The cyclist pedals toward the policeman, the policeman tells him to stop, the cyclist doesn't obey, and the policeman takes the cyclist to the ground and proceeds to search him. These actions take place in a minority neighborhood in Florence.

It is significant that the policeman could not articulate any legally acceptable suspicion of criminal activity. Two black men holding a conversation in their neighborhood is insufficient to support a Terry v. Ohio⁴ stop and frisk, even if the neighborhood is branded a "drug area." United States v. Sprinkle, 106 F.3d 613 (4th Cir. 1997). Absent articulable, reasonable suspicion of criminal activity, the police had no right to stop the cyclist and the cyclist had no obligation to stop when told to do so by the policeman. Illinois v. Wardlow, 528 U.S. 119 (2000).

I would affirm.

⁴ Terry v. Ohio, 392 U.S. 1 (1968)

JUSTICE KITTREDGE: I concur in part and dissent in part. While I concur that law enforcement had reasonable suspicion to detain Respondent Syllester D. Taylor and conduct a Terry⁵ investigatory stop,⁶ I believe the officer's manipulation of the tennis ball exceeded the parameters of the Fourth Amendment as interpreted in Minnesota v. Dickerson.⁷ I would affirm the court of appeals in result.

Deputies of the Florence County Sheriff's Office were dispatched to investigate an anonymous tip of an individual "possibly selling dope." The underlying facts, which amply support the trial court's finding of reasonable suspicion, are set forth in the majority opinion. State v. Brockman, 339 S.C. 57, 64-65, 528 S.E.2d 661, 664-65 (2000). "Our review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding." State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). "The appellate court may only reverse where there is clear error." State v. Pichardo, 367 S.C. 84, 95, 623 S.E.2d 840, 846 (Ct. App. 2005).

"Even where the stop is deemed proper, 'before the police may frisk a defendant, they must have a reasonable belief the defendant is armed and dangerous.'" State v. Blassingame, 338 S.C. 240, 248, 525 S.E.2d 535, 540 (Ct. App. 1999) (quoting State v. Fowler, 322 S.C. 263, 267, 471 S.E.2d 706, 708 (Ct. App. 1996)). "The purpose of this limited search is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear of violence." Minnesota v. Dickerson, 508 U.S. 366, 372 (1993). "In assessing whether a suspect is armed and dangerous, the officer need not be absolutely certain the individual is armed." Blassingame, 338 S.C. at 248-49, 525 S.E.2d at 540. "The issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his

⁵ Terry v. Ohio, 392 U.S. 1 (1968).

⁶ I join Judge Thomas' well-reasoned analysis, as she properly applied the correct standard of review. See State v. Taylor, 388 S.C. 101, 124-28, 694 S.E.2d 60, 72-74 (Ct. App. 2010) (Thomas, J., dissenting).

⁷ 508 U.S. 366 (1993).

safety or that of others was in danger." Id. "Whether a Fourth Amendment violation has occurred turns on an objective assessment of [an officer's] actions in light of the facts and circumstances confronting him at the time and not on the officer's actual state of mind at the time the challenged action was taken." United States v. Swann, 149 F.3d 271, 276 (4th Cir. 1998) (internal quotations omitted) (finding it was objectively reasonable for officers' suspicion to be aroused by a hard rectangular object which was approximately the same size and shape as a box cutter with a sharp blade and was found in a suspect's sock).⁸ There exists an indisputable nexus between drugs and guns, and where an officer has reasonable suspicion that drugs are present, there is an appropriate level of suspicion of criminal activity and apprehension of danger to justify a frisk. Banda, 371 S.C. at 253, 639 S.E.2d at 40.

Police officers may seize non-threatening contraband detected during a protective pat-down search permitted by Terry so long as the "contour or mass [of the object] makes its identity *immediately apparent*." Dickerson, 508 U.S. at 373-75 (emphasis added). "Once an officer has determined that the object is not a weapon, however, and if its shape or size does not indicate its contraband nature, *the search must stop*." United States v. Raymond, 152 F.3d 309, 312 (4th Cir. 1998) (emphasis added). Where an officer first believes a hard object under a person's outer clothing is a gun, but during the course of removing it, becomes aware that it is not a weapon, but rather is an object whose incriminating nature was immediately apparent, the pat-down does not constitute an unreasonable search. Id. at 313 (finding search was reasonable where officer initially thought hard object was a weapon but, upon pulling it from the suspect's waistband, "immediately realized from the shape of the object and his experience on the force that it was a crack cookie").

In the present case, as part of the valid investigatory detention, and for officer safety, a deputy conducted a pat-down of Respondent. The deputy

⁸ Notably, the United States Court of Appeals for the Fourth Circuit stated, "[a] similarly shaped hard object *in Swann's pocket* certainly would have raised no alarms, as there could be innumerable innocent explanations for it." Swann, 149 F.3d at 276 (emphasis added).

felt a hard bulge in Respondent's right pants pocket. The deputy testified he believed the object could have been a weapon, and he pushed the object to the top of Respondent's pocket without reaching inside the pocket. The object fell from Respondent's pocket and rolled on the ground. It was a tennis ball, as the deputy testified: "It rolled out on the ground beside him with [sic] a green tennis ball. At that time, I picked the tennis ball up. As I picked it up, *I squeezed it*. It had a slit in the top of it. And inside of the tennis ball, you could actually see the bag of what was believed to be crack cocaine at the time." (emphasis added).⁹ Significantly, the record contains not a scintilla of evidence that the deputy harbored any belief that the tennis ball, once identified, was a weapon. This undisputed fact belies the majority's effort to find that "the incriminating contents of the tennis ball became apparent while police were still in the process of ensuring that Respondent was unarmed."¹⁰

Although the deputy could lawfully remove the hard object from Respondent's pocket to ensure that it was not a weapon, the law does not allow a further search or manipulation of the object when it is clearly not a weapon and its incriminating nature is not immediately apparent. Under Minnesota v. Dickerson,¹¹ once the tennis ball was removed from Respondent's pocket and determined to be an object whose incriminating character was not immediately apparent, the deputy was not permitted to

⁹ The deputy's testimony before the jury was similar. The deputy stated the tennis ball "has a split in it and [Respondent] could get what he needed in and out of it." When questioned whether the drugs were "difficult to see when you squeezed it," the deputy answered, "No, sir, once you pick the ball up, just the little bit of pressure open [sic] the slit up so that you could see what was inside."

¹⁰ Moreover, it may be common (for purposes of meeting the "immediately apparent" standard) for drug dealers to secrete drugs in objects such as a tennis ball, but there is no evidence in this record to support such a finding.

¹¹ Dickerson provides an example of an impermissible search where the officer "squeeze[ed], slid[], and otherwise manipulate[ed] the contents of the defendant's pocket." 508 U.S. at 378. The United States Supreme Court found that the officer "overstepped [the] bounds of the 'strictly circumscribed' search for weapons allowed under Terry" with the "continued exploration of [defendant's] pocket after having concluded that it contained no weapon." Id.

squeeze or manipulate the tennis ball to discover contraband that was hidden inside. Consequently, the deputy exceeded the limited scope of the pat-down search authorized by Terry when he squeezed the tennis ball and looked inside the slit to discover the drugs. See also United States v. Askew, 529 F.3d 1119, 1146 (D.C. Cir. 2008) (finding police officer's partial unzipping and opening of the defendant's jacket was a search under the Fourth Amendment and observing that “Terry allows an identification *seizure*. It does not permit an identification *search*.”); United States v. Miles, 247 F.3d 1009, 1013 (9th Cir. 2007) (finding a search following a Terry stop invalid under the Fourth Amendment where the officer exceeded a permissible pat-down for weapons by "moving or shaking" a small box in defendant's pocket).

Because I believe the deputy's manipulation and search of the tennis ball was impermissible under the Fourth Amendment and the very sort of evidentiary search that Terry expressly refused to authorize, I would affirm the court of appeals in result concerning the suppression of the evidence.

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Dunes West Golf Club, LLC, Appellant,

v.

Town of Mount Pleasant, Respondent.

Appellate Case No. 2011-194211

Appeal from Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 27208
Heard April 3, 2012 – Filed January 9, 2013

AFFIRMED

G. Trenholm Walker and Katie Fowler Monoc, both of
Pratt-Thomas Walker, PA, of Charleston, for Appellant.

Frances I. Cantwell, of Regan and Cantwell, LLC, of
Charleston, and David G. Pagliarini, of Hinchey Murray
& Pagliarini, LLC, of Daniel Island, for Respondent.

JUSTICE KITTREDGE: In this direct appeal, Appellant Dunes West Golf Club, LLC, challenges the trial court's grant of summary judgment in favor of Respondent Town of Mount Pleasant. We affirm.

Dunes West is a 4,518-acre development in Mount Pleasant, South Carolina. This case concerns only the Dunes West golf course property, which consists of 256

acres. As more fully described below, in 2006, the Town of Mount Pleasant amended its zoning ordinance to create the Conservation Recreation Open Space zoning district, which imposed land-use restrictions on all golf course properties in Mount Pleasant, permitting only recreation and conservation uses. Appellant desired to carve out residential lots on the golf course property by designating several noncontiguous parcels as potential home sites. Although Appellant has presented varying acreage amounts and has failed to identify specifically what portion of the golf course property it seeks to develop,¹ it is clear residential development would require significant alterations to the golf course area of play. Because the new zoning designation did not permit construction of new homes, Appellant sought to have the golf course property rezoned to allow residential development. The Town denied the rezoning request, and Appellant filed suit, claiming the Town's actions violated its equal protection and due process rights, and amounted to an unconstitutional taking of its property. Following discovery, the Town of Mount Pleasant successfully moved for summary judgment. We have carefully reviewed each assignment of error and find summary judgment was properly granted. With this synopsis in mind, we now discuss the relevant facts and applicable law in detail.

I.

The Dunes West Development ("Development") is located on 4,518 acres of land within Respondent Town of Mount Pleasant ("Town"). The principal of Appellant Dunes West Golf Club, LLC ("Appellant"), John Weiland, through other corporate entities, purchased the undeveloped residential lots and the master developer rights to the Development in 2002, and thereafter invested considerable sums repairing the Development's infrastructure and updating its amenities. This appeal concerns only a small portion of the Development—namely, the 256 acres laid out over six contiguous tax map parcels that comprise the Dunes West Golf Course, related facilities and the immediately surrounding property, which we will refer to as the "Golf Course Property." Appellant acquired the Golf Course Property in 2005,²

¹ Appellant's various proposals are best described as a moving-target approach, which we discuss fully in the body of this opinion. In essence, Appellant has failed to identify precisely what property is the subject of this lawsuit, as it has given widely varying representations, ranging from 16.48 acres to 17.86 acres to 25.16 acres to 60.4 acres.

² The Golf Course Property was previously severed from the Development and

and at that time, the Development and the Golf Course Property were subject to the zoning requirements of the Dunes West Planned Development ("DWPD"), which permits flexible land use at the developer's discretion.³

According to Weiland, at the time Appellant acquired the Golf Course Property, he believed the golf course was an important amenity for the Development⁴ and that there was unused land located on and around the golf course that had potential for residential development. It is this potentially developable land on the Golf Course Property that is at the center of this case.

Weiland initially identified these developable portions of the Golf Course Property by instructing an employee to walk the property and make note of any undeveloped areas outside the out-of-bounds markers on the golf course.⁵ This informal

sold to a separate owner. Since initial construction in the early 1990s, the Golf Course Property has been used continuously for golf purposes with few, if any, changes.

³ The DWPD is a site-specific development plan allowing considerable flexibility regarding land use. Essentially, the DWPD master land-use plan provides for mixed uses throughout the Development and sets forth amounts of land assigned for particular uses but in no particular locations. Accordingly, the location of a particular use is determined at the developer's discretion and may be changed or shifted, essentially without Town oversight so long as minor development standards, such as setback requirements, are met and the overall density of the 4,518-acre development does not increase. For a detailed discussion regarding the characteristics of planned development districts in general, *see Sinkler v. County of Charleston*, 387 S.C. 67, 690 S.E.2d 777 (2010).

⁴ Weiland also believed the golf course was an important recreational feature to attract future residents of the Development and that continuity of ownership between the Development and the golf course was desirable to protect his substantial investments in the 4,518 acre Development.

⁵ According to Weiland's deposition testimony, he has owned and developed several golf courses over his thirty-five year career and is familiar with the out-of-bounds markers around the edges of golf courses. Weiland stated that, when considering whether to purchase the Golf Course Property, he viewed everything

approach first resulted in the identification of a series of noncontiguous lots, which together comprised approximately 57 acres. Neither Weiland nor anyone on his behalf examined existing plats to ascertain the location of easements and other restrictions or conducted any engineering analysis of soils, utilities, or potential impact to the golf course itself in identifying the developable areas.

As will be discussed below, as the matter proceeded to and through litigation, Appellant has presented widely varying projections as to precisely what part of the Golf Course Property was to be carved out for residential development. Nevertheless, all of the approaches had one thing in common—the alteration of the golf course, the filling of wetlands and the relocation of several easements which Appellant did not own.

In 2005, before Appellant took any formal steps in furtherance of residentially developing a portion of the Golf Course Property, a number of golf courses throughout the coastal area of South Carolina were converted for use as residential home sites. Local city and county councils became concerned about this increasing golf-course conversion trend, particularly where developers exploited flexible, planned development zoning provisions to level existing golf courses without any oversight from local government. Among those concerned municipalities was the Town. Believing a prompt, proactive approach was in the best interests of the Town and its residents, the Town examined the existing zoning designations and permitted uses for all golf course properties within its borders to determine whether and to what extent future development could be evaluated and controlled.

As a result, to "more effectively control the process of converting golf course property to other uses" and to "balance the interests of golf course property owners and golf course community residents with respect to such conversion of use," the Town's planning commission proposed implementing a new zoning district—namely, the Conservation Recreation Open Space ("CRO") district. *See* Town of Mt. Pleasant, S.C., Code § 156.333 (2006). The CRO zoning designation permits

beyond the out-of bounds markers as "good dirt" or developable land. Weiland stated that he "made the assumption that everything that was beyond those boundaries w[as] right for development."

only recreation and conservation uses and prohibits residential development.⁶ According to a Town planning commission staff report:

Rezoning all [golf] courses to CR-O or amending the PDs would not necessarily prevent future development of the golf course properties. It would provide that the owner of the course would be subject to the rezoning process including a public hearing should the owner desire to redevelop part or all of the golf course for some other type of development. Town Council approval would be required.

See Town of Mt. Pleasant Planning Comm'n Public Hearing (April 19, 2006) (statement of Christiane Farrell, Div. Chief, Mt. Pleasant Planning Dep't).

During the public hearing process on the proposed CRO Ordinance, Appellant voiced its opposition to including the entirety of the Golf Course Property in the CRO designation, claiming a total of 60.4 acres was not "part of the golf course" and was suitable for residential development. Appellant contended this 60.4 acres should remain subject to the DWPD's flexible floating zoning. However, no plat or survey of the proposed developable land existed at that time, and no graphic or other pictorial depiction of those areas was ever presented to the Town. The Town's zoning administrator testified at deposition that:

[I]t would have been very difficult, if not impossible, for [the Town] to decide or to determine what was indeed—what the developer considered developable land, not a part of the golf course, unless they showed it to us. And to my knowledge, that didn't occur until later on in the process [after the enactment of the CRO ordinance].

Following the public hearing process, the Mount Pleasant Town Council ("Council") voted to amend the Town's zoning ordinance to create the new CRO zoning district. *See Town of Mt. Pleasant, S.C., Ordinance No. 06031 (June 14, 2006).* Using tax-map-parcel boundaries, the Town identified the land parcels

⁶ The various recreational uses permitted in a CRO district include: golf courses, driving ranges, tennis courts, play fields, swimming pools and park land. Accessory uses, such as club houses, restroom and locker room facilities, snack bars, and parking areas, are also permitted. *See Town of Mt. Pleasant, S.C., Code § 156.333(B).*

comprising part of any one of the Town's five golf courses, and either by way of direct rezoning or an amendment to the relevant planned development, each of those parcels was designated as a CRO district. *See* Town of Mt. Pleasant, S.C., Ordinance Nos. 06032 (Patriot's Point Golf Course); 06033 (Snee Farm Country Club); 06034 (Charleston National Country Club); 06035 (Dunes West Golf Club); 06036 (Rivertowne Country Club) (June 14, 2006).

At Dunes West, the new CRO district was comprised solely of the 256-acre Golf Course Property. Following this amendment, the Golf Course Property was no longer subject to the flexible floating zoning of the DWPD. Instead, that land was subject to the use limitations of the CRO Ordinance, which did not permit residential development.

In 2008, Appellant submitted a rezoning petition seeking residential development of a portion of the Golf Course Property. This time, Appellant claimed that 17.93 noncontiguous acres located within the Golf Course Property were developable for residential lots. The location of the acreage sought to be rezoned fell within areas of play of the golf course and would have required extensive alterations to the course.⁷ The rezoning petition also contemplated filling wetlands and the abandonment of an easement not owned by Appellant. In addition, at the time of Appellant's rezoning request, there were approximately 1,200 available lots outside the Golf Course Property in the Development designated for residential use.

Appellant's petition prompted spirited public debate. The planning commission recommended that Appellant's proposal be denied by Council on the basis that it did not comport with the rezoning criteria set forth in the Town's Code of

⁷ The 2008 proposal included relocation of the teeing areas of four different holes, which would result in the reduction of the ninth hole from a par-four to a par-three hole and the eleventh hole from a par-five to a par-four hole. Additionally, that proposal would have required the reconfiguration of the putting greens for two holes, clearing various wooded areas, and relocation of approximately 1,700 linear feet of cart path, partly to areas without existing cart-path easements. Appellant's desire to maximize development prompted it to propose adding various lots in such close proximity to the course that installation of almost 1,000 linear feet of safety netting would be required along the tenth hole and the practice range to protect nearby homes from errant golf shots.

Ordinances. *See* Town of Mt. Pleasant, S.C., Code § 156.031(C) (providing the factors for consideration by the planning commission for rezoning requests, including: the relationship of the request to the Town's comprehensive plan; whether the request violates or supports the comprehensive plan; whether the uses permitted by the proposed change would be appropriate in the area concerned; whether adequate public facilities and infrastructure exist or could be provided in the area of the proposed development; the amount of vacant land in the vicinity currently classified for similar development; and whether the proposed change is consistent with the land development regulations of the Town). However, Appellant withdrew its rezoning petition prior to its submission for Council's consideration.

In April 2009, Appellant submitted another petition, this time seeking rezoning of 16.48 acres of noncontiguous land to permit residential development. Like the 2008 petition, the 2009 proposal included acreage within areas of play that would have required the filling of wetlands, the abandonment of easements it did not own, and many of the same extensive alterations to the golf course involved in the previous rezoning petition.⁸ Spirited public debate again ensued, with Town residents strongly opposing the request. Ultimately, Council denied Appellant's rezoning petition.

Appellant filed the underlying suit, claiming the Town's actions in designating the entirety of the Golf Course Property as a CRO district and refusing its rezoning petition amounted to a taking of 60.4 acres of the Golf Course Property and violated Appellant's substantive due process and equal protection rights. The circuit court granted summary judgment in favor of the Town on each of Appellant's claims, which Appellant now appeals.

II.

A trial court properly grants summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

⁸ These necessary alterations include reconfiguration of the fairway of the tenth hole, shortening the ninth and eleventh holes, including reducing the eleventh hole from a par-five to a par-four hole, moving several tee boxes, and relocating the maintenance shed and numerous cart paths throughout the Golf Course Property.

party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. "When opposing a summary judgment motion, the nonmoving party must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.'" *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) (quoting *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 107, 410 S.E.2d 537, 545 (1991)). "[T]he opposing party may not rest upon mere allegations or denials, but must respond with specific facts showing a genuine issue." *City of Columbia v. Town of Irmo*, 316 S.C. 193, 195, 447 S.E.2d 855, 857 (1994).

III.

A. Equal Protection

Appellant claims summary judgment on its equal protection claim was improperly granted because it presented evidence that the Town granted another substantially similar rezoning petition, and there was no rational basis for the Town's disparate treatment of the two requests. We disagree.

The Equal Protection Clause provides "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used. *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004) ("When social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985))). Under the rational basis test, the Court must determine: 1) whether the law treats similarly situated entities differently; 2) if so, whether the legislative body has a rational basis for the disparate treatment; and 3) whether the disparate treatment bears a rational relationship to a legitimate government purpose. *Ed Robinson Laundry & Dry Cleaning, Inc. v. S.C. Dep't of Rev.*, 356 S.C. 120, 124, 588 S.E.2d 97, 99 (2003).

Following the downzoning of all the golf courses within the Town, developers from another golf course, Snee Farm Country Club ("Snee Farm"), sought rezoning of a contiguous, twenty-acre portion of their property from CRO to a designation that would permit development of 58 single family homes. Snee Farm presented a

comprehensive development proposal and a detailed impact assessment to Council in support of its request. Monies generated from sales were to be placed in a trust account and applied to specific recreational improvements, including reconstructing the clubhouse, improving existing tennis courts, and constructing a new events pavilion, pool, and practice green with an expanded driving range. Snee Farm's rezoning petition involved virtually no alteration to golf course areas of play. Although community support for the Snee Farm rezoning proposal was divided, there was general support in favor of the proposal. Council granted Snee Farm's request and rezoned approximately 20 acres of land to permit the proposed residential development.

Like the Snee Farm rezoning petition, Appellant's petition requested rezoning of approximately 17 noncontiguous acres to develop 32 residential lots. However, unlike Snee Farm's request, Appellant's rezoning petition did not include an assessment of the potential effects on traffic, drainage, and other conditions in the surrounding area. Next, effectuating Appellant's plan required filling some areas of wetlands, relocating existing easements, and extensive alterations to the golf course, as detailed above. *See Whaley v. Dorchester Cnty. Zoning Bd. of Appeals*, 337 S.C. 568, 578, 524 S.E.2d 404, 409 (1999) (noting a legitimate government interest exists in limiting traffic and protecting aesthetic qualities in residential zones). Further, the Dunes West community was in overwhelming opposition to the rezoning petition. *See, e.g., Sowers v. Powhatan County*, 347 Fed. Appx. 898, 903-04 (4th Cir. 2009) (holding public opposition furnishes a rational basis for differential treatment in zoning decisions); *Harbit v. City of Charleston*, 382 S.C. 383, 396, 675 S.E.2d 776, 783 (Ct. App. 2009) ("[The Equal Protection Clause] does not prohibit different treatment of people in different circumstances under the law.").

The trial court correctly found there were significant differences between the two rezoning petitions, which demonstrated a rational basis for granting Snee Farm's proposal and denying Appellant's proposal. Specifically, the trial court found that, from a land-use perspective, "the Snee Farm proposal presented a compact, contiguous, unified site design that caused little alteration to the areas of play of the golf course. The Dunes West proposal contemplated spattering new lots throughout the Golf Course Property that caused multiple alterations to the areas of play." We find the two rezoning petitions were not similarly situated as a matter of law because there were material differences between them, and those differences are rationally related to the purposes of the CRO Ordinance. Moreover, Appellant

has failed to produce any evidence that the denial of its rezoning petition was motivated by discriminatory goals. See *Village of Willowbrook v. Olech*, 528 U.S. 562, 566 (2000) (Breyer, J., concurring) (noting that the distinguishing factor between "run-of-the-mill zoning cases [and] cases of constitutional right" is the presence of a factor demonstrating "'vindictive action,' 'illegitimate animus' or 'ill will.'"); *Whaley*, 337 S.C. at 576, 524 S.E.2d at 408 ("To prove that a statute has been administered or enforced discriminatorily, more must be shown than the fact that a benefit was denied to one person while conferred on another. A violation is established only if the plaintiff can prove that the state *intended* to discriminate." (emphasis in original)); *Butler v. Town of Edgefield*, 328 S.C. 238, 250-51, 493 S.E.2d 838, 845 (1997) (plaintiff did not establish Equal Protection claim where he failed to allege or set forth any facts which could establish purposeful or intentional discrimination). Accordingly, we affirm the grant of summary judgment with respect to the equal protection claim.

B. Substantive Due Process

Appellant claims the trial court applied incorrect legal standards in considering its substantive due process challenges and that the existence of genuine issues of material fact preclude summary judgment on those claims. We find the trial court properly granted summary judgment in favor of the Town as to Appellant's facial challenge to the CRO Ordinance because Appellant has failed to point to any specific fact which creates a genuine issue for trial. In addition, because the zoning classification of one's land is not a cognizable property right, summary judgment was properly granted as a matter of law regarding Appellant's as-applied challenge.

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

"In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." *Harbit*, 382 S.C. at 394, 675 S.E.2d at 782 (citing *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004)). "The State's

deprivation of the property interest must fall so far beyond the outer boundaries of legitimate governmental authority that no process could remedy the deficiency." *Id.* "Every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution." *McMaster*, 395 S.C. at 504, 719 S.E.2d at 663.

"A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property." *Harbit*, 382 S.C. at 394, 675 S.E.2d at 782. "Courts cannot become city planners but can only correct injustices when they are clearly shown to result from municipal action." *Knowles v. City of Aiken*, 305 S.C. 219, 222, 407 S.E.2d 639, 642 (1991). "In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and unreasonable." *Id.* at 224, 407 S.E.2d at 642. "And in the context of a zoning action involving property, it must be clear that the state's action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'" *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995) (quoting *Nectow v. Cambridge*, 277 U.S. 183, 187-88 (1928)).

1. Facial Substantive Due Process

In its facial substantive due process challenge, Appellant argues the trial court erred by applying an "arbitrary and capricious" standard rather than the freestanding "substantially advances" standard test it claims was set forth in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). Further, Appellant contends summary judgment was improperly granted because there is a genuine issue of material fact whether the CRO ordinance "substantially advances" a legitimate Town interest. We find the trial court did not err by applying the "arbitrary and capricious" standard. Further, we find the CRO Ordinance is not arbitrary or capricious and, in any event, the ordinance substantially advances numerous legitimate Town purposes. We therefore hold the Town is entitled to judgment as a matter of law.

The purposes of the CRO ordinance as set forth therein are:

(A) *Purpose of district.* The purpose of this section is listed as follows:

- (1) To provide for, and permit, an appropriate valuation by the tax assessor and/or land appraiser that reflects the conservation, recreation, and/or open space use of land.
- (2) To ensure the preservation of conservation, recreation, and/or open space use of land against undesirable development.
- (3) To lessen the hazards and loss of property, life, and the reduction of health and safety due to periodic inundation of flood waters, by restricting or prohibiting uses in those areas.
- (4) To provide opportunities for improved public and/or private recreation activities.
- (5) To provide for a community-wide network of open space, buffer zones, and recreation spaces.

Town of Mt. Pleasant, S.C., Code § 156.333(A).

Joel Foard, the director of the Town's planning and development department, testified at deposition that, although he did not know of any studies conducted specifically with regard to drafting the CRO Ordinance, the Town "had a long history of trying to preserve open space." Foard further testified that, since the mid-1980s, the Town extensively studied open space preservation through various master planning and comprehensive planning processes, including the creation of the Mount Pleasant Open Space Foundation to assess the need for and existence of open space areas within the Town on an ongoing basis.

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

Appellant claims the trial court erred in analyzing its substantive due process claim under the "arbitrary and capricious" framework instead of pursuant to a "substantially advances" theory. We disagree.

In *Agins v. City of Tiburon*, the United States Supreme Court stated that regulation of private property "effects a taking if [it] does not substantially advance [a] legitimate state interes[t]," and concluded that, under the facts of that case, no taking occurred because the challenged zoning ordinances "substantially advance legitimate governmental goals." 447 U.S. 255, 260-61 (1980).

Twenty-five years later, in *Lingle*, the Supreme Court "correct[ed] course" and clarified that "the 'substantially advances' formula was derived from due process, not takings precedents." 544 U.S. at 540 (noting that "a municipal zoning ordinance would survive a substantive due process challenge so long as it was not 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare'" (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-95 (1926))). Justice Kennedy concurred separately in *Lingle*, specifically noting that although the Supreme Court had "no occasion to consider" whether the challenged regulation violated due process,⁹ the majority opinion was not meant to "foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process," and noted "[t]he failure of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry." *Id.* at 548-49 (Kennedy, J., concurring).

Appellant argues the United States Supreme Court's *Lingle* decision establishes that the "substantially advances" theory is a new, freestanding due process test and that the trial court erred by applying the "arbitrary and capricious" due process framework in granting summary judgment. Although we acknowledge the potential relevance of a "substantially advances" inquiry within the due process analysis, we do not read the *Lingle* decision as abandoning the established "arbitrary and capricious" framework; rather, we view the "substantially advances" theory as embraced within the "arbitrary and capricious" analysis. *See id.* at 542

⁹ There was "no occasion to consider" that issue because the landowner had voluntarily dismissed its due process claim below and argued only a "substantially advances" theory in support of its takings claim on appeal.

("[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.") (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (stating that the Due Process Clause is intended in part to protect the individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective")); *see also City of Orangeburg v. Farmer*, 181 S.C. 143, 186 S.E. 783, 785 (1936) (striking down an ordinance prohibiting door-to-door sales calls as unconstitutional based on a finding that the ordinance failed to further the public health, safety, or welfare and was therefore unreasonable).

We find the trial court did not err by considering Appellant's substantive due process challenge under the "arbitrary and capricious" framework. *See, e.g., Worsley Cos. v. Town of Mt. Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000) (noting "[s]ubstantive due process prohibits a person from being denied life, liberty or property for *arbitrary* reasons" and that "[a] plaintiff must show that he was *arbitrarily and capriciously* deprived of a cognizable property interest rooted in state law" (emphasis added)).

Additionally, Appellant claims summary judgment was improper because it created a genuine issue of fact as to whether the CRO Ordinance is arbitrary and capricious because the Town lacked an adequate factual basis to support each of the purposes stated therein. We reject Appellant's argument because Appellant fails to identify any specific facts showing a genuine issue for trial; rather, Appellant simply challenges the wisdom of the Town's decision to enact the CRO Ordinance. It is not the function of the courts to pass upon the wisdom or folly of municipal ordinances or regulations. *See McMaster*, 395 S.C. at 504-05, 719 S.E.2d at 663 ("The power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations.").

Although a substantive due process claim is subject to a heightened burden of proof at the summary judgment stage, we find Appellant has failed to produce even a scintilla of evidence suggesting that the Town's exercise of its police power in creating the CRO district was not rationally related to the Town's legitimate long-term land-use goals. We further find Appellant has failed to present any evidence that the CRO Ordinance does not preserve existing recreational uses. To the contrary, the CRO Ordinance substantially advances those interests. In this

regard, all of the evidence in the record shows the Town's planning goals will be furthered by implementing some measure of control over future golf course conversions—namely, by requiring Town review to evaluate whether proposed development is consistent with its long-term land-use planning goals. In short, Appellant has failed to create a factual question regarding the legitimacy of the Town's objectively reasonable stated purposes. Therefore, we find summary judgment was properly granted as to Appellant's facial due process challenge. *See Berman v. Parker*, 348 U.S. 26, 33 (1954) ("The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."); *Rush v. City of Greenville*, 246 S.C. 268, 281, 143 S.E.2d 527, 533 (1965) ("The financial situation or pecuniary hardship of a single owner affords no adequate grounds for putting forth this extraordinary power [of invalidating zoning restrictions] affecting other property owners as well as the public.").

2. As-Applied Substantive Due Process

Appellant contends the Town arbitrarily and capriciously rezoned all of the Golf Course Property to a CRO designation. We disagree, for the rezoning represents a uniform plan applicable to all golf course developments and is, in no way, inherently arbitrary.

a. Protected Property Interest

As an initial matter, the trial court found Appellant failed to show that it possessed a vested interest in its right to construct houses on the Golf Course Property under either the common law or the Vested Rights Act.¹⁰ Appellant now argues whether

¹⁰ The Vested Rights Act is a set of statutory provisions under which a developer may seek to protect the right to undertake and complete the development of property. *See* S.C. Code Ann. §§ 6-29-1510 to -1560 (Supp. 2011). Specifically, the trial court found Appellant failed to avail itself of the provisions of the Vested Rights Act. We do not hold that, at the time the CRO Ordinance was passed, Appellant definitively had a vested right in residential development through the Vested Rights Act. We merely observe that Appellant took no action to assert any rights under the Act. This lack of action is relevant in terms of assessing whether

its residential development rights in the Golf Course Property Land were vested at the time of the downzoning "is irrelevant to a substantive due process analysis," and claims it possesses a constitutionally protected property right by virtue of its title to the Golf Course Property.

Initially, we find Appellant's argument is not procedurally appropriate.¹¹ Further, because Appellant lacks a property interest in the **former** PD zoning classification, the Town's act of rezoning of the Golf Course Property did not, and could not, deprive Appellant of any right. *See Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 269-70, 349 S.E.2d 891, 893 (Ct. App. 1986) ("[A] contemplated use of property by a landowner on the date a zoning ordinance becomes effective is not protected."). Therefore, Appellant's due process challenge fails as a matter of law.

Appellant possessed a constitutionally protected property interest in the context of its substantive due process claim and in evaluating Appellant's claimed investment backed expectations, as discussed below, concerning its taking claim.

¹¹ Appellant has abandoned its previous argument—namely, that it possessed a vested development right prior to the 2006 rezoning of its property. *See Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) ("Failure to argue is an abandonment of the issue and precludes consideration on appeal."). Further, Appellant argues for the first time to this Court that its title to the Golf Course Property, rather than its specific right to use and develop the property, forms the requisite property interest upon which a substantive due process challenge may be based. Appellant cannot present this argument for the first time on appeal. *See Atlantic Coast Builders & Contractors, LLC, v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 287 (2012) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Moreover, before the trial court, Appellant took the position that a vested right was required to establish a substantive due process violation. Appellant may not argue a different position on appeal. *See McLeod v. Starnes*, 396 S.C. 647, 657, 723 S.E.2d 198, 204 (2012) ("A party may not argue one ground at trial and an alternate ground on appeal."). Further, on the merits, we agree that title to land is a property interest cognizable under state law; however, we disagree that, under these facts, the CRO ordinance abrogates that interest in any way because the ordinance merely restricts the manner in which Appellant may use its property in the future and in no way affects Appellant's title to the land.

See Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach, 420 F.3d 322 (4th Cir. 2005) (enumerating the elements of both procedural and substantive due process claims and noting a party must show a cognizable property interest as the first step under either type of claim); *Harbit*, 382 S.C. at 395, 675 S.E.2d at 782 (finding landowner lacked a property interest in having his property zoned for a particular use); *Sunset Cay*, 357 S.C. at 430, 593 S.E.2d at 470 (finding claim that city ordinance violated developer's substantive due process right failed as a matter of law where ordinance did not deprive developer of any cognizable property interest rooted in state law); *Friarsgate*, 290 S.C. at 273, 349 S.E.2d at 895 ("[A] landowner has no right to insist that his property not be restricted by a zoning regulation absent a showing that he has, prior to the effective date of the regulation, established a nonconforming use."); *see also Horne v. Mayor of Baltimore*, 349 Fed. Appx. 835, 837 (4th Cir. 2009) (noting "property interests may take many forms," but "to possess a protected property interest, one 'must have more than an abstract need or desire for it or a unilateral expectation of it,' and 'must, instead, have a legitimate claim of entitlement to it.'") (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972))).

b. Arbitrary and Capricious Rezoning

Appellant also argues that rezoning the entire area within the Golf Course Property, including the land it anticipated developing residentially, was unnecessary to further the stated purposes of the CRO Ordinance. The crux of Petitioner's complaint is that the CRO zoning boundary is arbitrary because it sweeps too broadly.

We agree with the trial court that the Town's zoning boundary decision in reliance on the tax map parcels to determine zoning boundaries was not unreasonable. Indeed, the rezoning of the Golf Course Property tracts was part of a unified plan which applied to all golf courses in the Town, and the Town's use of tax map parcels as zoning district boundaries for each golf course is consistent with the stated tax-assessment purposes set forth in the CRO Ordinance. *See* Town of Mt. Pleasant, S.C., Code § 156.333(A)(1). Consequently, we reject Appellant's argument that the Town's actions in evaluating and targeting the Golf Course Property as the specific land to be rezoned were arbitrary or capricious in any way. *See Berman*, 348 U.S. at 35-36 ("It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land

to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."); *Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991) ("Irrationality and arbitrariness imply a most stringent standard against which state action is to be measured in assessing a substantive due process claim."); *Bd. of Sup'rs of Fairfax Cnty. v. Pyles*, 300 S.E.2d 79, 84 (Va. 1983) ("Fixing the specific location of boundaries between zoning districts is a legislative function that 'is, by nature, more or less arbitrary.'" (quoting *Fairfax County v. Williams*, 216 S.E.2d 33, 41 (Va. 1975))).

We affirm the trial court's decision to grant summary judgment in favor of the Town as to Appellant's due process claims.

C. Takings

Appellant next claims the Town's act of downzoning the Golf Course Property amounts to an unconstitutional taking under two alternative theories: a categorical or *per se* taking under *Lucas v. South Carolina Coastal Council*,¹² and a regulatory taking under the balancing test set forth in *Penn Central Transportation Co. v. New York City*.¹³ We conclude summary judgment in favor of the Town was properly

¹² 505 U.S. 1003 (1992). In *Lucas*, a landowner purchased two residential lots on the Isle of Palms in Charleston County, South Carolina, intending to build single-family homes. Thereafter, the South Carolina General Assembly enacted the Beachfront Management Act, which prohibited construction of habitable structures on the parcels. Because the Act deprived the landowner of "all economically viable use," the United States Supreme Court found a *per se* taking occurred, and a case-specific inquiry into the public interest advanced in support of the restraint was not required *Id.* at 1015-19.

¹³ 438 U.S. 104 (1978). *Penn Central* involved the designation of New York City's Grand Central Terminal as a historic landmark and the city preservation commission's refusal to permit landowners to construct a 50-story building over the terminal. Landowners filed suit, claiming the refusal to approve the development plans amounted to a taking and a substantive due process violation. The United States Supreme Court explained there is no "set formula" for when compensation should be made, but that the determination depends on an "essentially ad hoc, factual inquir[y]" based on the particular facts of each case based on consideration of three guiding factors: the extent to which the regulation interferes with the

granted as to both theories, as such a determination is a question of law for the court. *See Ex Parte Brown*, 393 S.C. 214, 224, 711 S.E.2d 899, 904 (2011)("The question of a taking is one of law.").

1. Relevant Parcel

As an initial matter, Appellant claims the trial court erred in considering, for the purposes of its takings analysis, the relevant parcel to include all 256 acres of the Golf Course Property. Appellant argues that only the discrete portion it seeks to develop for residential use should be considered. The obstacle Appellant presents here concerning its "discrete portion" argument is that we cannot tell what that portion is. Before this lawsuit was filed Appellant presented varying acreage amounts as the affected areas of the Golf Course Property for residential development. Those varying acreage amounts ranged from 16.48 acres to 17.86 acres to 25 acres. In its complaint, Appellant asserted that "[a]pproximately 60.4 acres of the Parcels is developable land outside the areas of play of the Golf Course." Before the trial court, Appellant presented a figure of 25 acres. On appeal, Appellant's brief contains inconsistent acreage representations, ranging from 25 to 60 acres.

Before determining whether a taking has occurred, a court must first determine what, precisely, is the property at issue. *See Dist. Intown Props. v. District of Columbia*, 198 F.3d 874, 879 (D.C. Cir. 1999) ("Under both *Lucas* and *Penn Central*, then, we must first define what constitutes the relevant parcel before we can evaluate the regulation's effect on that parcel."). "The definition of the relevant parcel profoundly influences the outcome of the takings analysis." *Id.* at 880. "Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is

owner's distinct investment-backed expectations; the economic impact of the regulation; and the character of the government action. *Id.* at 124. Based on those factors, the United States Supreme Court found no taking occurred by denying the owner's right to exploit the air space above the terminal; rather, "[t]he restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities to further enhance not only the Terminal site but also other [adjacent] properties [owned by appellants]." *Id.* at 138.

to furnish the *denominator* of the fraction." *Keystone Bituminous Coal Ass'n v. Benedictis*, 480 U.S. 470, 497 (1987).

Essentially, the question is whether a court should consider a regulation's impact on only part of the property or whether a court must consider its impact upon the whole parcel. This difficult issue has been described as a "conceptual black hole." See Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel As a Whole*, 36 Vt. L. Rev 549, 564 (2012) ("The takings denominator problem is more than a 'difficult, persisting question' that the [United States] Supreme Court continues to avoid.") (citing John E. Fee, *The Takings Clause As a Comparative Right*, 76 S. Cal. L. Rev. 1003, 1032 (2003)).

The United States Supreme Court has indicated several times that "piecemealing" various property interests is not permitted. See *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331-32 (2002) ("An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. Both dimensions must be considered if the interest is to be viewed in its entirety." (citation omitted)); *Keystone Bituminous Coal*, 480 U.S. at 498 ("Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. . . . [U]nder petitioners' theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes."); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."); *Penn Central*, 438 U.S. at 130-31 ("Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular government regulation has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.").

However, other United States Supreme Court decisions have implicitly acknowledged, though never explicitly held, that "conceptual severance" of a

parcel can be appropriate under the particular facts presented.¹⁴ See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (construing a public access easement as the relevant property interest separate and distinct from the parcel as a whole); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-37 (1982) (construing the relevant property interest to be the fee interest in the space occupied by the cable rather than the space in the building as a whole); *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (construing the relevant property interest to be the subsurface mineral and support estates rather than the complete fee estate). It has been suggested, "in order for the [United States Supreme] Court to find that 'something' has been completely taken, the severance . . . must have existed *prior to the government's action*. . . . That is, the appropriate understanding of what constitutes a 'parcel as a whole'—and hence the owner's 'property'—is previous real-life treatment of the resource, not the conceptual possibilities property law holds available." Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1677 (1988).¹⁵

¹⁴ The term "conceptual severance" is derived from "the modern notion that property is a bundle of rights made up of many strands. . . . [I]f you remove one or more strands from this bundle and treat them in the aggregate as a separate property interest, you are in effect conceptually severing these strands and then hypothetically or conceptually construing those strands as a separate and distinct property interest." Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663, 695 (1996) (internal quotations omitted) (describing the various types of conceptual severance as including vertical severance (division of subsurface, surface, and air rights); temporal severance (division of property based on the time regulation is in effect and not in effect—i.e. temporary takings); functional severance (division of property interests based on easements, rights of way, and servitudes); and horizontal severance (subdivision of a parcel into smaller lots)). "It consists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken." Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1676 (1988).

¹⁵ Indeed, this position is further supported by *Keystone Bituminous*, in which the United States Supreme Court found that, although the affected subsurface support estate could be recognized as a separate property interest under state law, "our

Further, the United States Supreme Court on several occasions has emphasized that the concepts of "fairness and justice," which form the basis of the takings clause, are best served by eschewing a "set formula" for determining when compensation is due. *See Lingle*, 544 U.S. at 537 ("While scholars have offered various justifications for [the takings] regime, we have emphasized its role in 'barring Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))); *Tahoe-Sierra*, 535 U.S. at 342 (finding a proposed categorical rule to be "simply 'too blunt an instrument'" and concluding "the interest in 'fairness and justice' will be best served by relying on the familiar *Penn Central* approach"). Perhaps, the United States Supreme Court might find this flexibility extends to the process of determining the relevant parcel if "fairness and justice" so require. Nonetheless, this ambiguity¹⁶ and

takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights. . . . Its value is merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface." 480 U.S. at 500-01.

¹⁶ In recent cases, the United States Supreme Court has declined to resolve the uncertainty and confusion involved in determining the relevant parcel based on the particular circumstances presented by each case. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (noting "[Petitioner's] contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of the deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators," but declining to resolve the question on issue preservation grounds); *Lucas*, 505 U.S. at 1017 n.7 ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court.").

lingering uncertainty has led some courts to stand firm in the seemingly safe refuge of the parcel-as-a-whole approach in analyzing takings claims.¹⁷ See, e.g., *Zealy v. City of Waukesha*, 548 N.W.2d 528, 532 (Wis. 1996) ("[T]he United States

¹⁷ However, other courts have found United States Supreme Court jurisprudence to be more nuanced and concluded that "[t]he effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment." *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-19 (1991) ("Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus."). *Accord Dist. Intown Props.*, 198 F.3d at 880 (noting that "[a]bove all, the parcel should be functionally coherent," and finding relevant factors to be "the degree of continuity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot[s]"); *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) ("With regard to the relevant parcel, our precedent displays a flexible approach, designed to account for factual nuances. . . . Where the developer treats legally separate parcels as a single economic unit, together they may constitute the relevant parcel."); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (1994) (rejecting a bright-line rule to define the relevant property in the context of a takings challenge and employing a "flexible approach, designed to account for factual nuances"); *Giovanella v. Conserv. Comm'n of Ashland*, 857 N.E.2d 451, 457-58 (Mass. 2006) (finding "the extent of contiguous commonly-owned property gives rise to a rebuttable presumption defining the relevant parcel" which may be overcome to either increase or decrease the size of the parcel by the application of various factors including whether the property is divided by a road; whether the property was acquired at the same time; whether the purchase and financing of parcels were linked; the timing of development; whether the land is put to the same use or different uses; whether the owner intended to or actually did use the property as one economic unit; and the treatment of the property under state law); *Quirk v. Town of New Boston*, 663 A.2d 1328, 1332-33 (N.H. 1995) (noting the relevant property may be a discrete portion of a larger tract where the landowner has fragmented the property into distinct segments before the regulatory environment existed or where portions of the larger tract have already been dedicated to benefit the public but finding no compelling reason to view a single parcel as discrete segments where the landowner had never treated the affected area as distinct from the unaffected portion of the property).

Supreme Court has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel.") (citing *Penn Central*, 438 U.S. at 130).

We need not attempt to untangle this Gordian Knot today, for even if we were persuaded that it may be appropriate, under the proper circumstances, to consider the relevant parcel as something less than the whole, this is not such a case.

The trial court determined the relevant parcel included the entire area within the Golf Course Property. Specifically, the trial court found:

From their initial development, these parcels have been used as a unit, as a golf course. [Appellant] did not set out to purchase just the Claimed Developable Lands. It purchased all the tracts and created a separate corporate entity with a title having a golf emphasis, i.e. "Dunes West Golf Club, LLC," to own them. It used the tracts as a golf course and did not . . . pursue residential development on the tracts. It mortgaged the tracts as a unit. These facts compel but one conclusion: the relevant parcel [is] the six tracts [of 256 acres], not fragments of them.

Appellant's moving-target approach and inability to consistently identify a discrete acreage for residential development precludes us from delineating with any precision the specific segments of land Appellant contends comprise the relevant parcel. Because of Appellant's ever-changing approach as to the portion of the Golf Course Property it seeks to develop, we are left with no choice but to uphold the trial court's parcel-as-a-whole approach. See *United States v. Causby*, 328 U.S. 256, 267-68 (1946) (stating "an accurate description of the property taken is essential" and, in the absence of a precise description, refusing to identify the relevant property through "conjecture rather than a conclusion from the evidence"); *Cothran v. Brown*, 357 S.C. 210, 217-19, 592 S.E.2d 629, 633 (2004) (noting that a party cannot take inconsistent positions in an attempt to create a sham issue of material fact).

Further, even assuming Appellant had consistently identified a particular segment, Appellant has failed to posit any fact suggesting that a portion of the Golf Course Property would be appropriately viewed as a discrete segment, either under the

factors other courts have considered or any other factor which might be fit to consider in this situation. To the contrary, everything in the record suggests the Golf Course Property is most appropriately viewed as a single unit.

In short, Appellant merely entreats this Court to conceptually subdivide the Golf Course Property and identify the relevant parcel in terms of the area of land it claims was taken by the CRO Ordinance. We are compelled to reject Appellant's argument because the United States Supreme Court has consistently refused to separate an owner's property into a portion which is impacted by the challenged regulation and a portion which is not, and define the relevant parcel as including only the former. *See, e.g., Tahoe-Sierra*, 535 U.S. at 331 ("[D]efining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every [regulation] . . . would constitute [a] categorical taking[.]."); *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 643 (1993) ("[A] claimant's parcel of property c[an] not be first divided into what was taken and what was left for the purposes of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question."). Were we to accept Appellant's argument, potential claimants could construe virtually any land-use control (such as a setback requirement) as amounting to a taking by defining the relevant parcel as only the area affected by the regulation (i.e. the area between the lot line and the building line in which the owner is not permitted to build). *See Beard v. S.C. Coastal Council*, 304 S.C. 205, 207-08, 403 S.E.2d 620, 622 (1991) (finding denial of a permit application to build a bulkhead on beachfront property did not constitute a taking and refusing to define the relevant parcel as consisting of only that portion of the beach critical area in which the landowners wished to construct an extension of the existing bulkhead).

We conclude the trial court did not err by finding the evidence supports but one reasonable inference—the entire 256-acre area within the Golf Course Property constitutes the relevant parcel in this analysis. Having established the parameters of the property at issue, we turn now to Appellant's takings claim.

2. Takings

The Takings Clause of the Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. "The

Fifth Amendment, which requires just compensation where private property is taken for public use, undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945). "It does not undertake, however, to socialize all losses, but those only which result from a taking of property." *Id.* "If damages from any other cause are to be absorbed by the public, they must be assumed by act of Congress and may not be awarded by the courts merely by implication from the constitutional provision." *Id.*

"As its text makes plain, the Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *Lingle*, 544 U.S. at 536. "In other words, it is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *Id.* at 536-37. "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Mahon*, 260 U.S. at 413. "The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. "The rub, of course, has been—and remains—how to discern how far is 'too far.'" *Lingle*, 544 U.S. at 538.

We acknowledge, as the United States Supreme Court has stated, that "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." *Penn Central*, 438 U.S. at 123. "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle*, 544 U.S. at 537. However, even absent a direct physical invasion, "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Id.* at 538.

a. Categorical Taking

We first address the *Lucas* categorical taking. According to Appellant, because certain areas of the Golf Course Property could have been used for residential

development prior to the 2006 rezoning, and by precluding that development, the rezoning eliminated all economically beneficial use of the claimed developable land. We disagree.

Government regulation effectuates a *per se* taking in two scenarios: (1) where an owner is required to suffer a permanent physical invasion of property, however minor, (finding a law requiring landlords to allow television cable companies to install equipment, which occupied only about 1.5 cubic feet of property, in their apartment buildings amounted to a taking); or (2)"where [a] regulation denies all economically beneficial or productive use of land." *See Lucas*, 505 U.S. at 1015-16 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-37 (1982)).

There is no dispute that this case does not involve a physical invasion of Appellant's property. Thus, the only issue is whether the CRO Ordinance deprived Appellant of "all economically beneficial uses" of its land, and therefore, amounted to a taking. *See id.* at 1019. On these facts, we find there was no categorical taking because the CRO designation permits numerous recreation and conservation uses, and Appellant has failed to produce any evidence that those permitted uses are not economically beneficial. Indeed, everything in the record demonstrates the Dunes West Golf Club generates a positive cash flow and is more profitable than Weiland's other golf courses. Appellant has presented no evidence that this is the "extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." *Lucas*, 505 U.S. at 1017. Thus, we find the trial court properly granted summary judgment in favor of the Town as to Appellant's categorical taking claim.

Although we find no categorical taking has occurred, the law provides that where limitations on land fall short of eliminating all economically beneficial use, a regulatory taking still may have occurred depending on a complex set of factors. Thus, we turn to Appellant's regulatory taking claim and analyze each of the relevant factors in turn.

b. Penn Central Balancing Test

As noted above, in the regulatory taking context, the issue of whether a taking occurred is a question of law for the Court. *See Carolina Chloride*, 394 S.C. 154, 171, 714 S.E.2d 869, 877 (2011) ("In an inverse condemnation case, the trial judge

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

Aside from scenarios involving a permanent physical invasion or a *Lucas*-type categorical taking, "regulatory takings challenges are governed by the standards set forth in *Penn Central*." *Lingle*, 544 U.S. at 539; *see also Byrd v. City of Hartsville*, 365 S.C. 650, 658, 620 S.E.2d 76, 80 (2005) (finding that an inverse condemnation claim involving denial of less than all economically viable use is governed by *Penn Central*). The "common touchstone" of each regulatory taking theory is "to identify *regulatory actions that are functionally equivalent to the classic taking* in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539 (emphasis added). However, the United States Supreme Court repeatedly has declined to identify a specific threshold of interference with property rights below which no taking occurs and above which there is a taking. *See, e.g., Tahoe-Sierra*, 535 U.S. at 332-35 (holding that determining whether a regulatory taking has occurred is not best served by categorical rules but rather "requires careful examination and weighing of all the relevant circumstances"). In this case, the CRO Ordinance falls clearly in the category of a regulatory action that is not the functional equivalent of a classic taking.

Penn Central, as clarified by *Lingle*, provides a navigable framework for resolving regulatory takings claims distinct from the substantive due process inquiry. Noting that these constitutional challenges present "essentially ad hoc" inquiries which are largely dependent on the particular circumstances of each case, *Penn Central* identifies the appropriate factors to consider in determining whether a taking has occurred: the character of the government action, the economic impact of the regulation on the claimant, and the extent to which the regulation has interfered with distinct investment-backed expectations. 438 U.S. at 124. Having carefully examined the *Penn Central* factors, we find Appellant's regulatory takings claim falls short.

Concerning the character of the government action, "In answering [the takings] question, we must remain cognizant that 'government regulation—by definition— involves the adjustment of rights for the public good'" *Lingle*, 544 U.S. at 538 (quoting *Andrus*, 444 U.S. at 65). The United States Supreme Court has recognized, "in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." *Penn Central*, 438

U.S. at 124. "[T]he 'Fifth Amendment's guarantee is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 123 (quoting *Armstrong*, 364 U.S. 40, 49 (1960)). However, the United States Supreme Court "quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government rather than remain disproportionately concentrated on a few persons." *Id.* at 124.

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

"[W]hile most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of 'the advantage of living and doing business in a civilized community,' some are so substantial and unforeseeable, and can so easily be identified and redistributed, that 'justice and fairness' require that they be borne by the public as a whole." *Kirby Forest Indust. v. United States*, 467 U.S. 1, 14 (1984) (quoting *Andrus*, 444 U.S. at 67).

Here, in examining the character of the Town's actions, the trial court found:

The CRO Ordinance is bottomed on legitimate, land use considerations. Preservation of open space and recreational opportunities, flood prevention and curbing ill effects of indiscriminate golf course conversions are all proper zoning considerations.

The CRO Ordinance was applied to all golf course properties in the Town. The Town has provided legitimate and substantial public purposes sought to be

achieved by the enactment of the comprehensive CRO Ordinance, and the Town's land-use ordinances permit a landowner to seek rezoning of a golf course, as was done here, in the event the landowner wishes to undertake residential development.

As noted above, the CRO Ordinance has not eliminated all development potential—there are still some (albeit a reduced number of) permitted uses which would allow further development under the CRO zoning designation. Nor did the Town abridge Appellant's presently existing use of the Golf Course Property or the right to sell the land if it wishes. Rather, we find the evidence in the record shows that the rezoning did not disadvantage Appellant in a constitutionally significant way. Indeed, the CRO restrictions are applicable to all golf courses throughout the Town, and the Town has not in any way exploited the Golf Course Property for its own use or to gain any economic advantage. Rather, the CRO Ordinance merely preserves existing golf courses, all of which were designated as open space by the Town's Comprehensive Plan prior to its enactment.

Furthermore, the CRO Ordinance is not a permanent and immutable prohibition against residential use; rather, the CRO Ordinance represents the implementation of a controlled process through which the Town may *evaluate* future use conversion and ensure existing recreational uses are not abrogated or converted in an inappropriate manner. As such, the CRO Ordinance provides a "clear reciprocity of advantage because it protects the interest of all affected landowners against immediate construction that might be inconsistent" with the Town's land-use planning goals. *Tahoe-Sierra*, 535 U.S. at 341.

In sum, it cannot be said that, by designating the Golf Course Property as a CRO district, the Town has taken or acquired Appellant's property. Accordingly, we conclude this factor weighs in the Town's favor.

As for the economic impact of the CRO Ordinance, United States Supreme Court decisions sustaining land-use regulations "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking,' and that the 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." *Penn Central* 438 U.S. at 131 (citations omitted). "Although a comparison of values before and after a regulatory action is relevant, it is by no means conclusive." *Keystone Bituminous*, 480 U.S. at 490. "[T]he extent of

diminution [in value] is but 'one fact for consideration' in determining whether governmental action constitutes a taking." *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707, 713 (3rd Cir. 1985).

Construing the facts in the light most favorable to Appellant, the market value of the Golf Course Property may have decreased after the CRO Ordinance was enacted; however, balanced against the legitimate public purposes of the CRO Ordinance, the impact of the rezoning is not the functional equivalent of a physical taking. *See Kirby Forest*, 467 U.S. at 15 ("[I]mpairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking."). The evidence in the record establishes that, in 2005, Appellant believed the purchase price of \$4 million was a fair price for the course itself, and at the time of purchase, it considered any development value of the surrounding acreage to be "a gift" which was not reflected in the purchase price.¹⁸ The evidence in the record further establishes the Golf Course Property retained at least \$3.5 million in value for use as a golf course even after the rezoning and that the decline in value was due to the poor economy.¹⁹ Even assuming, in the light most favorable to Appellant, that the CRO Ordinance was the direct and immediate cause of any diminution in value, all of the evidence shows the Golf Course Property nonetheless retained significant value after the rezoning. Existing jurisprudence uniformly rejects the proposition that a diminution in property value, standing alone, can establish a taking. *See Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87.5% diminution in value caused by zoning law); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value). Thus, we find any change in market value of the Golf Course Property is merely an incident of ownership that is not compensable under the Fifth Amendment. *See Causby*, 328 U.S. at 266-67 (noting that most "inconveniences" which are "part of the modern environment of life" are not normally compensable under the Fifth Amendment); *Sunrise Corp.*, 420 F.3d at 330 (noting fluctuations in property value are almost always incidents

¹⁸ This evidence is the deposition testimony of Kevin Popson, Appellant's Rule 30(b)(6), SCRCF, witness as to general matters.

¹⁹ This evidence is the deposition testimony of J.T. McMickle, Appellant's Rule 30(b)(6), SCRCF, witness as to financial matters. Although the record also contains several appraisals valuing the Golf Course Property at \$3,798,000, \$3,840,000, and \$4,900,000, our analysis is based on a valuation of \$3,500,000, which is the lowest figure and the one most favorable to Appellant.

of ownership that are not properly considered a taking); *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 786 (8th Cir. 1979) (finding that redevelopment ordinances, "even if they result in a decline in property values, do not constitute a taking requiring compensation to the property owner").

Lastly, the factor concerning Appellant's investment backed expectations militates against Appellant. "[C]ontinuation of the existing use of the property is the property owner's 'primary expectation' when considering an owner's investment-backed expectations for the property." *See Carolina Chloride*, 394 S.C. at 173, 714 S.E.2d at 878 (quoting *Byrd*, 365 S.C. at 662, 620 S.E.2d at 82). Further, "[a] 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (quoting *Webb's Famous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). All of the evidence in the record shows the only use to which the Golf Course Property has ever been put is a golf course. As such, continued use as a golf course is necessarily Appellant's primary expectation, which was not impaired in any way by the enactment of the CRO Ordinance; rather, the CRO Ordinance was designed specifically to preserve that existing use. Moreover, Appellant has failed to produce any evidence showing its "expectations" were reasonable or investment-backed.

In acquiring the valuable Golf Course Property, Appellant only casually approached the idea of converting a portion of the property to residential development and never submitted any formal development plan or subdivision plat to the Town in furtherance of its abstract desire. Further, Weiland did not investigate, prior to purchase or anytime thereafter, the feasibility of the desired development—thus, it is clear Appellant's unilateral development expectations did not take into account the wetlands, easements, or substantial changes to the golf course that would be required. Moreover, there is no evidence that the Town took any action or made any representation which served to increase Appellant's expectations or led Appellant to believe that residential use would be forthcoming. To the contrary, Weiland knew, before purchasing the Golf Course Property, that public sentiment regarding any residential development would be a factor in its approval, notwithstanding the prior PD zoning designation. Next, the Vested Rights Act presented a potential opportunity to achieve the goal of residential development Appellant now seeks, yet Appellant offers no explanation for letting the opportunity pass without even attempting to avail itself of that prospect.

Further, as to the investment-backed aspect, the record is devoid of any evidence showing Appellant substantially relied or materially altered its position based on the prior PD zoning or its desire to develop residentially a portion of the Golf Course Property. Although Appellant claims significant expenditures were made, none of those expenditures were in furtherance of residential development; rather, all of the evidence in the record shows money spent in furtherance of the existing recreational use of the Golf Course Property.²⁰ Although the record shows Appellant prepared preliminary projection of costs and revenues associated with residential development of the Golf Course Property, there is no evidence that any of those expenditures were *actually* incurred. Indeed, the only objective, overt act appearing in the record is Appellant's informal identification of potential future home sites, and to the extent any costs were incurred during that process, Appellant failed to submit any such evidence.

For government regulation to constitute a taking, the property owner must objectively demonstrate the existence investment-backed expectations. Therefore, Appellant's effort to elevate its anticipated development prospects to the level of tangible, investment-backed expectations is unavailing. Appellant has failed to show any concrete steps taken in furtherance of prospective residential development. Rather, we are presented with a unilateral expectation unsupported by the kind of solid evidence necessary to establish a regulatory taking. This lack of evidence is perhaps best illustrated by Appellant's ever-changing approach in identifying what portion of the Golf Course Property it wants to develop. *See Causby*, 328 U.S. at 267-68 (stating "an accurate description of the property taken is essential" and, in the absence of a precise description, refusing to identify the relevant property through "conjecture rather than a conclusion from the evidence"); *Cothran*, 357 S.C. at 217-19, 592 S.E.2d at 633 (noting that a party cannot take inconsistent positions in an attempt to create a sham issue of material fact).

²⁰ The record includes an itemized list of Appellant's expenditures for the period of time between 2005 and 2009; however, none of these expenditures was in furtherance of residential development. Rather, the bulk of expenditures related to maintenance and renovation of the clubhouse (i.e. the installation of various new lighting fixtures and new tile and carpet) and acquisition of new equipment for golf course operations (i.e. the purchase of 77 golf carts and various pieces of landscaping equipment), with a small portion being devoted to purchasing office supplies (i.e. a Xerox copy machine and several computers).

In short, the 256-acre Golf Course Property remains a valuable property, not only as a golf course, but also for other, related uses permitted by the CRO designation. Appellant is essentially left to argue that its takings claim is founded upon only its inability to exploit certain portions of the Golf Course Property for residential development. As the *Penn Central* Court noted, "the submission that appellants may establish a taking simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." *Penn Central*, 438 U.S. at 130.

We reject Appellant's regulatory taking claim. In sum, we find the Town was legitimately concerned about the possibility that golf courses could be converted to residential use without any land-use oversight, and in response to those concerns, the Town simply "adjust[ed] the benefits and burdens of economic life to promote the common good" in a way that incidentally impacted Appellant's ability to maximize the profit from the development of its land. *Id.* at 124.

IV.

For the foregoing reasons, we affirm the circuit court's grant of summary judgment in favor of the Town.

AFFIRMED.

**PLEICONES, ACTING CHIEF JUSTICE, BEATTY, HEARN, JJ., and
Acting Justice James E. Moore, concur.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Christopher Broadnax, Appellant.

Appellate Case No. 2010-166606

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Published Opinion No. 5071
Heard May 8, 2012 – Filed January 9, 2013

REVERSED AND REMANDED

Appellate Defender LaNelle C. Durant, of Columbia, for
Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, and Senior Assistant
Attorney General Harold M. Coombs, Jr., all of
Columbia, for the State.

LOCKEMY, J.: In this appeal from his criminal conviction, Christopher Broadnax contends the trial court erred in: (1) admitting his three prior armed robbery convictions for impeachment purposes; (2) denying his motion to withdraw the life without parole (LWOP) notice based on the arbitrary use of the

prosecution's discretion in the plea bargaining process; (3) denying his motion to withdraw the LWOP notice based on the lack of any standards to guide solicitors regarding when they should seek a sentence of LWOP; and (4) denying his motion that the jury be informed he was facing the mandatory sentence of LWOP. We reverse and remand to the trial court.

FACTS

On May 24, 2009, Broadnax entered a Church's Fried Chicken (Church's) around 5:00 p.m. He pointed a gun at three of the employees and forced one to remove all the register's money. Broadnax then placed the money into a bag and fled the scene. An employee followed Broadnax outside and observed him getting into a truck that subsequently drove away. The police responded, and they were able to track a similar truck several blocks away from the Church's. The police stopped the truck and removed the driver. Broadnax was found inside, crouched down in the passenger seat. A gun and a bag of clothing were located underneath the passenger seat. On November 19, 2009, a grand jury indicted Broadnax for armed robbery, and on June 10, 2010, the case was called to trial before a jury.

In a pre-trial hearing, Broadnax admitted he was convicted of armed robbery in 1979 and 1991.¹ The State had served him with notice of LWOP on May 18, 2010, based on those previous armed robbery charges. Broadnax argued he was not adequately informed of the possibility of LWOP at the time of his prior convictions; thus, it was a violation of his Sixth Amendment rights. Further, he maintained he relinquished his right to go to trial in 1991 in reliance on the representation and assurance of his attorney, who did not inform him of the subsequent possibility of LWOP; thus, his rights under the Fifth and Fourteenth Amendments as well as all the South Carolina constitutional equivalent provisions were violated. The trial court withheld ruling on the issue to allow the State to submit case law on the issues. At the end of the pre-trial hearing, the State submitted case law, but there was no ruling made from the bench on the issue.²

Broadnax further objected to the solicitor's total discretion in noticing LWOP sentences under section 17-25-45 of the South Carolina Code (Supp. 2011), and

¹ Broadnax had three armed robbery convictions from 1991, but only one armed robbery conviction from 1979.

² This issue was not raised on appeal; thus, it is not preserved.

maintained the unfettered discretion violated his substantive due process rights. Broadnax stated he had been willing to plead guilty to his current charge, but the solicitor had "it out for him." Broadnax stated that in the interest of judicial economy, the prosecution sometimes uses the threat of LWOP as a method to induce a plea, and they will choose not to go forward with LWOP when a defendant will plea. He requested to proffer testimony from Investigator A. L. Thomas to show the prosecution's arbitrary and capricious actions. However, instead of proffering Investigator Thomas's testimony, Broadnax proffered testimony from a law clerk, Jacob Taylor Bell, who could testify to the same evidence. Bell stated he was present for a conversation regarding plea offers between Investigator Thomas and Broadnax's counsel. In that conversation, Broadnax indicated he was willing to plead to twenty years, but Bell testified Investigator Thomas "explicitly said [the prosecutor] had her fangs out for Broadnax." The trial court explained that "when you've got the notice that lists three or four different armed robbery offenses, I fail to see that there is any arbitrariness in the use of the life without parole notice," and denied Broadnax's motion.

Broadnax then argued section 17-25-45 violated the Equal Protection Clause and maintained the statutory discretion given to solicitors in deciding whether to notice LWOP was capricious and arbitrary. He contended it would depend on the county, "[o]r even less, it [would] depend[] on which solicitor a defendant draws as to whether or not they will get LWOP when they are willing to plead to something." He contended that with no defined standard to guide prosecutors, a situation is created where similarly situated defendants are treated differently depending on the county jurisdiction. In support of his argument, Broadnax cited *Bush v. Gore*, 531 U.S. 98 (2000). The trial court denied that motion as well.

During the trial, Broadnax decided to testify in his own defense, and the trial court conducted an inquiry into his prior record to determine which convictions could be admitted into evidence. The trial court found three out of his four prior armed robbery convictions were admissible, in addition to prior convictions for transaction card theft, grand larceny, and petit larceny, pursuant to Rule 609(a)(2), SCRE.³ The trial court noted *State v. Al-Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003) supported its decision that the armed robbery convictions were crimes

³ No issue was raised relating to the time element established in Rule 609(b), SCRE.

of dishonesty. However, the trial court also stated *Al-Amin* involved a defendant on trial for murder, whereas Broadnax was charged with armed robbery, noting the difference had the potential to increase the prejudicial impact of admitting the prior armed robbery convictions. Despite that distinction, the trial court followed the court in *Al-Amin*, and determined that case made it clear no Rule 403 analysis applied to any convictions admitted for impeachment purposes under Rule 609(a)(2). Defense counsel then requested permission to elicit testimony from Broadnax on direct examination about the prior convictions without having waived his objection to that same testimony. He did not want to be "hamstrung" and wished to avoid the prior convictions being exploited by the State on cross-examination. "[I]t [was defense counsel's] understanding that this [was] only for impeachment purposes and it's not for [] propensity. And if such an objection arises, [he] would of course make it on the record." The trial court agreed to Broadnax's strategy of eliciting testimony about the prior convictions on direct examination but not waiving his objection to that testimony.

After the jury returned with a guilty verdict, Broadnax renewed all his objections. He also moved for a new trial based on violations of the Fourteenth Amendment. Specifically, Broadnax contended the State denied him his due process right to a fair trial by eliciting testimony of his three prior convictions for armed robbery and by misusing the word "innocent" so as to improperly shift the burden to the defendant.⁴ The trial court denied all his motions, and this appeal followed.

ISSUES ON APPEAL

Did the trial court err in admitting Broadnax's three prior armed robbery convictions for impeachment purposes pursuant to Rule 609(a)(2)?

Did the trial court err in denying Broadnax's motion to withdraw the notice of LWOP based on the arbitrary use of the prosecution's discretion in the plea bargaining process?

Did the trial court err in denying Broadnax's motion to withdraw the notice of LWOP based on the lack of standards guiding solicitors in when they should seek a sentence of LWOP?

⁴ Broadnax did not raise the issue of the State's alleged misuse of "innocent" on appeal.

Did the trial court err in denying Broadnax's motion that the jury be instructed Broadnax was facing a mandatory sentence of LWOP?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). "This [c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* (citing *State v. Quattlebaum*, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)).

LAW/ANALYSIS

Prior Convictions

Broadnax argues the trial court erred in admitting the prior armed robbery convictions into evidence for purposes of impeachment under Rule 609(a)(2). Specifically, Broadnax maintains that since the armed robberies should not have been admitted for impeachment purposes pursuant to Rule 609(a)(2), the trial court should have analyzed them pursuant to Rule 609(a)(1); thus, a balancing test was necessary. We agree.

As a threshold matter, we address the State's argument that Broadnax did not preserve this issue for our review. *See State v. Liverman*, 386 S.C. 223, 243, 687 S.E.2d 70, 80 (Ct. App. 2009) (holding issues must be raised to and ruled upon by trial court to be preserved for review); *see also State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."); *State v. Burton*, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct. App. 1997) ("Failure to object when the evidence is offered constitutes a waiver of the right to object."). We disagree.

Broadnax raised his objection directly prior to taking the stand in his own defense. After the trial court issued its ruling on admissibility, Broadnax stated he would be eliciting the challenged testimony in order to avoid having the State exploit it. Thus, we believe this issue was properly preserved for our review. *See State v. Mueller*, 319 S.C. 266 at 267-69, 460 S.E.2d 409, 410-11 (Ct. App. 1995) (finding

that because no evidence was presented between the ruling on impeachment evidence and the defendant's testimony, there was no basis for the trial court to change its ruling, and "if a party has obtained a final ruling on the admissibility of impeachment evidence, that party does not lose his right to challenge on appeal the admissibility of the evidence by eliciting the evidence during direct examination"). We continue now to the merits of Broadnax's argument.

Rule 609(a), SCRE provides that for the purpose of attacking the credibility of a witness:

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

"Under Rule 609(a)(2), SCRE, if a crime is viewed as one involving dishonesty, the court must admit the prior conviction because, prior convictions involving dishonesty or false statement must be admitted regardless of their probative value or prejudicial effect." *State v. Bryant*, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006); *see State v. Al-Amin*, 353 S.C. 405, 425-27, 578 S.E.2d 32, 43-44 (Ct. App. 2003) (stating crimes involving dishonesty or false statements are "automatically admissible for impeachment purposes because they have the greatest probative value on the issue of truth and veracity").

Our supreme court held in *State v. Bryant*, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006) that "a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness." *See United States v. Smith*, 181 F.Supp.2d 904 (N.D. Ill. 2002) (stating that since the government did not show that any of the convictions of robbery, burglary, theft, or drug possession involved

any false statements or acts of deceit beyond the basic crime itself, they were not admissible under the Federal Rule of Evidence 609(a)(1)). Unlike in *Al-Amin*, our supreme court has stated stealing is not always a crime of dishonesty if there are no additional affirmative false statements or acts of deceit beyond the crime itself.

If the crime of armed robbery is not considered a crime of dishonesty under 609(a)(2), it may still be admitted under Rule 609(a)(1), but it would be subject to a balancing test. Under Rule 609(a)(1), the trial court must determine if the probative value of admitting the evidence outweighs its prejudicial effect to the accused. Moreover, our supreme court laid out other various factors to consider when determining whether to admit prior convictions under 609(a)(1): (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity of the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Bryant*, 369 S.C. at 517 n.1, 633 S.E.2d at 155 n.1 (citing *State v. Martin*, 347 S.C. 522, 530-31, 556 S.E.2d 706, 710-11 (Ct. App. 2001)).

After careful consideration of previous case law, we take this opportunity to follow *Bryant* in deciding these prior armed robberies, without more, are not crimes of dishonesty.⁵ We are not ruling that the prior armed robberies are *per se* inadmissible; however, as the court in *Bryant* stated, to be admissible under Rule 609(a)(2), there simply must be something beyond the basic crime. In the present case, the State did not show any further affirmative false statements or acts of deceit beyond the basic crime itself. Accordingly, we find the trial court erred in admitting Broadnax's prior convictions of armed robbery pursuant to Rule 609(a)(2), SCRE, and the probative value of Broadnax's prior armed robbery convictions should have been weighed against their prejudicial effect prior to their admission pursuant to Rule 609(a)(1).

"Error is harmless where it could not reasonably have affected the result of the trial." *Bryant*, 369 S.C. at 518, 633 S.E.2d at 156 (citing *In re Harvey*, 355 S.C. 53, 63, 584 S.E.2d 893, 897-98 (2003)). "Generally, appellate courts will not set

⁵ We recognize this court held in *Al-Amin* that armed robbery was a crime of dishonesty pursuant to Rule 609(a)(2). *State v. Al-Amin*, 353 S.C. 405, 425, 578 S.E.2d 32, 43 (Ct. App. 2003). However, since *Al-Amin*, our supreme court has decided *Bryant*.

aside convictions due to insubstantial errors not affecting the result." *Id.* (citing *State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991)). "Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *Id.* (citing *State v. Bailey*, 298 S.C. 1, 4-5, 377 S.E.2d 581, 583-84 (1989)). "The circumstances of each individual case are to be considered." *Id.*

Because Broadnax's prior convictions were the identical charge as the offense in the present case, we cannot conclude Broadnax was not prejudiced by the admission of those prior convictions. *See State v. Howard*, 396 S.C. 173, 180-81, 720 S.E.2d 511, 515-16 (Ct. App. 2011); *see also Bryant*, 369 S.C. at 517-18, 633 S.E.2d at 156 (holding that when a prior offense is similar to the charged offense the "danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission"); *State v. Scriven*, 339 S.C. 333, 343-44, 529 S.E.2d 71, 76-77 (Ct. App. 2000) (holding that the prior convictions are "similar or identical to charged offenses, and the likelihood of a high degree of prejudice to the accused is inescapable"). Because we find the admission of Broadnax's prior armed robberies created such a high degree of prejudice in this case, we reverse and remand for a new trial.

The determination of this issue is dispositive, and thus, we decline to address Broadnax's remaining arguments relating to a solicitor's discretion in noticing LWOP and the trial court's denial of his request to inform the jury of his potential LWOP sentence. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that if an appellate court's ruling on a particular issue is dispositive of an appeal, rulings on remaining issues are unnecessary).

CONCLUSION

For the foregoing reasons, we reverse and remand for a new trial.

REVERSED AND REMANDED.

WILLIAMS, J., concurs.

THOMAS, J. (concurring in part and dissenting in part): I agree with the majority that Broadnax's prior armed robbery convictions, without more, were not admissible under Rule 609(a)(2) for impeachment purposes, but would remand on the issue of whether or not they could have been admitted under Rule 609(a)(1).

As the majority notes, the South Carolina Supreme Court held in *State v. Bryant*, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006), that "a conviction for robbery, burglary, theft, and drug possession, *beyond the basic crime itself*, is not probative of truthfulness." (emphasis added). By including the phrase "beyond the basic crime itself," the court has declined thus far to hold that such crimes are never probative of truthfulness. Rather, in qualifying its ruling, it allowed for the possibility that upon a proper showing, a witness could be impeached by a conviction for not only one of these crimes, but convictions for other crimes that are rarely if ever recognized as crimes involving dishonesty or false statement. *See id.* (noting violations of narcotics laws as well as firearms violations, "are *generally* not probative of truthfulness" (emphasis added)). Therefore, our supreme court has not completely prohibited the admission of convictions for robbery, burglary, theft, drug possession or other narcotics violations, and firearms violations under Rule 609(a)(2) if the proponent can show through evidence such as prior plea colloquies, indictments, or other reliable information from previous proceedings that the witness to be impeached gave a false statement or otherwise behaved dishonestly when committing the offense leading to the conviction sought to be admitted. If so, the conviction at issue could be admitted in trial courts of this State under Rule 609(a)(2) even though the underlying offense itself is not "in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." *State v. Shaw*, 328 S.C. 454, 457 n.4, 492 S.E.2d 402, 404 n.4 (Ct. App. 1997) (quoting Notes of Conference Report, H.R. No. 93-1597, *reprinted in 3 Weinsteins's Evidence* 609-39 (1976), *quoted in United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977)).

Here, the trial judge, relying on *State v. Al-Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003), admitted Broadnax's prior armed robbery convictions for impeachment purposes under Rule 609(a)(2) as crimes "involv[ing] dishonesty or false statement." *See* Rule 609(a)(2), SCRE. I agree with the majority that *Bryant*, which was issued by the South Carolina Supreme Court after this court decided *Al-Amin*, gives guidance to this court. Armed robbery, absent presentation of facts and circumstances by the State to demonstrate an act of dishonesty or false

statement was involved in the crime, is not *per se* a crime that "involved dishonesty or false statement" that would be admissible under Rule 609(a)(2). As the majority points out, the State did not show any false statements or dishonest conduct beyond the convictions themselves. Under *Bryant*, without this additional information, the corresponding armed robbery convictions would not be probative of Broadnax's truthfulness as a witness and would therefore be inadmissible under Rule 609(a)(2).

As the majority has done, I agree it would then be appropriate to inquire whether Broadnax's prior armed robbery convictions could have been admitted under Rule 609(a)(1).⁶ Under Rule 609(a)(1), evidence of these convictions "shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." However, I am reluctant to have this court make this determination without first giving the trial court the opportunity to rule on the issue. *See State v. Scriven*, 339 S.C. 333, 340, 529 S.E.2d 71, 74 (Ct. App. 2000) ("[Rule 609(a)(1)] requires *the trial judge* to balance the probative value of the evidence for impeachment purposes against the prejudice to the accused." (emphasis added)). We have followed this practice even when the similarity between the prior offenses and the offense on which the accused was tried raised a potential for prejudice. *See id.* at 340-44, 529 S.E.2d at 74-77 (holding the trial court must conduct a balancing test under Rule 609(a)(1) to determine whether an accused facing trial on charges for distributing cocaine and marijuana could be impeached with his prior drug convictions).

Therefore, I agree with the majority that the trial court erred in holding Broadnax's prior convictions for armed robbery were admissible for impeachment purposes pursuant to Rule 609(a)(2), but would remand for a determination by the trial court of their admissibility for impeachment purposes pursuant to Rule 609(a)(1).

⁶ The record indicates a reference was made to Rule 609(a)(1), SCRE, when counsel presented their arguments as to whether Broadnax's convictions were admissible to impeach his credibility, thus indicating that if the trial court determined they were not admissible under Rule 609(a)(2), the State was prepared to argue that they could be admitted under Rule 609(a)(1).