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Dec 27 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Chief Justice (Ret.) Jean H. Toal, Circuit Court Judge

Appellate Case No. 2023-001789

J. Bradford McIlvain,Appellant,

v.

The Town of Kiawah Island,Respondent.

**REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL
FOR LACK OF JURISDICTION**

Respondent Town of Kiawah Island hereby submits its Reply Memorandum in support of Respondent’s Motion to Dismiss this appeal for lack of subject matter jurisdiction and in opposition to Appellant J. Bradford McIlvain’s Memorandum in opposition to Motion to Dismiss.

Rule 262(c)(3), SCACR prohibits *pro se* parties (like Appellant McIlvain) from serving a Notice of Appeal via email.¹ Appellant McIlvain does not address this Rule in his brief. Rather, he admits the Notice of Appeal “had to be served on or before November 13, 2023,” Appellant’s Memo, p. 5, fn. 1, but service by U.S. Mail was not accomplished until November 27, 2023. Appellant’s Memo, p. 6. Based on these undisputed facts, Appellant McIlvain’s appeal must be

¹ By Order dated May 6, 2022, the Supreme Court confirmed the acceptable methods for the electronic service of documents under Rule 262(c)(3), SCACR. Subsection (d)(1) of this Order provides as follows: “**A lawyer admitted to practice law in South Carolina** may **serve** a document on another lawyer admitted to practice law in South Carolina using the lawyer’s primary e-mail address listed in the Attorney Information System (AIS).” (Emphasis added).

dismissed, as jurisdictionally defective, due to his failure to comply with Rules 203(b)(1), SCACR (“A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.”); Rule 262(c), SCACR.

Appellant McIlvain alleges, in his brief, that the Town served him by email in the underlying action. This is not only false, but legally irrelevant to whether Appellant McIlvain complied with Rules 203(b)(1) and 262(c), SCACR.

In fact, attorneys for the Town served every motion, memorandum, and order on McIlvain by U.S. Mail. Respondent’s Certificates of Service, Exhibit No. 7. Counsel for the Town also provided Appellant McIlvain with courtesy copies of all filings by email, so he would immediately receive those filings, but they were all followed by formal service by U.S. Mail. Respondent’s Certificates of Service, Exhibit No. 7.

Indeed, counsel for the Town asked McIlvain to consent to service by email instead of U.S. Mail. August 2, 2023 Wilson Email, Exhibit No. 8. Appellant McIlvain never responded to this email and never consented to service by email. As a result, Respondent served all motions, briefs, and orders on Appellant McIlvain by U.S. Mail. Respondent’s Certificates of Service, Exhibit No. 7; Exhibit C to Appellant’s Affidavit, Exhibit No. 1 to Appellant’s Memorandum in Opposition.

Despite not consenting to receive service by email, Appellant served Respondent by email throughout the case, including the Notice of Appeal. Appellant’s Certificates of Service, Exhibit No. 9. This is why Appellant McIlvain’s initial service of the Notice of Appeal was not effective. Rule 262(c), SCACR.

Of course, how the parties served each other in the underlying case has no relevance to the requirements of the South Carolina Appellate Court Rules, which require *pro se* parties to proceed via personal service or service by U.S. Mail only. Rule 262(c), SCACR. These Rules are not

impacted or altered by the parties' actions before the Circuit Court and cannot be altered by the parties. To be clear, the Town never consented to receive service by email either in the underlying matter or in this appeal and has provided Appellant McIlvain with proper service by U.S. Mail throughout. On the other hand, Appellant McIlvain felt free to use email service (despite refusing to consent to email service).

Appellant McIlvain concedes he did not provide service by U.S. Mail until forty-five (45) days after receiving written notice of entry of the order from which he appealed. Appellant McIlvain's failure to timely serve his Notice of Appeal deprives this Court of jurisdiction, and neither the Court nor the parties can circumvent this rule. Rule 263(b), SCACR ("The time prescribed by these Rules for performing any act *except the time for serving the notice of appeal* under Rules 203 and 243 may be extended" (emphasis added)); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004) ("The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice."); *Ex Parte Sadisco of Greenville, Inc. v. Greenville Cnty. Bd. of Zoning Appeals*, 340 S.C. 57, 530 S.E.2d 383 (2000) ("This Court has consistently stated that service of the notice of appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of appeal must be served.").

In the absence of timely service, the Court has no jurisdiction to hear this matter, and it must be dismissed. *State v. Devore*, 416 S.C. 115, 784 S.E.2d 690 (Ct. App. 2016). Based on the foregoing, Respondent Town would ask that the Court dismiss this appeal for lack of jurisdiction with prejudice.

Respectfully submitted,

/s/ Joseph C. Wilson, IV
Joseph C. Wilson, IV, Esquire
Town Attorney, Town of Kiawah Island
Post Office Box 178
Folly Beach, South Carolina 29439
(843) 834-2390
joew@kiawahisland.org

/s/ Ross A. Appel
Ross A. Appel
McCULLOUGH ▪ KHAN ▪ APPEL
2036 eWall Street, Suite 200
Mt. Pleasant, SC 29464
(843) 937-0400
ross@mklawsc.com

Attorneys for Respondent Town of Kiawah Island

December 27, 2023

EXHIBIT NO. 7

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	C/A NO. 2023-CP-10-03550
J. BRADFORD MCILVAIN,)	
)	
Plaintiff,)	
)	
vs.)	CERTIFICATE OF SERVICE
)	
THE TOWN OF KIAWAH ISLAND,)	
)	
Defendant.)	
<hr/>		

I certify that on this date, I served a copy of **Defendant's Notice of Appearance and Motion for Judgment on the Pleadings** in this action, dated August 2, 2023, on Plaintiff J. Bradford McIlvain by mailing it to him at **146 Blue Heron Pond Road, Kiawah Island, South Carolina 29455**, by U.S. Mail in an envelope with sufficient postage affixed.

August 2, 2023
Date

Peter S Reynolds
Signature

Town of Kiawah Island
4475 Betsy Kerrison Parkway
Kiawah Island, SC 29455

Mr. J. Bradford McIlvain
146 Blue Heron Pond Road
Kiawah Island, South Carolina 29455

PRIORITY MAIL

US POSTAGE PAID PITNEY BOWES



ZIP 29455 \$ 009.80⁰
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0001359275 AUG 02 2023




STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
J. BRADFORD MCILVAIN,)
)
Plaintiff,)
)
vs.)
)
THE TOWN OF KIAWAH ISLAND,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
C/A NO. 2023-CP-10-03550

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Defendant The Town of Kiawah Island's Answer to Complaint** has been served upon the following by emailing and mailing a copy, with proper postage affixed hereto, on this 10th day of August, 2023.

J. Bradford McIlvain
146 Blue Heron Pond Road
Kiawah Island, SC 29455
bradmilvain@comcast.net

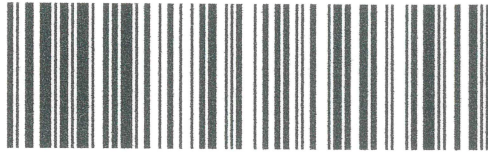

Elizabeth M. Lademan, Paralegal

August 10, 2023
Mt. Pleasant, South Carolina

MK McCULLOUGH • KHAN • APPEL
ATTORNEYS AT LAW

2036 E-WALL STREET • MOUNT PLEASANT, SC 29464

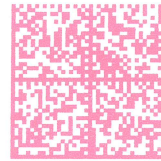
OF THE RETURN ADDRESS, FOLD AT DOTTED LINE
CERTIFIED MAIL®



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J. Bradford McIlvain
146 Blue Heron Pond Road
Kiawah Island, SC 29455

FIRST-CLASS



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AUG 10 2023

ELECTRONICALLY FILED - 2023 Aug 10 2:18 PM - CHARLESTON - COMMON PLEAS - CASE#2023CP1003550


STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
J. BRADFORD MCILVAIN,)
)
Plaintiff,)
)
vs.)
)
THE TOWN OF KIAWAH ISLAND,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
C/A NO. 2023-CP-10-03550

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **the Order Denying the Plaintiff’s Request for Declaratory Judgment and Injunctive Relief** has been served upon the following by emailing and mailing a copy via certified mail, return receipt requested, restricted delivery and with proper postage affixed hereto, on this 18th day of August, 2023.

J. Bradford McIlvain
146 Blue Heron Pond Road
Kiawah Island, SC 29455
bradmilvain@comcast.net

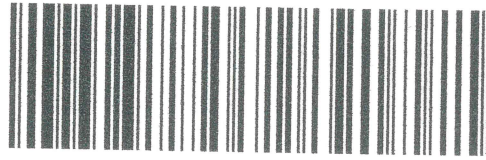

Elizabeth M. Lademan, Paralegal

August 18, 2023
Mt. Pleasant, South Carolina

MK McCULLOUGH • KHAN • APPEL
ATTORNEYS AT LAW

2036 E-WALL STREET • MOUNT PLEASANT, SC 29464

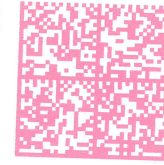
CERTIFIED MAIL



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J. Bradford McIlvain
146 Blue Heron Pond Road
Kiawah Island, SC 29455
bradmilvain@comcast.net

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AUG 18 2023

ELECTRONICALLY FILED - 2023 Aug 18 11:30 AM - CHARLESTON - COMMON PLEAS - CASE#2023CP1003550


STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
J. BRADFORD MCILVAIN,)
)
Plaintiff,)
)
vs.)
)
THE TOWN OF KIAWAH ISLAND,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
C/A NO. 2023-CP-10-03550

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Notice of Rehearing Order** has been served upon the following by emailing and mailing a copy via certified mail, return receipt requested, restricted delivery and with proper postage affixed hereto, on this 29th day of August, 2023.

J. Bradford McIlvain
146 Blue Heron Pond Road
Kiawah Island, SC 29455
bradmilvain@comcast.net

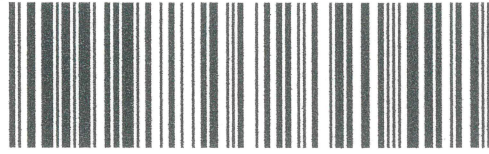

Elizabeth M. Lademan, Paralegal

August 29, 2023
Mt. Pleasant, South Carolina

MK McCULLOUGH • KHAN • APPEL
ATTORNEYS AT LAW

2036 E-WALL STREET • MOUNT PLEASANT, SC 29464

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J. Bradford McIlvain
146 Blue Heron Pond Road
Kiawah Island, SC 29455

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AUG 29 2023

ELECTRONICALLY FILED - 2023 Aug 29 4:13 PM - CHARLESTON - COMMON PLEAS - CASE#2023CP1003550


STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
J. BRADFORD MCILVAIN,)
)
Plaintiff,)
)
vs.)
)
THE TOWN OF KIAWAH ISLAND,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
C/A NO. 2023-CP-10-03550

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Defendant Town of Kiawah Island’s Reply Memorandum in Support of Motion for Judgment on the Pleadings** has been served upon the following by emailing and mailing a copy via certified mail, return receipt requested, restricted delivery and with proper postage affixed hereto, on this 8th day of September 2023.

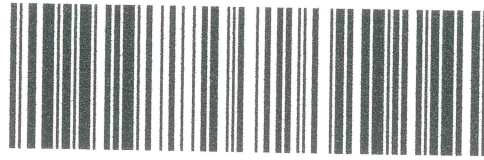
J. Bradford McIlvain
146 Blue Heron Pond Road
Kiawah Island, SC 29455
bradmilvain@comcast.net


Elizabeth M. Lademan, Paralegal

September 8, 2023
Mt. Pleasant, South Carolina

MK McCULLOUGH • KHAN • APPEL
ATTORNEYS AT LAW

2036 E-WALL STREET • MOUNT PLEASANT, SC 29464



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SEP 08 2023

J. Bradford McIlvain
146 Blue Heron Pond Road
Kiawah Island, SC 29455

ELECTRONICALLY FILED - 2023 Sep 08 3:56 PM - CHARLESTON - COMMON PLEAS - CASE#2023CP1003550


STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
J. BRADFORD MCILVAIN,)
)
Plaintiff,)
)
vs.)
)
THE TOWN OF KIAWAH ISLAND,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
C/A NO. 2023-CP-10-03550

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Defendant The Town of Kiawah Island's Supplemental Memorandum in Support of Motion for Judgment on the Pleadings** has been served upon the following by emailing and mailing a copy, with proper postage affixed hereto, on this 29th day of September, 2023.

J. Bradford McIlvain
146 Blue Heron Pond Road
Kiawah Island, SC 29455


Elizabeth M. Lademan, Paralegal

September 29, 2023
Mt. Pleasant, South Carolina

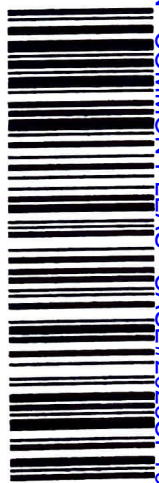
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McCULLOUGH, KHAN, APPEL
ATTORNEYS AT LAW

2036 E. WALL STREET • MOUNT PLEASANT, SC 29464



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J. Bradford McIlvain
146 Blue Heron Pond Road
Kiawah Island, SC 29455
bradmilvain@comcast.net

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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
J. BRADFORD MCILVAIN,)
)
Plaintiff,)
)
vs.)
)
THE TOWN OF KIAWAH ISLAND,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
C/A NO. 2023-CP-10-03550

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **The Order Granting Motion for Judgment on the Pleadings** has been served upon the following by mailing a copy, with proper postage affixed hereto, on this 16th day of October, 2023.

J. Bradford McIlvain
146 Blue Heron Pond Road
Kiawah Island, SC 29455


Elizabeth M. Lademan, Paralegal

October 16, 2023
Mt. Pleasant, South Carolina

MK McCULLOUGH • KHAN • APPEL
ATTORNEYS AT LAW

2036 E-WALL STREET • MOUNT PLEASANT, SC 29464



9589 0710 5270 0163 4561 78

J. Bradford McIlvain
146 Blue Heron Pond Road
Kiawah Island, SC 29455

FIRST-CLASS



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ZIP 29464
02 7H

\$ 008.30

0006104931

OCT 16 2023

ELECTRONICALLY FILED - 2023 Oct 16 11:10 AM

EXHIBIT NO. 8

From: [Joe Wilson](#)
To: [Brad McIlvain](#)
Cc: [Ross Appel](#)
Subject: RE: Service of Appearances McIlvain v TOKI
Date: Wednesday, August 2, 2023 11:33:00 AM
Attachments: [Notice of Appearance.docx](#)

Brad

Here is a more formal Notice of Appearance. Will you accept service by email or do you want hard copies of everything?

Joseph C. Wilson, IV, Esquire
Wilson Law Firm
P.O. Box 178
Folly Beach, South Carolina 29439
Cell Phone: (843) 834-2390

-----Original Message-----

From: Brad McIlvain <bradmilvain@comcast.net>
Sent: Tuesday, August 1, 2023 6:04 PM
To: Joe Wilson <joew@kiawahisland.org>
Subject: Service of Appearances McIlvain v TOKI

Joe,

Rule 5 (6) of the SC Rules of Civil Procedure notes “appearances” “shall be served upon each of the parties of record.” I am a party of record. I should have been served with your appearance.

Regards,

Brad McIlvain

Sent from my iPhone

EXHIBIT NO. 9

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	NINTH JUDICIAL DISTRICT
COUNTY OF CHARLESTON)	
)	
J. BRADFORD MCILVAIN,)	
)	
)	Case No.
Plaintiff,)	2023-CP-10-03550
)	
-versus-)	
)	
TOWN OF KIAWAH ISLAND,)	
)	
)	
Defendant.)	

2023 AUG 28 AM 9:52
J. Bradford McIlvain
J. Bradford McIlvain

CERTIFICATE OF SERVICE

I certify that on this date I served a copy of the Motion for Reconsideration, dated August 28, 2023, on Defendant Town of Kiawah Island by emailing it to its counsel as noted below:

Joseph C. Wilson, IV, Esquire
Wilson Law Firm
joew@kiawahisland.org

Ross A. Appel, Esquire
McCullough-Kahn-Appel
ross@mklawsc.com

August 28, 2023
Date

J. Bradford McIlvain
J. Bradford McIlvain

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
J. BRADFORD MCILVAIN,)
)
Plaintiff,)
)
-versus-)
)
TOWN OF KIAWAH ISLAND,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL DISTRICT

Case No.
2023-CP-10-03550

BY WCL
JULIE J. ARMSTRONG
CLERK OF COURT

2023 SEP -7 AM 10:40

FILED

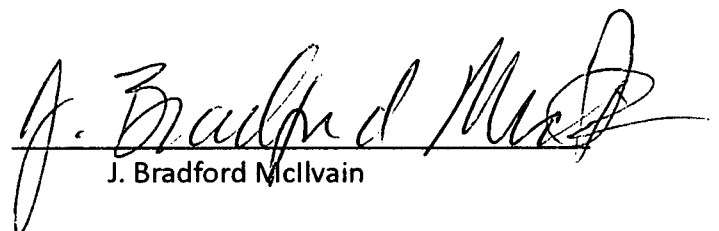
CERTIFICATE OF SERVICE

I certify that on this date I served a copy of Plaintiff's Opposition to Defendant's Motion for Judgment on the Pleadings or, in the Alternative, Motion for Summary Judgment, dated September 7, 2023, on Defendant Town of Kiawah Island by emailing it to its counsel as noted below:

Joseph C. Wilson, IV, Esquire
Wilson Law Firm
joew@kiawahisland.org

Ross A. Appel, Esquire
McCullough-Kahn-Appel
ross@mklawsc.com

September 7, 2023
Date


J. Bradford McIlvain

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
J. BRADFORD MCILVAIN,)
)
Plaintiff,)
)
-versus-)
)
TOWN OF KIAWAH ISLAND,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL DISTRICT

Case No.
2023-CP-10-03550

FILED
2023 SEP 25 AM 11:11
CLERK OF COURT
JR

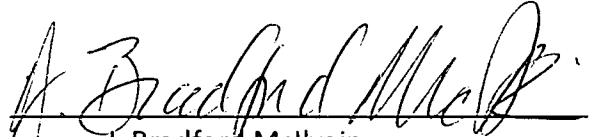
CERTIFICATE OF SERVICE

I certify that on this date I served a copy of the Supplemental Brief in Opposition to Defendant's Motion for Judgment on the Pleadings or, in the Alternative, Motion for Summary Judgment, dated September 25, 2023, on Defendant Town of Kiawah Island by emailing it to its counsel as noted below:

Joseph C. Wilson, IV, Esquire
Wilson Law Firm
joew@kiawahisland.org

Ross A. Appel, Esquire
McCullough-Kahn-Appel
ross@mklawsc.com

SEPTEMBER 25, 2023
Date



J. Bradford McIlvain

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean Toal, Judge

Case No. 2023-CP-10-03550

J. Bradford McIlvain,

v.

Town of Kiawah Island,

Appellant,

Respondent.

FILED
2023 NOV 13 AM 11:21
JULIE A. WILSON, CLERK OF COURT
RECEIVED
Dec 27 2023
SC Court of Appeals

CERTIFICATE OF SERVICE

I certify that on this date I served a copy of the Notice of Appeal dated November 10, 2023 on Defendant Town of Kiawah Island by emailing it to its counsel as noted below:

Joseph C. Wilson, IV, Esquire
Wilson Law Firm
joew@kiawahisland.org

Ross A. Appel, Esquire
McCullough-Kahn-Appel
ross@mklawsc.com

November 10, 2023
Date


J. Bradford McIlvain

RECEIVED

Dec 27 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Chief Justice (Ret.) Jean H. Toal, Circuit Court Judge

Appellate Case No. 2023-001789

J. Bradford McIlvain,Appellant,

v.

The Town of Kiawah Island,Respondent.

PROOF OF SERVICE

I, attorney for Respondent Town of Kiawah Island, hereby certifies that a true and correct copy of Respondent’s Memorandum Reply Memorandum in Support of Motion to Dismiss Appeal was served upon the Appellant in this matter via email and U.S. Mail this 27th day of December 2023 addressed as follows:

J. Bradford McIlvain
146 Blue Heron Pond Road
Kiawah Island, SC 29455
bradmilvain@comcast.net

/s/ Joseph C. Wilson, IV
Joseph C. Wilson, IV, Esquire
Town Attorney, Town of Kiawah Island
Post Office Box 178
Folly Beach, South Carolina 29439
(843) 834-2390
joe@follybeachlaw.com