

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil Case No. _____

BALLANTYNE VILLAGE PARKING, LLC,

Plaintiff,

vs.

CITY OF CHARLOTTE,

Defendant.

COMPLAINT
(Jury Trial Demanded)

Plaintiff Ballantyne Village Parking, LLC, complaining of the City of Charlotte, alleges as follows:

INTRODUCTION

1. Charlotte should not be run through illegal back room deals between government and powerful parties that victimize the weaker party at the expense of law and justice.

2. This action is simply an effort to have the Court order the City of Charlotte to follow its own rules, customs, and promises regarding application of its zoning ordinances. Whether a property owner in Charlotte is treated in a legal, fair, and transparent manner by the City should not depend on the connections of the corporate law firm that represents the property owner, the relationships the property owner has with insiders at the City, or how much it is prepared to mislead the City. The City of Charlotte is legally and by custom and practice obligated to follow a transparent, fair process when it considers actions that affect property rights. Since Charlotte will not play fair, it falls to this Court to make Charlotte play fair.

3. The action is brought under 42 U.S.C. § 1983, the United States and North Carolina Constitutions, and other applicable law for deprivation of Ballantyne Village Parking's rights. In addition, this action includes a request for declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202, and Federal Rule of Civil Procedure 57.

4. Ballantyne Village Parking, LLC owns a parking deck next to the Ballantyne Village shopping center. The owners of Ballantyne Village shopping center have convinced Charlotte to issue a building permit that will cause the shopping center to use spaces in the parking deck, even though the owners of the shopping center do not have any right to use those spaces. In issuing the permit, Charlotte excluded the parking deck owner from emails and discussions with the shopping center owners; intentionally, arbitrarily, blatantly, and materially violated its own zoning rules; and cast aside binding City-approved site plans in its effort to bend over backward to assist the shopping center and its powerful and connected corporate lawyers. Charlotte even allowed the shopping center's lawyers to secretly and unilaterally edit and approve City documents connected with issuing the initial permit.

5. These abuses were covered up and concealed from Ballantyne Village Parking, the parking deck owner, until only recently, when it demanded documents pursuant to a public records request. While Ballantyne Village Parking, the parking deck owner, was playing by the rules and trying to follow the City's process, the owner of the shopping center at Ballantyne Village and members of Charlotte's City Planning and City Attorney Departments were working secretly to deprive Ballantyne Village of the property rights it possesses in its parking deck. The emails that Charlotte was forced to produce revealed shocking misconduct that only this Court, it appears, can stop.

PARTIES, VENUE, AND JURISDICTION

6. Plaintiff, Ballantyne Village Parking, LLC (“BVP”) is a North Carolina Limited Liability Company, with its registered agent and principal place of business at 5950 Fairview Road, Suite 808, Charlotte, North Carolina 28210.

7. Defendant City of Charlotte, North Carolina (“Charlotte” or the “City”) is a municipal corporation organized under the laws of the State of North Carolina, and capable under statute of bringing and defending lawsuits, including claims against the Charlotte Planning, Design & Development Department (“City Planning”) and Charlotte’s Office of the City Attorney (“City Attorney”). Charlotte is responsible for governing and overseeing the actions of its departments and representatives, including City Planning, and the City Attorney. As used herein, any reference to “Charlotte” includes City Planning, the City Attorney, and their representatives, and any reference to City Planning, the City Attorney, and their representatives includes Charlotte.

8. Related Party ASVRF SP Ballantyne Village JV LLC (“ASVRF”) is a Delaware limited liability company that has its principal place of business at 505 South Flower Street, 49th Floor, Los Angeles, California 90071. It is registered as a foreign limited liability company with the North Carolina Secretary of State and can be served through its Registered Agent: CT Corporation System, 160 Mine Lake Court, Suite 200, Raleigh, North Carolina 27615. ASVRF is the successor in interest to MV Ballantyne Village, LLC, a Delaware limited liability company.

9. Related party Moore & Van Allen PLLC (“MVA”) is a North Carolina professional limited liability company with its principal office at 100 North Tryon Street, Suite 4700, Charlotte, North Carolina 28202, which represented ASVRF in the misconduct alleged herein.

10. Related party Ballantyne Village Hotels, LLC (“BVH”) is a North Carolina limited liability company, with its registered agent and principal place of business at 6101 Carnegie Boulevard, Suite 103, Charlotte, North Carolina 28209.

11. This Court has original federal question jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343 because BVP’s claims present substantial, disputed questions of federal law arising under the United States Constitution and under 42 U.S.C. §§ 2201 and 2202.

12. The Court has supplemental jurisdiction over BVP’s state law claims pursuant to 28 U.S.C. § 1367(b) because BVP’s state law claims are so related to BVP’s federal claims that they form part of the same case or controversy under Article III of the United States Constitution and should be tried in a single action.

13. This Court has subject matter and personal jurisdiction over the parties.

14. Venue is appropriate in this District pursuant to 28 U.S.C. § 1391 because it is the judicial district in which all parties reside as well as the judicial district in which the events and omissions giving rise to these claims occurred.

15. Upon information and belief, Charlotte has purchased insurance, either by contract with an insurance company or by participation in an insurance risk pool, that covers the claims raised in this action and has thereby waived any defense of sovereign or governmental immunity.

FACTUAL ALLEGATIONS

16. Defendant ASVRF owns Ballantyne Village, a shopping center located at 14825 Ballantyne Village Way, Charlotte, North Carolina 28277. The Ballantyne Village shopping center is sometimes referred to as “Lot 1”.

17. Among various restaurants, stores, and office space, Lot 1 contains a movie theater.

18. Plaintiff BVP owns a surface parking lot and a parking deck adjacent to Lot 1. BVP's surface parking lot is sometimes referred to as "Lot 3", and its parking deck is sometimes referred to as "Lot 4" or the "Parking Deck".

19. Related party BVH owns a surface parking lot adjacent to Lot 1. BVH's surface parking lot is sometimes referred to as "Lot 2".

20. This is a true and accurate representation of Lots 1 through 4 at Ballantyne Village and the relationship between them:



21. There is an inadequate number of parking spaces on Lot 1 to satisfy Charlotte's zoning requirements for the property. In order to partially compensate for this deficiency, over a decade ago, Lot 1 obtained an easement to use a limited number of parking spaces on Lot 4 (BVP's parking deck) under certain circumstances.

22. The easement rights of ASVRF and Lot 1 to use spaces on 4 are partially described in a document called Second Amendment to Cross Easement Agreements, dated May 26, 2015 and recorded with Mecklenburg County's Register of Deeds on July 7, 2015 ("Second Amendment").

23. Certain easement agreements preceding the Second Amendment also continue to govern these rights between BVP and ASVRF and are relevant to the litigation.

24. A true and accurate copy of the Second Amendment is attached hereto as **Exhibit**

A.

25. According to the Second Amendment,

only to the extent necessary to meet the Minimum Parking Space Allocation, BVP grants to [Lot 1] a permanent, non-exclusive easement over Lot 4 [BVP's parking deck] (including, without limitation, the Garage and all rights-of-way therein) for the purpose of using Lot 4 Parking Spaces for the parking of motor vehicles, which parking spaces (in an amount at least equal to the Minimum Parking Space Allocation) may be designated by [BVP] from time to time.

Second Amendment, § 4.

26. The Second Amendment defines "Minimum Parking Space Allocation" as "the number of Lot 4 Parking Spaces" – *i.e.*, spaces in BVP's parking deck – "that are necessary for the Owner of Lot 1," ASVRF, "to meet all governmental zoning and building code requirements for Lot 1 (after giving effect to parking spaces located on Lot 1 or otherwise available to Lot 1)."

Second Amendment, § 1(o).

27. The shopping center on Lot 1 had a gross floor area of 178,000 square feet. This means that Lot 1 claims it requires 712 parking spaces to comply with Charlotte's Zoning Ordinance, which requires a parking space for every 250 square feet of a shopping center.

28. In or around the end of 2017, ASVRF initiated plans to convert the movie theater on Lot 1 to office space.

29. ASVRF has claimed to have a tenant ready to lease the space after conversion from movie theater to office, but has steadfastly refused to name the tenant, raising questions about whether such a tenant exists or whether it was simply ASVRF's purpose to harass BVP and further improperly encroach on BVP's parking deck property rights.

30. According to ASVRF, this conversion would add 20,790 square feet to the interior of the shopping center on Lot 1, for a total of 198,790 square feet. Accordingly, ASVRF claimed, Lot 1 would need another 83 spaces under Charlotte's Zoning Ordinance, for a total of 795 spaces.

31. Of the 712 parking spaces that Lot 1 currently claims that it requires to satisfy the Charlotte Zoning Ordinance, 368 are available on Lot 1 itself and in the form of on-street parking. Therefore, ASVRF claims that Lot 1 needs 344 spaces on Lot 4, BVP's parking deck.

32. If the movie theater is converted to office space and Lot 1's need for spaces increases by 83 spaces, ASVRF claims that Lot 1 will need 427 spaces on Lot 4, BVP's parking deck.

33. ASVRF incorrectly claims that the Second Amendment gives it the legal right to these 83 spaces in BVP's parking deck on Lot 4.

34. Indeed, ASVRF incorrectly claims that the Second Amendment gives it the potential legal right to unlimited (all) spaces in the parking deck, even though the deck was built by BVP and is completely owned by BVP. ASVRF has asserted that it should have the right to use parking spaces in BVP's parking deck notwithstanding that ASVRF has not paid anything to BVP – or provided any consideration at all – for use of the spaces. ASVRF has asserted that it receives the right to additional spaces in the parking deck to comply with the zoning ordinance, pursuant to Section 4 of the Second Amendment, simply by increasing the interior square footage of the shopping center on Lot 1.

35. Under ASVRF's analysis of the Second Amendment, BVP should have to provide it with complete access to a fully-maintained parking deck on Lot 4, without compensation or consideration of any kind. This is legally impossible and patently unreasonable and unjust.

36. BVP has steadfastly denied that ASVRF and Lot 1 have the right to the additional 83 spaces – or any additional spaces – in the parking deck on Lot 4, for a number of legal reasons.

37. To perform the movie theater conversion in the shopping center on Lot 1, ASVRF requires an initial permit from City Planning. The conversion cannot occur without this permit.

38. To obtain this initial permit, ASVRF had to demonstrate to City Planning, among other compliance with the zoning ordinances, that it had sufficient parking spaces to meet the zoning ordinance. In this instance, this meant exclusive right to use the additional 83 spaces on BVP's parking deck on Lot 4, since Lot 1 had insufficient spaces elsewhere. Because of BVP's opposition, ASVRF could not make this showing to City Planning.

39. The Second Amendment includes a procedure for resolving disputes between the owners of Lot 1 (for now, ASVRF) and Lot 4 (BVP), such as the dispute over whether ASVRF and Lot 1 can use the additional 83 spaces on Lot 4 required by the movie theater conversion.

40. The dispute resolution process in the Second Amendment has two parts: a non-binding, preliminary “ombudsman” procedure described in Section 7, and a binding arbitration procedure described in Section 8. Ombudsman decisions under Section 7 are non-binding, not final or dispositive, and mere preliminary recommendations. A dispute under the Second Amendment dispute resolution procedures is not final until the Section 8 arbitration procedure has been fully litigated through a decision from the arbitrator.

41. The ombudsman step of the Second Amendment's dispute resolution procedure is expressly mere predicate to the arbitration. For instance, Section 7(a) states: “As to any Claim, an initial decision by the Ombudsman shall be required as a condition precedent to arbitration of any claim....”

42. In similar fashion, the ombudsman step of the Second Amendment's dispute resolution procedure is expressly non-binding. Section 7 states: "All Claims shall initially be referred to the Ombudsman for resolution *before any binding dispute resolution procedure*," which indicates, implicitly, that the Ombudsman procedure is *not* a binding dispute resolution procedure.

43. Finally, the Second Amendment, at Section 8(c) expressly states that the Ombudsman's award is not binding if it is appealed to the arbitrator within 15 days of its issuance: "An Owner appealing from a decision of the Ombudsman must file a demand for arbitration with[in] fifteen (15) days of the Ombudsman's written decision or the decision will be binding on the Owners."

44. After the non-binding, predicate, advisory Ombudsman procedure, according to Section 8 of the Second Amendment, a party can appeal to an arbitrator in accordance with the procedures of the American Arbitration Association.

45. According to the dispute resolution procedure agreed upon by ASVRF and BVP in the Second Amendment, only the decision of the arbitrator is final, not the Ombudsman's decision: "The award rendered by the arbitrator shall be final, and judgment may be entered upon it in accordance with applicable law and any court having jurisdiction thereof." Second Am, § 8(c).

46. After BVP instructed ASVRF of BVP's position that it was not entitled – under the Second Amendment or otherwise – to the unlimited possible parking spaces (or the 83 spaces) that ASVRF demanded for Lot 1's use in BVP's Lot 4 parking deck, ASVRF (through its lawyers at MVA) submitted a letter on July 2, 2018 stating Claim under the Ombudsman procedure in Section 7 of the Second Amendment.

47. ASVRF's July 2, 2018 Claim to the Ombudsman asked for a declaration that: [T]he [Lot 1] Owner, [ASVRF,] will continue to have rightful access to at least as many spaces in the

parking deck as are necessary for the owner to meet all governmental zoning and building code requirements for Lot 1 (after giving effect to parking spaces located on Lot 1 or otherwise available to Lot 1), including the additional 83 spaces required by the theater-to-office conversion.”

48. ASVRF admitted that a substantial reason it made the July 2 Ombudsman Claim was to further its effort to obtain an initial permit from Charlotte and City Planning. ASVRF stated that obtaining the Ombudsman’s decision that it was entitled to 83 more spaces in the parking deck: “will cause the city to issue zoning approval and [ASVRF] to avoid the substantial damages that would be caused by the loss of a potential tenant” (*i.e.*, the tenant that ASVRF claimed would lease the movie theater space after conversion to office space).

49. This statement was untrue, because the Ombudsman’s decision, under the dispute resolution provision in the Second Amendment, is not final once appealed, and the City must require a final, certain count of guaranteed adequate spaces under the zoning ordinance to issue the initial permit.

50. On July 16, 19, and 26 and August 10, among other dates, BVP sent letters and emails to the Ombudsman rebutting ASVRF’s unfounded claim that it should receive access to 83 more spaces in BVP’s parking deck without compensating BVP.

51. Among other meritorious arguments, BVP argued to the Ombudsman that the Ombudsman did not have jurisdiction, only a court did. BVP also argued that the operative easements, including the Second Amendment, expressly did not convey the right to additional spaces. BVP further argued that ASVRF had not provided consideration for the parking spaces, that it was not BVP’s intent to grant the parking spaces, that ASVRF’s demand for uncompensated parking spaces in the deck placed an undue demand on BVP, that BVH had a greater right and need for some of the spaces because it had bargained for them in purchasing Lot 2, and that various

equitable doctrines barred ASVRF. BVP also argued to the Ombudsman that ASVRF's requested use violated restrictions by Charlotte, including a 2005 site plan amendment that prohibited the expanded use of square footage attempted by ASVRF. The significance of the 2005 site plan amendment is described below.

52. During the months that BVP was litigating through the non-binding, preliminary Ombudsman procedure, it did not know anything about the flurry of communication, behind its back, between ASVRF/MVA and the City regarding the initial permit that threatened BVP's property rights in its parking deck. BVP's ignorance in this regard was a result of the deliberate efforts of the City and MVA to exclude BVP from communications.

53. The Ombudsman entered a "Decision/Award" on September 24, 2018 provisionally allowing ASVRF/ Lot 1 "rightful access to at least as many spaces in the parking deck as are necessary to meet all governmental zoning and building code requirements for Lot 1 (whether 83 or otherwise) that are required by zoning because of the conversion of the theater space to office space." This Decision/Award itself contemplated that BVP would appeal to an arbitrator, as per Section 8 of the Second Amendment. The Ombudsman's Decision/Award is not final, because it has been appealed to an arbitrator.

54. BVP filed a claim with the American Arbitration Association (the arbitrator) on October 8, 2018. Therefore, pursuant to Sections 7 and 8 of the Second Amendment, the Ombudsman's award was voided and non-binding.

55. The arbitration of the dispute over whether Lot 1 has access to the additional 83 spaces required for the initial permit remains in its early stages. For example, the preliminary hearing that the American Arbitration Association requires before the arbitration proceedings can commence occurred only yesterday, on January 23, 2019. No discovery, briefing, or substantive

hearings have yet occurred yet in the arbitration, which should take many months to conclude. As discussed above, there will be no binding decision whether ASVRF/ Lot 1 is entitled to the additional 83 spaces until the arbitrator enters a final decision and a court confirms that decision. As such, the result remains in doubt, and will for some time. BVP expects to prevail.

56. As noted, to perform the movie theater conversion in the shopping center on Lot 1, ASVRF requires an initial permit from the City Planning. The conversion cannot occur without this permit.

57. Accordingly, on or before December 2017 ASVRF began communications with City Planning that would lead to the initial permit. BVP was excluded from, and did not know about, these communications.

58. On or around December 6, 2017, a representative of ASVRF emailed with Charlotte and City Planning representatives John Marshall (“Marshall”), Shad Spencer (“Spencer”) and Solomon Fortune (“Fortune”) regarding the theater conversion. Mr. Fortune stated that “the site would not be able to go over the square footage approved on the conditional site plan,” a 2005 site plan issued by the City Planning that BVP and BVH have relied on for years (“2005 Revised Site Plan”).

59. Ultimately, Charlotte issued a permit for the theater to office conversion that allowed Lot 1 to exceed the footage approved by the conditional site plan.

60. Since the 2005 Revised Site Plan is a binding document approved and issued by the City that the City is required to follow and that the public is entitled to rely on, this was a violation of zoning and other laws, that has injured BVP and BVH.

61. There are other important City requirements for obtaining an initial permit that affect BVP’s property rights. As noted, perhaps most importantly, to receive the initial permit,

among other requirements, ASVRF must demonstrate to City Planning that it has use of the total number of spaces required in the zoning ordinance once the movie theater in the shopping center on Lot 1 has been converted to office space.

62. This includes the 83 additional spaces in BVP's Lot 4 parking deck to which ASVRF claims it is entitled – and to which BVP has asserted ASVRF is not entitled – under the Second Amendment.

63. Accordingly, in the same December 6, 2017 email, Mr. Fortune, speaking for Charlotte and City Planning, stated: “We will also need to make sure the site can meet parking requirements for the additional office space.”

64. No representative of BVP was copied on the December 6, 2017 email chain, although BVP, as admitted by City Planning in an email from Mr. Spencer to Mr. Marshall, was an obvious stakeholder in the matter of the use of its parking deck.

65. The events for months following the December 2017 emails are unknown to BVP, because Charlotte did not copy BVP on any correspondence or include it in any meetings and, upon information and belief, ASVRF and its lawyers at MVA, particularly Evan Bass, actively attempted to exclude BVP and its representatives (including its manager, Robert B. Bruner (“Bruner”)), from all communications.

66. BVP was tipped off about the discussions between ASVRF and Charlotte regarding the initial permit only months later.

67. BVP, as soon as it knew about the discussions, informed Charlotte that it opposed ASVRF's claim and expected to be included on any communications regarding demands for parking spaces in its deck. In an email dated May 30, 2018 to Messrs. Fortune, Spencer, and others

at City Planning, as well as ASVRF representative Jonathan Gould (“Gould”), BVP’s representative Mr. Bruner told Charlotte and City Planning:

- a. ASVRF’s theater to office conversion plan violated zoning ordinances by requiring more square footage than permitted by the 2005 Revised Site Plan.
- b. Contrary to ASVRF’s and its lawyers’ representations, there was no agreement between BVP and ASVRF for BVP to provide the additional parking for Lot 1, on Lot 4’s parking deck or anywhere else.
- c. That Mr. Bruner and BVP should be copied on all communications between Charlotte and ASVRF or its representatives regarding the issue.

68. At that point, at the latest, Charlotte knew that there was a dispute over whether Lot 1 could use the additional 83 spaces on the Lot 4 parking deck.

69. Initially, Charlotte (in the form of City Planning and its lawyers, the City Attorney) did the right thing and declined to issue an initial permit until the dispute over whether Lot 1 was entitled to the additional 83 parking spaces on Lot 4 had been resolved. Unfortunately, as will be seen later in this Complaint, the City’s efforts to act in compliance with fairness and law were short lived, and quickly eroded under MVA’s lobbying.

70. In an email dated June 7, 2018, one of the lawyers at the City Attorney, Terri Hagler-Gray (“Hagler-Gray”) wrote to BVP/ Mr. Bruner that Charlotte would not, and should not, issue the initial permit until the arbitration process was completed, writing to ASVRF’s lawyer Evan Bass and others that issue of Lot 1’s rights to parking spaces in BVP’s deck “appears to be a legal issue that may require sorting out by a court before the City will be able to definitely determine if sufficient parking is available to accommodate the increase in parking spaces required by the additional floor area required by your client.”

71. Later, in a June 18 email to Mr. Bruner of BVP and Mr. Spencer of City Planning, the City Attorney, through Ms. Hagler-Gray, made similar assurances to BVP that it would not issue an initial permit until the parking issue had been resolved, in dispositive manner, through the proper arbitration process: “On last Friday, I informed Evan [Bass, MVA lawyer for ASVRF] that the City was not issuing the permit to his client because we had not received confirmation from you, as the owner of the parking garage, that there were additional spaces in the garage available to meet the increased parking requirement to resolve your dispute.

72. BVP has a legal right to be included in all communications and meetings between ASVRF and City Planning regarding the initial permit, and told ASVRF and City Planning as much in emails.

73. Whether the City issues the initial permit and ASVRF can increase its demand for spaces in BVP’s Lot 4 parking deck by 83 is a matter of great financial importance to BVP. For example, even ASVRF has estimated that each space can be rented for at least \$100 a month, and BVP’s information is that the spaces are far more valuable than that figure.

74. Notwithstanding the significance of this issue for BVP, ASVRF and MVA asked City Planning to exclude BVP – a vested stakeholder – from the decision regarding the initial permit that cannot be (or should not have been) issued without the use of 83 spaces owned by BVP on Lot 4.

75. Initially, Charlotte – in the form of City Planning and the City Attorney (City Planning’s legal counsel) – agreed with BVP, and admitted that BVP was required to be included in all communications and meetings regarding the initial permit.

76. In a June 6, 2018 email from Mr. Spencer at City Planning to Mr. Bass, ASVRF’s lawyer, Mr. Spencer wrote: “I need to make you aware that Mr. Bruner has requested that he be

included in all written communication regarding the issue. Since the City is subject to NC public records laws, I will be forwarding him a copy of this email exchange.”

77. Tellingly, consistent with Charlotte and ASVRF’s impropriety regarding inclusion of BVP in the process, Mr. Spencer did not even copy Mr. Bruner on the email indicating that Mr. Bruner had requested to be included on communications.

78. Mr. Bass and others representing ASVRF strenuously tried to exclude Mr. Bruner and BVP from communications regarding use of BVP’s own parking deck, generally not including BVP on communications.

79. Mr. Bass wrote to Mr. Marshall, Mr. Spencer, and others at City Planning on June 5, 2018: “I have removed Mr. Bruner from this email” regarding parking and the theater conversion plan, “and I ask that we correspond without his involvement.”

80. He then discussed his incorrect views on Lot 1’s purported rights to parking spaces on BVP’s Lot 4. After Mr. Spencer told Mr. Bass that Mr. Bruner would need to be copied on emails, Mr. Bass maligned Mr. Bruner, lamenting that “[i]t is unfortunate that Mr. Bruner has made your job so difficult again.”

81. Ultimately, Mr. Bass and ASVRF’s other representatives got their way: BVP and Mr. Bruner were generally excluded from communications regarding the purported rights of Lot 1 to use additional spaces on BVP’s Lot 4 parking deck, and the initial permitting process in general. Notwithstanding Charlotte’s admission that BVP must be part of the initial permit communications and meetings, many communications and meetings excluded BVP, just as MVA had requested on behalf of its client, ASVRF.

82. Numerous meetings, telephone calls, and emails were exchanged between Charlotte and ASVRF/ MVA that excluded BVP, including, among others:

- a. Mr. Bass emailed Ms. Hagler-Gray at the City Attorney (copying Mr. Marshall, Mr. Gould, his MVA partner and ASVRF attorney Scott Tyler (“Tyler”), Mr. Fortune and others) on June 7, 2018 asking to talk about the parking issue and offering to forward materials to her. Incredibly, even though Mr. Bass sent this email a day after Mr. Spencer indicated that BVP and Mr. Bruner would have to be copied and included on communications, Mr. Bass did not copy Mr. Bruner. Mr. Bruner and BVP were not included on the teleconference, if it occurred.
- b. In an email dated September 25, 2018, Mr. Bass thanked Ms. Hagler-Gray and Robert Hagemann, the actual City Attorney, for their “time on the phone last week” discussing the parking issue. The teleconference occurred on September 19, 2018. Mr. Bruner and BVP were not included on the call or copied on the email.

83. During these communications from which BVP was excluded, ASVRF and MVA made significant material misrepresentations to Charlotte, which misrepresentations BVP could not correct because it was excluded from the communications.

84. For example, MVA told Charlotte that the dispute over whether ASVRF and Lot 1 was entitled to the 83 additional parking spaces on Lot 4 necessary for the permit had concluded, when it had not.

85. Specifically, on September 25, 2018, Mr. Bass emailed Ms. Hagler-Gray and Mr. Hagemann at the City Attorney that: The Ombudsman, “Mr. Huckel just issued the final decision,” and claimed that this confirmed ASVRF’s right to the additional 83 spaces. He concluded: “We are hopeful that you are now able to release the permits for construction.” As usual, BVP was not

copied on the email or any responses, and therefore left unable to respond or correct the false statement.

86. In fact, as noted above, the litigation over that issue has not concluded. The arbitration process described in Section 8 of the Second Amendment is in its early stages. No binding, dispositive decision on the issue exists until the arbitration process is complete.

87. BVP had previously notified the City Attorney that the Ombudsman decision was non-binding, not final, and a mere predicate to the arbitration, but the City Attorney ignored that fact in its haste to accommodate ASVRF and MVA.

88. Notwithstanding Charlotte's (through City Planning, and the City Attorney) initial position that no permit would be issued until resolution of the dispute over whether Lot 1 would be entitled to 83 more spaces on Lot 4, after Mr. Bass' September 25, 2018 email, Charlotte abruptly decided that it would issue the initial permit.

89. It announced this decision in a letter dated October 3, 2018 ("October 3 Letter") addressed to ASVRF.

90. The October 3 Letter confirmed that Charlotte required documentation from ASVRF confirming that, in June 2018, "it had access to the necessary additional parking spaces required under zoning for the proposed renovation of the movie theater space at Ballantyne Village to office space."

91. The Letter then confirmed Charlotte's knowledge that BVP had informed Charlotte that "Ballantyne Village did not have an agreement with BVP to provide for the additional parking."

92. The Letter confirmed Charlotte's June 2018 position that "the City was not in a position to resolve this private dispute concerning language in the controlling easement agreements [*i.e.*, the Second Amendment and related easement agreements] regarding parking.

93. The Letter then indicted that it would issue the permit, "but retains the right to revoke this permit should this decision be reversed by a higher tribunal and it is determined that the requisite spaces are not available in the parking lots and garage owned by BVP or by any other means." As such, Charlotte, in the October 3 Letter, admitted that it was relying on a preliminary decision and not waiting for a final decision from the arbitrator, as it was required to do (and as it had agreed to do) before issuing the initial permit.

94. Upon information and belief, City Planning has never issued an initial permit conditioned upon the outcome of litigation, or when there is a likelihood that the party requesting the initial permit does not have permanent, exclusive access to the spaces required by the zoning ordinance.

95. Lot 1 obviously does not have the guaranteed spaces on Lot 4 required by ordinance if its purported rights to those spaces are the subject of pending litigation, so it was unequivocally wrong for the City to issue the initial permit.

96. It was not enough for the City to issue an unprecedented initial permit after months of secret communications with MVA. Incredibly, in a stunning abuse of process, City Planning and the City Attorney actually allowed MVA's Bass to help draft the October 3 Letter regarding the initial permit. Mr. Bruner and BVP were not copied on several emails with edits to the letter between Charlotte and Mr. Bass. BVP was not told of the October 3 Letter until it was issued.

97. The City Attorney even emailed Mr. Bass of MVA, on October 3, 2018 (not copying BVP) asking him to confirm that a draft of the October 3 Letter's "[l]anguage is agreeable

to you so that staff may proceed with issuance of the permit,” essentially asking for ASVRF to approve the language and actions taken by Charlotte to deprive BVP of its property rights.

98. Charlotte, encouraged by ASVRF and MVA, committed other material legal errors and zoning ordinance violations, in issuing the initial permit, beyond not requiring proof of the correct number of guaranteed spaces.

99. For example, it approved the conversion even though the conversion will cause Lot 1 to use more square footage for office space than permitted in the 2005 Revised Site Plan, which Charlotte was required to consult and follow in issuing the initial permit, and which BVP and BVH have relied on.

100. As another example, City Planning and the City Attorney not only erroneously concluded that Lot 1 had guaranteed use of the additional 83 spaces for the theater conversion, but erroneously concluded that Lot 1 has use of any number close to the required number of spaces in the Lot 4 parking deck. In fact, a correct reading of the Second Amendment confirms that, per the formula governing Lot 1’s rights to spaces on Lot 4, Lot 1 does not have the right to any parking spaces. City Planning and the City Attorney overlooked this.

101. This oversight is unsurprising, because in one discussion after Charlotte issued the initial permit, representatives of City Planning and the City Attorney admitted that they had never even read the Second Amendment – the operative document in this case. Instead, they relied on MVA and ASVRF’s representations (or misrepresentations) about what the Second Amendment purportedly says.

102. In summary, Charlotte, City Planning, and the City Attorney committed at least the following abuses that harmed BVP in the process of issuing the initial permit:

- a. Secretly communicating with and excluding BVP from emails, meetings, and teleconferences, notwithstanding the admitted legal requirement that BVP be included.
- b. Ignoring the 2005 Revised Site Plan, notwithstanding the requirement that it be considered in the initial permitting process, thereby improperly allowing ASVRF to receive an initial permit for a theater to office space conversion that allowed more square footage than permitted to be used for office space on Lot 1.
- c. Allowing MVA to secretly and unilaterally draft or edit the October 3 Letter.
- d. Promising in June 2018 that it would wait to issue the initial permit until it received a final arbitration award pursuant to Section 8 of the Second Amendment, and then inexplicably (and after months of ASVRF's and MVA's secret, unilateral lobbying through emails, calls, and meetings with City Planning and the City Attorney) issuing the initial permit while the arbitration (which is not complete to this day) was still in the early stages.
- e. Not requiring ASVRF/Lot 1 to demonstrate that it had access to exclusive and guaranteed access to sufficient spaces on Lot 4 to meet code.
- f. Failing to adequately review and apply key documents necessary to determine whether Lot 1 had access to sufficient spaces on Lot 4, such as the Second Amendment.

103. Charlotte's abuses are so arbitrary, unjust and extreme that any attempt to obtain fair process through Charlotte's procedures, including appeal to the Zoning Board of Adjustment

(“Charlotte ZBA”), without the intervention of this Court to compel Charlotte to follow the law and play fair, would be futile.

104. In addition to the evidence above that Charlotte has not followed its own rules in dealing with BVP and issuing the initial permit, there are additional reasons why BVP cannot receive legal and fair process with Charlotte unless and until the Court intervenes. For example, the Charlotte ZBA’s chairperson is an attorney at ASVRF’s law firm, MVA and at least one person with City Planning who was responsible for the misconduct complained of herein, Shad Spencer, is listed on its website as a member of the Charlotte ZBA.

105. Charlotte’s misconduct was intentional, deliberate, willful, arbitrary, irrational, and served no public interest.

106. Given the nature of the claims alleged herein, Charlotte, ASVRF, and MVA are hereby instructed to preserve any and all emails, communications, or other documents pertaining to the allegations herein or the litigation arising herefrom, including, without limitation, future communication between Charlotte and MVA regarding the litigation or this matter in general.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION – DENIAL OF SUBSTANTIVE DUE PROCESS

107. BVP re-allages and incorporates by reference the preceding paragraphs as if fully set forth herein.

108. BVP has a property interest in Lot 4 and the parking deck that sits upon it. To wit: it fully owns Lot 4 and the deck.

109. Charlotte deprived BVP of that interest by issuing an initial permit to ASVRF, that is predicated on Lot 1’s purported right to use an additional 83 spaces on BVP’s Lot 4 parking deck, without adequately assessing before issuing the permit whether Lot 1 actually had that right

or even providing BVP fair opportunity to participate in the permitting process. Indeed, Charlotte actively excluded BVP from the process by – notwithstanding BVP’s request to be included in communications and Charlotte’s confirmation that BVP should be included – excluding BVP from many emails, teleconferences, and meetings with ASVRF and MVA.

110. In addition, Charlotte deprived BVP of its property interest by failing to consider the 2005 Revised Site Plan – including its office space square footage limitations – in issuing the permit to ASVRF.

111. Further, Charlotte deprived BVP of its property interest by allowing ASVRF’s lawyers at MVA to secretly edit and determine the content of the October 3 Letter regarding the initial permit, without involving BVP in the process or even notifying BVP of the fact that MVA had contributed to the October 3 Letter.

112. Moreover, although City Planning and the City Attorney concluded during June 2018 that they should wait for the Second Amendment dispute resolution and arbitration process to conclude before issuing the permit, they inexplicably changed course in October 2018 and issued the initial permit even though the dispute resolution process had not concluded.

113. Charlotte’s action falls so far beyond the outer limits of legitimate action that no process could cure the deficiency. In particular, Charlotte, City Planning, and the City Attorney have demonstrated through the above actions that they will not follow even their own procedural rules in issuing the permit, such as including BVP on communications and in the process, following the 2005 Revised Site Plan, allowing MVA to write the October 3 Letter, and issuing the initial permit before completion of arbitration. Charlotte appears to be willing to do whatever it needs to do – legal or not – to satisfy ASVRF and/or MVA, with which it appears to have an improperly close relationship.

114. Charlotte's lengthy pattern of secret communications with MVA and ASVRF, ignoring the 2005 Revised Site Plan and other documents it was required to review, allowing MVA to contribute unilaterally and secretly to the drafting of the October 3 Letter, prematurely issuing the permit before the final arbitration award was issued, and other violations of its own rules and procedures connected with issuing the initial permit has no conceivable relationship to the exercise of its traditional police power through zoning.

115. The actions described herein, in the context of zoning involving property, had no foundation in reason and were mere arbitrary or irrational exercise of power having no substantial relation to public health, the public morals, the public safety, or the public welfare in the proper sense.

116. The zoning actions complained of herein were tainted with fundamental procedural irregularity, targeted at a single party (BVP), and deviated from and were inconsistent with regular practice.

117. Because of the collective misconduct of Charlotte, ASVRF, and MVA, BVP was denied adequate hearing before being deprived of its property interest.

118. Charlotte's conduct damaged BVP in the manner described throughout the Complaint.

SECOND CAUSE OF ACTION – DENIAL OF PROCEDURAL DUE PROCESS

119. BVP realleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

120. Charlotte has taken property rights from BVP with respect to Lot 4 and the parking deck without fair notice, procedure, and an opportunity for hearing appropriate to the nature of the case.

121. In particular, Charlotte admitted that BVP should be included in communications regarding the initial permit and Lot 4, but did not copy BVP on communications and allowed ASVRF and MVA to exclude BVP. BVP was also excluded from meetings and teleconferences.

122. Charlotte's conduct damaged BVP in the manner described throughout the Complaint.

THIRD CAUSE OF ACTION – EQUAL PROTECTION VIOLATION

123. BVP realleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

124. Charlotte intentionally accorded BVP different (and far inferior) treatment than it accorded ASVRF, which is a similarly-situated party.

125. Charlotte's treatment of BVP was entirely arbitrary, irrational, intentional, and unrelated to any governmental interest. For example, Charlotte repeatedly contradicted itself, violated its own procedures, and arbitrarily changed course by taking such measures as:

- a. Telling BVP it would not issue a permit until after a final decision in the arbitration and then issuing the permit early in the arbitration anyway;
- b. Agreeing that BVP should be included in relevant communications and then allowing BVP to be excluded from emails, calls, and meetings with ASVRF and MVA;
- c. Allowing MVA to secretly and unilaterally contribute to drafting the October 3 Letter for no legal reason whatsoever;
- d. Failing to follow Zoning Ordinances and procedures it accepted in its own emails, such as abiding by the 2005 Revised Site Plan in issuing the permit.

- e. Issuing the initial permit “conditionally,” when, upon information and belief, it has never issued provisional permits conditioned on the outcome of litigation.

126. BVP suffered the injuries described in this Complaint as a result of the discriminatory treatment.

FOURTH CAUSE OF ACTION – NEGLIGENCE (DUE PROCESS)

127. BVP realleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

128. Charlotte owes a legal duty to property owners to provide them with due process in taking any actions that could affect their property rights.

129. By failing to include BVP in emails, teleconferences, meetings, and other material aspects of the initial permitting process in which ASVRF and MVA were included – even though BVP had obvious property rights at stake – Charlotte breached its duty to provide BVP with adequate due process.

130. BVP was proximately injured by that breach in various ways discussed throughout this Complaint, including: the fact that BVH opted not to exercise an option to purchase BVP’s Lot 3 and the fact that Charlotte has issued an initial permit that would authorize a theater to office space conversion that could increase the burden on Lot 4.

FIFTH CAUSE OF ACTION – NEGLIGENCE

(2005 REVISED SITE PLAN/ INCORRECT SPACE COUNT)

131. Such a declaration would settle all aspects of the legal controversy between BVP and the City of Charlotte.

132. BVP realleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

133. Charlotte had a legal duty to follow the 2005 Site Plan in considering the initial permit, including its limitations on allocation of square footage for combined office space created on Lot 1, Lot 2, Lot 3, and Lot 4. This duty is set forth both in the Zoning Ordinance and in email correspondence between Charlotte and ASVRF during December 2017.

134. Charlotte breached that duty by disregarding the 2005 Site Plan and issuing a permit that allowed ASVRF and Lot 1 to use more square footage for office space than permitted in the 2005 Site Plan.

135. In addition, Charlotte is prohibited by issuing the initial permit if ASVRF does not have sufficient parking spaces to meet zoning ordinance requirements for Lot 1 after the theater to office conversion. Not only did ASVRF fail to demonstrate that Lot 1 had a right to use the additional 83 spaces (because that is contingent on the outcome of the pending arbitration proceeding), but it has also failed to demonstrate that it has the required access to any of the spaces on Lot 4 according to the formula governing allocation of spaces in the Second Amendment.

136. Those breaches injured BVP, among other harms, by causing BVH to defer its option to purchase Lot 3 from BVP because of concerns regarding whether sufficient square footage would remain for Lot 3 to use for development of office space.

SIXTH CAUSE OF ACTION – DECLARATORY JUDGMENT

137. BVP re-alleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

138. There is a genuine dispute and an actual controversy between BVP and Charlotte regarding whether Charlotte should have issued the initial permit to ASVRF and whether Charlotte (City Planning and the City Attorney) followed the proper procedure for issuing the initial permit.

139. Pursuant to the Uniform Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, BVP in good faith requests the Court to declare the following:

- a. That the outstanding initial permit should be rescinded.
- b. That BVP is entitled to, and must be allowed to, participate in and see any communications between Charlotte (including City Planning and the City Attorney) and ASVRF and any of its representatives regarding the initial permit at Ballantyne Village, and ASVRF/ Lot 1's purported rights to use any spaces on BVP's Lot 4.
- c. That no initial permit can be issued unless and until the arbitration process described in Section 8 of the Second Amendment has been finally resolved, in an arbitration decision confirmed by a court, to allow Lot 1 to use the additional spaces on Lot 4.
- d. That no initial permit can be issued unless and until (regardless of the outcome of the arbitration) Lot 1 demonstrates to the City that it possesses exclusive rights to sufficient guaranteed spaces on Lot 4 to meet code.
- e. That the City must abide by the 2005 Revised Site Plan in issuing the initial permit.
- f. That ASVRF should not be able to secretly and unilaterally edit or prepare documents issued by Charlotte in connection with the initial permit, its

purported rights to use parking spaces on Lot 4, or any other of BVP's property rights at Ballantyne Village.

- g. That Charlotte should have to follow its own customs, procedures, and rules, as articulated in the Zoning Ordinance, its communications, and elsewhere.

SEVENTH CAUSE OF ACTION – PRELIMINARY INJUNCTION

140. BVP re-alleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

141. BVP requests that the Court issue a preliminary injunction forthwith, ordering Charlotte to revoke the initial permit and enjoining Charlotte from issuing another permit until after the final arbitration award is issued and confirmed by a court of competent jurisdiction and measures can be implemented to ensure that City Planning and the City Attorney comply with all of the rules and procedures including those that it violated in issuing the initial permit as described herein.

142. BVP is likely to succeed on the merits related to the relief requested in the foregoing paragraph.

143. Without the preliminary injunction requested herein, BVP will suffer irreparable harm. Without limitation, for example, unless Charlotte is instructed by this Court to follow the rules and standard procedures it has disregarded here and to treat BVP fairly, it will affirm the initial permit at an unlawful zoning board hearing. Once it has the initial permit, ASVRF will do the theater to office conversion, exceeding the office space allotment in the 2005 Revised Site Plan, improperly using spaces on BVP's parking deck, and rendering it impossible for BVP to sell Lot 3 to BVH or any other party. These harms cannot be remedied with money because, among

other problems, no amount of money can compensate BVP for the lost use and enjoyment of its parking deck, or for the lost business opportunity to sell Lot 3 or Lot 4.

144. The balance of hardships tips in BVP's favor. On Charlotte's part, the only "hardship" will be complying with its rules and customs and treating BVP fairly. BVP, on the other hand, is being deprived of its property rights and millions of dollars of value in its parking deck on Lot 4, as well as its fundamental due process rights. Even according to Charlotte, complying with the law is not a "hardship."

145. The preliminary injunction is in the public interest, because the public has a right to confidence in fairness and compliance with rules of the actions of City Planning and the City Attorney.

146. Specifically, but without limitation, the preliminary injunction should:

- a. Order the initial permit revoked.
- b. Order the City to cause any employees or representatives involved in the misconduct described herein to recuse themselves from any further involvement related to the initial permit.
- c. Order that BVP is to be included in all material communications between the City and ASVRF or its representatives on the issue of the initial permit or any issues affecting BVP's property rights.
- d. Order that no initial permit can be issued until the City can confirm that Lot 1 has access to all spaces required by the zoning ordinances, which cannot occur until there is a final award under the arbitration that is confirmed by a court, as described in the Second Amendment.

- e. Order that in considering any relevant initial permitting request, the City must follow and evenly apply its zoning ordinances, customs and rules in a consistent and non-arbitrary manner. This includes, without limitation, that it abide by the restrictions of the 2005 Revised Site Plan and require Lot 1 to demonstrate that it has guaranteed and exclusive use of the number of spaces on BVP's property that the zoning ordinances require.

EIGHTH CAUSE OF ACTION – PERMANENT INJUNCTION

147. BVP re-alleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

148. BVP has suffered an irreparable injury. Specifically, it has been victimized by Charlotte's failure to comply with its own zoning and permitting rules, procedures, and customs in a manner that has caused BVP to lose property rights in its parking deck on Lot 4, to the unfair benefit of ASVRF.

149. Remedies available at law, such as money damages, are inadequate to compensate for that injury, because without injunctive relief there is no assurance that Charlotte and ASVRF will not continue to violate the rules, procedures, and customs applicable to the initial permit for the theater to office conversion on Lot 1, and BVP's property rights on Lot 4.

150. Considering the balance of hardships between BVP and Defendants, a remedy in equity is warranted.

151. The public interest would not be disserved by a permanent injunction.

PRAYER FOR RELIEF

WHEREFORE, BVP respectfully requests that the Court grant the following relief:

1. Issue the declaratory relief and injunctive relief requested herein.
2. Award actual and compensatory damages to Plaintiff against the Defendant, jointly and severally, in an amount to be determined at trial.
3. Award punitive damages to Plaintiff against Defendant, jointly and severally, in an amount to be determined at trial.
4. Award costs of this action to Plaintiff.
5. Award attorney's fees and costs to Plaintiff.
6. Award such other and further relief as this Court may deem appropriate.
7. Plaintiff hereby demands a trial by jury.

This 24th day of January 2019.

/s/ William R. Terpening
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