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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas
Jennifer B. McCoy, Circuit Court Judge
Trial Court Case No. 2022CP1000846

Appellate Case No. 2023-001082

TOWN OF SULLIVAN'S ISLAND,

Respondent,

vs.

NATHAN BLUESTEIN and
THEODORE ALBENESIUS, III,

Appellants.

AMENDED RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

TOWN OF SULLIVAN'S ISLAND,

Plaintiff,

vs.

NATHAN BLUESTEIN and THEODORE ALBENESIUS, III,

Defendants.

Case No. 2022-CP-10-00846

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Motion for Summary Judgment, filed May 23, 2022, on behalf of Plaintiff Town of Sullivan's Island ("Town" or "Town Council") against Defendants Nathan Bluestein and Theodore Albenesius, III (together, "Defendants") on the Town's claim for declaratory judgment and on Defendants' counterclaims for breach of contract, specific performance, and promissory estoppel (the "Motion"). The Court conducted a hearing on the matter on September 22, 2022. William W. Wilkins and Alexandra H. Austin appeared for the Town, and James B. Hood and Lisa B. Bisso appeared for Defendants. The Court has fully considered the Motion, memoranda of law submitted in support of and in opposition to the outstanding Motion, the evidence presented, the record herein, the applicable law, and arguments of counsel. The Court finds there is no genuine issue of material fact as to the Town's claim or Defendants' counterclaims, and the Town is entitled to summary judgment as a matter of law. Accordingly, as set forth below, the Court GRANTS the Town's Motion.

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INTRODUCTION

This action concerns the validity and/or enforceability of a settlement agreement, as amended (the "Settlement Agreement"), between Defendants and a prior town council of Sullivan's Island with respect to certain accreted beachfront property (the "Accreted Land") owned by the Town. The Settlement Agreement imposes ongoing obligations on the Town in perpetuity regarding use and maintenance of the Accreted Land. The Town argues, and this Court agrees, the Settlement Agreement is invalid and unenforceable because it restricts, limits, and/or prohibits the exercise of the legislative functions or governmental powers ("legislative/governmental powers")[1] of the Town and purports to bind future town councils in the exercise of these powers. Moreover, even if the Settlement Agreement could somehow be said to involve only the proprietary/business functions of the Town, it would nonetheless be invalid and unenforceable because it is unreasonable as a matter of law.

Although this litigation is in its early stages, it is nonetheless ripe for summary judgment. The pleadings demonstrate that the Settlement Agreement standing alone governs the dispute, that it is unambiguous in its terms, that it presents no questions of material fact, and resolution presents solely matters of law. Moreover, a determination that the Settlement Agreement is invalid and unenforceable is dispositive of all claims in the case, including Defendants' counterclaims. Accordingly, a ruling on this threshold and dispositive issue is proper, without the need for unnecessary discovery or delay, and will best serve the interests of justice and judicial economy, as well as those of the parties and the public.

[1] Throughout the relevant case law the words "powers" and "functions" are used interchangeably.

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FINDINGS OF UNDISPUTED FACT

The Accreted Land

The Town is the fee simple owner of the Accreted Land located along the Atlantic Ocean on Sullivan's Island in Charleston County, South Carolina. It obtained fee simple ownership of the Accreted Land in 1949 by deed from the War Assets Administration of the United States.[2] (Compl. ¶ 8; Answer ¶ 7.)

In 1981, the Town passed a zoning ordinance restricting use of the Accreted Land. (Compl. ¶ 9; Answer ¶ 8.) The ordinance states, in pertinent part:

> There shall be no construction of any type, no destruction of vegetation (except trimming, cutting and pruning of bushes and trees as provided in this section), and no man-made changes of topography in [the] area. The Town Council ***may*** establish a program pursuant to which citizens ***may*** apply to the Town for permission to prune, trim and cut bushes and trees in the … area as follows … (5) in those areas where the height of trees or bushes are deemed objectionable, the trees or bushes may be pruned to a height of no less than three (3) feet, provided that the cumulative effect of the trimming, cutting or pruning shall not be detrimental to the safety, welfare, and health of the people of the Town.

§ 21-39A, Town Code of Ordinances.

On February 12, 1991, the Town executed a deed conveying the Accreted Land to the Lowcountry Open Land Trust ("LOLT").[3] (Compl. ¶ 10; Answer ¶ 9.) Subsequently, on that same day, LOLT executed a deed conveying the Accreted Land[4] back to the Town, subject to

---

[2] This deed is recorded in the Register of Deeds Office for Charleston County in Book K51 at pages 271-286.

[3] This deed is recorded in the Register of Deeds Office for Charleston County in Book K200 at pages 484-495.

[4] Over the years the Accreted Land has significantly increased in width due to the gradual accumulation of sand and other sediment. Now the Accreted Land contains well over one

certain terms, conditions, restrictions, and covenants (the "1991 Deed").[5] (Compl. ¶ 11; Answer ¶ 10.) It provides, in pertinent part:

> 1. Except as otherwise provided or permitted in Paragraphs 2 and 3 hereof, the Property shall remain in its natural state, no changes shall be made to its topography or vegetation and no structures or improvements shall be erected on the Property.
>
> 2. Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of Paragraph 4, the Town Council is given ***the unrestricted authority to*** trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean and providing views of the ocean and beaches to its citizens.
>
> 3. Notwithstanding the provisions of Paragraph 1 hereof, and subject to the limitations of this Paragraph 3 and of Paragraphs 2 and 4, the Town Council of Sullivan's Island (the "Council") shall have ***the right to*** improve, change, modify or alter the Property only if such actions are to further or effect one or more of the following enumerated public objectives or policies ("Public Policies"):
>
> a) Drainage
> b) Mosquito control
> c) Public walkways and emergency access to the Atlantic Ocean
> d) Beach renourishment
> e) Erosion control
> f) Vegetation management
> g) Educational programs
> h) Public safety
> i) Public health; and
> j) Scenic enhancement.
>
> Prior to taking any action affecting the Property to further or effect a Public Policy ("Public Action"), the Council shall make specific written findings of fact;

---

hundred acres on which has grown a dense forest in a variety of trees, bushes, plants and undergrowth. Compl., Ex. B at 6.

[5] This deed is recorded in the Register of Deeds Office for Charleston County in Book K200 at pages 496-510.

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1) that the proposed Public Action is proposed solely for the purpose of furthering or effecting one or more of the enumerated Public Policies,

2) that the proposed Public Action is necessary for the health, safety or general welfare of the Town,

3) that the benefits of the proposed Public Action outweigh the damage done to the aesthetic, ecological, scientific, or educational value of the Property in its natural state, and

4) that in making its findings of fact, the Council has given due and reasonable consideration to

   i) the cumulative effect of the proposed Public Action and past Public Actions on the natural state of the Property,

   ii) the alternative methods, if any, of furthering or effecting the proposed Public Policy which do not impact adversely on the natural state of the Property, and

   iii) the probable results of not taking the proposed Public Action.

The above described written findings of fact must be made prior to each individual Public Action relating to the Property and shall be specific to the circumstances of the proposed Public Action and not merely conclusive in nature.

. . . .

During the term of these restrictions, the Town shall cause to remain in effect an ordinance of the Town making it a violation of law for any person to violate the provisions of these Restrictions, as such Restrictions may be modified pursuant to Paragraph 8 hereof.[6] The Town may enact ordinances and regulations affecting the Property which are more restrictive

[6] Paragraph 8 provides that the Restrictions may be amended by "an affirmative vote of both (a) seventy-five (75%) percent of the registered voters of the Town who vote in the referendum held pursuant to the terms hereof, and (b) one hundred (100%) percent of the members of Town Council."

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> than these Restrictions or which are not inconsistent with these Restrictions.

(*Id.*; Mot., Ex. A.)

In 1995 the Town amended the 1981 zoning ordinance to provide, in pertinent part, that "vegetation may be trimmed and pruned so as to have a maximum height of no less than seven feet (7') above the ground." § 21-39.1G, Town Code of Ordinances. (Compl. ¶ 12; Answer ¶ 11.) In 2005, the Town amended the zoning ordinance again to provide, as it does to this day, that "vegetation may be trimmed and pruned so as to have a maximum height of no less than five (5) feet above the ground." § 21-71(C)(3), Town Code of Ordinances. (Compl. ¶ 13; Answer ¶ 12; Mot., Ex. B.) The ordinance further provides:

> **A. No construction or removal of vegetation.**
>
> There shall be no . . . destruction or removal of vegetation by any means except trimming and pruning of shrubs and trees as provided in this Ordinance. . . .
>
> . . . .
>
> **C. Permit for trimming and pruning of vegetation.**
>
> . . . .
>
> (3) The only vegetation that may be trimmed and pruned . . . is limited to the following: Southern Waxmyrtle (Myrica Cerifera), Eastern Baccharis (Baccharis Halimifolia), and Popcorn trees (Tallowtree, Sapium Sebiferum).

(*Id.*)

The Underlying Action

Defendants own real property on Sullivan's Island. (Compl. ¶ 4; Answer ¶5.) In June 2010, Defendants separately applied to the Town for a permit to trim and prune ocean

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adjacent property to a height of no less than three (3) feet. (Compl. ¶ 14; Answer ¶ 13; Mot., Ex. C.) The Town denied Defendants' permit applications, as failing to meet the requirements of Section 21-71(C) of the Town Code of Ordinances. (Compl. ¶ 15; Answer ¶ 13; Mot. Ex. D.)

On July 8, 2010, Defendants filed a lawsuit against the Town in the Court of Common Pleas, Charleston County, captioned *Bluestein, et al. v. Town of Sullivan's Island, et al.* and bearing case number 2010-CP-10-05449 (the "Underlying Action").[7] (Compl. ¶ 16; Answer ¶ 14.) The Master in Equity granted summary judgment in the Underlying Action on November 10, 2015 in favor of the Town and against Defendants. (Compl. ¶ 17; Answer ¶ 15.) On August 1, 2018, the South Carolina Court of Appeals affirmed the grant of summary judgment in the Underlying Action. *Bluestein v. Town of Sullivan's Island*, 424 S.C. 362, 818 S.E.2d 239 (Ct. App. 2018). (Compl. ¶ 18; Answer ¶ 16.) On February 19, 2020, the South Carolina Supreme Court reversed the grant of summary judgment in the Underlying Action on grounds that genuine issues of material fact exist as to the maintenance responsibilities of the Town toward the Accreted Land and remanded to the Court of Common Pleas for further proceedings. *Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 839 S.E.2d 879 (2020). (Compl. ¶ 19; Answer ¶ 17.) Following remand, on or about May 7, 2019, the prior Town Council was elected.

[7] The plaintiffs in the Underlying Action included the Defendants in this action, as well as Ettaleah Bluestein and Karen Albenesius. The defendants named in the Underlying Action included the Town, as well as Sullivan's Island Town Council.

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The Settlement Agreement

Thereafter, on October 7, 2020, the prior Town Council and Defendants entered into the Settlement Agreement and sought its approval from the Court of Common Pleas.[8] (Compl. ¶ 20; Answer ¶ 18.) The circuit court entered a consent order approving the Settlement Agreement in the Underlying Action on October 15, 2020. (Compl. ¶ 21, Ex. A; Answer ¶ 18.) The Settlement Agreement provides, in part:

> **II. <u>Findings of Fact:</u>**
>
> a. The settlement, and implementing steps associated therewith, are solely undertaken to further specifical [sic] enumerated, permissible public purposes under the Deed. In this instance, the Town Council believes that thinning of vegetation will serve the interests of improved mosquito control, improved vegetation management, enhanced public safety, improved public health, and scenic enhancement.
>
> . . . .
>
> b. The settlement, and implementing steps associated therewith, are necessary for the health, safety and general welfare of the Town.
>
> . . . .
>
> **III. Settlement of this litigation is agreed to on terms stated below:**
>
> **<u>General Approach</u>:**
>
> - The Town would implement selective thinning of the Accreted Land (AL), based on initial cut parameters set forth below for each of the four Zones (Transition Zone, Zone 1, Zone 2, and Zone 3.) In

[8] As stated in the Settlement Agreement, as of October 7, 2020, Ettaleah Bluestein and Karen Albenesius were no longer participating plaintiffs in the Underlying Action and, thus, were not parties to the Settlement Agreement. Additionally, after the Settlement Agreement was entered into, a new Town Council and Mayor were elected on May 4, 2021. Thus, the parties to the Settlement Agreement were the Defendants and a prior town council.

order to maintain similar conditions going forward, with the help of a naturalist the Town would review changes in the condition of the AL on a recurring basis (for instance, once every five years) with an eye towards making whatever changes might be necessary to maintain appropriate levels of density and diversity. This would provide a mechanism to deal with natural attrition, growth, or other changes to the natural environment. Primary funding for transition zone work will be from the Town. Funding for work in Zones 1-3 is subject to receipt of adequate donations or grants.

. . . .

Compliance with Law required:

Implementation is subject to compliance with law.

. . . .

VI. Binding:

This Settlement Agreement shall be binding upon and inure to the benefit of all the Parties, and their heirs, successors and assigns.

. . . .

VIII. Miscellaneous Provisions:

. . . .

b) Acknowledgements. Each Party acknowledges and agrees that . . . this Settlement Agreement is a legally binding contract with which the Partis [sic] will faithfully comply. Each individual signing this Settlement Agreement on behalf of one of the Parties to this Agreement has the authority to execute this Settlement Agreement and bind the entity or person on whose behalf this Settlement Agreement is executed.

. . . .

f) Modification. This Agreement may not be modified or amended, nor may any of its provisions be waived, except upon mutual agreement of all Parties or their authorized agents in writing.

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(Compl. ¶ 22, Ex. A; Answer ¶ 19.)

On April 6, 2021, the parties in the Underlying Action sought approval from the circuit court of an amendment to the Settlement Agreement to address anticipated third-party regulatory concerns.[9] (Compl. ¶ 24; Answer ¶ 21.) On April 12, 2021, the circuit court entered an order in the Underlying Action amending its prior consent order and amending the Settlement Agreement. (Compl. ¶ 25, Ex. B; Answer ¶ 21.)

On or about May 4, 2021, a new Town Council—the Plaintiff in this action—was elected.

PROCEDURAL POSTURE

The Town filed this action against Defendants on February 21, 2022 seeking a declaratory judgment that the Settlement Agreement is invalid and unenforceable. Defendants answered the Complaint on April 13, 2022, and brought counterclaims against the Town for breach of contract, specific performance, and promissory estoppel. The Town replied to Defendants' counterclaims on May 13, 2022.

The Town filed its Motion for Summary Judgment with Supporting Memorandum of Law and Motion for Stay of Discovery on May 23, 2022, which is the subject of this Order. The Town filed a Motion to Quash, or in the Alternative, for a Protective Order with Supporting Memorandum of Law, seeking to quash subpoenas issued to Town Council

[9] The amendment did not materially modify the provisions of the Settlement Agreement, except to add that "[t]he Town shall not unreasonably withhold consent to a proposed modification so long as the proposed modification would not result in cutting/trimming/pruning that is more aggressive than that detailed on the subject in the Settlement Agreement and Order originally executed in this case."

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members and to non-party Sullivan's Island For All or, in the alternative, seeking a protective order on June 17, 2022, and renewed the motion on July 14, 2022. Defendants filed their Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Motion for Stay of Discovery on September 16, 2022. The same day, Defendants filed a Memorandum in Opposition to Plaintiff's Motion(s) to Quash. The Court conducted a hearing on all pending motions on September 22, 2022.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). The South Carolina Rules of Civil Procedure require that summary judgment be granted if "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. Under South Carolina law, where "plain, palpable and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving party is proper. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976). Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, "this initial responsibility may be discharged by showing – that is, pointing out to the trial court – that there is an absence of evidence to support the nonmoving party's case." *Baughman v. American Telephone and Telegraph Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once the moving party meets this initial burden, "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." *Grimsley v. S.C. Law Enf't Div.*, 415 S.C. 33, 42,

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780 S.E.2d 897, 901 (2015) (citation and internal quotations omitted). "Only disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment." *Langley v. Lynch*, No. 2017-UP-226, 2017 WL 4621154, at *3 (S.C. Ct. App. May 24, 2017) (citation omitted).

CONCLUSIONS OF LAW[10]

The Town has established the absence of a genuine issue of material fact with respect to its claim for declaratory judgment, and Defendants have not demonstrated the existence of a genuine issue for trial. There is no dispute as to the authenticity of the Settlement Agreement, which the Court finds is unambiguous, and a determination as to its validity and enforceability presents solely questions of law to be resolved by the Court. Further, there are no facts, relevant documents, or information not already before the Court which could impact the Court's determination of this purely legal issue. Accordingly, this case is ripe for disposal on summary judgment.

As set forth below, the Settlement Agreement is invalid and unenforceable as a matter of law because it involves the legislative/governmental powers of the Town and purports to bind the current and future town councils. However, even if the Settlement Agreement could somehow be said to involve only proprietary/business functions, it is still invalid and unenforceable because it is unreasonable as a matter of law. Accordingly, the Town is entitled to a declaratory judgment that the Settlement Agreement is invalid and unenforceable as a matter of law.

[10] Any findings of fact contained in the Conclusions of Law are incorporated into and deemed to be Findings of Undisputed Fact.

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A. **The Settlement Agreement is Invalid and Unenforceable Because It Involves the Legislative/Governmental Powers of the Town and Purports to Bind the Current and Future Town Councils.**

South Carolina courts have found to be invalid many different kinds of contracts which attempted to bind successor governing bodies. "When a municipal contract extends beyond the term of the governing members of the municipality entering into the contract the subject matter of the contract will determine its validity." *City of Beaufort v. Beaufort-Jasper County Water and Sewer Authority*, 325 S.C. 174, 178, 480 S.E.2d 728, 731 (1997). The general rule is that "if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils."[11] *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 132, 459 S.E.2d 876, 880 (Ct. App. 1995) (*Cowart I*). *See also Newman v. McCullough*, 212 S.C. 17, 25, 46 S.E.2d 252, 256 (1948) ("the acts of former councils relating to the governmental functions of said councils which involve

[11] While "there is an exception to the rule that contracts involving a governmental function may not bind successor boards when enabling legislation *clearly authorizes* the local governing body to make a contract extending beyond its members' own terms," no such enabling legislation has been found to exist here. *West Anderson Water District v. City of Anderson*, 417 S.C. 496, 507, 790 S.E.2d 204, 209 (Ct. App. 2016) (citation and internal quotations omitted) (emphasis in original). Some jurisdictions have held a further exception to exist where the municipal body is a board or commission with staggered terms. *See, e.g.*, *Daly v. Stokell*, 63 So.2d 644, 645 (Fla. 1953) (en banc). However, South Carolina courts have declined to recognize this exception. *See Cowart I*, 319 S.C. at 134, 459 S.E.2d at 882 (explaining that "[t]he rule that municipal corporations cannot bind successors to contracts involving governmental matters is very clearly and powerfully stated" by the South Carolina Supreme Court and that there is no suggestion of an exception to this rule for staggered boards). *See also Piedmont Public Serv. Dist. v. Cowart*, 324 S.C. 239, 241-42, 478 S.E.2d 836, 838 (1996) (*Cowart II*) (affirming *Cowart I* and holding "[w]e agree with the Court of Appeals that the policy considerations [underlying the general rule] are not changed by the bestowal of perpetual succession.").

a matter of discretion to be exercised by such councils are without force and effect upon succeeding councils.").

(1) The Settlement Agreement Involves the Legislative/Governmental Powers of the Town.

The test to determine whether a particular act involves legislative/governmental powers is "whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired." *Cowart I*, 319 S.C. at 133, 459 S.E.2d at 881 (citation and internal quotations omitted). Here, the Town is statutorily vested with certain powers, including but not limited to the power to enact ordinances, provide for the general health and welfare of the Town, and adopt the budget of the Town. S.C. Code Ann. § 5-7-30 (1986). As such matters involve public policy considerations, each successive Town Council is vested with the discretion to act in the public interest, and such discretion cannot be divested or delegated away by a prior Town Council. *See G. Curtis Martin Inv. Trust v. Clay*, 274 S.C. 608, 612, 266 S.E.2d 82, 85 (1980) (holding that the Sewer District Authority could not "delegate away those powers and responsibilities which give life to it as a body politic[;] [and] [a] municipal corporation or other corporate political entity created by state law, to which police power has been delegated, may not divest itself of such power by contract or otherwise."). *See also Newman*, 212 S.C. at 25, 46 S.E.2d at 256 ("The power conferred upon municipal councils to exercise legislative or governmental functions is done so to be exercised as often as may be found needful or politic; and the council holding such powers is vested with no authority to circumscribe, limit or diminish their efficiency, but must transmit them unimpaired to their successors.").

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The Settlement Agreement was entered into by a prior Town Council which attempted to restrict and limit the current and future Town Councils' use of their legislative/governmental powers on matters concerning the use and maintenance of the Accreted Land. *See* McQuillin, *Municipal Corporations*, § 29:103 (3d ed.) ("To the extent that a governmental contract impinges on a municipality's ability to legislate freely, the contract is ultra vires and void" because it violates the prohibition against municipal contracts binding successor councils with respect to a legislative/governmental function). Moreover, determinations concerning permissible uses of the Accreted Land are zoning issues, and "[z]oning is a legislative act." *Knowles v. City of Aiken*, 305 S.C. 219, 224, 407 S.E.2d 639, 642 (1991). *See also Woodale Partnership v. City of Charleston*, No. 2:07-CV-2025-MBS, 2010 WL 11661386, at *10 (D.S.C. Sept. 17, 2010) (holding that the city did not have the power to forbid future city councils and zoning boards from exercising their legislative functions by forever freezing the zoning classification of the property). These functions are uniquely sovereign in character and are not capable of being performed by a private corporation or entity. Accordingly, they are by definition legislative and/or governmental. *See Owen v. City of Independence, Mo.*, 445 U.S. 622, 645 (1980) (explaining that proprietary/business functions, as opposed to legislative/governmental functions, are those capable of being performed by a private corporation).

(2) <u>The Settlement Agreement Improperly Restricts, Delegates and/or Divests the Legislative/Governmental Powers of the Town.</u>

The Settlement Agreement infringes upon the legislative/governmental powers of the Town because it restricts, delegates and/or divests the statutory authority of the Town Council to enact ordinances concerning the use and maintenance of the Accreted Land.

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Among other things, the Settlement Agreement requires the Town to "implement selective thinning of the Accreted Land" pursuant to specific, enumerated parameters, and to "maintain similar conditions going forward. . . ." Notably, many of the parameters directly violate the 2005 ordinance prohibiting the removal of vegetation on the Accreted Land, except for trimming and pruning to a height of no less than five (5) feet. The effective nullification by the Settlement Agreement of pre-existing ordinances and prohibition of the enactment of future ordinances concerning the Accreted Land constitutes an improper divestment of the legislative/governmental powers of the Town.

Relatedly, the Settlement Agreement restricts the ability of the Town to adopt regulations concerning the preservation, maintenance, or removal of vegetation on the Accreted Land pursuant to its legislative/governmental powers.[12] The Settlement Agreement states that "the Town Council believes that thinning of vegetation will serve the interests of . . . enhanced public safety, improved public health . . . [and] [t]he settlement, and implementing steps associated therewith, are necessary for the health, safety and general welfare of the Town." This provision effectively "freezes" the Town's position as to what will best serve the interests of the public as it relates to the Accreted Land. However, the Town may not be restricted from adopting in the future any regulations concerning the Accreted Land or taking any other action it deems appropriate for public safety and general welfare. "It is a fundamental principle of constitutional law that no legislative body may part with its right to exercise the police power, nor may a municipality to which such power has been

[12] Such issues involve important public policy considerations, particularly in the context of a coastal community, such as Sullivan's Island.

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delegated divest itself of same ***by contract or otherwise***. It is a continuing power which may be exercised as often as required in the public interest and must always remain fluid." *Sammons v. City of Beaufort*, 225 S.C. 490, 499, 83 S.E.2d 153, 157 (1954) (invalidating covenant requiring town to maintain on-street parking facilities throughout life of municipal bonds, on ground that such a covenant deprives future boards of legislative/governmental powers to adopt parking regulations necessary for the public safety and welfare).

Finally, by requiring primary funding for a portion of the work "[to] be from the Town," the Settlement Agreement also delegates the legislative/governmental powers of the Town to set and adopt a budget, *i.e.*, its fiscal power. As with its other legislative/governmental powers, the authority of the Town to adopt a budget cannot be delegated away. *See Clay*, 274 S.C. at 612, 266 S.E.2d at 85. Because the Settlement Agreement requires that similar conditions be maintained going forward, it creates an ongoing financial obligation for the Town, thus removing this budgetary item from its discretion and, instead, delegating it by contract. This constitutes an improper delegation of the legislative/governmental powers of the Town—powers that cannot be "bartered" away. *Sammons*, 225 S.C. at 498, 83 S.E.2d at 157.

The Settlement Agreement entered into by a prior Town Council may not limit a duly elected future Town Council in the exercise of its legislative/governmental powers, just as an ordinance passed by a prior Town Council may not prohibit a successor Town Council from repealing it and replacing it with a new ordinance the new Town Council determines promotes the public welfare of its citizens. *Id*. *See also Newman*, 212 S.C. at 25, 46 S.E.2d at

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256. Because it improperly restricts, delegates and/or divests the legislative/governmental powers of the Town, the Settlement Agreement is invalid and unenforceable.

B. <u>Even if the Settlement Agreement Involves Only the Proprietary/Business Functions of the Town, It Is Invalid and Unenforceable Because It Unfairly, Unreasonably and Improperly Restricts Those Functions.</u>

As set forth above, the Court finds the Settlement Agreement involves the legislative/governmental powers of the Town. However, even if the Settlement Agreement could somehow be found to involve only proprietary/business functions (*i.e.*, non-legislative/governmental powers), municipal contracts must nonetheless, "at the time of their execution, be fair and of a reasonable duration." *Cowart I*, 319 S.C. at 135, 459 S.E.2d at 882 ("[I]f the contract involves the exercise of the municipal corporation's business or proprietary powers, the contract may extend beyond the term of the contracting body and is binding on successor bodies if, at the time the contract was entered into, it was ***fair and reasonable and necessary*** or advantageous to the municipality."). Such municipal contracts "may be made for, but only for, such a term as is within the limitation imposed by statute or charter or, if no limitation is imposed, ***for a reasonable time***." *Id*. at 131, 459 S.E.2d at 880 (citation omitted) (emphasis added).

The Settlement Agreement is of perpetual duration because it obligates the Town to "maintain similar conditions going forward." The perpetual nature of the agreement is further evidenced by the requirement that the Town "review changes in the condition of the [Accreted Land] on a recurring basis (for instance, once every five years)." Moreover, the Settlement Agreement is binding upon and inures to the benefit of not only the named parties, but for their heirs, successors and assigns, and "may ***not*** be modified or amended,

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nor may any of its provisions be waived, except upon mutual agreement ***of all Parties***,"[13] except that "[t]he Town shall not unreasonably withhold consent to a proposed modification so long as the proposed modification would not result in cutting/trimming/pruning that is more aggressive than that" set forth in the original settlement agreement. The ongoing obligations of the Town under the Settlement Agreement extend not only to the individually named parties, their heirs, successors and assigns, but also to the Accreted Land itself, all of which evidences the perpetual, never-ending nature of the obligations imposed by it.

A perpetual duration of the Settlement Agreement is unreasonable as a matter of law. While it does not appear that South Carolina courts have had the opportunity to consider the specific issue of a perpetual municipal contract like the one set forth in the Settlement Agreement, the requirement under South Carolina law that municipal contracts be of a reasonable duration *ipso facto* strongly suggests that municipal contracts of a perpetual duration are, on their face, unreasonable. Moreover, decisions from other jurisdictions are instructive and demonstrate that perpetual municipal contracts are void as against public policy. *See Town of Secaucus v. City of New Jersey*, 20 N.J. Tax 562, 567-68 (2003) (explaining that "[m]unicipal agreements having a perpetual term are not favored" and are generally void as against public policy unless expressly authorized by statute). *See also State ex rel. City of St. Paul v. Minnesota Transfer Ry. Co.*, 83 N.W. 32, 34-35 (Minn. 1900) (contract between city and railway company whereby city agreed to maintain a bridge in perpetuity

[13] Just like the contract with the Sewer District Authority in *Martin*, *supra* at 14, the Settlement Agreement improperly gives private citizens (the Defendants, their heirs, successors and assigns) a veto power over any act taken by future Town Councils to modify any provisions of the Settlement Agreement.

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was void because such agreement is beyond municipal powers of the city and contrary to public policy); McQuillin, *Municipal Corporations*, § 29:104 (3d ed.) ("Municipal agreements having a perpetual term are not favored."). Here, the perpetual duration of the Settlement Agreement is *prima facie* unreasonable and contrary to public policy.

Thus, even if the Settlement Agreement involves only non-legislative or non-governmental powers—which, as set forth above, the Court finds it does not—it is invalid and unenforceable because it unfairly, unreasonably and improperly restricts the proprietary functions of the Town.

C. <u>The Settlement Agreement is Invalid and Unenforceable Against the Town.</u>

An illegal contract is unenforceable. *Berkebile v. Outen*, 311 S.C. 50, 53 n.2, 426 S.E.2d 760, 762 n.2 (1993). The Settlement Agreement itself recognizes that the implementation of its provisions "is subject to compliance with law." "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Id.* Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties. *Scruggs v. Quality Elec. Servs., Inc.*, 282 S.C. 542, 545, 320 S.E.2d 49, 51 (Ct. App. 1984). But a contract is entire, and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent. *See Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 65, 566 S.E.2d 863, 864 (Ct. App. 2002).

Here, the material terms of the Settlement Agreement are interdependent, such that merely severing the offending provisions is not feasible. *See OrthAlliance, Inc. v. McConnell*,

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No. 8:08-2591-RBH, 2010 WL 1344988, at *6 (D.S.C. Mar. 30, 2010) (explaining that, even where a contract contains a provision for the severability of void or unenforceable terms, contractual provisions that are interdependent may not be severable). The offending provisions are material to and go to the very heart of the agreement. Even if the unenforceable terms could be severed, the Settlement Agreement would then be reduced to an agreement with no meaningful substance or effect. Specifically, the provisions requiring vegetation to be removed, or trimmed, cut, or pruned beyond what is permissible under the 2005 ordinance in effect would have to be severed as unenforceable, as would the provision requiring the Town to "maintain similar conditions going forward."

Most importantly, because it involves the legislative/governmental powers of the Town, as set forth above, the Settlement Agreement cannot, as a matter of law, extend beyond the term of the town council which was a party to it. Because the Settlement Agreement was entered into by Defendants and a prior town council, it is not binding or enforceable against the current Town Council or future councils.

D. <u>That The Town May Enter Into Contracts Does Not Authorize The Invalid And Unenforceable Settlement Agreement.</u>

Defendants concede that contracts involving legislative/governmental powers of a municipality are not binding on future councils. Def.'s Mem. Opp'n at 8. Instead, they argue the Settlement Agreement must involve only the Town's proprietary/business functions because the Town regularly enters into contracts for maintenance of Town-owned land and concerning land use and zoning, which extend beyond the terms of the council members who entered into them. Def.'s Mem. Opp'n at 10-12. Further, Defendants argue a determination that the Settlement Agreement is invalid risks invalidating other contracts to which the

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Town is a party. Def.'s Mem. Opp'n at 20. Both on the record before the Court and as a matter of law, neither argument is persuasive.[14]

It is axiomatic that a municipality has authority to enter into contracts. For example, a municipality may enter into service contracts in the exercise of its proprietary/business functions. Inherent in a municipality's power to contract, as well as in its power to sue and be sued, is the authority to settle litigation. Defendants, in fact, submitted four settlement agreements to which the Town was a party and which resolved litigation involving land use issues. Def.'s Mem. Opp'n at Ex. 7. Three of the four agreements involved appeals by private landowners of zoning denials or restrictions on private property. *Id.* at 1-8, 20-33. In each instance, the settlement resulted in the Town granting the applied-for special exception or conditional use, subject to termination under certain conditions. The fourth agreement

[14] Defendants rely upon *Moore v. Beaufort County*, 936 F.2d 159 (4th Cir. 1991) in support of their argument that the Settlement Agreement does not involve the legislative/governmental functions of the Town. Def.'s Mem. Opp. at 9-10. *Moore* involved the settlement of a case pursuant to section 2 of the Voting Rights Act in which the parties agreed that a limited voting plan for the Board of County Commissioners elections would be implemented. When the ***same*** Beaufort County board subsequently rejected the agreement, the plaintiffs moved to enforce the agreement and the district court granted their motion. The Fourth Circuit addressed the county's contention that limited voting was contrary to the "public policy" of North Carolina and held that it was ***not***. There, the issue of whether the agreement involved the legislative/governmental powers of the county was not an issue before the court. Furthermore, it was established that the county's previous election method violated section 2 of the Voting Rights Act, and that, therefore, the consent decree was necessary to remedy a violation of federal law. Thus, the county had federal authority to enter into the settlement agreement, and was not confined to its authority under state law. To the extent *Moore* is relevant at all, it is distinguishable.

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settled a dispute over land ownership, and resulted in the Town granting a twenty-year temporary easement for access over the property. *Id*. at 8-19.

Unlike those examples, the Settlement Agreement at issue imposes affirmative, ongoing, and perpetual obligations on the Town, circumvents the Town's zoning procedures, supplants the Town's duly enacted zoning ordinances, and bargains away the authority and discretion of future town councils to act in the public interest. Simply put, the authority of the Town to settle litigation does not permit it to contract around state and local substantive and procedural laws; and the invalidation of an unlawful Settlement Agreement has no bearing on the validity of other lawful settlement agreements, or on the authority of the Town to enter into them.

Similarly, the authority of the Town to accept property subject to deed restrictions, or to place restrictions on public land, is uncontroverted. However, like contracts and settlement agreements, deed restrictions must also be lawful and not contrary to public policy to be enforceable. Defendants argue that the unenforceability of the Settlement Agreement may call into question the validity of the 1991 Deed. Def.'s Mem. Opp'n at 20. While it is not at issue in this action, the 1991 Deed is fundamentally different from the Settlement Agreement. As a preliminary and dispositive matter, a deed restriction is a privately-enforceable *limitation* on the use of property—it does not authorize a use in excess of what is permitted under the applicable zoning laws. Thus, while the 1991 Deed is an agreement not to use the Accreted Land for purposes which might otherwise be legally permissible, the Settlement Agreement purports to legally authorize (and indeed require) a

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specific use of the Accreted Land. Both involve uses of the Accreted Land, but only the latter is distinctly legislative in character.

Furthermore, and with respect to the 1991 Deed specifically, it expressly permits the Town to take actions inconsistent with the deed restrictions where the Town determines such action is in furtherance of the public interest, including but not limited to public health and safety. Mot., Ex. A at ¶ 3. It does not impose ongoing, affirmative duties on the Town, ***nor*** is it perpetual in duration, and may be modified or revoked by vote. Mot., Ex. A at ¶¶ 8-9.

Finally, this Court dismisses Defendants' suggestion that the issues presented in this action were resolved in or may be resolved by reference to rulings in the Underlying Action. The validity and enforceability of the Settlement Agreement were not in dispute in the Underlying Action and have not been previously litigated or decided. Nor is the fact that the Settlement Agreement was approved by consent order determinative of its validity or enforceability. *See, e.g.*, *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 268 (8th Cir. 2011) (a consent order settling litigation cannot authorize an unlawful agreement); *Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995) (parties can settle litigation with consent decrees but they "can only agree to that which they have the power to do outside of litigation"); *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) (underlying consent decree is void to extent that it exceeded parties' authority).

E. <u>Defendants' Counterclaims Fail as a Matter of Law.</u>

That the Settlement Agreement is invalid and unenforceable is dispositive of Defendants' counterclaims for breach of contract, specific performance, and promissory

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estoppel. Specifically, all three causes of action require, at a minimum, that there be a valid and binding contract. *See Hennes v. Shaw*, 397 S.C. 391, 399, 725 S.E.2d 501, 506 (Ct. App. 2012) (holding a plaintiff must prove the existence of a binding contract to recover for breach of contract); *Chitwood v. McMillan*, 189 S.C. 262, 264, 1 S.E.2d 162, 164 (1939) (holding liability for breach of contract requires the existence of a valid contract); *Ingram v. Kasey's Associates*, 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000) (holding specific performance requires "clear evidence of a valid agreement"); *Trident Const. Co., Inc. v. Austin Co.*, 272 F. Supp. 2d 566, 577 (D.S.C. 2003) (holding the doctrine of promissory estoppel "may not be used to create a legally enforceable promise when it would not otherwise be binding under ordinary contract principles"). Thus, because the Settlement Agreement is invalid and unenforceable, as set forth above, summary judgment in favor of the Town and against Defendants is proper, not only as to the Town's claim for declaratory judgment, but also as to Defendants' counterclaims.

FINAL ORDER AND JUDGMENT

The Court **GRANTS** summary judgment in favor of the Town and against Defendants on the Town's claim for declaratory judgment and on Defendants' counterclaims for breach of contract, specific performance, and promissory estoppel. The portion of the Town's Motion requesting a stay of discovery is denied as **MOOT**. Because there is no just reason for delay, it is hereby **ORDERED, ADJUDGED AND DECREED** that this is a **FINAL JUDGMENT** as a matter of law as to all claims and counterclaims herein, such that final judgment is hereby entered.

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AND IT IS SO ORDERED.

_____
Honorable Jennifer B. McCoy
Circuit Court Judge, At Large

_____, 2023
Charleston, South Carolina

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Charleston Common Pleas

Case Caption: Sullivans Island Town Of VS Nathan Bluestein , defendant, et al

Case Number: 2022CP1000846

Type: Order/Summary Judgment

So Ordered

s/Jennifer B. McCoy #2764

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP1000846

Sullivans Island Town Of
PLAINTIFF(S)

Nathan Bluestein et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

Defendants filed a Motion to Reconsider with this Court on February 8, 2023. "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). This Court respectfully Denies Defendants Motion to Reconsider without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 401–402, 444 S.E.2d 534, 536 (Ct. App. 1994).

ORDER INFORMATION

This order ☑ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/04/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

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Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Charleston Common Pleas

Case Caption: Sullivans Island Town Of VS Nathan Bluestein , defendant, et al

Case Number: 2022CP1000846

Type: Order/Electronic Form 4

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2023-06-04 20:31:10 page 3 of 3

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS
TOWN OF SULLIVAN'S ISLAND, Plaintiff, vs. NATHAN BLUESTEIN and THEODORE ALBENESIUS, III, Defendants.	Case No. _____ **SUMMONS**

TO: DEFENDANTS NATHAN BLUESTEIN AND THEODORE ALBENESIUS, III:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in the above-entitled action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint upon the subscribers at their offices located at Nexsen Pruet, LLC, 205 King Street, Suite 400, Charleston, South Carolina 29401, within thirty (30) days after the date of such service, exclusive of the day of service; and if you fail to answer the said Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default against you for the relief demanded in the Complaint.

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s/William W. Wilkins
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Attorneys for Plaintiff Town of Sullivan's Island

February 17, 2022
Charleston, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS
TOWN OF SULLIVAN'S ISLAND, Plaintiff, vs. NATHAN BLUESTEIN and THEODORE ALBENESIUS, III, Defendants.	Case No. _____ **COMPLAINT** **(Declaratory Judgment)** **(Non-Jury)**

Plaintiff Town of Sullivan's Island ("Town"), complaining of the Defendants herein, would respectfully allege and show unto this Honorable Court as follows:

INTRODUCTION

This action concerns the validity and/or enforceability of a settlement agreement, as amended (the "Settlement Agreement"), between the parties with respect to certain accreted beachfront real property belonging to the Town of Sullivan's Island. As set forth herein, the provisions of the Settlement Agreement improperly restrict the legislative/governmental powers of Plaintiff's Town Council (hereafter "Plaintiff" or "Town") and successor Town Councils, improperly divest them of legislative/governmental powers, and improperly restrict their proprietary functions. Accordingly, the Town seeks and is entitled to an Order of this Court declaring the Settlement Agreement invalid and unenforceable as to Plaintiff and successor Town Councils.

PARTIES AND JURISDICTION

1. The Town is a municipal corporation organized and existing pursuant to the laws of the State of South Carolina. It operates under a Council Form of Government, pursuant to

Section 2-1 of the Town Code of Ordinances and Title 5, Chapters 5 and 11, of the Code of Laws of South Carolina.

2. At all times relevant, the Town held rights in and to real property located on Sullivan's Island in Charleston County, South Carolina.

3. Upon information and belief, Defendants Nathan Bluestein and Theodore Albenesius, III (together, "Defendants") are citizens and residents of the State of South Carolina, County of Charleston, South Carolina.

4. At all times relevant, Defendants held rights in and to real property located on Sullivan's Island in Charleston County, South Carolina.

5. This Court has jurisdiction over the parties and the subject matter herein.

6. Venue is proper in this Court, as a substantial part of the events or omissions giving rise to this action occurred in or otherwise affect real property located in Charleston County, South Carolina, along with rights attendant to such property.

7. There is a substantial, justiciable controversy between the Town and Defendants, as more fully set forth herein, which warrants this action.

FACTUAL BACKGROUND

8. On December 28, 1949, the Town obtained fee simple ownership of certain accreted beachfront property (the "Accreted Land") located along the Atlantic Ocean by deed from the War Assets Administration of the United States. This deed is recorded in the Register of Deeds Office for Charleston County in Book K51 at pages 271-286.

9. In 1981, the Town passed a zoning ordinance restricting use of the Accreted Land. The ordinance states, in pertinent part:

> There shall be no construction of any type, no destruction of vegetation (except trimming, cutting and pruning of bushes and trees

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> as provided in this section), and no man-made changes of topography in [the] area. The Town Council may establish a program pursuant to which citizens may apply to the Town for permission to prune, trim and cut bushes and trees in the … area as follows … (5) in those areas where the height of trees or bushes are deemed objectionable, the trees or bushes may be pruned to a height of no less than three (3) feet, provided that the cumulative effect of the trimming, cutting or pruning shall not be detrimental to the safety, welfare, and health of the people of the Town. § 21-39A, Town Code of Ordinances.

10. On February 12, 1991, the Town executed a deed conveying the Accreted Land to the Lowcountry Open Land Trust ("LOLT"). This deed is recorded in the Register of Deeds Office for Charleston County in Book K200 at pages 484-495.

11. Subsequently, also on February 12, 1991, LOLT executed a deed conveying the Accreted Land back to the Town, subject to certain terms, conditions, restrictions and covenants. This deed is recorded in the Register of Deeds Office for Charleston County in Book K200 at pages 496-510. It provides, in pertinent part:

> 1. Except as otherwise provided or permitted in Paragraphs 2 and 3 hereof, the Property shall remain in its natural state, no changes shall be made to its topography or vegetation and no structures or improvements shall be erected on the Property.
>
> 2. Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of Paragraph 4, the Town Council is given ***the unrestricted authority to*** trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean and providing views of the ocean and beaches to its citizens.
>
> 3. Notwithstanding the provisions of Paragraph 1 hereof, and subject to the limitations of this Paragraph 3 and of Paragraphs 2 and 4, the Town Council of Sullivan's Island (the "Council") shall have ***the right to***[1] improve, change, modify or alter the Property only if such

[1] The restrictive covenants set forth in the deed from LOLT to the Town remain in effect unless amended by "an affirmative vote of both (a) seventy-five (75%) percent of the registered voters of the Town who vote in the referendum held pursuant to the terms hereof, and (b) one hundred (100%) percent of the members of Town Council."

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actions are to further or effect one or more of the following enumerated public objectives or policies ("Public Policies"):

a) Drainage
b) Mosquito control
c) Public walkways and emergency access to the Atlantic Ocean
d) Beach renourishment
e) Erosion control
f) Vegetation management
g) Educational programs
h) Public safety
i) Public health; and
j) Scenic enhancement.

Prior to taking any action affecting the Property to further or effect a Public Policy ("Public Action"), the Council shall make specific written findings of fact;

1) that the proposed Public Action is proposed solely for the purpose of furthering or effecting one or more of the enumerated Public Policies,

2) that the proposed Public Action is necessary for the health, safety or general welfare of the Town,

3) that the benefits of the proposed Public Action outweigh the damage done to the aesthetic, ecological, scientific, or educational value of the Property in its natural state, and

4) that in making its findings of fact, the Council has given due and reasonable consideration to

   i) the cumulative effect of the proposed Public Action and past Public Actions on the natural state of the Property,

   ii) the alternative methods, if any, of furthering or effecting the proposed Public Policy which do not impact adversely on the natural state of the Property, and

   iii) the probable results of not taking the proposed Public Action.

The above described written findings of fact must be made prior to each individual Public Action relating to the Property and shall be specific to the circumstances of the proposed Public Action and not merely conclusive in nature.

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. . . .

> During the term of these restrictions, the Town shall cause to remain in effect an ordinance of the Town making it a violation of law for any person to violate the provisions of these Restrictions, as such Restrictions may be modified pursuant to Paragraph 8 hereof. The Town may enact ordinances and regulations affecting the Property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions.

12. In 1995, the Town amended the zoning ordinance to provide, in pertinent part, that "vegetation may be trimmed and pruned so as to have a maximum height of no less than seven feet (7') feet above the ground." § 21-39.1G, Town Code of Ordinances.

13. In 2005, the Town amended the zoning ordinances to provide, in pertinent part, that "vegetation may be trimmed and pruned so as to have a maximum height of no less than five (5) feet above the ground." § 21-71(C)(3), Town Code of Ordinances. The ordinance further provides:

> **A. No construction or removal of vegetation.**
>
> There shall be no. . . destruction or removal of vegetation by any means except trimming and pruning of shrubs and trees as provided in this Ordinance. . . .
>
> . . . .
>
> **C. Permit for trimming and pruning of vegetation.**
>
> . . . .
>
> (3) The only vegetation that may be trimmed and pruned . . . is limited to the following: Southern Waxmyrtle (Myrica Cerifera), Eastern Baccharis (Baccharis Halimifolia), and Popcorn trees (Tallowtree, Sapium Sebiferum).

14. At various times between June 15, 2010 and June 23, 2010, both Defendants separately applied to the Town for a permit to trim and prune vegetation on ocean adjacent property to a height of no less than three (3) feet.

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15. At various times between June 21, 2010 and June 24, 2010, the Town separately denied both Defendants' permit applications, as failing to meet the requirements of Section 21-71(C) of the Town Code of Ordinances.

16. On July 8, 2010, Defendants filed a lawsuit in Charleston County in the Court of Common Pleas against the Town captioned *Bluestein, et al. v. Town of Sullivan's Island, et al.* and bearing case number 2010-CP-10-05449 (the "Underlying Action").[2]

17. On November 10, 2015, the Circuit Court granted summary judgment in the Underlying Action in favor of the Town and against Defendants.

18. On August 1, 2018, the South Carolina Court of Appeals affirmed the Circuit Court's grant of summary judgment in the Underlying Action. *Bluestein v. Town of Sullivan's Island*, 424 S.C. 362, 818 S.E.2d 239 (Ct. App. 2018).

19. On February 19, 2020, the South Carolina Supreme Court reversed the grant of summary judgment in the Underlying Action on grounds that genuine issues of material fact exist as to the maintenance responsibilities of the Town toward the Accreted Land and remanded to the Circuit Court for further proceedings. *Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 839 S.E.2d 879 (2020).

20. On October 7, 2020, the parties in the Underlying Action sought approval from the Circuit Court of a settlement agreement dated October 7, 2020 (the "Original Settlement Agreement").[3]

[2] The plaintiffs in the Underlying Action included the Defendants, as well as Ettaleah Bluestein and Karen Albenesius. The defendants named in the Underlying Action included the Town, as well as Sullivan's Island Town Council.

[3] As of October 7, 2020, Ettaleah Bluestein and Karen Albenesius were no longer participating plaintiffs in the Underlying Action, and, thus, were not parties to the Original Settlement Agreement.

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21. On October 15, 2020, the Circuit Court entered a consent order approving the Original Settlement Agreement in the Underlying Action. A copy of the Court's Order, to which the Original Settlement Agreement is attached as an exhibit, is attached as "**Exhibit A**" and incorporated herein by reference.

22. The Original Settlement Agreement provides, in pertinent part:

> **II. Findings of Fact:**
>
> a. The settlement, and implementing steps associated therewith, are solely undertaken to further specifical [sic], permissible public purposes under the Deed. In this instance, the Town Council believes that thinning of vegetation will serve the interests of improved mosquito control, improved vegetation management, enhanced public safety, improved public health, and scenic enhancement.
>
> . . . .
>
> b. The settlement, and implementing steps associated therewith, are necessary for the health, safety and general welfare of the Town.
>
> . . . .
>
> **III. Settlement of this litigation is agreed to on terms stated below:**
>
> **General Approach:**
>
> - The Town would implement selective thinning of the Accreted Land (AL), based on initial cut parameters set forth below for each of the four Zones (Transition Zone, Zone 1, Zone 2, and Zone 3.) In order to maintain similar conditions going forward, with the help of a naturalist the Town would review changes in the condition of the AL on a recurring basis (for instance, once every five years) with an eye towards making whatever changes might be necessary to maintain appropriate levels of density and diversity. This would provide a mechanism to deal with natural attrition, growth, or other changes to the natural environment. Primary funding for transition zone work will be from the Town. Funding for work in Zones 1-3 is subject to receipt of adequate donations or grants.
>
> . . . .

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Compliance with Law required:

Implementation is subject to compliance with law.

. . . .

VI. Binding:

This Settlement Agreement shall be binding upon and inure to the benefit of all the Parties, and their heirs, successors and assigns.

. . . .

VIII. Miscellaneous Provisions:

. . . .

b) Acknowledgements. Each Party acknowledges and agrees that . . . this Settlement Agreement is a legally binding contract with which the Partis [sic] will faithfully comply. Each individual signing this Settlement Agreement on behalf of one of the Parties to this Agreement has the authority to execute this Settlement Agreement and bind the entity or person on whose behalf this Settlement Agreement is executed.

. . . .

f) Modification. This Agreement may not be modified or amended, nor may any of its provisions be waived, except upon mutual agreement of all Parties or their authorized agents in writing.

23. The Underlying Action was disposed of and ended on October 15, 2020.

24. On April 6, 2021, the parties in the Underlying Action sought approval from the Circuit Court of an amendment to the Original Settlement Agreement, which modified the work plan contained in the Original Settlement Agreement to address anticipated third-party regulatory concerns.[4]

[4] The amendment did not otherwise materially modify the provisions of the Original Settlement Agreement, except to add that "[t]he Town shall not unreasonably withhold consent to a proposed modification so long as the proposed modification would not result in cutting/trimming/pruning

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25. On April 12, 2021, the Circuit Court entered an order in the Underlying Action amending its prior consent order and amending the Original Settlement Agreement. A copy of the Court's Order amending the Original Settlement Agreement is attached as "**Exhibit B**" and incorporated by reference.

26. Upon further review, the Town is informed and believes that the Settlement Agreement is invalid and unenforceable as to Plaintiff and all successor Town Councils. Specifically, the Town is informed and believes that the provisions of the Settlement Agreement improperly restrict the legislative/governmental powers of Plaintiff and successor Town Councils, improperly divest Plaintiff and successor Town Councils of legislative/governmental powers, and improperly restrict their present and future proprietary functions.

27. The Town believes that, both as a matter of law and public policy, the relief sought herein is necessary to protect the powers and responsibilities statutorily vested in it, as well as its authority to freely carry out its present and future governance responsibilities.

DECLARATORY JUDGMENT SOUGHT

28. The Town realleges the foregoing allegations as if restated herein verbatim.

29. The Town is informed and believes that the Settlement Agreement is invalid and unenforceable for the reasons set forth above and specifically enumerated in the Introduction and in Paragraph 26. Consequently, the Town is informed and believes that it is entitled to an Order of this Court that the Settlement Agreement is invalid and unenforceable.

that is more aggressive than that detailed on the subject in the Settlement Agreement and order originally executed in this case."

WHEREFORE, the Town prays that this Court issue an Order declaring the Settlement Agreement invalid and unenforceable, and for such other and further relief as this Court may deem just and proper.

s/William W. Wilkins
William W. Wilkins, SC Bar No. 6112
Clarence R. Turner, IV, SC Bar No. 104766
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Attorneys for Plaintiff Town of Sullivan's Island

February 17, 2022
Charleston, South Carolina

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EXHIBIT A

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Nathan Bluestein, Ettaleah Bluestein, Theodore Albenesius and Karen Albenesius	)	C/A No. 10-CP-10-5449
Plaintiffs,	)	**ORDER APPROVING SETTLEMENT**
Versus	)	
Town of Sullivan's Island and Sullivan's Island Town Council,	)	
Defendants.	)	

UPON Motion of all Parties, and it appearing that the said Parties deem the offer of settlement acceptable, advantageous, and to the best interest of all Parties and

IT FURTHER APPEARING in the discretion of this Court that such settlement is proper and in the best interest of all Parties, it is

ORDERED, ADJUDGED AND DECREED that the Parties are hereby authorized to consummate the settlement referred to in the within Settlement Agreement and General Release (Exhibit 1) and to execute and deliver to the Defendants an appropriate Release terminating, releasing, and ending any and all claims and actions asserted or brought under or by virtue of any South Carolina Statute or by common law against the Defendants, Town of Sullivan's Island and Sullivan's Island Town Council, including their Mayor, council, officers, directors, employees, agents, servants, attorneys, partners and representatives, predecessors and successor corporations or entities and their attorneys, heirs, assigns, executors, administrators, successors, subsidiaries, affiliated companies, parent companies, insiders, and any other indemnitors.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each side bear and pay their own costs, including court costs and attorneys' fees.

ELECTRONIC SIGNATURE PAGE TO FOLLOW.

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Charleston Common Pleas

Case Caption: Nathan Bluestein, plaintiff, et al VS Sullivans Island Town Of Etc, defendant, et al

Case Number: 2010CP1005449

Type: Order/Approval Of Settlement

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2020-10-14 12:20:57 page 2 of 2

EXHIBIT 1

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SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Settlement Agreement") is given by Nathan Bluestein and Theodore Albenesius, III (Plaintiffs) to the Town of Sullivan's Island and Sullivan's Island Town Council ("Town"), collectively referred to as "Parties", as of this 7th day of October, 2020.

Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius filed a lawsuit against the Town of Sullivan's Island and Sullivan's Island Town Council in the Court of Common Pleas for Charleston County, Case No. 2010-CP-10-5449, which was appealed and heard in the South Carolina Court of Appeals, App. No. 2015-002550 and the South Carolina Supreme Court, App. No. 2018-001888 ("Lawsuit"), concerning the municipal ordinances and restrictions regarding the land along the Atlantic Ocean in the Town under a conservation easement and donation to the Town in 1991. Since the Lawsuit was filed, Ettaleah Bluestein, M.D. passed away and Karen Albenesius was divorced from Theodore Albenesius and is no longer a participating Plaintiff in the litigation.

The Parties have now agreed to a resolution of this long-standing dispute, pursuant to the following terms and conditions that have been approved and adopted by the Town Council. This settlement agreement balances the competing needs of beachfront and inland island residents and the ecological and natural interests on the one hand and human needs and safety on the other.

I. RECITALS

Whereas, the Town owns property along the Atlantic Ocean which is known generally as The Accreted Land (AL); and

Whereas, the Town obtained title to the AL by way of a deed from the Low Country Open Land Trust; and

Whereas, the deed contained certain restrictions and covenants, both procedural and substantive; and

Whereas, the deed provides the Town with the unrestricted authority to trim and control the growth of vegetation; and

Whereas, after a decade of litigation the Town and Plaintiffs have reached a voluntary settlement; and

Whereas, the Town recognizes the need to develop a detailed implementation plan to use in conjunction with OCRM; and

Whereas, after preliminary consultation with the Land Trust the Town has received feedback that the Land Trust does not object to the settlement; and

Whereas, the Town is permitted to undertake activity on the AL to enhance mosquito control, engage in scenic enhancement, and to control vegetation pursuant to the following specific written findings of fact;

II. Findings of Fact:

a. The settlement, and implementing steps associated therewith, are solely undertaken to further specifical enumerated, permissible public purposes under the Deed. In this instance, the Town Council believes that thinning of vegetation will serve the interests of improved mosquito control, improved vegetation management, enhanced public safety, improved public health, and scenic enhancement. The current thickness of vegetation, in significant part caused by the "hedging effect" of prior cutting rules, makes it extremely difficult for anti-mosquito treatments to penetrate. There is also an increased prevalence of pests correlated to the growth of the AL over past years with the 2005 cutting rule in effect. Additionally, the level of thickness significantly impedes airflow causing stagnant conditions that is not conducive to healthful and enjoyable living. Further, the thickness of vegetation on the AL allows for rapid spread of wildfire should favorable fire conditions exist. The thinning of myrtles and trees would improve all of these shortcomings. In addition, the cumulative effect of decades of growth has been to alter views from what existed at the time of deed signing. The proposed action would help restore views to a level closer to what were enjoyed at the time the Deed Restrictions were implemented. Finally, excessive plant density (stems per acre) can retard desirable maturation of plant life on the AL and that the thinning proposed herein will allow those stems retained to develop more fully and beneficially. The combination of these factors will not only improve the safety of human habitation on the island, but also improve the overall condition of flora and fauna on the island. The utilization of environmentally sensitive means (use of appropriate equipment, thinning techniques, naturalist approved seeding, etc) can avoid material problems with erosion, particularly in light of the decades of documented natural accretion in this area.

b. The settlement, and implementing steps associated therewith, are necessary for the health, safety and general welfare of the Town. Reduction in pests and mosquitoes benefits public health, as does fire hazard reduction. Improved airflow is also beneficial, allowing for (among other things) increased opportunities to avoid the need for artificial climate control during the course of a year.

c. The benefits of the proposed settlement, and implementing steps associated therewith, outweigh any potential damage done to the aesthetic, ecological, scientific and education value of the property in its natural state. The AL is proposed to remain in an undeveloped state. The proposed changes are intended to improve aesthetic conditions. They are also intended to improve wildlife habitat and allow maturation of retained vegetation. Given the diversity and number of stems remaining under the proposed plan, the scientific and educational value of the property will not be undermined but will be enhanced.

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d. The Parties have considered

i. The cumulative effect of actions pursuant to the proposed settlement an past AL related actions on the natural state of the Property. The Town' cutting rules have been unchanged for fifteen years and, in fact, bear strikin resemblance to the rules in place at the time the deed restrictions wer enacted. Consequently, there is no significant "cumulative" action to b considered. Regardless, the changes proposed here will either not harm o enhance the natural environment of the AL for flora and fauna and will d so in a manner that benefits the island as a whole.

ii. There are no suitable alternative methods of furthering the stated publi benefits that would not adversely impact the natural state of the AL. Th principle concern being addressed here is excessive vegetation growth an density leading to all of the problems previously enumerated. The only wa to address excessive vegetation growth and density is selective thinning The current plan represents a selective thinning plan carefully tailored t address these stated concerns while maximizing retained ecological educational and scientific goals.

iii. First, the existing conditions (and trend toward increasing vegetatio thickness and growth) will continue to mature into an increasing problem In that sense, taking no action at this point would amount to "action" furthering the undesirable attributes. Second, failure to undertake the proposed settlement would subject the Town and residents to the uncertainty inherent in a trial.

III. Settlement of this litigation is agreed to on terms stated below:

General Approach:

- The Town would implement selective thinning of the Accreted Land (AL), based on initial cut parameters set forth below for each of the four Zones (Transition Zone, Zone 1, Zone 2, and Zone 3.) In order to maintain similar conditions going forward, with the help of a naturalist the Town would review changes in the condition of the AL on a recurring basis (for instance, once every five years) with an eye towards making whatever changes might be necessary to maintain appropriate levels of density and diversity. This would provide a mechanism to deal with natural attrition, growth, or other changes to the natural environment. Primary funding for transition zone work will be from the Town. Funding for work in Zones 1-3 is subject to receipt of adequate donations or grants.

- To facilitate resolution of this case, the Town retained Thomas and Hutton to perform a tree survey which is reflected in the attachments hereto. Due to the lapse of time from the tree survey to the actual performance of the work described herein, the Parties recognize the potential for further tree

growth from the time of the tree survey to the time of the work described. The trees meeting the dimensions for trimming described below and identified in the attached tree survey are the specific trees to be trimmed, cut or removed notwithstanding any growth during that interval.

Zones:

- Zone 1: Station 16 beach path to western edge of property line at 1715 Atlantic (TMS# 523-12-00-014)
- Zone 2: Eastern edge of Zone 1 to Eastern Edge of SIES property
- Zone 3: Eastern edge of Zone 2 to Station 28.5 beach path
- Transition Zone (TZ)

Beach Paths:

- All vegetation to be removed 4' on either side of town owned beach paths/boardwalks
- Private beach paths to be maintained at a width of 6.5' plus additional understory may be cleared to a maximum of 2' on either side (per draft plan 3a.) Cutting and maintenance shall be subject to the receipt by the Town of sufficient grants or donations.

Myrtles (All Zones):

- Allow for 50% of myrtles seaward of TZ to be removed with focus on saving myrtles located in low-lying topography areas
- All remaining myrtles may be cut to a height of 5'
- Property owners abutting town owned beach paths may trim myrtles from non-adjacent property line to beach path (eliminating "no man's land" currently existing in certain areas)
- Current town procedures will apply for annual cutting and payment thereof will apply

Zone 1:

- Keep all Live Oaks, Magnolias, Palmettos
- Remove all Cedar, Pine, Hackberry trees under 12" DBH

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- Remove all other tree species under 6" DBH
- Limbing of trees >16" DBH will be allowed with TOSI approval so long as proposed limbing would not harm health of tree.
- Vines on trees may be removed with TOSI approval for health of tree
- All non-native or invasive species may be removed

Zone 2:

- Keep all Live Oaks, Magnolias, Palmettos >6" DBH
- Remove all Cedar, Pine, Hackberry trees under 16" DBH
- Remove all other tree species under 8" DBH
- Limbing of trees allowed with TOSI approval so long as proposed limbing would not harm health of tree.
- Vines located on trees may be removed with TOSI approval for health of tree
- All non-native or invasive species may be removed

Zone 3:

- Keep all Live Oaks, Magnolias, Palmettos >6" DBH
- Remove all Cedar, Pine, Hackberry trees under 18" DBH
- Remove all other tree species under 10" DBH
- Limbing of trees will be allowed with TOSI approval so long as proposed limbing would not harm health of tree.
- Vines on trees may be removed with TOSI approval for health of tree
- All non-native or invasive species may be removed

Transition Zone:

- Trees to be preserved are only Live Oaks, Magnolias, Palm Trees 16" DBH or greater
- All other vegetation to be removed

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- 100' seaward of property line of adjacent properties (includes Bayonne right of way)

- Heavy machinery allowed landward of OCRM setback line

Permitting:

Permitting will be required through OCRM. Continued consultation with OCRM and the Land Trust will be important as the Town develops its implementation plan and permit application. The Town will need to engage an engineer and/or technical consultant to develop an appropriate, detailed plan specifying methods and objectives, and to make appropriate regulatory applications. We would expect environmentally appropriate overseeding to be a part of any such plan in order to assure continued soil stability. The Parties agree to cooperate as required to obtain any such permit. The Parties covenant and agree to work in good faith to obtain all permits and complete the work agreed to and described herein. Neither of the Parties shall directly or indirectly, individually or through others, endeavor to interfere with the permitting process.

Funding and Timing:

Thinning of the 2500 Block of Atlantic will proceed with all deliberate speed after formal settlement approval by Council and the funding of the block thinning cost by Plaintiff and/or homeowners in that block. The work shall be done by way of a contract signed by the Town and a vegetation management contractor as appropriate under the Town's procurement process.

Homeowners shall have the right to enter into an agreement with the Town whereby they must provide sufficient funds with the Town within 12 months of the settlement of Bluestein v. Town of Sullivan's Island to cut the property within their block in accordance with the zone specifications contained herein. As described above, using such funds the Town shall hire the approved contractor to complete the thinning. Such cutting will be done on a block by block basis after sufficient funds to thin a particular block are on-hand.

Appeals:

No party shall appeal the issuance of any permits issued for completion of work consistent with the settlement.

Compliance with Law required:

Implementation is subject to compliance with law.

Good Faith and Fair Dealing:

The Parties covenant and agree to work in good faith to obtain all permits and complete the work agreed to and described herein. No Party shall directly or indirectly, individually or through others, endeavor to interfere with the permitting process or the completion of the work described herein.

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Incorporation of Charts and Diagrams:

The supporting Charts and Diagrams are attached hereto and shall be incorporated as if set forth fully herein.

Submission of Applications:

The Town agrees to (1) authorize the necessary procurement actions in accordance with Town policy, (2) the development of detailed plans and applications, and (3) the submittal of applications necessary to effectuate this settlement.

IV. Mutual Release

In consideration of the covenants contained in this Settlement Agreement, Nathan Bluestein and Theodore Albenesius, III, their heirs, legal representatives, and assigns, do hereby release, cancel, acquit, relinquish and forever discharge the Town, together with its agents, representatives, attorneys, assigns, affiliates, predecessors, successors, officers, directors, employees, and any and all persons or entities in privity with them ("Releasees") from any and all claims, rights, demands, debts, liabilities, controversies, or causes of action, known or unknown, asserted or unasserted, liquidated or unliquidated, fixed or contingent, of any nature whatsoever including, but not limited to, those pertaining to (a) the Deed for AL; (b) the Ordinances related to the AL; (c) all claims under the Deed or Ordinances and the manner in which the Town interpreted those documents; (d) any claim asserted or assertable in the Lawsuit including, without limitation, claims in contract or in tort, common law or statutory, for actual, multiple, or punitive damages, attorneys' fees, interest and costs; and (e) all claims arising out of any act, transaction, or occurrence through the date hereof relating in any manner to the issues raised in the Lawsuit or which could have been raised in the Lawsuit.

In consideration of the covenants contained in this Settlement Agreement, the Town does hereby release, cancel, acquit, relinquish and forever discharge Nathan Bluestein and Theodore Albenesius, III, their heirs, legal representatives, and assigns, together with their agents,

representatives, attorneys, assigns, affiliates, predecessors, successors, officers, directors, employees, and any and all persons or entities in privity with them ("Releasees") from any and all claims, rights, demands, debts, liabilities, controversies, or causes of action, known or unknown, asserted or unasserted, liquidated or unliquidated, fixed or contingent, of any nature whatsoever including, but not limited to, those pertaining to (a) the Deed for AL; (b) the Ordinances related to the AL; (c) all claims under the Deed or Ordinances and the manner in which the Town interpreted those documents; (d) any claim asserted or assertable in the Lawsuit including, without limitation, claims in contract or in tort, common law or statutory, for actual, multiple, or punitive damages, attorneys' fees, interest and costs; and (e) all claims arising out of any act, transaction, or occurrence through the date hereof relating in any manner to the issues raised in the Lawsuit or which could have been raised in the Lawsuit.

V. Dismissal with Prejudice

Nathan Bluestein and Theodore Albenesius, III, agree that the Lawsuit shall be dismissed with prejudice, with each side bearing and paying their own costs, including court costs and attorneys' fees.

VI. Binding

This Settlement Agreement shall be binding upon and inure to the benefit of all the Parties, and their heirs, successors and assigns.

VII. Disputes

Any Party may commence a legal proceeding to enforce this Settlement Agreement. Any such action shall be brought exclusively in the Court of Common Pleas located in Charleston County, South Carolina.

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VIII. Miscellaneous Provisions.

a) Fees and Costs. Each Party shall be solely responsible for the fees and costs he, she, or it has incurred in connection with the Lawsuit.

b) Acknowledgements. Each Party acknowledges and agrees that this Settlement Agreement was negotiated and drafted with the full participation of the Parties and the Parties' respective counsel; that this Settlement Agreement was negotiated at arms' length and in good faith; that this Settlement Agreement was voluntarily executed after consultation with experienced legal counsel; that the Parties have carefully read the contents of this Settlement Agreement and understand its terms; that the consideration provided to the Parties under this Settlement Agreement is adequate; and that this Settlement Agreement is a legally binding contract with which the Partis will faithfully comply. Each individual signing this Settlement Agreement on behalf of one of the Parties to this Agreement has the authority to execute this Settlement Agreement and bind the entity or person on whose behalf this Settlement Agreement is executed.

c) Governing Law and Jurisdiction. This Settlement Agreement shall be interpreted and enforced, in all respects, according to the laws of the State of South Carolina.

d) Time is of the Essence. Time is of the essence as to every provision of this Settlement Agreement.

e) Interpretation and Severability. The paragraph headings contained in this Settlement Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Settlement Agreement. In interpreting this Settlement Agreement and construing its terms, neither of the Parties shall be deemed to have drafted this Settlement Agreement, and no drafting presumption against either of the Parties shall be applicable to this Settlement Agreement. Should any portion, word, clause, phrase, sentence or paragraph of this Settlement Agreement be declared void or unenforceable, such portion shall be considered independent and severable from the remainder, the validity of which shall remain unaffected.

f) Modification. This Agreement may not be modified or amended, nor may any of its provisions be waived, except upon mutual agreement of all Parties or their authorized agents in writing.

g) Counterparts. This Settlement Agreement may be executed in counterparts, each of which shall be deemed an original, all of which together shall constitute one and the same instrument. The Parties agree that as to this Settlement Agreement, electronic copies and signatures have the same force and effect as originals.

h) Entire Agreement. Each of the Parties acknowledge and agree that this Settlement Agreement constitutes the entire agreement of the Parties hereto with respect to the subject matter of this Settlement Agreement, and each of the Parties further acknowledge and agree that this Settlement Agreement supersedes any and all other agreements, understandings, negotiations, or discussions, either oral or in writing,

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express or implied, between one or more of the Parties. The Parties each acknowledge that no representations, inducements, promises, agreements, or warranties, oral or otherwise, have been made by them, or anyone acting on their behalf, which are not embodied in this Settlement Agreement; that they have not executed this Settlement Agreement in reliance on any representation, inducement, promise, agreement, warranty, fact or circumstances, not expressly set forth in this Settlement Agreement; and that no representation, inducement, promise, agreement, or warranty not contained in this Settlement Agreement shall be valid or binding unless executed in writing and signed by all Parties to this Settlement Agreement.

IN WITNESS WHEREOF, we have hereunto set our hand this 7th day of October, 2020.

Nathan NB

~~Nicky~~ Bluestein
2513 Atlantic Ave.
Sullivan's Island, SC 29482

Teddy Albenesius
P.O. Box 60477
North Charleston, SC 29419

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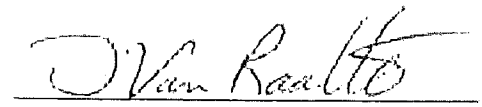
IN WITNESS WHEREOF, I have hereunto set my hand this 7th day of October, 2020

ON BEHALF OF *Town of Sullivan's Island and Sullivan's Island Town Council ("Town")*:



Derk Van Raalte, Esquire
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Law Offices of Brady Hair
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P. O. Box 61896
North Charleston, SC 29419
P: (843) 572-8700/F: (843) 745-1082

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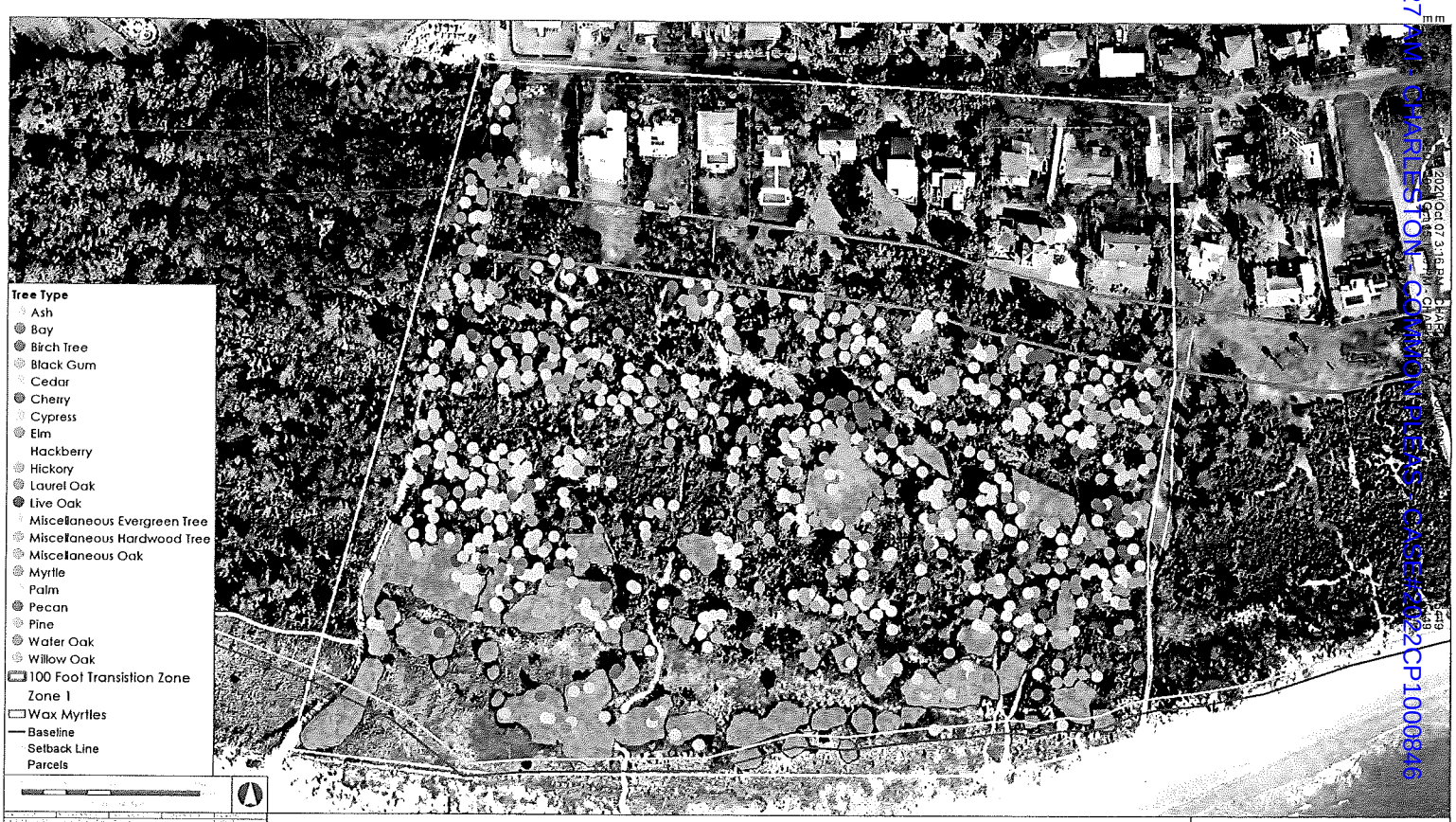

Sullivans Island

Charleston County, South Carolina

Zone 1, All Trees, Surveyed Myrtle Areas

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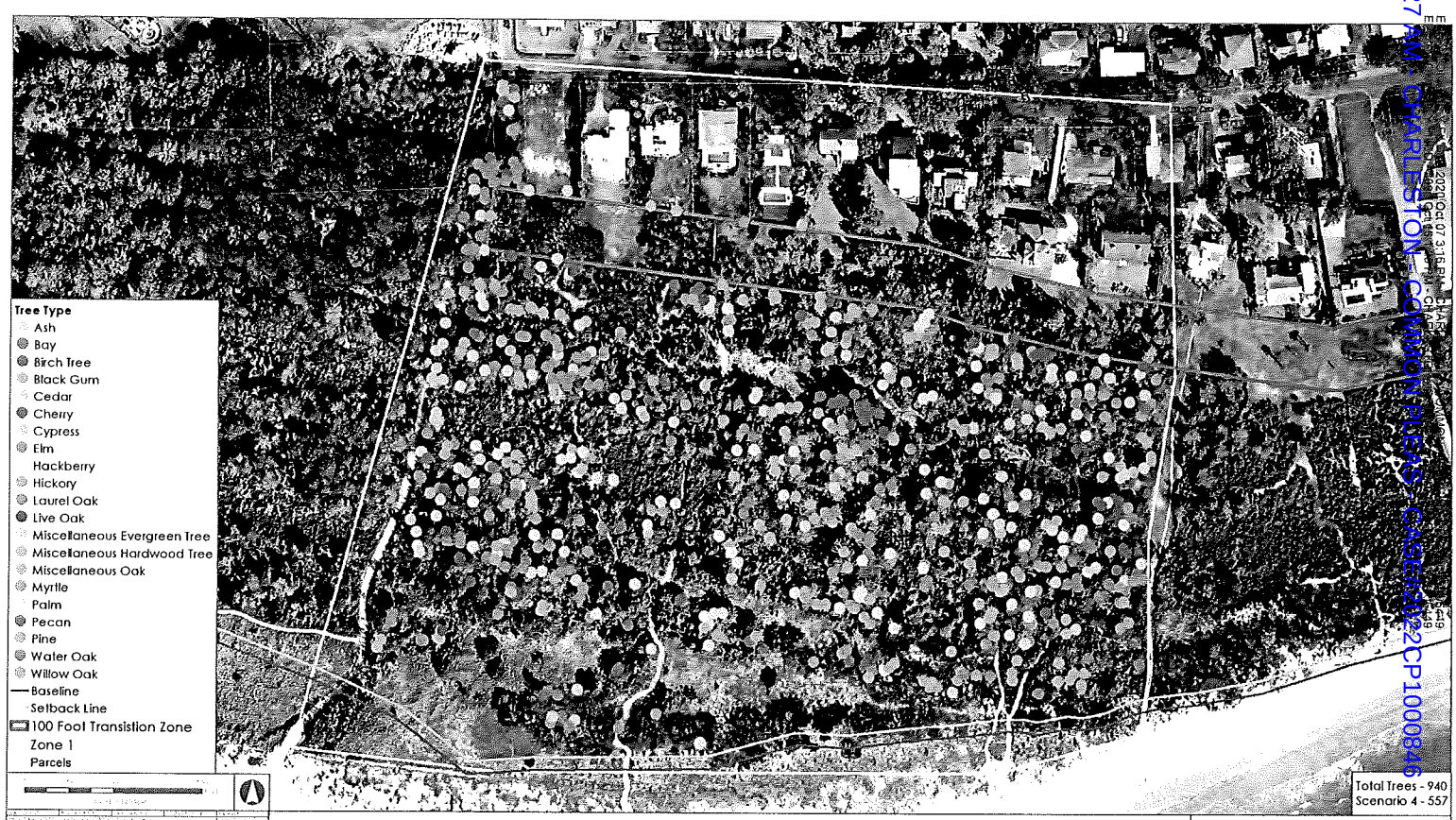

Sullivans Island

Charleston County, South Carolina

Zone 1, Scenario 4

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Sullivans Island

Charleston County, South Carolina

Zone 2, All Trees, Surveyed Myrtle Areas

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Sullivans Island

Charleston County, South Carolina

Zone 2, Scenario 4

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Sullivans Island

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Zone 3, All Trees, Surveyed Myrtle Areas

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Sullivans Island

Charleston County, South Carolina

Zone 3,Scenario 4 Revision

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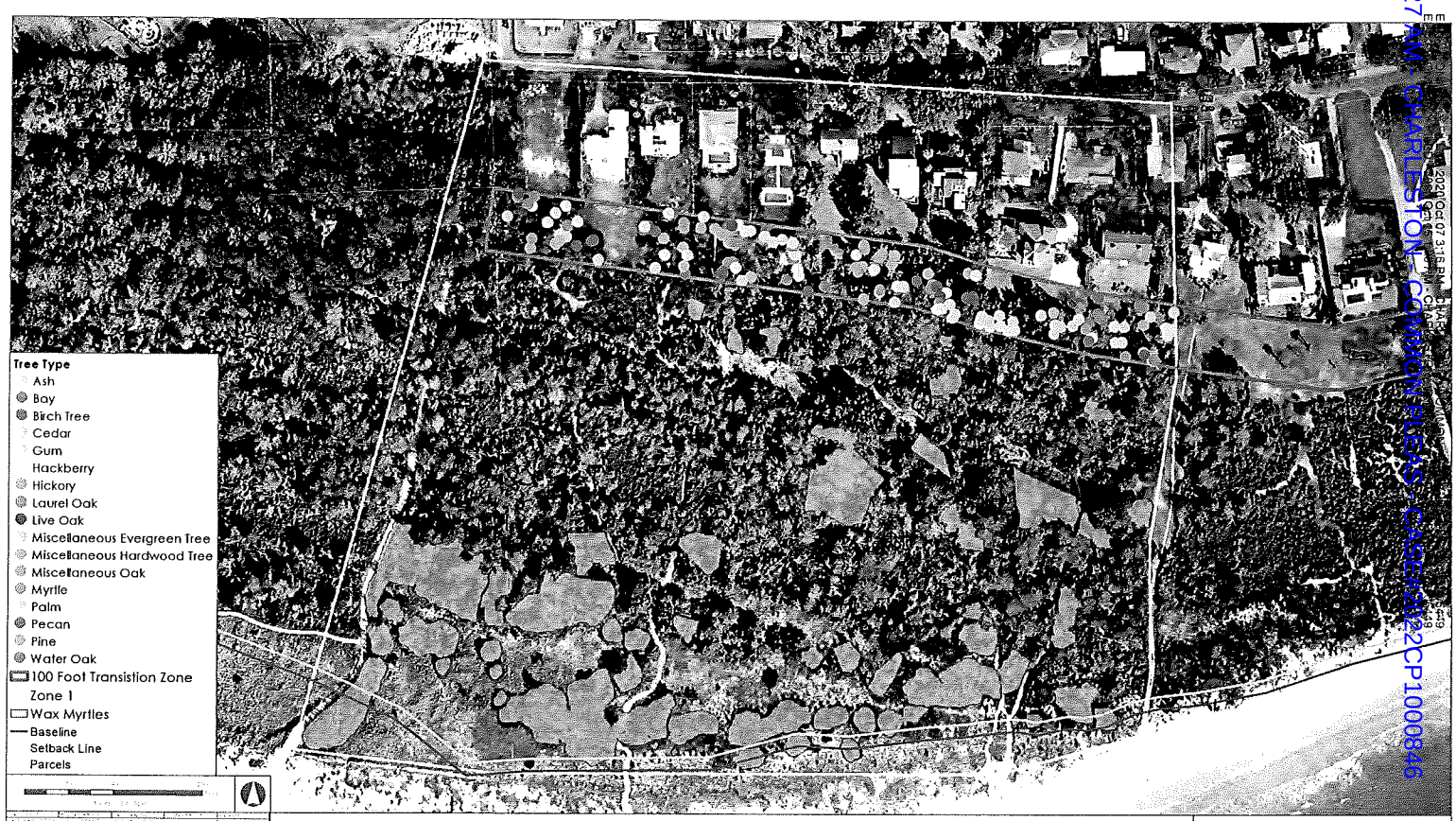

Sullivans Island

Charleston County, South Carolina

Transition Zone 1, All Trees, Surveyed Myrtle Areas

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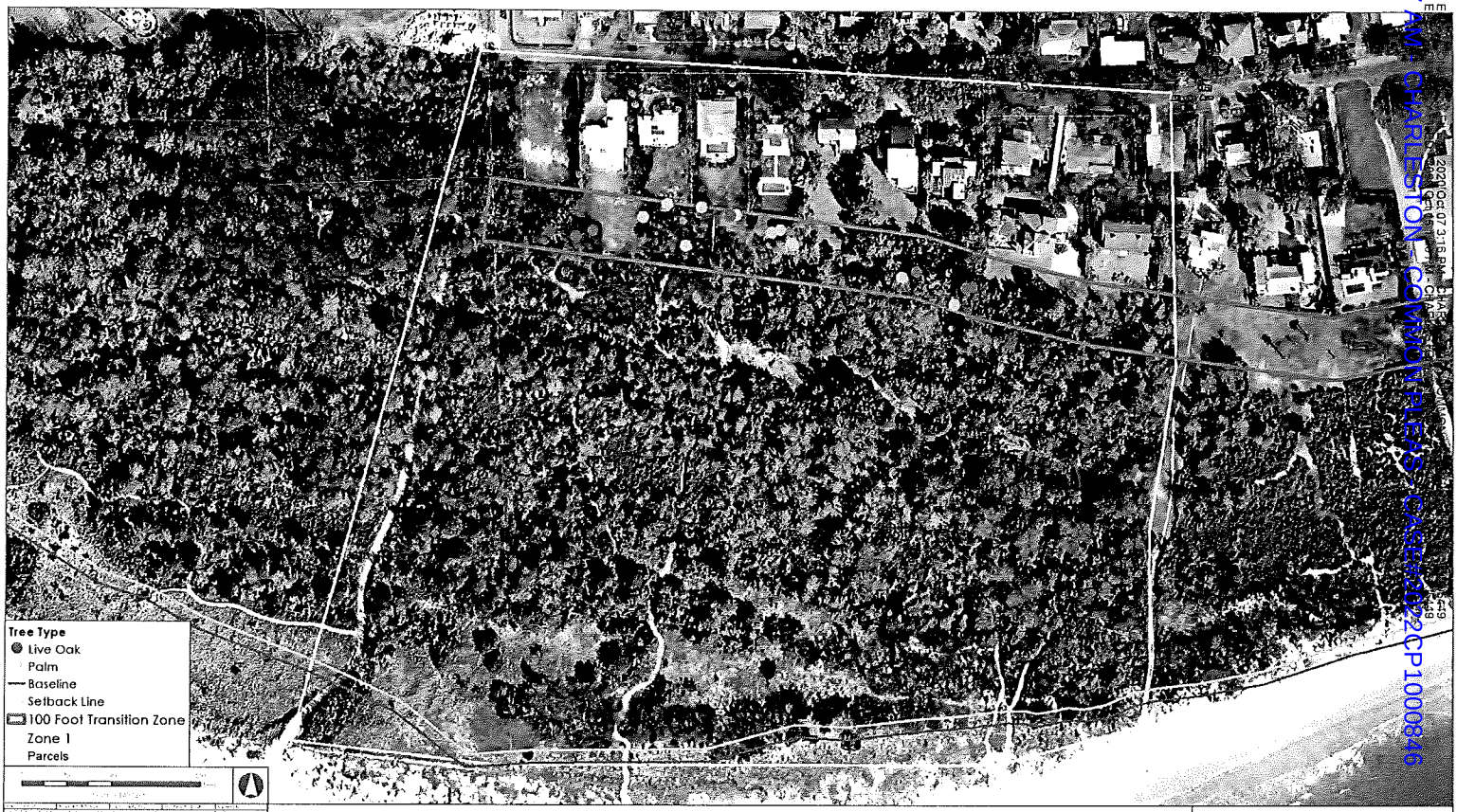

Sullivans Island

Charleston County, South Carolina

Transition Zone 1, Reduced Scenario 2

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Sullivans Island

Charleston County, South Carolina

Transition Zone 2, All Trees, Surveyed Myrtle Areas

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Sullivans Island

Charleston County, South Carolina

Transition Zone 2, Reduced Scenario 2

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Sullivans Island

Charleston County, South Carolina

Transition Zone 3, All Trees, Surveyed Myrtle Areas

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EXHIBIT B

ELECTRONICALLY FILED - 2022 Feb 21 9:27 AM - CHARLESTON - COMMON PLEAS - CASE#2022CP1000846

ELECTRONICALLY FILED - 2022 Feb 21 9:27 AM - CHARLESTON - COMMON PLEAS - CASE#2022CP1000846
ELECTRONICALLY FILED - 2021 Apr 12 1:43 PM - CHARLESTON - COMMON PLEAS - CASE#2010CP1005449

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Nathan Bluestein, Ettaleah Bluestein, Theodore Albenesius and Karen Albenesius	)	C/A No. 10-CP-10-5449
Plaintiffs,	)	**ORDER AMENDING SETTLEMENT**
Versus	)	
Town of Sullivan's Island and Sullivan's Island Town Council,	)	
Defendants.	)	

WHEREAS, this Court previously entered a Consent Order approving settlement of the above-captioned litigation based upon terms and conditions jointly agreed upon by the Parties; and

WHEREAS, the execution of the terms of that settlement Order required the Parties to obtain various permits and authorizations from State and/or Federal regulatory agencies; and

WHEREAS, based on field conditions encountered during the preparation of regulatory applications, all Parties agree that amendment of the Settlement terms and conditions would be mutually beneficial in order to properly address anticipated third-party regulatory concerns; and

WHEREAS, based on the above, it appears that relief under Rule 60(b)(5) is appropriate because it would not be equitable or desirable for the parties to further seek to implement the settlement as originally written and the Parties are in agreement that the revised terms attached hereto further the spirit of the original settlement agreement and allow the flexibility needed to conform with guidance from third-party regulatory agencies.

IT FURTHER APPEARING in the discretion of this Court that such settlement, as amended, is proper and in the best interest of all Parties, it is

ORDERED, ADJUDGED AND DECREED that this Court's Prior Order be Amended as follows:

1. The Work Plan attached hereto as Exhibit A shall replace the scope of work described in the original Settlement Order. Should third-party regulatory feedback or guidance be received suggesting further work plan changes the Parties may jointly agree to further modify this plan to address such feedback or guidance. Should one Party decline a modification suggested based on third-party regulatory feedback or guidance the other Party shall not be deemed at-fault or held responsible if permitting fails on that basis. The Town shall not unreasonably withhold consent to a proposed modification so long as the proposed modification would not result in cutting/trimming/pruning that is more aggressive than that detailed on the subject in the Settlement Agreement and Order originally executed in this case.
2. The twelve (12) month period referenced on page 6 of the Original Settlement Agreement, which originally commenced as of the date of original settlement, shall now commence on the date the Town receives necessary regulatory approvals to allow the proposed scope of work to proceed.
3. For the purpose of clarification, tree measurements referenced in this document and the Settlement Agreement refer to the size of specific trees as reported in geothinQ by the name "Sullivan's Island Tree Survey, 2015."
4. The Parties' statements of general intent, goals, and desire to balance various interests as described in the original Settlement Agreement remain valid.

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ELECTRONICALLY FILED - 2022 Feb 21 9:27 AM - CHARLESTON - COMMON PLEAS - CASE#2022CP1000846

5. As a guiding principle, it is generally intended that trees and other vegetation designated for removal under the original settlement plan that will now be retained under this work plan will be trimmed / pruned by TOSI in a manner to promote adequate views and breezes, provided a Town arborist opines that the proposed extent of such trimming / pruning will not likely endanger the long-term survival of the plant.

ELECTRONIC SIGNATURE PAGE TO FOLLOW.

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Charleston Common Pleas

Case Caption: Nathan Bluestein, plaintiff, et al VS Sullivans Island Town Of Etc, defendant, et al

Case Number: 2010CP1005449

Type: Order/Amend

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2021-04-12 10:29:02 page 4 of 4

EXHIBIT A

THOMAS & HUTTON
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WWW.THOMASANDHUTTON.COM

TO: USACOE, OCRM, SCDHEC-BOW

FROM: Tony M. Woody, PE
Thomas & Hutton

DATE: March 10, 2021

SUBJECT: Sullivan's Island Accreted Lands
Work Plan

JOB NO.: 25357.0002

1.0 NARRATIVE

On October 7, 2020 the Town of Sullivan's Island entered into a Settlement Agreement to end a decade long lawsuit and agreed to thin the vegetation on the Accreted Lands to serve the interest of improved mosquito control, improved vegetation management, enhanced public safety, improved public health, and scenic enhancement. The vegetation thinning will be accomplished by utilization of environmentally sensitive means (use of appropriate equipment, thinning techniques, naturalist approved seeding, etc) and can avoid material problems with erosion, particularly in light of documented natural accretion in the area.

The Accreted Lands are located on the southern portion of Sullivan's Island in TMS #523-12-00-077, 529-09-00-112 (two parcels), 529-10-00-087, and a portion of TMS #529-09-00-068. The total area is approximately 147 acres, and is divided into three Zones... 1, 2, and 3, and a Transition Zone that is part of all three Zones. The Zones were established to identify different thinning approaches to better represent the different environments of each zone.

The attached Work Plan Exhibit identifies the three Zones, and the Transition Zone, the Beach Front Baseline and Setback Line, the Dune Line (in Zone 3), and the delineated Freshwater Wetlands (pending USACOE review). The description below identifies the work to be accomplished along with the means and methods within each zone, inside and outside of the Freshwater Wetlands, landward and seaward of the Beach Front Setback Line, and landward and seaward of the Dune Line.

The goal of this technical paper is to describe the work (thinning and removal of existing vegetation) along with the means and methods of accomplishing the work with enough clarity and in enough detail to allow Federal and State agencies with permitting authority to determine if the proposed activities will require a permit.

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2.0 GENERAL

A. In order to be respectful of habitat during breeding seasons, work to be planned to commence and conclude during the period between November 1st and February 28th. If field or other unexpected conditions delay progress on work commenced during this period then such work will be completed as near as possible to February 28th.

B. TOSI will retain expertise to determine on a daily basis if conditions are suitable to work during the work period identified above. The determination will include weather patterns and soil moisture condition.

C. When present, stumps will remain in place and treated with a herbicide approved for use in the associated environment to prevent new growth.

D. No removal of vegetation that disturbs the soil will occur and no fill including incidental fill will be placed in Freshwater Wetlands.

E. Unless otherwise specified below, trees and other vegetation removed from the Accredited Lands will be transferred to an inland site on Sullivan's Island outside of the Accreted Lands, chipped, and disposed of in accordance with Local and State regulations.

F. Existing beach access paths will be used to the maximum extent practicable. Alternate routes and dispersed routes may be utilized where it appears that geographically dispersed activity, rather than concentrated activity, would be more protective of the natural environment.

3.0 TRANSITION ZONE LANDWARD OF SETBACK LINE IN ZONES 1, 2, AND LANDWARD OF DUNE LINE IN ZONE 3

A. Retain all Live Oaks, Magnolias, and Palm trees 16" DBH or greater. Lesser size species and other species will be cut to the extent reasonably practicable given existing field conditions.

B. Trees and shrubs 3" DBH and smaller shall be cut at ground level and mulched in place if located outside of wetland or removed if located inside a wetland. Cutting of such material will be by chainsaw or similar device if located inside a wetland.

C. Trees and shrubs removed greater than 3" DBH shall be cut by chainsaw and carried offsite with small non powered equipment.

D. Stumps will remain in place.

E. Vines will be removed as determined by TOSI.

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4.0 TRANSITION ZONE SEAWARD OF SETBACK LINE IN ZONES 1, 2, AND SEAWARD OF DUNE LINE IN ZONE 3

A. No tree or shrub removal proposed.

B. Vegetation will be pruned or trimmed by TOSI after receipt of an arborist opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant material.

C. Vines will be removed as determined by TOSI.

5.0 ZONE 1 OUTSIDE OF TRANSITION ZONE AND LANDWARD OF THE SETBACK LINE

A. Myrtles that are inside Freshwater Wetlands – All myrtles to be trimmed to a minimum height of 3 feet.

B. Myrtles that are outside of Freshwater Wetlands – 50% of myrtles to be cut at the ground. Remaining 50% to be trimmed to 5 feet. TOSI to identify the areas to be cut and retained based on field conditions, aesthetics, habitat, and natural considerations.

C. Trees and shrubs 3" DBH and smaller that are specified for removal shall be cut at ground level and mulched in place outside of wetland areas, and shall be cut at ground level and removed from the site inside wetland areas.

D. Trees specified for removal that are greater than 3" DBH shall be cut at ground level and removed from the site.

E. Retain all Live Oaks, Magnolias and Palmettos. Retain all non-specified tree species if 6" DBH or larger. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.

F. Retain all non-specified tree species if 6" DBH or larger. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.

G. Retain all Cedar, Pine, and Hackberry Trees 12" DBH or greater. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.

H. Remaining plant material will be trimmed or pruned as determined by TOSI after receipt of an arborist's opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant.

I. Vines will be removed as determined by TOSI.

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6.0 ZONE 2 OUTSIDE OF TRANSITION ZONE AND LANDWARD OF SETBACK LINE

A. Myrtles that are inside Freshwater Wetlands - All myrtles shall be trimmed to a minimum height of 3 feet.

B. Myrtles that are outside of Freshwater Wetlands - 50% of myrtles shall be cut at the ground. Remaining 50% shall be trimmed to 5 feet. TOSI to identify the areas to be cut and retained based on field conditions, aesthetics, habitat, and natural considerations.

C. Trees and shrubs 3" DBH and smaller that are specified for removal shall be cut at ground level and mulched in place outside of wetland areas, and shall be cut at ground level and removed from the site inside wetland areas.

D. Trees and shrubs specified for removal that are greater than 3" DBH shall be cut at ground level and removed from the site.

E. Retain all Live Oaks, Magnolias and Palmettos 6" DBH or greater. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.

F. Retain all non-specified tree species if 8" DBH or larger. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.

G. Retain all Cedar, Pine, and Hackberry Trees 16" DBH or greater. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.

H. Remaining plant material will be trimmed or pruned as determined by TOSI after receipt of an arborist's opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant.

I. Vines will be removed as determined by TOSI.

7.0 ZONES 1 AND 2 SEWARD OF SETBACK LINE

A. Myrtles shall be trimmed to a minimum height of 3'.

B. No tree or shrub removal proposed.

C. Vines will be removed as determined by TOSI.

D. Vegetation other than myrtles will be pruned or trimmed by TOSI after receipt of an arborist's opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant material.

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8.0 ZONE 3 OUTSIDE OF TRANSITION ZONE AND LANDWARD OF DUNE LINE

A. Myrtles that are inside Freshwater Wetlands - All myrtles shall be trimmed to a minimum height of 3 feet.

B. Myrtles that are outside of Freshwater Wetlands - 50% of myrtles shall be cut at the ground. Remaining 50% shall be trimmed to 5 feet. TOSI to identify the areas to be cut and retained based on field conditions, aesthetics, habitat, and natural considerations.

C. Retain all Live Oaks, Magnolias and Palmettos 6" DBH or greater. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.

D. Non-specified species 10" DBH or greater shall be retained. Lesser size specimens may be cut at ground level to the extent reasonably practicable given existing field conditions.

E. Retain all Cedar, Pine, and Hackberry Trees 18" DBH or greater. Lesser size specimens may be cut at ground level to the extent reasonably practicable given existing field conditions.

F. Trees and shrubs 3" DBH and smaller shall be cut at ground level and mulched in place outside of freshwater wetland areas, and shall be cut at ground level and removed from the site inside freshwater wetland areas.

G. Remaining plant material will be trimmed or pruned as determined by TOSI after receipt of an arborist's opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant.

H. Vines will be removed as determined by TOSI.

9.0 ZONE 3 SEAWARD OF THE DUNE LINE

A. Myrtles shall be trimmed to a minimum height of 3'.

B. No trees or shrubs to be removed.

C. Vegetation other than myrtles will be trimmed or pruned as determined by TOSI after receipt of an arborist's opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant.

TMW/ala

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	
Town of Sullivan's Island,	)	C/A No. 2022-CP-10-00846
	)	
Plaintiff,	)	**ANSWER TO COMPLAINT AND COUNTERCLAIMS OF NATHAN BLUESTEIN AND THEODORE ALBENESIUS, III**
	)	
Versus	)	
	)	
Nathan Bluestein and Theodore Albenesius, III,	)	**(*Jury Trial Requested*)**
	)	
	)	
Defendants.	)	

The Defendants Nathan Bluestein and Theodore Albenesius, III (hereinafter "Defendants"), by and through their undersigned attorneys, hereby respond to the allegations in the Plaintiff's Complaint, subject to all affirmative defenses and counterclaims, as follows:

1. Each and every allegation of the Complaint not hereinafter specifically admitted is denied and strict proof thereof is demanded. This denial applies to, but is not limited to, introductory statements, headings, and descriptions included within the Complaint.

AS TO INTRODUCTION

2. The unnumbered paragraph in the Complaint, styled as "Introduction" contains a characterization of the Complaint and conclusions of law to which no response is required. To the extent a response to the unnumbered "Introduction" paragraph of the Complaint is required, the Defendants deny the same.

AS TO PARTIES AND JURISDICTION

3. Defendants admit the allegations contained in Paragraph 1 of the Complaint.

4. Responding to the allegations contained in Paragraph 2 of the Complaint, the Defendants admit only that, in general, the Town holds title to certain parcels of real property located on Sullivan's Island, South Carolina and that Sullivan's Island, South Carolina is located

within Charleston County, South Carolina. The Defendants deny any other allegations which may be contained in Paragraph 2 of the Complaint and demand strict proof with respect to the Town's title to any specific parcel of real property within Sullivan's Island, South Carolina, the Defendants crave reference to that specific "real property" which the Plaintiff owns.

5. The Defendants admit the allegations contained in Paragraphs 3 and 4 of the Complaint.

6. Paragraphs 5, 6 and 7 contain conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

AS TO FACTUAL ALLEGATIONS

7. Responding to Paragraph 8 of the Complaint, the Defendants crave reference to the Deed for "certain accreted beachfront property" recorded with the Charleston County Register of Deeds at Book K51, page 271 and deny any inconsistent allegations therewith.

8. Responding to Paragraph 9 of the Complaint, the Defendants crave reference to the Town's Ordinance § 21-39A, as enacted in 1981, and deny any allegation inconsistent therewith.

9. Responding to Paragraph 10 of the Complaint, the Defendants crave reference to the Deed conveying certain property to the Lowcountry Open Land Trust recorded with the Charleston County Register of Deeds at Book K200, page 484 and deny any allegation inconsistent therewith.

10. Responding to Paragraph 11 of the Complaint, the Defendants crave reference to the deed conveying certain property from the Lowcountry Open Land Trust to the Town recorded with the Charleston County Register of Deeds at Book K200, page 496 and deny any allegation inconsistent therewith.

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11. Responding to Paragraph 12 of the Complaint, the Defendants crave reference to the Town's Ordinance § 21-39.1G, as amended in 1995, and deny any allegation inconsistent therewith.

12. Responding to Paragraph 13 of the Complaint, the Defendants crave reference to the Town's Ordinance § 21-71(A) and (C)(3), as amended in 2005, and deny any allegation inconsistent therewith.

13. Responding to Paragraphs 14 and 15 of the Complaint, the Defendants admit only that the Town denied applications for trimming and management of vegetation on the Accreted Land submitted by each Defendant in or around June 2010. Defendants carve reference to the particular document(s) reflecting their separate permit applications and the Town's rejection of the same and deny any allegation in Paragraphs 14 and 15 inconsistent therewith.

14. Responding to Paragraph 16 of the Complaint, these Defendants admit that they and other parties filed the lawsuit styled *Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III and Karen Albenesius v. Town of Sullivan's Island and Sullivan's Island Town Council*, C/A No. 2010-cp-10-05449 on July 8, 2010 in the Charleston County Court of Common Pleas.

15. Responding to Paragraph 17 of the Complaint, the Defendants crave reference to the Order entered by the Charleston County Court of Common Pleas on November 10, 2015 in C/A No. 2010-cp-10-05449, state that this Order speaks for itself, and deny any allegation inconsistent therewith.

16. Responding to Paragraph 18 of the Complaint, the Defendants crave reference to the Order entered by the South Carolina Court of Appeals on August 1, 2018 (Op. No. 5581),

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which has been reported at 424 S.C. 362 and 818 S.E.2d 239, state that this Order speaks for itself, and deny any allegations inconsistent therewith.

17. Responding to Paragraph 19 of the Complaint, the Defendants crave reference to the Order entered by the South Carolina Supreme Court on February 19, 2020 (Op. No. 27947), which has been reported at 429 S.C. 458 and 839 S.E.2d 879, state that this Order speaks for itself, and deny any allegations inconsistent therewith.

18. The Defendants admit the allegations contained in Paragraphs 20 and 21 of the Complaint.

19. Responding to the allegations contained in Paragraph 22 of the Complaint, the Defendants crave reference to the Settlement Agreement executed by the Town and the Defendants on October 7, 2020, and deny any allegation inconsistent therewith.

20. The Defendants deny Paragraph 23 of the Complaint as written.

21. The Defendants admit the allegations contained in Paragraphs 24 and 25 of the Complaint.

22. Responding to Paragraphs 26 and 27 of the Complaint, the allegations contain legal conclusions to which no response is required. To the extent a response is required, the Defendants deny the allegations of Paragraphs 26 and 27 of the Complaint.

AS TO DECLARATORY JUDGMENT SOUGHT

23. Responding to Paragraph 28 of the Complaint, the Defendants repeat and reallege the foregoing paragraphs as if stated herein verbatim.

24. The Defendants deny the allegations of Paragraph 29 of the Complaint.

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AS TO THE PRAYER FOR RELIEF

25. Responding to the unnumbered WHEREFORE Paragraph of the Complaint, the Defendants deny that the October 7, 2020 Settlement Agreement, as approved by this Court and as amended on April 12, 2021 with such amendment also approved by this Court, is unenforceable, deny that Plaintiff is entitled to the declaratory relief requested, and deny that Plaintiff is entitled to any other relief.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANTS ALLEGE:
(Failure to Join Indispensable Parties)

26. Plaintiff has failed to join parties indispensable to this matter as required by Rule 19, SCRCP and, consequently, this matter should be dismissed pursuant to Rule 12(b)(7), SCRCP.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANTS ALLEGE:
(Failure to Join All Parties With Interest Which May Be Affected By Proceeding)

27. Plaintiff has failed to join all parties who may have an interest which would be affected by the outcome of Plaintiff's claim as required by S.C. Code § 15-53-80.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANTS ALLEGE:
(Condonation)

28. Plaintiff decision (1) to enter into the October 7, 2020 Settlement Agreement, (2) to seek Court approval of the same, (3) to enter into the April 12, 2021 amendment to the Settlement Agreement and (4) to seek Court approval of the same causes the present action to be barred by the doctrine of condonation.

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FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANTS ALLEGE:
(Release, Accord and Satisfaction)

29. The Settlement Agreement between the Plaintiff and the Defendants was finalized and approved by this Court on October 15, 2020 and April 12, 2021 and contains a mutual release. As such, the Parties have released all claims such as the one this Plaintiff now requests.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANTS ALLEGE:
(Waiver)

30. At the time Plaintiff entered the Settlement Agreement it now seeks to circumvent, it had knowledge of the legally binding nature of such an agreement, of the legally binding nature of the Court's orders approving the same, and that it was releasing its rights under the same. The Plaintiff has consequently waived its right to now assert the Settlement Agreement is not legally binding and it is not required to fulfill its legal obligations under the agreement.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANTS ALLEGE:
(Estoppel)

31. In entering into the Settlement Agreement, the Defendants detrimentally relied on Plaintiff's affirmative representations, including but not limited to (1) that Plaintiff had the authority to enter the Settlement Agreement, (2) that Plaintiff agreed to be bound by the same, (3) that the Town warranted that it would in good faith to faithfully execute its obligations undertaken in the Settlement Agreement, and (4) that time is of the essence in performing the obligations undertaken therein. The Defendants forbore further pursuit of the relief requested in their original suit against the Town, C/A No. 2010-cp-20-05449 in reliance on the Town's promise to perform the actions agreed upon in the Settlement Agreement, to their detriment. Consequently, the Town should be estopped from reneging on performing the actions it has agreed to do.

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FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANTS ALLEGE:
(Unclean Hands)

32. The Plaintiff has no right to the relief sought in its Complaint because it comes to this Court with unclean hands.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:
(Fraud and Misrepresentation)

33. In the event that the Settlement Agreement this Court approved was entered into by the Plaintiff with improper authority, Plaintiff, its representatives, employees, or agents falsely represented to these Defendants that they had the legal authority to enter into the court-approved Settlement Agreement and intended that their false representation be relied upon. Such a representation was salient and material in that these Defendants would not have entered the Settlement Agreement, thereby releasing their rights, if they had known the Plaintiff, its representatives, employees, or agents did not have the authority to enter the same. These Defendants relied on the Plaintiff's representations and had a right for such reliance provided that the Plaintiff evinced their representatives, employees, or agents as having such authority to enter the Settlement Agreement. Notably, the contentions and relief sought now by the Plaintiff suggest that the Plaintiff executed such Settlement Agreement without initiating "further review" of its rights and authority to enter prior to. As a result of these Defendants' ingenuous reliance on Plaintiff's fraudulent misrepresentations, these Defendants have suffered injuries as set forth more fully below.

FURTHER ANSWERING AND BY WAY OF COUNTERCLAIMS, THE DEFENDANTS ALLEGE:

34. The lawsuit styled *Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III and Karen Albenesius v. Town of Sullivan's Island and Sullivan's Island Town*

Council, C/A No. 2010-cp-10-05449 was filed on July 8, 2010 in the Charleston County Court of Common Pleas.

35. After the conclusion of an appeal of a summary judgment order, Nathan Bluestein and Theodore Albenesius (the remaining Plaintiffs in C/A No. 2010-cp-10-05449) and the Town of Sullivan's Island reached an agreement to resolve the claims raised in C/A No. 2010-cp-10-05449.

36. A properly noticed Special Meeting of Town Council for the Town of Sullivan's Island was held on October 2, 2020 for the purpose of reviewing the terms of the agreement to resolved the claims raised in C/A No. 2010-cp-10-05449.

37. At the October 2, 2020 Special Meeting, the Town Council for the Town of Sullivan's Island passed a resolution approving of the settlement. This resolution made certain findings of fact, authorized the settlement of C/A No. 2010-cp-10-05449 under the terms negotiated by the parties and authorized the Town's staff to take all necessary and appropriate steps to effectuate the settlement.

38. Pursuant to the October 2, 2020 Resolution, the Town executed the Settlement Agreement and Release on October 7, 2020 to resolve the claims raised in C/A No. 2010-cp-10-05449. This Settlement Agreement and Release was approved by the Charleston County Court of Common Pleas on October 15, 2020. A copy of the Settlement Agreement and Release and the Court's Order approving the same was attached as Exhibit A to the Town's present Complaint and are incorporated herein by reference.

39. The scope of work proscribed by the Settlement Agreement includes trimming and vegetation management within the Accreted Land both on the landward and the seaward sides of

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the applicable setback line identified by the South Carolina Department of Health and Environmental Control ("SCDHEC") within the Accreted Land.

40. For work to be performed on the seaward side of SCDHEC's setback line, the Town was required to obtain a permit or permission from SCDHEC before starting its agreed-upon work as identified by the Settlement Agreement and Release.

41. However, no permit or permission from SCDHEC is required for the Town's agreed-upon work for areas within the Accreted Land falling on the landward side of, or behind, SCDHEC's setback line.

42. On April 12, 2021, the Charleston County Court of Common Pleas entered an Order Amending the October 15, 2020 Settlement Agreement and Release. A copy of the Court's Order approving the amendment was attached as Exhibit B to the Town's present Complaint and is incorporated herein by reference.

43. Since the execution of the Settlement Agreement and Release and its April 2021 amendment, the Defendants in the present action and other property owners on Sullivan's Island have worked diligently to prepare to fund the scope of work contemplated by the Settlement Agreement and Release. Various property owners, including the Defendants in the present action, have and continue to be ready, willing and able to contribute to the management of the Accreted Land as contemplated by the Settlement Agreement and Release and its April 2021 amendment.

44. The Settlement Agreement and Release, as amended, contemplates that the Town would perform the agreed-upon trimming work throughout the Accreted Land between November 1, 2021 and February 28, 2022.

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45. Despite the representations, findings and statements made by the Town, the Town has failed to take all necessary and appropriate steps to fulfill its obligations under the Settlement Agreement and Release.

46. In fact, the Town has actively sought to thwart, avoid, or delay the performance of its obligations under the Settlement Agreement in numerous ways, including, but not limited to:

a. Failing to procure the necessary permits and/or approvals, where required, to perform the agreed-upon scope of work proscribed in the Settlement Agreement and Release, as amended;

b. Failing to perform the agreed-upon scope of work proscribed in the Settlement Agreement and Release, as amended, for those areas within the Accreted Land which fall on the landward side of SCDHEC's setback line;

c. Failing to respond timely and fully to requests for information from regulatory agencies relating to the agreed-upon work;

d. Failing to procure or provide estimated costs for the agreed-upon scope of work on a block-by-block basis to property owners, as required by the Settlement Agreement and Release, as amended;

e. Failing to perform any of the agreed-upon work;

f. Preparing for and providing media notice of, but failing to provide public notice of, a presentation against performance of the Settlement Agreement and Release during a regularly scheduled meeting of Town Council on September 21, 2021;

g. Holding a Special Meeting regarding a "Public Request for Clarification of Mediated Settlement" regarding C/A No. 2010-cp-10-05449 on September 29, 2021 but providing no opportunity for further public comment at the same;

h. Holding a Special Meeting regarding the Town's obligations associated with the Settlement Agreement and Release in C/A No. 2010-cp-10-05449 on October 12, 2021 but providing no opportunity for further public comment at the same;

i. Retaining additional counsel to justify the Town's plan to breach the Settlement Agreement and Release in C/A No. 2010-cp-10-05449; and

j. Filing the present lawsuit.

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FOR A FIRST COUNTERCLAIM
(Breach of Contract)

47. Defendants repeat and reallege the foregoing paragraphs as if restated herein verbatim.

48. The Settlement Agreement and Release, as amended, is a binding contract between Defendants and Plaintiff.

49. Plaintiff has breached the same by failing to perform the duties and obligations undertaken under the Settlement Agreement and Release including, but not limited to:

a. Failing to procure the necessary permits and/or approvals, where required, to perform the agreed-upon scope of work proscribed in the Settlement Agreement and Release, as amended;

b. Failing to timely respond to inquiries and/or requests for information from SCDHEC relating to the agreed-upon work outlined in the Settlement Agreement and Release;

c. Failing to fully respond to inquiries and/or requests for information from SCDHEC, when the same were made;

d. Failing to perform its agreed-upon work within the portion of the Accreted Land for which no permit is required, including but not limited to the portion of the Accreted Land falling on the landward side, or behind, SCDHEC's setback line;

e. Failing to procure or provide estimated costs for the agreed-upon scope of work on a block-by-block basis to property owners, as required by the Settlement Agreement and Release, as amended; and

f. Refusing to perform any of the agreed-upon activities for management of the vegetation in the Accreted Land as described in the Settlement Agreement and Release, as amended.

50. Defendants have been damaged, and will continue to be damaged to increasing degrees, by Plaintiff's breach of the Settlement Agreement and Release in amounts including, but not limited to, actual damages, consequential damages, special damages, loss or diminution of property value, and other damages to be proven at trial.

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FOR A FOURTH COUNTERCLAIM
(Specific Performance)

51. The Defendants repeat and reallege the foregoing paragraphs as if restated herein verbatim.

52. The parties entered into a binding contract – namely, the Settlement Agreement and Release executed in October 2020 and amended in April 2021.

53. The Defendants, in good faith and with the full knowledge and approval of the Town, executed the Settlement Agreement and Release.

54. The Defendants have, in the Settlement Agreement and Release, released the claims they raised in C/A No. 2020-cp-10-05499 and have at all times remained ready, willing and able to perform each of the ministerial or administrative tasks left to them under the terms of the Settlement Agreement and Release as soon as the Town furnished the requisite block-specific quotations for the agreed-upon vegetation management plan.

55. Despite this agreement and the Defendants' faithful performance or ready ability and willingness to fulfill all obligations undertaken under the same, the Town has failed to perform the actions it undertook in the Settlement Agreement and Release, has failed to take the steps necessary to provide the final information needed for the Defendants and other property owners to furnish the funds necessary to pay for the agreed-upon vegetation management in the Accreted Land adjacent to their properties, has failed to take all necessary or appropriate steps to secure the proper permitting or permission for such work, where required, and has failed to also take the agreed-upon action in areas throughout the Accreted Land for which no permitting is required.

56. The Defendants are therefore entitled to specific performance of the obligations undertaken by the Town in the Settlement Agreement and Release.

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FOR A FIFTH COUNTERCLAIM
(Promissory Estoppel)

57. Defendants repeat and reallege the foregoing paragraphs as if restated herein verbatim.

58. The Settlement Agreement and Release, as amended, is unambiguous in its terms including, but not limited to, the fact that it is an agreement made to resolve the disputed claims raised in C/A No. 2010-cp-10-05449, its obligations thereunder, and the performance of the same.

59. Defendants, in entering into the Settlement Agreement and Release, reasonably relied on the promises made by the Town both within the Settlement Agreement and Release and to induce them to enter into the same including, but not limited to, the Town's promise that time is of the essence, that the Town would procure the appropriate permitting or permission where required and furnish appropriate contractors and quotes for the agreed-upon work within the Accreted Land, and the Town's representations that it had considered the possible results of failing to enter into the Settlement Agreement and Release, among others.

60. Defendants' reliance on the Town's promises was objectively foreseeable.

61. As a result of Defendants' reliance on the Town's promises within and relating to the Settlement Agreement and Release and in exchange for all of the promises, warranties, averments, representations, and undertakings therein, Defendants executed the Settlement Agreement and Release, have been eagerly awaiting the Town's performance of its obligations under the same, and have refrained from further pursuing the claims raise in C/A No. 2010-cp-10-05449 up to and including at trial.

62. Defendants' forbearance in pursuing their original claims, in their good faith reliance on the agreement memorialized in the Settlement Agreement and Release, has caused them damage associated with the time lost in pursuing these claims when it now appears that the

Town does not, and may never have, intended to perform the actions it agreed to in the Settlement Agreement and Release.

63. Further, Defendants' reliance on the Town's promises, warranties, averments representations and undertakings in the Settlement Agreement and Release has caused them damage in that they have executed a release for illusory consideration.

WHEREFORE, Defendants pray that the Town's declaratory relief be denied, that Defendants' be awarded all appropriate relief as requested in their counterclaims, including actual, consequential, special and punitive damages, and for any further relief as the Court deems just and proper.

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April 13, 2022
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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS
TOWN OF SULLIVAN'S ISLAND, Plaintiff, vs. NATHAN BLUESTEIN and THEODORE ALBENESIUS, III, Defendants.	Case No. 2022-CP-10-00846 **REPLY TO COUNTERCLAIMS**

Plaintiff Town of Sullivan's Island ("Town" or "Town Council"), by and through its undersigned counsel, replies to the Counterclaims of Defendants Nathan Bluestein and Theodore Albenesius, III (together, "Defendants") as follows:

FOR A FIRST DEFENSE
(Denial)

1. Each and every allegation contained in Defendants' Answer and Counterclaims not hereinafter specifically admitted is denied.

2. Paragraphs 1 through 33 of Defendants' Answer and Counterclaims contain responses and affirmative defenses to the Complaint, such that no response is required. To the extent a response is required, such allegations are denied.

3. Answering the allegations of Paragraph 34, the Town specifically refers to the lawsuit captioned *Bluestein, et al. v. Town of Sullivan's Island, et al.*, bearing case number 2010-cp-10-05449, filed on July 8, 2010 in the Charleston County Court of Common Pleas (the "Underlying Action"), which documents speak for themselves, and denies all allegations inconsistent with it.

4. Answering the allegations of Paragraph 35, the Town specifically refers to the settlement agreement dated October 7, 2020 (as amended, the "Settlement Agreement") between a prior council of the Town ("prior counsel") and Defendants, which speaks for itself, and denies all allegations inconsistent with it.

5. Answering the allegations of Paragraph 36, the Town specifically refers to the agenda and/or minutes from the Town Council Special Meeting held on October 2, 2020, which speak for themselves, and denies all allegations inconsistent with it.

6. Answering the allegations of Paragraph 37, the Town specifically refers to the Resolution dated October 2, 2020, which speaks for itself, and denies all allegations inconsistent with it.

7. Answering the allegations of Paragraph 38, the Town specifically refers to the Settlement Agreement and to the consent order entered by the Circuit Court approving the Settlement Agreement in the Underlying Action, attached to the Complaint as "Exhibit A," which speak for themselves, and denies all allegations inconsistent with it.

8. Answering the allegations of Paragraphs 39, 40 and 41, the Town specifically refers to the Settlement Agreement, which speaks for itself, and denies all allegations inconsistent with it.

9. Answering the allegations of Paragraph 42, the Town specifically refers to the order entered by the Circuit Court amending the Settlement Agreement, attached to the Complaint herein as "Exhibit B," which speaks for itself, and denies all allegations inconsistent with it.

10. The Town lacks sufficient information to form a belief as to the truth of the allegations contained in Paragraph 43 and, therefore, denies the same.

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11. Answering the allegations of Paragraph 44, the Town specifically refers to the Settlement Agreement, which speaks for itself, and denies all allegations inconsistent with it.

12. The Town denies the allegations of Paragraphs 45 and 46, and each of their subparts, and avers, upon information and belief, that the Settlement Agreement is invalid and unenforceable because its provisions improperly restrict the legislative/governmental powers of the Town Council, improperly divest it of its legislative/governmental powers, and improperly restrict its proprietary functions.

AS TO THE FIRST COUNTERCLAIM
(Breach of Contract)

13. Responding to Paragraph 47, the Town repeats and restates its answers to Paragraphs 1 through 46.

14. The Town denies the allegations of Paragraphs 48, 49 and 50, and each of their subparts, and avers, upon information and belief, that the Settlement Agreement is invalid and unenforceable because its provisions improperly restrict the legislative/governmental powers of the Town Council, improperly divest it of its legislative/governmental powers, and improperly restrict its proprietary functions.

AS TO THE SECOND COUNTERCLAIM[1]
(Specific Performance)

15. Responding to Paragraph 51, the Town repeats and restates its answers to Paragraphs 1 through 50.

[1] The heading in Defendants' Answer and Counterclaims incorrectly labels their cause of action for specific performance as their "Fourth Counterclaim." However, such cause of action is the second counterclaim alleged by Defendants.

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16. The Town denies the allegations of Paragraph 52 and avers, upon information and belief, that the Settlement Agreement is invalid and unenforceable because its provisions improperly restrict the legislative/governmental powers of the Town Council, improperly divest it of its legislative/governmental powers, and improperly restrict its proprietary functions.

17. Answering the allegations of Paragraph 53, the Town admits only that the Settlement Agreement was entered into by a prior counsel and Defendants, but avers, upon information and belief, that the Settlement Agreement is invalid and unenforceable because its provisions improperly restrict the legislative/governmental powers of the Town Council, improperly divest it of its legislative/governmental powers, and improperly restrict its proprietary functions. The Town lacks sufficient information to form a belief as to the truth of the remaining allegations contained in Paragraph 53 and, therefore, denies the same.

18. The allegations of Paragraph 54 contain legal conclusions to which no response is required. To the extent a response is required, the Town denies such allegations. The Town lacks sufficient information to form a belief as to the truth of any averments of fact contained in Paragraph 54 and, therefore, denies the same.

19. The Town denies the allegations of Paragraph 55 and avers, upon information and belief, that the Settlement Agreement is invalid and unenforceable because its provisions improperly restrict the legislative/governmental powers of the Town Council, improperly divest it of its legislative/governmental powers, and improperly restrict its proprietary functions.

20. The Town denies the allegations of Paragraph 56.

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AS TO THE THIRD COUNTERCLAIM[2]
(Promissory Estoppel)

21. Responding to Paragraph 57, the Town repeats and restates its answers to Paragraphs 1 through 56.

22. The allegations of Paragraph 58 are legal conclusions to which no response is required. To the extent a response is required, the Town admits only that the Settlement Agreement was entered into by a prior counsel and Defendants, but avers, upon information and belief, that the Settlement Agreement is invalid and unenforceable because its provisions improperly restrict the legislative/governmental powers of the Town Council, improperly divest it of its legislative/governmental powers, and improperly restrict its proprietary functions.

23. The allegations of Paragraphs 59 and 60 are legal conclusions to which no response is required. To the extent a response is required, the Town lacks sufficient information to form a belief as to the truth of any averments of fact contained in Paragraph 59 and, therefore, denies the same.

24. Answering the allegations of Paragraph 61, the Town admits only that the Settlement Agreement was entered into by a prior counsel and Defendants. The Town lacks sufficient information to form a belief as to the truth of the remaining allegations contained in Paragraph 61 and, therefore, denies the same.

25. The Town denies the allegations of Paragraphs 62 and 63.

26. The Town denies, to the extent required, any averments of fact contained in the prayer for relief.

[2] The heading in Defendants' Answer and Counterclaims incorrectly labels their cause of action for promissory estoppel as their "Fifth Counterclaim." However, such cause of action is the third counterclaim alleged by Defendants.

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FOR A SECOND DEFENSE
(Unenforceable Contract)

27. The Settlement Agreement is, upon information and belief, invalid and unenforceable because its provisions improperly restrict the legislative/governmental powers of the Town Council, improperly divest it of its legislative/governmental powers, and improperly restrict its proprietary functions.

FOR A THIRD DEFENSE
(Nonperformance Excused)

28. Performance by the Town pursuant to the Settlement Agreement is, upon information and belief, rendered invalid and unenforceable by law such that any nonperformance by the Town is excused.

FOR A FOURTH DEFENSE
(Failure of Condition Precedent)

29. Implementation of the Settlement Agreement is expressly conditioned upon its compliance with law, the failure of which excuses any nonperformance by the Town.

FOR A FIFTH DEFENSE
(Mistake)

30. The Settlement Agreement is invalid and unenforceable because, upon information and belief, prior counsel and Defendants were mistaken about the Town's ability and/or obligation to perform under it.

FOR A SIXTH DEFENSE
(No Damage to Defendants)

31. Even if Defendants other allegations are true, which is denied, Defendants did not suffer any damages or economic loss.

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FOR A SEVENTH DEFENSE
(Unavailability of Punitive Damages)

32. Punitive damages are not available to Defendants because the Town is immune from punitive damages. *See Washington v. Whitaker*, 317 S.C. 108, 114, 451 S.E.2d 894, 898 (1994) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 248 (1981) (holding that a municipality is immune from punitive damages)). Nor have Defendants pled any facts which, if proven, would entitle them to such an award. Furthermore, an award of punitive damages would violate the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and Article 1, Section 3 of the South Carolina Constitution.

FOR AN EIGHTH DEFENSE
(Reservation of Right to Add Defenses)

33. The Town reserves the right to allege additional defenses and additional facts and circumstances in support of its defenses as the facts become available.

WHEREFORE, having fully answered the Counterclaims of Defendants, the Town prays that the Counterclaims be denied and that judgment be granted in favor of the Town and against Defendants for the relief requested in the Complaint.

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS
TOWN OF SULLIVAN'S ISLAND, Plaintiff, vs. NATHAN BLUESTEIN and THEODORE ALBENESIUS, III, Defendants.	Case No. 2022-CP-10-00846 **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WITH SUPPORTING MEMORANDUM OF LAW AND MOTION FOR STAY OF DISCOVERY**

Plaintiff Town of Sullivan's Island ("Town" or "Town Council"), by and through its undersigned counsel and pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, hereby moves this Honorable Court for an Order granting summary judgment in favor of the Town and against Defendants Nathan Bluestein and Theodore Albenesius, III (together, "Defendants"). The grounds for this Motion are that there is no genuine dispute of material fact, such that summary judgment should be granted as a matter of law.

INTRODUCTION

This action concerns the validity and/or enforceability of a settlement agreement, as amended (the "Settlement Agreement"), between Defendants and a prior town council of Sullivan's Island with respect to certain accreted beachfront property (the "Accreted Land") owned by the Town. The Settlement Agreement imposes ongoing obligations on the Town in perpetuity regarding use and maintenance of the Accreted Land. The Settlement Agreement is invalid and unenforceable because it restricts, limits, and indeed prohibits the exercise of the legislative

functions or governmental powers ("legislative/governmental powers")[1] of the Town and purports to bind future town councils in the exercise of these powers. Moreover, even if the Settlement Agreement could be said to involve only the proprietary/business functions of the Town, it would nonetheless be invalid and unenforceable because the perpetual nature of the agreement is unreasonable as a matter of law.

Even though the pleadings have been recently filed, this litigation is nonetheless ripe for summary judgment. The pleadings demonstrate that the Settlement Agreement standing alone governs the dispute, that it is unambiguous in its terms, that it presents no questions of material fact, and resolution presents ***solely*** matters of law. Moreover, a determination that the Settlement Agreement is invalid and unenforceable is dispositive of all claims in the case, including Defendants' counterclaims. Accordingly, a ruling on this threshold and dispositive issue is proper, without the need for unnecessary discovery or delay, and will best serve the interests of justice and judicial economy, as well as those of the parties and the public.

STATEMENT OF UNDISPUTED FACTS

The Accreted Land

The Town is the fee simple owner of the Accreted Land located along the Atlantic Ocean on Sullivan's Island in Charleston County, South Carolina. It obtained fee simple ownership of the Accreted Land in 1949 by deed from the War Assets Administration of the United States.[2]

In 1981, the Town passed a zoning ordinance restricting use of the Accreted Land. The ordinance states, in pertinent part:

> There shall be no construction of any type, no destruction of vegetation

[1] Throughout the relevant case law the words "powers" and "functions" are used interchangeably.
[2] This deed is recorded in the Register of Deeds Office for Charleston County in Book K51 at pages 271-286.

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> (except trimming, cutting and pruning of bushes and trees as provided in this section), and no man-made changes of topography in [the] area. The Town Council ***may*** establish a program pursuant to which citizens ***may*** apply to the Town for permission to prune, trim and cut bushes and trees in the … area as follows … (5) in those areas where the height of trees or bushes are deemed objectionable, the trees or bushes may be pruned to a height of no less than three (3) feet, provided that the cumulative effect of the trimming, cutting or pruning shall not be detrimental to the safety, welfare, and health of the people of the Town.

§ 21-39A, Town Code of Ordinances.

On February 12, 1991, the Town executed a deed conveying the Accreted Land to the Lowcountry Open Land Trust ("LOLT").[3] Subsequently, on that same day, LOLT executed a deed conveying the Accreted Land back to the Town, subject to certain terms, conditions, restrictions, and covenants.[4] A copy of the deed, which is a recorded public document, is attached as Exhibit "A." It provides, in pertinent part:

> 1. Except as otherwise provided or permitted in Paragraphs 2 and 3 hereof, the Property shall remain in its natural state, no changes shall be made to its topography or vegetation and no structures or improvements shall be erected on the Property.
>
> 2. Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of Paragraph 4, the Town Council is given ***the unrestricted authority to*** trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean and providing views of the ocean and beaches to its citizens.
>
> 3. Notwithstanding the provisions of Paragraph 1 hereof, and subject to the limitations of this Paragraph 3 and of Paragraphs 2 and 4, the Town Council of Sullivan's Island (the "Council") shall have ***the right to*** improve, change, modify or alter the Property only if such actions are to further or effect one or more of the following enumerated public objectives or policies ("Public Policies"):

[3] This deed is recorded in the Register of Deeds Office for Charleston County in Book K200 at pages 484-495.
[4] This deed is recorded in the Register of Deeds Office for Charleston County in Book K200 at pages 496-510.

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a) Drainage
b) Mosquito control
c) Public walkways and emergency access to the Atlantic Ocean
d) Beach renourishment
e) Erosion control
f) Vegetation management
g) Educational programs
h) Public safety
i) Public health; and
j) Scenic enhancement.

Prior to taking any action affecting the Property to further or effect a Public Policy ("Public Action"), the Council shall make specific written findings of fact;

1) that the proposed Public Action is proposed solely for the purpose of furthering or effecting one or more of the enumerated Public Policies,

2) that the proposed Public Action is necessary for the health, safety or general welfare of the Town,

3) that the benefits of the proposed Public Action outweigh the damage done to the aesthetic, ecological, scientific, or educational value of the Property in its natural state, and

4) that in making its findings of fact, the Council has given due and reasonable consideration to

   i) the cumulative effect of the proposed Public Action and past Public Actions on the natural state of the Property,

   ii) the alternative methods, if any, of furthering or effecting the proposed Public Policy which do not impact adversely on the natural state of the Property, and

   iii) the probable results of not taking the proposed Public Action.

The above described written findings of fact must be made prior to each individual Public Action relating to the Property and shall be specific to the circumstances of the proposed Public Action and not merely conclusive in nature.

. . . .

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> During the term of these restrictions, the Town shall cause to remain in effect an ordinance of the Town making it a violation of law for any person to violate the provisions of these Restrictions, as such Restrictions may be modified pursuant to Paragraph 8 hereof.[5] The Town may enact ordinances and regulations affecting the Property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions.

In 1995 the Town amended the 1981 zoning ordinance to provide, in pertinent part, that "vegetation may be trimmed and pruned so as to have a maximum height of no less than seven feet (7') above the ground." § 21-39.1G, Town Code of Ordinances. In 2005, the Town amended the zoning ordinance again to provide, as it does to this day, that "vegetation may be trimmed and pruned so as to have a maximum height of no less than five (5) feet above the ground." § 21-71(C)(3), Town Code of Ordinances. A copy of the cited sections of the 2005 zoning ordinance, § 21-71(A)-(C), which is a public record, is attached as Exhibit "B." The ordinance further provides:

> **A. No construction or removal of vegetation.**
>
> There shall be no . . . destruction or removal of vegetation by any means except trimming and pruning of shrubs and trees as provided in this Ordinance. . . .
>
> . . . .
>
> **C. Permit for trimming and pruning of vegetation.**
>
> . . . .
>
> (3) The only vegetation that may be trimmed and pruned . . . is limited to the following: Southern Waxmyrtle (Myrica Cerifera), Eastern Baccharis (Baccharis Halimifolia), and Popcorn trees (Tallowtree, Sapium

[5] Paragraph 8 provides that the Restrictions may be amended by "an affirmative vote of both (a) seventy-five (75%) percent of the registered voters of the Town who vote in the referendum held pursuant to the terms hereof, and (b) one hundred (100%) percent of the members of Town Council." Ex. A.

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Sebiferum).

The Underlying Action

Defendants own property on Sullivan's Island. In June 2010, the Defendants separately applied to the Town for a permit to trim and prune ocean adjacent property to a height of no less than three (3) feet. Copies of the permit applications, which were attached as exhibits to Defendants' Second Amended Complaint in the Underlying Action, are attached as Exhibit "C." The Town denied Defendants' permit applications, as failing to meet the requirements of Section 21-71(C) of the Town Code of Ordinances. Copies of the permit denials, which were attached as exhibits to Defendants' Second Amended Complaint in the Underlying Action, are attached as Exhibit "D."

On July 8, 2010, Defendants filed a lawsuit against the Town in the Court of Common Pleas, Charleston County, captioned *Bluestein, et al. v. Town of Sullivan's Island, et al.* and bearing case number 2010-CP-10-05449 (the "Underlying Action").[6] The Master in Equity granted summary judgment in the Underlying Action on November 10, 2015 in favor of the Town and against Defendants. On August 1, 2018, the South Carolina Court of Appeals affirmed the grant of summary judgment in the Underlying Action. *Bluestein v. Town of Sullivan's Island*, 424 S.C. 362, 818 S.E.2d 239 (Ct. App. 2018). On February 19, 2020, the South Carolina Supreme Court reversed the grant of summary judgment in the Underlying Action on grounds that genuine issues of material fact exist as to the maintenance responsibilities of the Town toward the Accreted Land

[6] The plaintiffs in the Underlying Action included the Defendants in this action, as well as Ettaleah Bluestein and Karen Albenesius. The defendants named in the Underlying Action included the Town, as well as Sullivan's Island Town Council.

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and remanded to the Court of Common Pleas for further proceedings. *Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 839 S.E.2d 879 (2020).

The Settlement Agreement

Thereafter, on October 7, 2020, the parties entered into the Settlement Agreement and sought its approval from the Court of Common Pleas.[7] The circuit court entered a consent order approving the Settlement Agreement in the Underlying Action on October 15, 2020. (Compl. at Ex. A.) The Settlement Agreement provides, in part:

> **II. <u>Findings of Fact:</u>**
>
> a. The settlement, and implementing steps associated therewith, are solely undertaken to further specifical [sic] enumerated, permissible public purposes under the Deed. In this instance, the Town Council believes that thinning of vegetation will serve the interests of improved mosquito control, improved vegetation management, enhanced public safety, improved public health, and scenic enhancement.
>
> . . . .
>
> b. The settlement, and implementing steps associated therewith, are necessary for the health, safety and general welfare of the Town.
>
> . . . .
>
> **III. Settlement of this litigation is agreed to on terms stated below:**
>
> **<u>General Approach</u>:**
>
> - The Town would implement selective thinning of the Accreted Land (AL), based on initial cut parameters set forth below for each of the four Zones (Transition Zone, Zone 1, Zone 2, and Zone 3.) In order to maintain similar conditions going forward, with the help of a naturalist

[7] As stated in the Settlement Agreement, as of October 7, 2020, Ettaleah Bluestein and Karen Albenesius were no longer participating plaintiffs in the Underlying Action and, thus, were not parties to the Settlement Agreement. Additionally, and as a matter of public record, a new Town Council and Mayor were elected on May 4, 2021, and, thus, the parties to the Settlement Agreement are the Defendants and a ***prior*** town council.

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the Town would review changes in the condition of the AL on a recurring basis (for instance, once every five years) with an eye towards making whatever changes might be necessary to maintain appropriate levels of density and diversity. This would provide a mechanism to deal with natural attrition, growth, or other changes to the natural environment. Primary funding for transition zone work will be from the Town. Funding for work in Zones 1-3 is subject to receipt of adequate donations or grants.

. . . .

Compliance with Law required:

Implementation is subject to compliance with law.

. . . .

VI. Binding:

This Settlement Agreement shall be binding upon and inure to the benefit of all the Parties, and their heirs, successors and assigns.

. . . .

VIII. Miscellaneous Provisions:

. . . .

b) Acknowledgements. Each Party acknowledges and agrees that . . . this Settlement Agreement is a legally binding contract with which the Partis [sic] will faithfully comply. Each individual signing this Settlement Agreement on behalf of one of the Parties to this Agreement has the authority to execute this Settlement Agreement and bind the entity or person on whose behalf this Settlement Agreement is executed.

. . . .

f) Modification. This Agreement may not be modified or amended, nor may any of its provisions be waived, except upon mutual agreement of all Parties or their authorized agents in writing.

The Underlying Action was disposed of and ended on October 15, 2020. A copy of the case details in the Underlying Action, a court document, is attached as Exhibit "E." On April 6,

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2021, the parties in the Underlying Action sought approval from the circuit court of an amendment to the Settlement Agreement to address anticipated third-party regulatory concerns.[8] On April 12, 2021, the circuit court entered an order in the Underlying Action amending its prior consent order and amending the Settlement Agreement. (Compl. at Ex. B.)

PROCEDURAL POSTURE

On May 4, 2021 a new Town Council and Mayor were elected. The Town subsequently filed this action against Defendants on February 21, 2022 seeking a declaratory judgment that the Settlement Agreement is invalid and unenforceable. Defendants answered the Complaint on April 13, 2022, and brought counterclaims against the Town for breach of contract, specific performance, and promissory estoppel. On May 10, 2022, Defendants served their First Interrogatories and First Requests for Production on the Town. The Town replied to Defendants' counterclaims on May 13, 2022.

LEGAL STANDARD

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). The South Carolina Rules of Civil Procedure require that summary judgment be granted if "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. Under South Carolina law, where "plain, palpable and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving

[8] The amendment did not materially modify the provisions of the Settlement Agreement, except to add that "[t]he Town shall not unreasonably withhold consent to a proposed modification so long as the proposed modification would not result in cutting/trimming/pruning that is more aggressive than that detailed on the subject in the Settlement Agreement and Order originally executed in this case."

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party is proper. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976). Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, "this initial responsibility may be discharged by showing – that is, pointing out to the trial court – that there is an absence of evidence to support the nonmoving party's case." *Baughman v. American Telephone and Telegraph Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once the moving party meets this initial burden, "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." *Grimsley v. S.C. Law Enf't Div.*, 415 S.C. 33, 42, 780 S.E.2d 897, 901 (2015) (citation and internal quotations omitted). "Only disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment." *Langley v. Lynch*, No. 2017-UP-226, 2017 WL 4621154, at *3 (S.C. Ct. App. May 24, 2017) (citation omitted).

ARGUMENT AND CITATION OF AUTHORITY[9]

There is no genuine issue of material fact with respect to the Town's claim for declaratory judgment. There is no dispute as to the authenticity of the Settlement Agreement, which the parties agree is unambiguous,[10] and a determination as to its validity and enforceability presents solely questions of law that should be resolved by the Court. Moreover, a determination that the Settlement Agreement is invalid and unenforceable is dispositive, not only of the Town's claim for declaratory judgment, but also of Defendants' counterclaims, such that the Court can, and should, rule on this issue without any need for the parties to engage in unnecessary discovery.

[9] Any factual statements contained in the Argument and Citation of Authority are incorporated into and deemed to be Statements of Undisputed Facts.
[10] *See* Answer ¶ 58 ("[t]he Settlement Agreement . . . is unambiguous in its terms").

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Even though the pleadings have been recently filed, there are no facts, relevant documents, or information not already before the Court which could impact the Court's determination of this purely legal issue.

As set forth below, the Settlement Agreement is invalid and unenforceable as a matter of law because it involves the legislative/governmental powers of the Town and purports to bind the current and future town councils. However, even if the Settlement Agreement involves only proprietary/business functions—which, for the reasons set forth below, it does not—it is still invalid and unenforceable because the perpetual duration of the Settlement Agreement is unreasonable as a matter of law. Accordingly, the Town is entitled to a declaratory judgment that the Settlement Agreement is invalid and unenforceable, and discovery should be stayed as unnecessary.

A. **The Settlement Agreement is Invalid and Unenforceable Because It Involves the Legislative/Governmental Powers of the Town and Purports to Bind the Current and Future Town Councils.**

South Carolina courts have found to be invalid many different kinds of contracts binding successor governing bodies. "When a municipal contract extends beyond the term of the governing members of the municipality entering into the contract the subject matter of the contract will determine its validity." *City of Beaufort v. Beaufort-Jasper County Water and Sewer Authority*, 325 S.C. 174, 178, 480 S.E.2d 728, 731 (1997). The general rule is that "if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils."[11] *Piedmont Pub. Serv. Dist. v. Cowart*,

[11] While "there is an exception to the rule that contracts involving a governmental function may not bind successor boards when enabling legislation *clearly authorizes* the local governing body to make a contract extending beyond its members' own terms," no such enabling legislation has been found to exist here. *West Anderson Water District v. City of Anderson*, 417 S.C. 496, 507,

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319 S.C. 124, 132, 459 S.E.2d 876, 880 (Ct. App. 1995) (*Cowart I*). *See also Newman v. McCullough*, 212 S.C. 17, 25, 46 S.E.2d 252, 256 (1948) ("the acts of former councils relating to the governmental functions of said councils which involve a matter of discretion to be exercised by such councils are without force and effect upon succeeding councils.").

(1) The Settlement Agreement Involves the Legislative/Governmental Powers of the Town.

The test to determine whether a particular function is legislative is "whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired." *Cowart I*, 319 S.C. at 133, 459 S.E.2d at 881 (citation and internal quotations omitted). Here, the Town is statutorily vested with certain powers, including but not limited to the power to enact ordinances, provide for the general health and welfare of the Town, and adopt the budget of the Town. S.C. Code Ann. § 5-7-30 (1986). As such matters involve public policy considerations, the Town must retain its discretion to act in the public interest, and such discretion cannot be divested or delegated away by contract or otherwise. *See G. Curtis Martin Inv. Trust v. Clay*, 274 S.C. 608, 612, 266 S.E.2d 82, 85 (1980) (holding that the district could not "delegate away those powers and responsibilities which give life to it as a body politic[;] [and] [a] municipal corporation or other corporate political entity created by state law, to which

790 S.E.2d 204, 209 (Ct. App. 2016) (citation and internal quotations omitted) (emphasis in original). Some jurisdictions have held a further exception to exist where the municipal body is a board or commission with staggered terms. *See, e.g.*, *Daly v. Stokell*, 63 So.2d 644, 645 (Fla. 1953) (en banc). However, South Carolina courts have declined to recognize this exception. *See Cowart I*, 319 S.C. at 134, 459 S.E.2d at 882 (explaining that "[t]he rule that municipal corporations cannot bind successors to contracts involving governmental matters is very clearly and powerfully stated" by the South Carolina Supreme Court and that there is no suggestion of an exception to this rule for staggered boards). *See also Piedmont Public Serv. Dist. v. Cowart*, 324 S.C. 239, 241-42, 478 S.E.2d 836, 838 (1996) (*Cowart II*) (affirming *Cowart I* and holding "[w]e agree with the Court of Appeals that the policy considerations [underlying the general rule] are not changed by the bestowal of perpetual succession.").

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police power has been delegated, may not divest itself of such power by contract or otherwise."). *See also Newman*, 212 S.C. at 25, 46 S.E.2d at 256 ("The power conferred upon municipal councils to exercise legislative or governmental functions is done so to be exercised as often as may be found needful or politic; and the council holding such powers is vested with no authority to circumscribe, limit or diminish their efficiency, but must transmit them unimpaired to their successors.").

The Settlement Agreement was entered into by a prior town council which attempted to restrict and limit the current and future Town Councils' use of their legislative/governmental powers on matters concerning the use and maintenance of the Accreted Land. *See* McQuillin, *Municipal Corporations*, § 29:103 (3d ed.) ("To the extent that a governmental contract impinges on a municipality's ability to legislate freely, the contract is ultra vires and void" because it violates the prohibition against municipal contracts binding successor councils with respect to a legislative/governmental function). Moreover, determinations concerning permissible uses of the Accreted Land are zoning issues, and "[z]oning is a legislative act." *Knowles v. City of Aiken*, 305 S.C. 219, 224, 407 S.E.2d 639, 642 (1991). *See also Woodale Partnership v. City of Charleston*, No. 2:07-CV-2025-MBS, 2010 WL 11661386, at *10 (D.S.C. Sept. 17, 2010) (holding that the city did not have the power to forbid future city councils and zoning boards from exercising their legislative functions by forever freezing the zoning classification of the property). These functions are uniquely sovereign in character and are not capable of being performed by a private corporation or entity. Accordingly, they are by definition legislative and/or governmental. *See Owen v. City of Independence, Mo.*, 445 U.S. 622, 645 (1980) (explaining that proprietary/business functions, as opposed to legislative/governmental functions, are those capable of being performed by a private corporation).

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(2) The Settlement Agreement Improperly Restricts, Delegates and/or Divests the Legislative/Governmental Powers of the Town.

The Settlement Agreement infringes upon the legislative/governmental powers of the Town because it restricts, delegates and/or divests the statutory authority of the Town Council to enact ordinances concerning the use and maintenance of the Accreted Land. Among other things, the Settlement Agreement requires the Town to "implement selective thinning of the Accreted Land" pursuant to specific, enumerated parameters, and to "maintain similar conditions going forward. . . ." Notably, many of the parameters directly violate the 2005 ordinance prohibiting the removal of vegetation on the Accreted Land, except for trimming and pruning to a height of no less than five (5) feet. The effective nullification by the Settlement Agreement of pre-existing ordinances and prohibition of the enactment of future ordinances concerning the Accreted Land constitutes an improper divestment of the legislative/governmental powers of the Town.

Relatedly, the Settlement Agreement restricts the ability of the Town to adopt regulations concerning the preservation, maintenance, or removal of vegetation on the Accreted Land pursuant to its legislative/governmental powers. The Settlement Agreement states that "the Town Council believes that thinning of vegetation will serve the interests of . . . enhanced public safety, improved public health . . . [and] [t]he settlement, and implementing steps associated therewith, are necessary for the health, safety and general welfare of the Town." This provision effectively "freezes" the Town's position as to what will best serve the interests of the public as it relates to the Accreted Land. However, the Town must not be restricted from adopting in the future any regulations concerning the Accreted Land or taking any other action it deems appropriate for public safety and general welfare. "It is a fundamental principle of constitutional law that no legislative body may part with its right to exercise the police power, nor may a municipality to which such power has

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been delegated divest itself of same ***by contract or otherwise***. It is a continuing power which may be exercised as often as required in the public interest and must always remain fluid." *Sammons v. City of Beaufort*, 225 S.C. 490, 499, 83 S.E.2d 153, 157 (1954) (invalidating covenant requiring town to maintain on-street parking facilities throughout life of municipal bonds, on ground that such a covenant deprives future boards of legislative/governmental powers to adopt parking regulations necessary for the public safety and welfare).

Finally, by requiring primary funding for a portion of the work "[to] be from the Town," the Settlement Agreement also delegates the legislative/governmental powers of the Town to set and adopt a budget, *i.e.*, its fiscal power. As with its other legislative/governmental powers, the authority of the Town to adopt a budget cannot be delegated away. *See Clay*, 274 S.C. at 612, 266 S.E.2d at 85. Because the Settlement Agreement requires that similar conditions be maintained going forward, it creates an ongoing financial obligation for the Town, thus removing this budgetary item from its discretion and, instead, delegating it by contract. This constitutes an improper delegation of the legislative/governmental powers of the Town—powers that cannot be "bartered" away. *Sammons*, 225 S.C. at 498, 83 S.E.2d at 157.

Thus, because it improperly restricts, delegates and/or divests the legislative/governmental powers of the Town, the Settlement Agreement is invalid and unenforceable.

B. <u>Alternatively, the Settlement Agreement Unfairly, Unreasonably and Improperly Restricts the Proprietary/Business Functions of the Town.</u>

Even if the Settlement Agreement were found to involve only proprietary/business functions (*i.e.*, non-legislative/governmental powers)—although, for the reasons set forth above, it does not—municipal contracts must nonetheless, "at the time of their execution, be fair and of a reasonable duration." *Cowart I*, 319 S.C. at 135, 459 S.E.2d at 882 ("[I]f the contract involves the

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exercise of the municipal corporation's business or proprietary powers, the contract may extend beyond the term of the contracting body and is binding on successor bodies if, at the time the contract was entered into, it was ***fair and reasonable and necessary*** or advantageous to the municipality."). Such municipal contracts "may be made for, but only for, such a term as is within the limitation imposed by statute or charter or, if no limitation is imposed, ***for a reasonable time***." *Id*. at 131, 459 S.E.2d at 880 (citation omitted) (emphasis added).

(1) The Settlement Agreement is of Perpetual Duration and Unreasonable as a Matter of Law.

The Settlement Agreement is of perpetual duration because it obligates the Town to "maintain similar conditions going forward." The perpetual nature of the agreement is further evidenced by the requirement that the Town "review changes in the condition of the [Accreted Land] on a recurring basis (for instance, once every five years)." Moreover, the Settlement Agreement is binding upon and inures to the benefit of not only the named parties, but for their heirs, successors and assigns, and "may ***not*** be modified or amended, ***nor*** may any of its provisions be waived, except upon mutual agreement ***of all Parties***," except that "[t]he Town shall not unreasonably withhold consent to a proposed modification so long as the proposed modification would not result in cutting/trimming/pruning that is more aggressive than that" set forth in the original settlement agreement. The ongoing obligations of the Town under the Settlement Agreement extend not only to the individually named parties, their heirs, successors and assigns, but also to the Accreted Land itself, all of which evidences the perpetual, never-ending nature of the obligations imposed by it.

The perpetual duration of the Settlement Agreement is unreasonable as a matter of law. While it does not appear that South Carolina courts have had the opportunity to consider the

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specific issue of perpetual municipal contracts like the one set forth in the Settlement Agreement, the requirement under South Carolina law that municipal contracts be of a reasonable duration *ipso facto* suggests that municipal contracts of a perpetual duration are, on their face, unreasonable. Moreover, decisions from other jurisdictions are instructive and demonstrate that perpetual municipal contracts are void as against public policy. *See Town of Secaucus v. City of New Jersey*, 20 N.J. Tax 562, 567-68 (2003) (explaining that "[m]unicipal agreements having a perpetual term are not favored" and are generally void as against public policy unless expressly authorized by statute). *See also State ex rel. City of St. Paul v. Minnesota Transfer Ry. Co.*, 83 N.W. 32, 34-35 (Minn. 1900) (contract between city and railway company whereby city agreed to maintain a bridge in perpetuity was void because such agreement is beyond municipal powers of the city and contrary to public policy); McQuillin, *Municipal Corporations*, § 29:104 (3d ed.) ("Municipal agreements having a perpetual term are not favored."). Here, the perpetual duration of the Settlement Agreement is *prima facie* unreasonable and contrary to public policy.

Thus, assuming *arguendo* that the Settlement Agreement involves only non-legislative or non-governmental powers, it is invalid and unenforceable because it unfairly, unreasonably and improperly restricts the proprietary functions of the Town.

C. <u>The Settlement Agreement is Invalid and Unenforceable Against the Town.</u>

An illegal contract is unenforceable. *Berkebile v. Outen*, 311 S.C. 50, 53 n.2, 426 S.E.2d 760, 762 n.2 (1993). Indeed, the Settlement Agreement itself recognizes that the implementation of its provisions "is subject to compliance with law." "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Id.* Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties. *Scruggs v. Quality Elec. Servs., Inc.*, 282

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S.C. 542, 545, 320 S.E.2d 49, 51 (Ct. App. 1984). But a contract is entire, and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent. *See Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 65, 566 S.E.2d 863, 864 (Ct. App. 2002).

Here, the material terms of the Settlement Agreement are interdependent, such that merely severing the offending provisions is not feasible. *See OrthAlliance, Inc. v. McConnell*, No. 8:08-2591-RBH, 2010 WL 1344988, at *6 (D.S.C. Mar. 30, 2010) (explaining that, even where a contract contains a provision for the severability of void or unenforceable terms, contractual provisions that are interdependent may not be severable). Indeed, the offending provisions are material to and go to the very heart of the agreement. Even if the unenforceable terms could be severed, however, the Settlement Agreement would then be reduced to an agreement with no meaningful substance or effect. Specifically, the provisions requiring vegetation to be removed, or trimmed, cut, or pruned beyond what is permissible under the 2005 ordinance in effect would have to be severed as unenforceable, as would the provision requiring the Town to "maintain similar conditions going forward."

Most importantly, however, because it involves the legislative/governmental powers of the Town, as set forth above, the Settlement Agreement cannot, as a matter of law, extend beyond the term of the town council which was a party to it. Because the Settlement Agreement was entered into by Defendants and a prior town council, it is not binding or enforceable against the current Town Council or future councils.

D. <u>Defendants' Counterclaims Fail as a Matter of Law.</u>

That the Settlement Agreement is invalid and unenforceable is dispositive of Defendants' counterclaims for breach of contract, specific performance, and promissory estoppel. Specifically,

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all three causes of action require, at a minimum, that there be a valid and binding contract. *See Hennes v. Shaw*, 397 S.C. 391, 399, 725 S.E.2d 501, 506 (Ct. App. 2012) (holding a plaintiff must prove the existence of a binding contract to recover for breach of contract); *Chitwood v. McMillan*, 189 S.C. 262, 264, 1 S.E.2d 162, 164 (1939) (holding liability for breach of contract requires the existence of a valid contract); *Ingram v. Kasey's Associates*, 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000) (holding specific performance requires "clear evidence of a valid agreement"); *Trident Const. Co., Inc. v. Austin Co.*, 272 F. Supp. 2d 566, 577 (D.S.C. 2003) (holding the doctrine of promissory estoppel "may not be used to create a legally enforceable promise when it would not otherwise be binding under ordinary contract principles"). Thus, because the Settlement Agreement is invalid and unenforceable, as set forth above, summary judgment in favor of the Town and against Defendants is proper, not only as to the Town's claim for declaratory judgment, but also as to Defendants' counterclaims.

CONCLUSION

For the foregoing reasons, and any others the Court may deem just and proper, the Town is entitled to judgment as a matter of law and respectfully requests the Court grant summary judgment in its favor and against Defendants on the Town's cause of action for declaratory judgment and Defendants' counterclaims for breach of contract, specific performance, and promissory estoppel. Additionally, the Town respectfully requests that discovery be stayed pending resolution of its Motion.

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May 23, 2022
Charleston, South Carolina

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EXHIBIT A

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STATE OF SOUTH CAROLINA)
) TITLE TO REAL ESTATE
COUNTY OF CHARLESTON)

WHEREAS, the Lowcountry Open Land Trust (the "Grantor") is a nonprofit corporation whose purpose is to preserve and conserve natural areas; and

WHEREAS, the Grantor is the owner in fee simple of certain real property (hereinafter referred to as the "Property" which has aesthetic, scientific, educational, and ecological value in its present state as a natural area which has not been subject to development or exploitation, which property is described more on the attached Exhibit A;

WHEREAS, the parties desire to place restrictions upon the Property for the purposes of, inter alia retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants, or wildlife; and

WHEREAS, "natural, scientific, educational, aesthetic, scenic and recreational resource," as used herein shall, without limiting the generality of the terms, mean the condition of the Property at the time of this grant, evidenced by:

A) The appropriate survey maps from the United States Geological Survey, showing the property line and other contiguous or nearby protected areas;

B) An aerial photograph of the Property at an appropriate scale taken as close as possible to the date hereof; and

C) On-site photographs taken at appropriate locations on the Property;

and other documentation, which documentation shall be sufficient to establish the condition of the Property asof the date hereof which documentation shall be maintained in duplicate by both the Grantor and the Grantee hereof and made available to interested members of the public upon reasonable request for purposes of enforcing the restrictions contained herein.

KNOW ALL MEN BY THESE PRESENTS THAT the Lowcountry Open land Trust, a non-profit corporation, organized and existing under the laws of the State of South Carolina (the "Grantor"), in the state aforesaid in consideration of the sum of Ten and 00/100 ($10.00) Dollars, and other valuable consideration, to it in hand paid at and before the sealing of these presents by the Town of Sullivan's Island, South Carolina (the "Town"/"Grantee"), in the State aforesaid the receipt whereof is hereby acknowledged, have granted, bargained, sold and released and by these Presents do grant, bargain, sell and release unto the said the Town of Sullivan's Island, South Carolina, its successors and assigns, the following described property:

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FOR DESCRIPTION OF PROPERTY SEE EXHIBIT A ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE (THE "PROPERTY").

This conveyance is made subject to the following terms, conditions, restrictions, and covenants (hereinafter the "Restrictions"):

1. Except as otherwise provided or permitted in Paragraphs 2 and 3 hereof, the Property shall remain in its natural state, no changes shall be made to its topography or vegetation and no structures or improvements shall be erected on the Property.

2. Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of Paragraph 4, the Town Council is given the unrestricted authority to trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean and providing views of the ocean and beaches to its citizens.

3. Notwithstanding the provisions of Paragraph 1 hereof, and subject to the limitations of this Paragraph 3 and of Paragraphs 2 and 4, the Town Council of Sullivan's Island (the "Council") shall have the right to improve, change, modify or alter the Property only if such actions are to further or effect one or more of the following enumerated public objectives or policies ("Public Policies"):

a) Drainage
b) Mosquito control
c) Public walkways and emergency access to the Atlantic Ocean
d) Beach renourishment
e) Erosion control
f) Vegetation management
g) Educational programs
h) Public safety
i) Public health; and
j) Scenic enhancement.

Prior to taking any action affecting the Property to further or effect a Public Policy ("Public Action"), the Council shall make specific written findings of fact;

1) that the proposed Public Action is proposed solely for the purpose of furthering or effecting one or more of the enumerated Public Policies,

2) that the proposed Public Action is necessary for the health, safety or general welfare of the Town,

3) that the benefits of the proposed Public Action outweigh the damage done to the aesthetic, ecological, scientific, or educational value of the Property in its natural state, and

4) that in making its findings of fact, the Council has given due and reasonable consideration to

i) the cumulative effect of the proposed Public Action and past Public Actions on the natural state of the Property,

ii) the alternative methods, if any, of furthering or effecting the proposed Public Policy which do not impact adversely on the natural state of the Property, and

iii) the probable results of not taking the proposed Public Action.

The above described written findings of fact must be made prior to each individual Public Action relating to the Property and shall be specific to the circumstances of the proposed Public Action and not merely conclusive in nature. In no event shall any Public Action violate the provisions of Paragraph 4 hereof.

4. In all events, the following activities, improvements and structures shall be prohibited on the Property:

a) any building or structure with a roof

b) Asphalt pavement, concrete pavement or pavement of a non-porous material

c) electrical power lines, wires, conduit, stations or pads

d) sewer lines, pipes or lift stations

e) water lines, pipes or lift stations

f) commercial activities in any way related to the buying or selling of things, goods or services.

Notwithstanding the provisions of Paragraph 4(c), (d) and (e) the Council may allow utility easements for electrical, sewer and water lines to cross through the Property, provided no utility services are provided as a result to any improvements on the Property.

5. These Restrictions may be enforced by the Town, any property owner within the Town, or by any voter registered within the Town. Such persons may seek any appropriate remedy for any violation, including, but not limited to, injunctive relief to force a termination of the violation or to permit restoration of the area damaged by an prohibited activity. The forbearance to

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enforce the terms and provisions thereof in the event of a breach shall not be deemed a waiver of any rights granted hereunder. The Town shall not be liable to any person for any violation of these Restrictions by any person other than itself.

6. During the term of these restrictions, the Town shall cause to remain in effect an ordinance of the Town making it a violation of law for any person to violate the provisions of these Restrictions, as such Restrictions may be modified pursuant to Paragraph 8 hereof. The Town may enact ordinances and regulations affecting the Property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions.

7. If any provision of these Restrictions shall be invalid or for any reason become unenforceable, no other provision shall thereby be affected or impaired.

8. These Restrictions may be modified or repealed only upon an affirmative vote of both (a) seventy-five (75%) percent of the registered voters of the Town who vote in the referendum held pursuant to the terms hereof, and (b) one hundred (100%) percent of the members of Town Council. For purposes of these Restrictions, a registered voter in the Town shall mean any voter eligible to vote in Town elections who is registered 30 days prior to the referendum held pursuant to the terms hereof. At least 45 days prior to any referendum held pursuant to the terms hereof, the Council shall adapt reasonable regulations concerning the manner of voting hereunder. Nothing herein shall prohibit the Council from adopting regulations which allow voting by ballot on a designated day or days or by circulation of written petitions over a period of time.

9. These Restrictions shall remain in full force and effect for a period of 50 years and shall be automatically renewed and continued in effect for additional periods of 50 years each until such time as these Restrictions are repealed in accordance with the provisions of Paragraph 8 hereof. The terms of this Paragraph may be modified in accordance with the provisions of Paragraph 8 hereof.

GRANTEE'S ADDRESS: Town of Sullivan's Island
Town Hall
P. O. Box 427
Sullivan's Island, SC 29482

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said Town of Sullivan's Island, South Carolina, its Successors and Assigns forever.

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AND it does hereby bind itself and its Successors, to warrant and forever defend, all and singular the said Premises unto the said Town of Sullivan's Island, South Carolina, its Successors and Assigns, against it and its Successors, lawfully claiming, or to claim the same or any part thereof.

WITNESS its Hand and Seal, this 12 day of February, in the year of our Lord one thousand nine hundred and ninety-one and the two hundred and fifteenth year of the sovereignty and Independence of the Untied States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

LOWCOUNTRY OPEN LAND TRUST

By: _____
Its: President

By: Susan A. Kidd
Its: Vice President

STATE OF SOUTH CAROLINA)

CHARLESTON COUNTY)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named LOWCOUNTRY OPEN LAND TRUST by its authorized officer(s), sign, seal and as its act and deed, deliver the within written Deed, and that (s)he with the other witness named above witnessed the execution thereof.

SWORN to before me this 12
day of February A.D. 1991

_____ (SEAL)
Notary Public for South Carolina
My commission expires: 4-2-96

_____
(Signature of Witness)

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EXHIBIT A

All those lots, parcels and pieces of property located within the Town of Sullivan's Island, County of Charleston, State of South Carolina, being more specifically described as follows:

Parcel 1

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Star of the West Street, Middle Street, Station 12 Street, and the mean high water mark of the waters of the Atlantic Ocean and Charleston harbor. Said property is also shown as Parcel #1 on the below described plat attached hereto and marked Exhibit B.
TMS: 523-06-00-073

Parcel 2

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Palmetto Street, Poe Avenue, Station 16 Street, and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #2 on the below described plat attached hereto and marked Exhibit B.

SPECIFICALLY SAVING AND EXCEPTING all that land now owned by the United States Government.

SPECIFICALLY SAVING AND EXCEPTING all those lots, parcels and pieces of land know as Tract A and Tract B on a plat by William Porcher, dated April 21, 1989, entitled "Plat Showing Battery Logan Owned by Sullivan's Island Board of Township Commissioners, Being Subdivided into Tract A and Tract B, Sullivan's Island, Charleston County, South Carolina" being duly recorded in the R.M.C. Office for Charleston County on the 24th day of May, 1989, in Plat Book BW, at Page 28.
TMS: 523-07-00-124

Parcel 3

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 16 Street, Atlantic Avenue, Station 18 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #3 on the below described plat attached hereto and marked Exhibit B.
TMS: 523-12-00-077

Parcel 4

All that real property not previously conveyed by the Board of

Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 18 Street, I'on Street, Station 18-1/2 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #4 on the below described plat attached hereto and marked Exhibit B.

SPECIFICALLY SAVING AND EXCEPTING Lots M, N, M2, N2, and property presently owned by the United States Coast Guard, along with West Atlantic Avenue as shown on plat entitled "Town of Sullivan's Island, Charleston County, South Carolina", dated May 18, 1964, attached hereto and incorporated herein as Exhibit B.
TMS: 529-09-00-112

Parcel 5

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 18-1/2 Street, Thee Street, the western boundary of the lands now leased by Charleston County School District No. 2 and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #5 on the below described plat attached hereto and marked Exhibit B.
TMS: 529-09-00-112

Parcel 6

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated seaward beyond the boundaries of all that real property leased under School District No. 2 of Charleston County, State of South Carolina as more specifically shown by Grant of Lease dated the 23rd day of April, 1954, and recorded in the R.M.C. Office for Charleston County in Book N58, at Page 150. Said property is also shown as Parcel #6 on the below described plat attached hereto and marked Exhibit B.
TMS: 529-09-00-112

Parcel 7

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by the eastern boundaries of the lands now leased by Charleston County School District No. 2, Pettigrew Street, Station 22 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #7 on the below described plat attached hereto and marked Exhibit B.
TMS: 529-09-00-112

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Parcel 8

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 22 Street, East Atlantic Avenue and Station 22-1/2 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #8 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-09-00-112

Parcel 9

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 22-1/2 Street, Bayonne Street, Station 28 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #9 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-10-00-087

Parcel 10

All that real property not previously conveyed by the Board of Township Commissions, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 28 Street, Marshall Boulevard, Station 32 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as parcel #10 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-11-00-109

Parcel 11

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated and lying seaward of those lots known and described as Lots 1 through 5, Block 16 and Lots 1 through 7, Block 17, as more specifically shown on the below described plat which is marked Exhibit B. Said property is also shown as Parcel #11 on the below described plat attached hereto and marked Exhibit B.

The above tracts of land are more specifically shown and delineated as the colored portion of a plat entitled "Sullivan's Island, Charleston County, South Carolina", dated May 18, 1964, which is attached hereto and incorporated herein by reference and marked Exhibit B.

TMS: 529-12-00-116

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Being the same property conveyed to the Grantor herein by Deed of even date from the Town of Sullivan's Island which is recorded in the RMC Office for Charleston County prior to the recording of this deed but simultaneously herewith in Book _____, at Page _____.

Grantees address: P. O. Box 1293
450 King Street
Charleston, SC 29402

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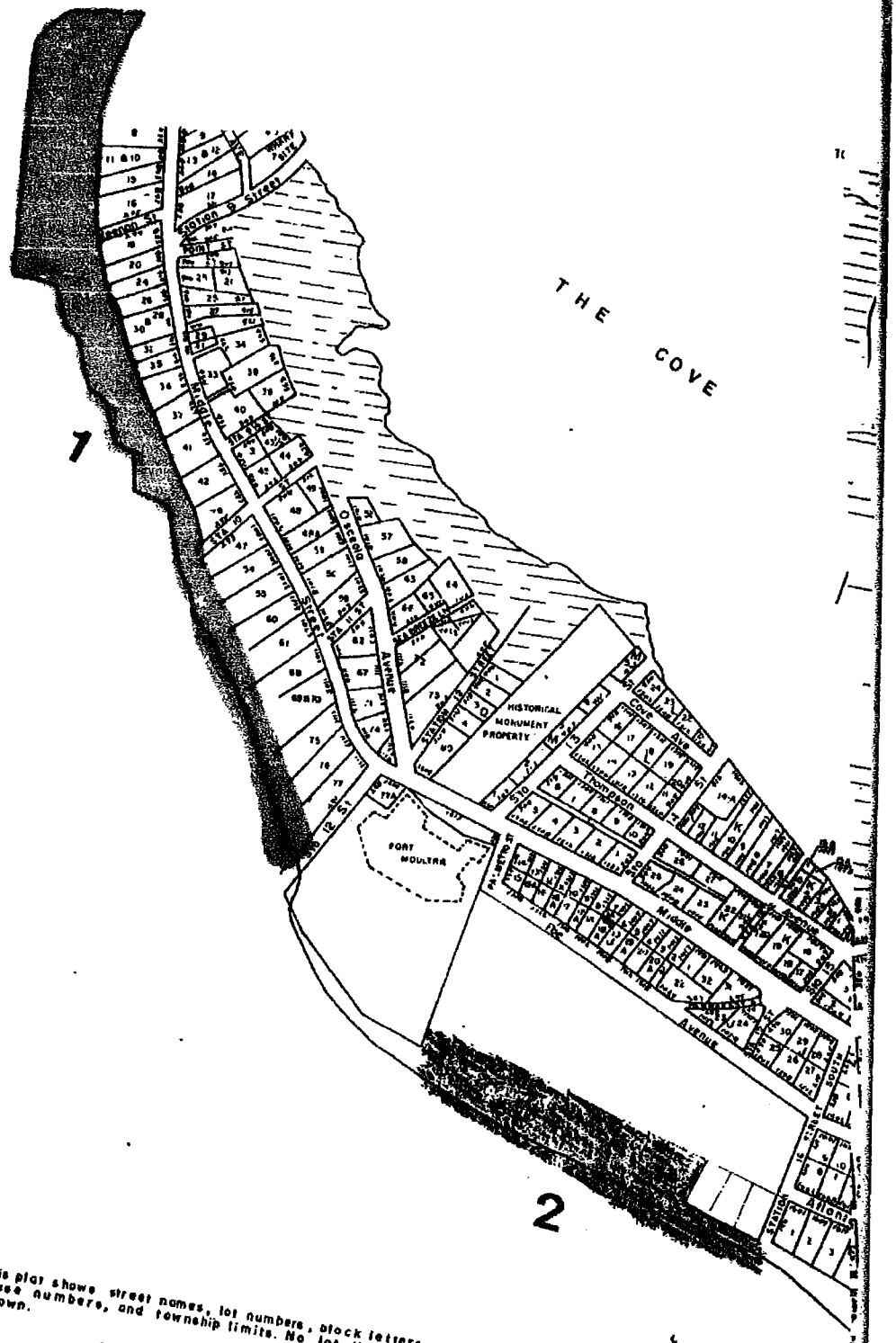
EXHIBIT B



NOTE: This plat shows street names, lot numbers, block letters, house numbers, and township limits. No lot dimensions shown.

APPROVED: George G. Durst, MD
George G. Durst, MD Chairman Board of Township Commissioners

Agatha P. Muller
Agatha P. Muller, Asst.

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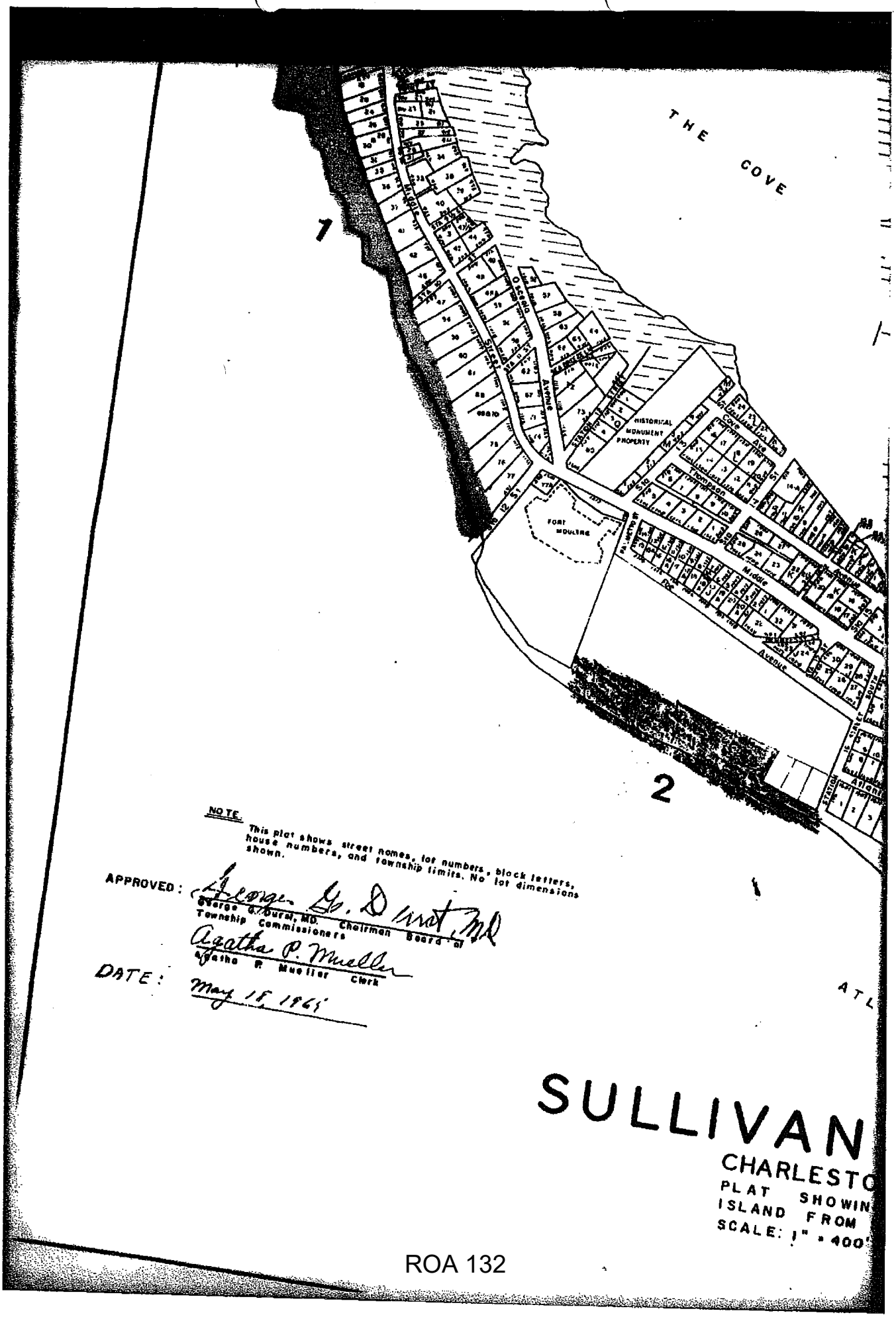

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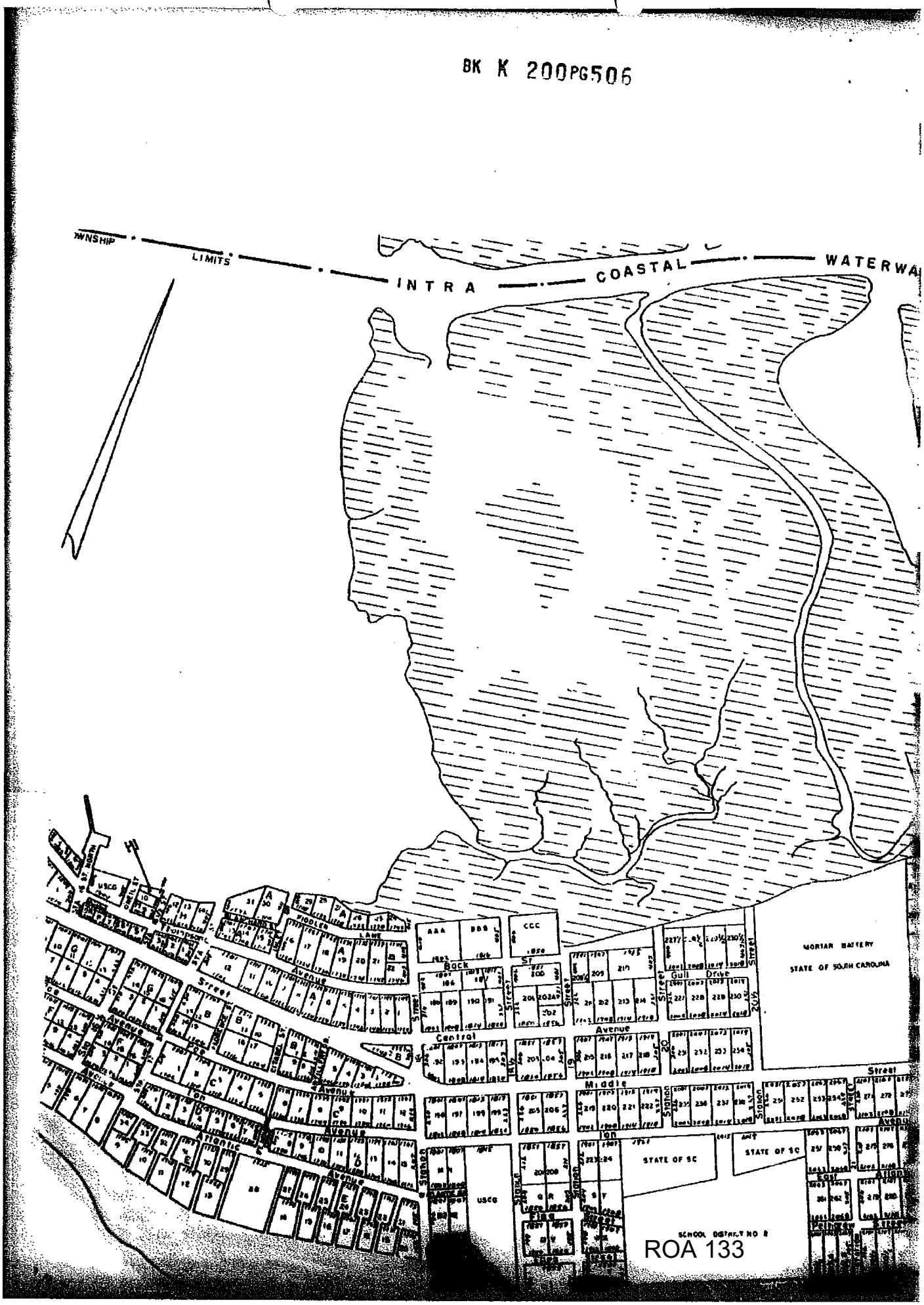

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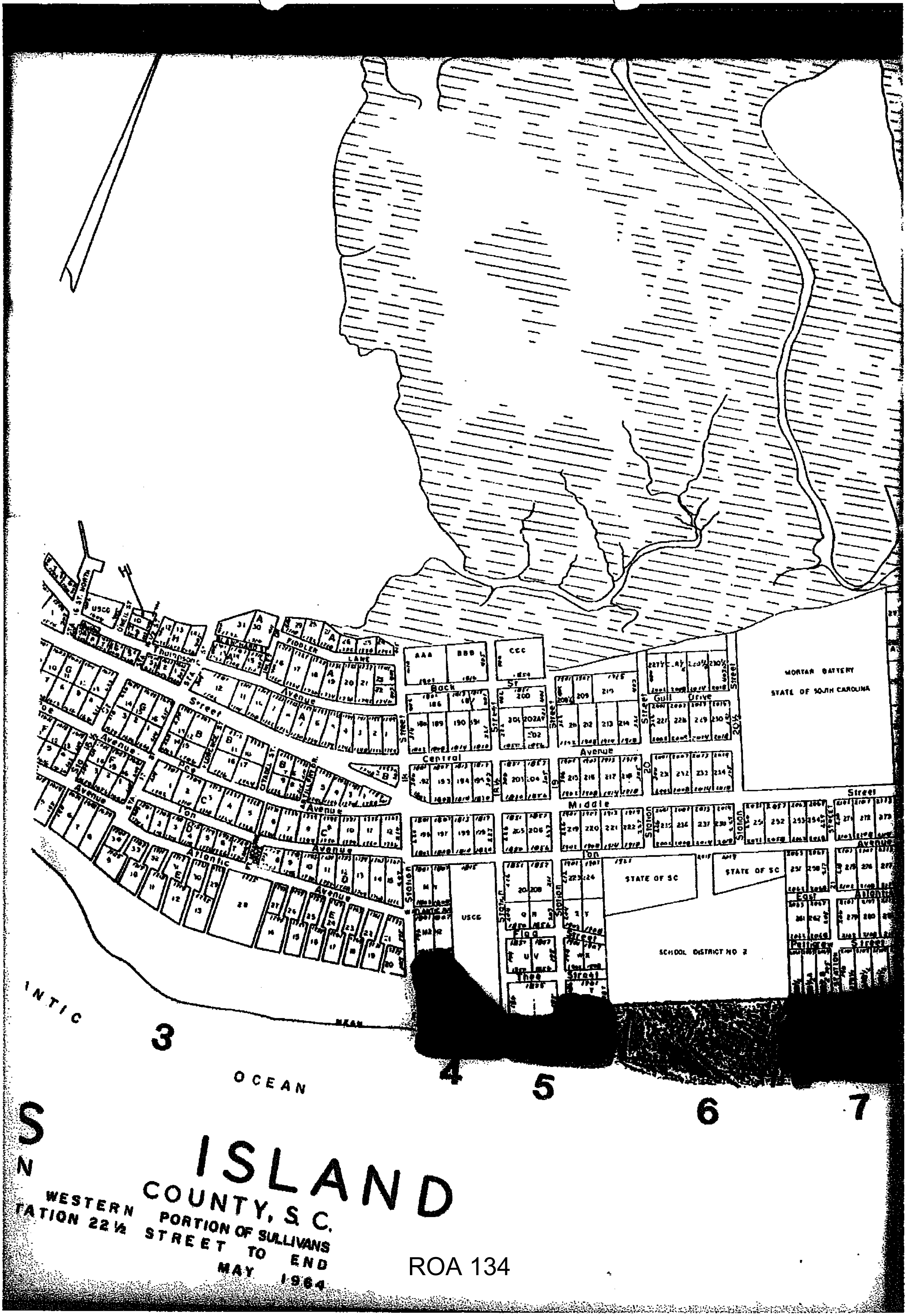

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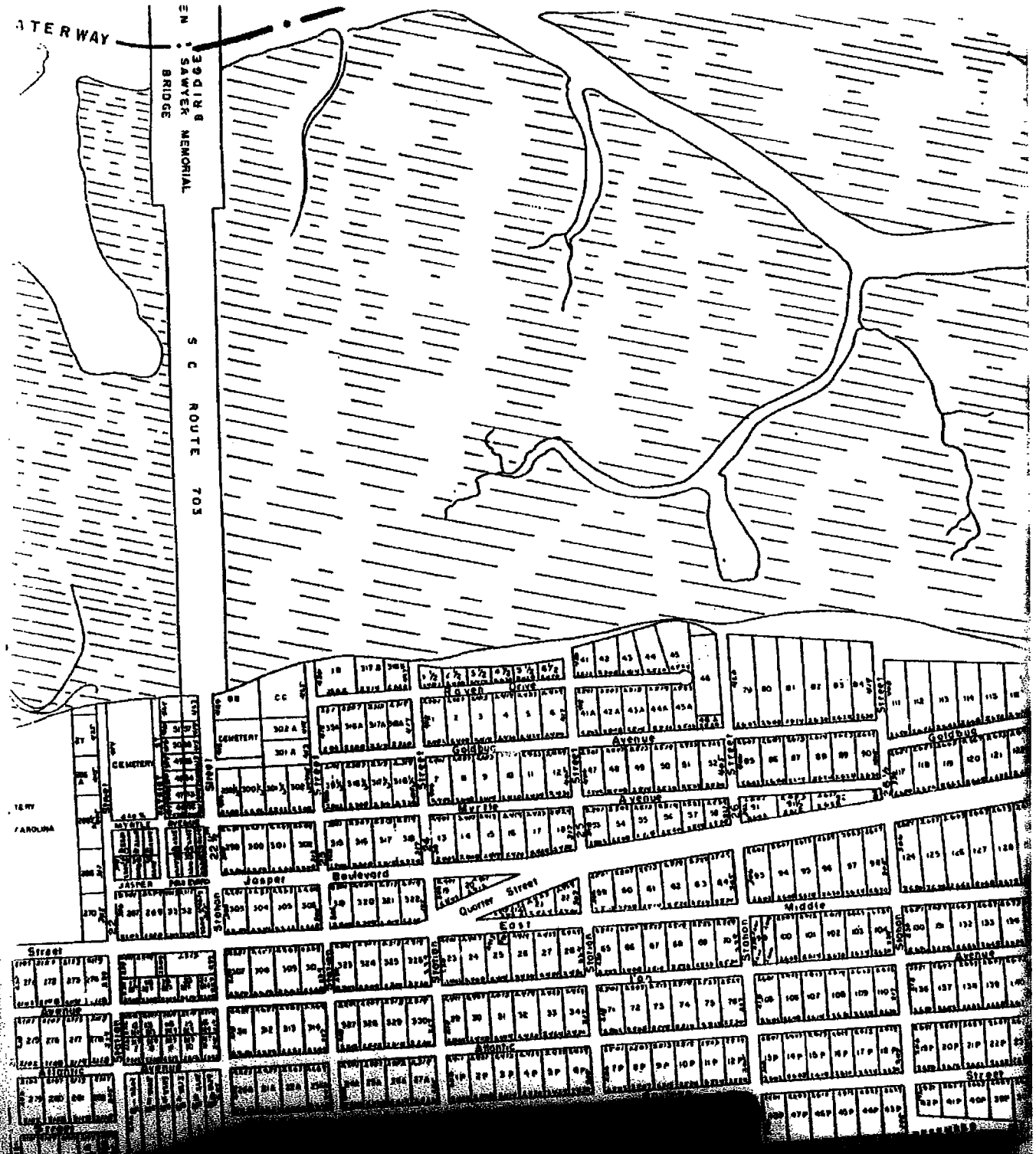

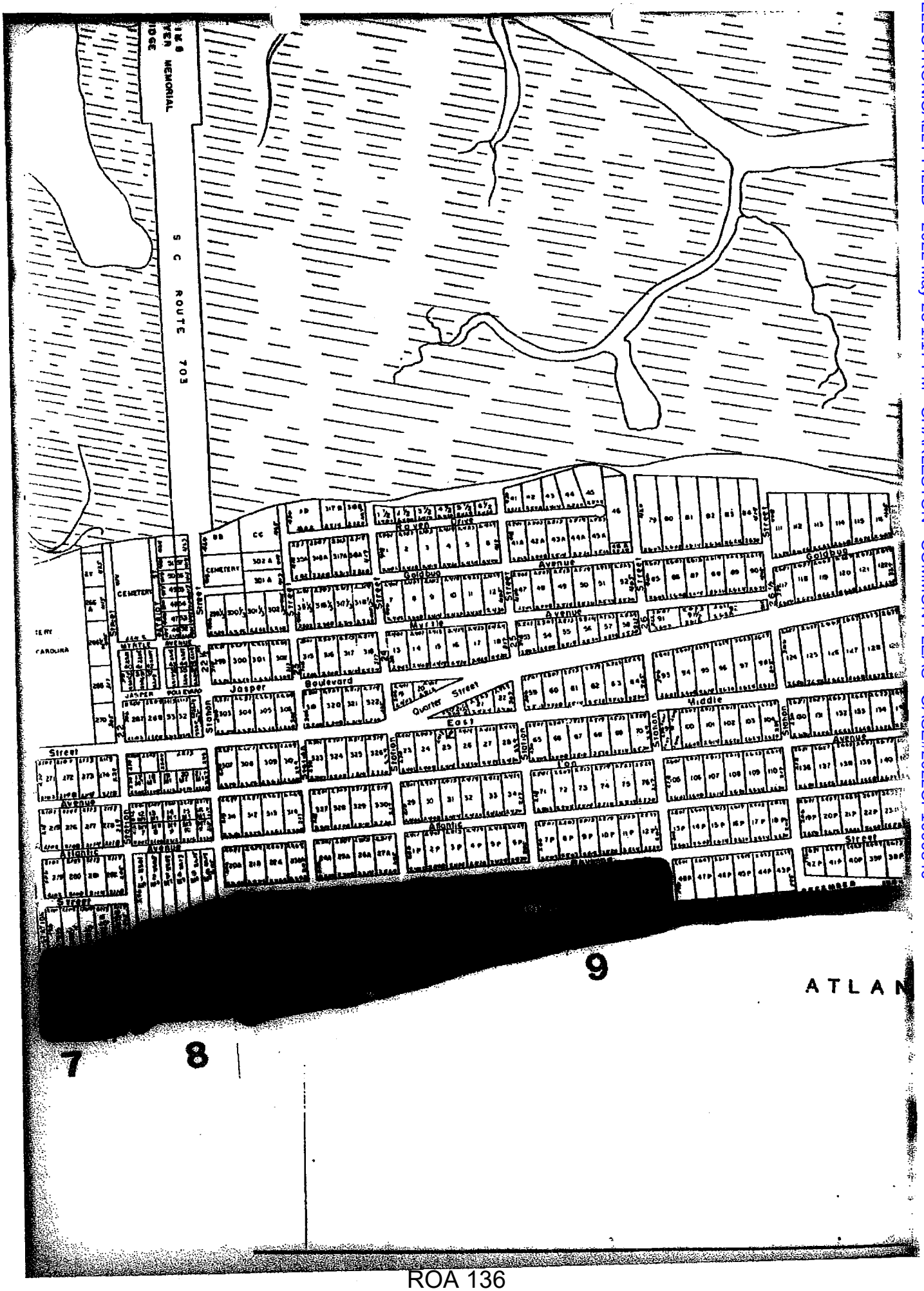

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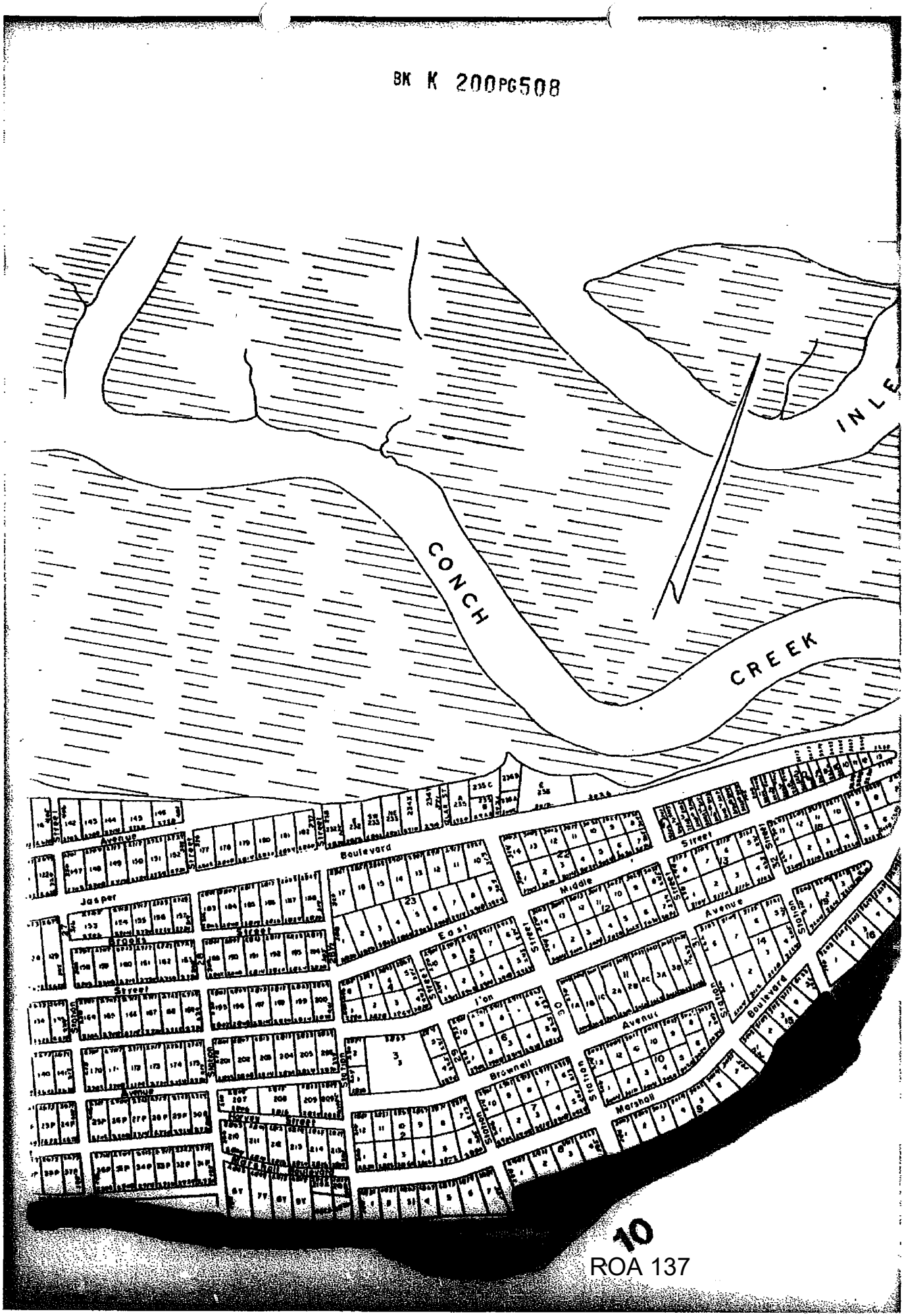

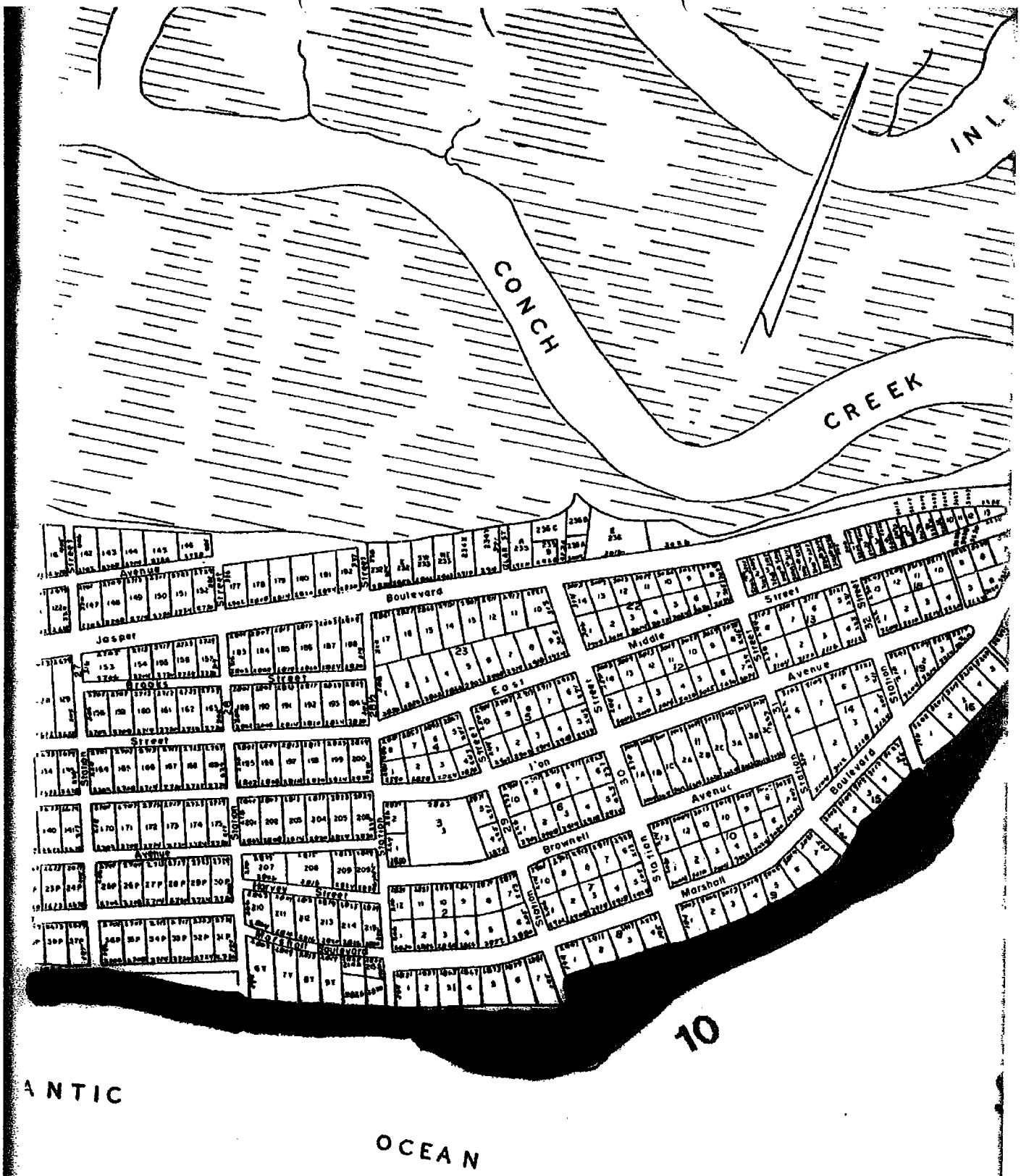

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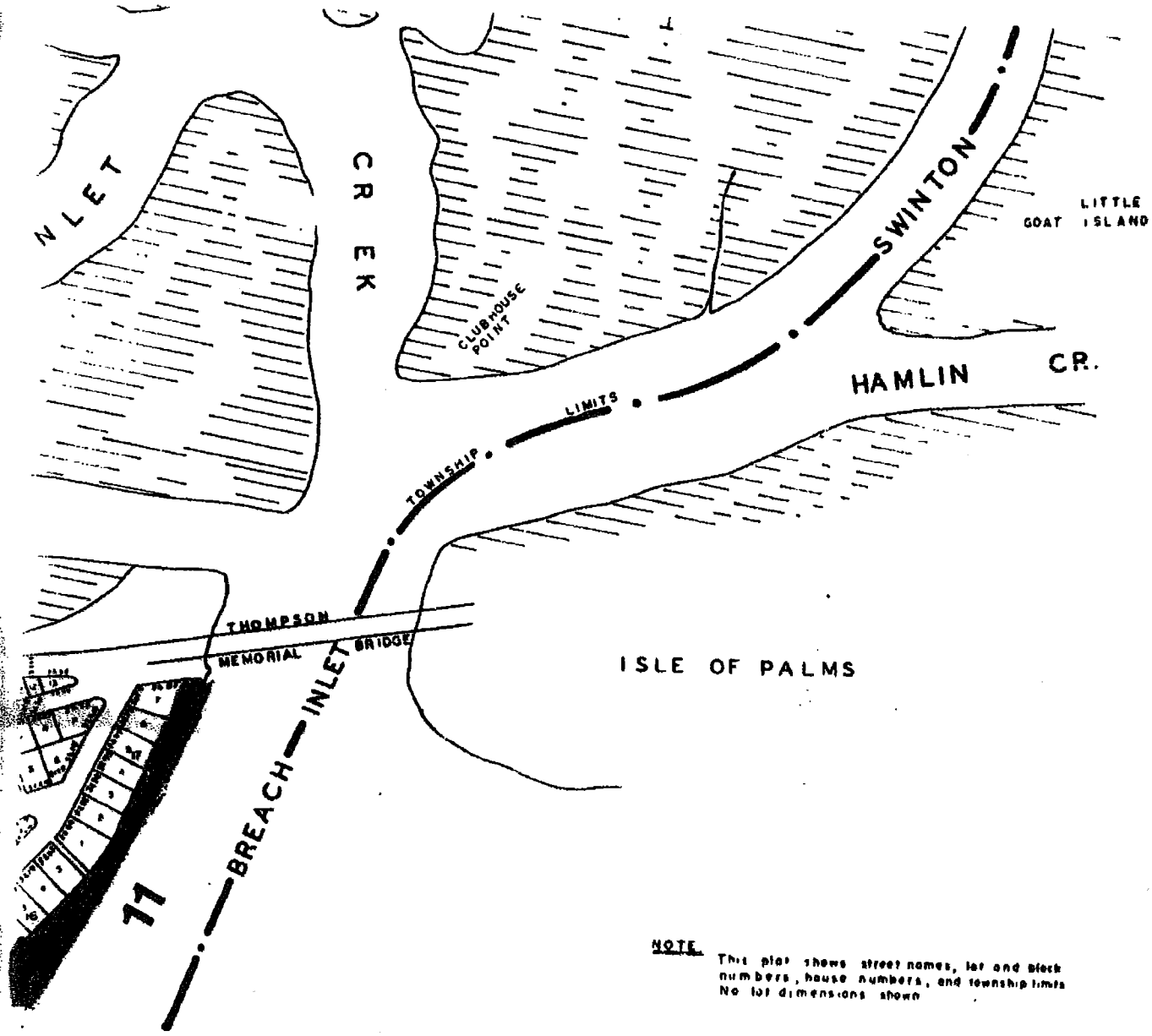

NOTE: This plat shows street names, lot and block numbers, house numbers, and township limits. No lot dimensions shown.

APPROVED: George A. Durst, M.D.
George A. Durst, MD. Chairman Board of Township Commissioners

Agatha P. Mueller
Agatha P. Mueller Clerk

DATE: May 18, 1964

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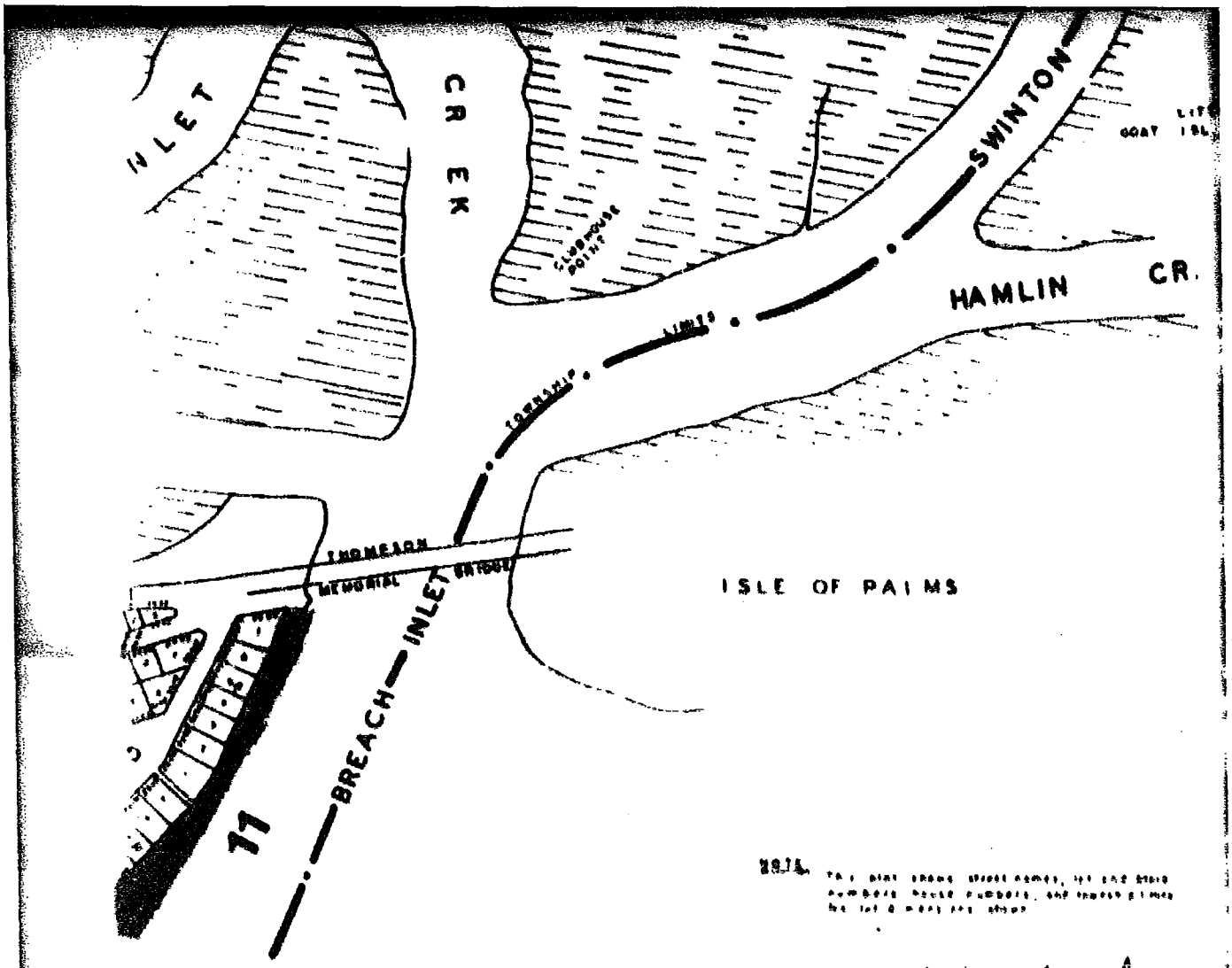

APPROVED

DATE May 18, 1964

SULLIVANS ISLAND

CHARLESTON COUNTY, S.C.
PLAT SHOWING EASTERN PORTION OF SULLIVANS ISLAND FROM STATION 22 1/2 STREET TO BREACH INLET.
SCALE: 1" = 400'
MAY, 1964

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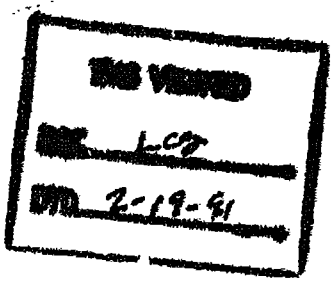
DUDUS - HENNESSY
ATTORNEYS AT LAW

BK K 200PG510

Amv



FILED

K200-496

91 FEB 14 AM 9:51

ROBERT N. KING
REGISTER
CHARLESTON COUNTY SC

26.00

Recorded this 14 day of Feb - 1991
On Property Record Card

Pauline S. Koger

Auditor Charleston County

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EXHIBIT B

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upland source and shall be approved by the OCRM as beach-compatible. The timing and location of renourishment sand placement shall be governed by Town and OCRM regulations.

Sec. 21-70. General provisions for RC-1 Area District.

A. The provisions of this Article are applicable to the RC-1 Area District land area of the Town. The Town of Sullivan's Island retains full authority over RC-1 Area District land, subject to the conditions, restrictions, and covenants set forth in the Title to Real Estate dated February 12, 1991, conveying said land to the Town of Sullivan's Island. The permits allowed herein for the trimming and pruning of vegetation upon application of private landowners as set forth herein are not intended by the Town, and the provisions shall not be construed as granting to any private landowner, the unrestricted right to trim and prune vegetation in the RC-1 Area District. The trimming and pruning provided herein is granted as an accommodation to landowners living immediately adjacent to RC-1A, RC-1C or RC-1E areas, and the Town retains full authority to amend and/or revoke any portion of these provisions.

B. The permits allowed herein do not obviate the need or requirement of any landowner obtaining a permit under this Article from any other required permit or authorization from any governmental or regulatory body that may have jurisdiction over the RC-1 Area District. Any landowner obtaining a permit shall agree to indemnify the Town for any action taken pursuant to said permit in derogation of any County, State, or Federal law or regulation, including costs, fines and attorney's fees.

C. Nothing in this Article shall be construed to prevent the Town of Sullivan's Island from erecting or having erected signs in the RC-1 Area District for regulatory or instructional purposes.

Sec. 21-71. Trimming and pruning in the RC-1 District.

A. No construction or removal of vegetation.

There shall be no construction of any type, no destruction or removal of vegetation by any means except trimming and pruning of shrubs and trees as provided in this Ordinance, and no manmade changes to topography in an RC-1 Area District, except as provided herein and in the Title to Real Estate dated February 12, 1991, conveying said land to the Town of Sullivan's Island.

B. Retaining of a town vegetation consultant.

The Town shall engage a qualified consultant to monitor trimming and pruning of shrubs and trees in the RC-1 Area District. The consultant shall agree to visit each site during the trimming and pruning permitted hereunder to ensure that work is being done according to the highest professional standards and the requirements of this Ordinance. The cost of the consultant's visits shall be included in the permit fee that shall be paid by each applicant.

C. Permit for trimming and pruning of vegetation.

(1) Any landowner living immediately adjacent to the RC-1A, RC-1C or RC-1E Area shall upon application to the Zoning Administrator be issued a permit, subject to the other terms and conditions of this Ordinance, to trim and prune the shrubs and trees enumerated herein in an area from the applicant's lot line towards the ocean within the extension of the landowner's side lot lines projected towards the ocean.

(2) The trimming and pruning allowed herein shall only be permitted between November 1st and the following February 28th.

(3) The only vegetation that may be trimmed and pruned in the RC-1A, RC-1C or RC-1E Areas is limited to the following: Southern Waxmyrtle (Myrica Cerifera), Eastern Baccharis (Baccharis Halimifolia), and Popcorn trees (Tallowtree, Sapium Sebiferum). This vegetation may be trimmed and pruned so as to have a maximum height of no less than five (5) feet above the ground and shall be trimmed and pruned in accordance with the highest professional standards and in accordance with the guidelines promulgated by the Town of Sullivan's Island. In the case of Popcorn trees, cutting can extend below five (5) feet if recommended by the consultant hired under this Ordinance and approved by the Tree Commission.

(4) The trimming and pruning allowed and all work performed shall be accomplished without the use of any heavy machinery, vehicles or other such machinery being brought into the RC-1 Area District or onto the beach front.

(5) There shall be no trimming, cutting or pruning of any vegetation of any sort in the RC-1B and RC-1D Areas.

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EXHIBIT C

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Andy Benke
Town of Sullivan's Island
1610 Middle Street
Sullivan's Island, S.C. 29482

Re: Cutting and Pruning of Vegetation in front of 2513 Atlantic Avenue

Dear Andy:

I would request that the Town give me a permit to cut all vegetation to 3 ft. in front of my residence at 2513 Atlantic Avenue as was specifically authorized and allowed by Section21-39(A)(5) of Sullivan's Island Town Code and Ordinances (ratified 1981).

Sincerely,

Nathan J. Bluestein

Nathan J. Bluestein

Ettaleah Bluestein, M.D.

Dr. EttaLeah C. Bluestein

EXHIBIT
10

2411 Atlantic Avenue
Sullivan's Island, SC 29482
June 23, 2010

Andy Benke
Town of Sullivan's Island
1610 Middle Street
Sullivan's Island, SC 29482

Re: Cutting and Pruning of Vegetation in front of 2411 Atlantic Avenue

Dear Mr. Benke:

I would request that the Town issue us a permit to cut all vegetation to three (3) feet in front of our residence at 2411 Atlantic Avenue as was specifically authorized and allowed by §21-39(A)(5) of the Sullivan's Island Town Code and Ordinances (ratified 1981).

Sincerely,

Theodore H. and Karen K. Albenesius

Theodore H. and Karen K. Albenesius

EXHIBIT 11

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EXHIBIT D

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ELECTRONICALLY FILED - 2022 May 23 4:12 PM - CHARLESTON - COMMON PLEAS - CASE#2022CP1000846

CARL J. SMITH
MAYOR

TOWN COUNCIL
MICHAEL PERKIS, MAYOR PRO-TEM
BUDDY HOWLE
JERRY KAYNARD
MADELEINE MCGEE
PATRICK O'NEIL
MARY JANE WATSON

TOWN OF SULLIVAN'S ISLAND

ANDY BENKE
TOWN ADMINISTRATOR

JASON BLANTON
COMPTROLLER

LAWRENCE A. DODDS
TOWN ATTORNEY

GREG GRESS
WATER AND SEWER MANAGER

DANIEL S. HOWARD
CHIEF OF POLICE

ELLEN McQUEENEY
TOWN CLERK

RANDY ROBINSON
BUILDING OFFICIAL

M. ANTHONY STITH
FIRE CHIEF

June 21, 2010

Mr. Nathan J. Bluestein
EttaLeah C. Bluestein
2513 Atlantic Avenue
Sullivan's Island, SC 29482

In reference: Cutting and Pruning at 2513 Atlantic Avenue

Dear Mr. and Dr. Bluestein,

Thank you for your letter of June 15, 2010 requesting a permit to cut the vegetation in front of your residence.

You may have cited an older version of the zoning ordinance when requesting permission to trim and prune on Town property. Under the current ordinance, Section 21-71C(1)-(5) will define the area where cutting is allowed, specify the cutting season, list the trees and shrubs that may be trimmed and pruned and explain the terms under which cutting may occur.

Unfortunately your request does not meet the requirements of Section 21-71C; and, therefore, cannot be issued.

With kind regards, I am

Sincerely,
TOWN OF SULLIVAN'S ISLAND

Randy Robinson
Zoning Official

P.O. BOX 427 • SULLIVAN'S ISLAND, SC 29482
(843) 883-3198 • FAX (843) 883-3009 • WWW.SULLIVANSISLAND-SC.COM

EXHIBIT
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ARL J. SMITH
MAYOR

TOWN COUNCIL
MICHAEL PERKIS, MAYOR PRO-TEM
BUDDY HOWLE
JERRY KAYNARD
MADELEINE MCGEE
PATRICK O'NEIL
MARY JANE WATSON

TOWN OF SULLIVAN'S ISLAND

ANDY BENKE
TOWN ADMINISTRATOR

JASON BLANTON
COMPTROLLER

LAWRENCE A. DODDS
TOWN ATTORNEY

GREG GRESS
WATER AND SEWER MANAGER

DANIEL S. HOWARD
CHIEF OF POLICE

ELLEN McQUEENEY
TOWN CLERK

RANDY ROBINSON
BUILDING OFFICIAL

M. ANTHONY STITH
FIRE CHIEF

June 24, 2010

Mr. Theodore H. Albenesius
Ms. Karen K. Albenesius
2411 Atlantic Avenue
Sullivan's Island, SC 29482

(By Certified Mail Receipt 7009-2250-0000-9303-7782)

In reference: Cutting and Pruning at 2411 Atlantic Avenue

Dear Mr. and Mrs. Albenesius,

Thank you for your letter of June 23, 2010 requesting a permit to cut the vegetation in front of your residence.

You may have cited an older version of the zoning ordinance when requesting permission to trim and prune on Town property. Under the current ordinance, Section 21-71C(1)-(5) will define the area where cutting is allowed, specify the cutting season, list the trees and shrubs that may be trimmed and pruned and explain the terms under which cutting may occur.

Unfortunately your request does not meet the requirements of Section 21-71C; and, therefore, cannot be issued.

With kind regards, I am

Sincerely,
TOWN OF SULLIVAN'S ISLAND

Randy Robinson
Zoning Official

P.O. BOX 427 • SULLIVAN'S ISLAND, SC 29482
(843) 883-3198 • FAX (843) 883-3009 • WWW.SULLIVANSISLAND-SC.COM

EXHIBIT
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EXHIBIT E

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Julie J. Armstrong
Charleston County Clerk of Court

Charleston County
Circuit Court Case Details
Public Index

Switch View

Nathan Bluestein, plaintiff, et al VS Sullivans Island Town Of Etc, defendant, et al

Case Number:	2010CP1005449	**Court Agency:**	Common Pleas	**Filed Date:**	07/08/2010
Case Type:	Common Pleas	**Case Sub Type:**	Real Prop/Other 499	**File Type:**	Non-Jury
Status:	Settled	**Assigned Judge:**	Scarborough, Mikell R.		
Disposition:	Withdrawn or Settled by Parties	**Disposition Date:**	10/15/2020	**Disposition Judge:**	McCoy, Jennifer B.
Original Source Doc:		**Original Case #:**		**Restore Reason:**	Reopen Case for Appeal
Judgment Number:		**Court Roster:**			

Case Parties **Judgments** **Tax Map Information** **Associated Cases** **Actions** **Financials**

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Bluestein, Nathan	NEF(04-12-2021 01:43:23 PM) Order/Amend	Filing		04/12/2021-13:43		
Bluestein, Nathan	Order Amending Settlement	Order		04/12/2021-13:43		
Bluestein, Nathan	NEF(04-06-2021 04:45:50 PM) Motion/Alter and/or Amend	Filing		04/06/2021-16:51		
Bluestein, Nathan	Joint Motion/Amend Settlement Order By Consent	Motion		04/06/2021-16:45	04/12/2021-16:45	
Bluestein, Nathan	NEF(10-15-2020 01:23:15 PM) Order/Approval Of Settlement	Filing		10/15/2020-13:23		
Bluestein, Nathan	Order/Approval Of Settlement	Order		10/15/2020-13:23		
Bluestein, Nathan	NEF(10-07-2020 03:16:10 PM) Motion/Other	Filing		10/08/2020-10:35	10/15/2020-10:35	
Bluestein, Nathan	Consent Motion F/Court Approval of A Settlement	Motion		10/07/2020-15:16	10/15/2020-15:16	
Bluestein, Nathan	NEF(10-07-2020 03:10:31 PM) Notice/Notice of Appearance	Filing		10/07/2020-15:10	10/15/2020-15:10	
Bluestein, Nathan	Notice/Notice of Appearance	Filing		10/07/2020-15:10	10/15/2020-15:10	
Bluestein, Nathan	Remit Fr/ Supreme Crt Reversing & Remanding to Trial Crt	Filing		03/19/2020-10:49	10/15/2020-10:49	
Bluestein, Nathan	Remit Fr/ Supreme Crt Reversing & Remanding to Trial Crt	Filing		03/10/2020-10:47	10/15/2020-10:47	
Bluestein, Nathan	Remit Fr/ Supreme Crt Reversing & Remanding to Trial Crt	Filing		02/27/2020-10:12	10/15/2020-10:12	
	Remittitur From Supreme Court: Petition for Writ Granted	Filing		01/14/2019-09:13	10/15/2020-09:13	
	Remittitur From Court Of Appeals- rehearing is Denied	Filing		09/24/2018-11:36	10/15/2020-11:36	
	Plaintiffs Notice of Appealling multiple Orders, crt/srv	Filing		12/11/2015-14:42	10/15/2020-14:42	
	Master Order-granting defnts' mot for sum judg etc	Order		11/10/2015-09:58	10/15/2020-09:58	
	Master Order-Plntffs' Mot for Reconsideration is denied	Order		11/05/2015-12:02	11/10/2015-12:02	
	Plaintiffs Reply of Support & Opposition to Motions, crt/srv	Filing		09/30/2015-08:59	11/10/2015-08:59	
Sullivans Island Town Of Etc	Motion/Motion Filing Fee	Filing		09/14/2015-12:14	11/10/2015-12:14	
Van Raalte, Derk IV	Motion/Summary Judgment by defendant	Motion		09/14/2015-11:07	11/10/2015-11:07	
Sullivans Island Town Of Etc	Motion/Motion Filing Fee	Filing		09/11/2015-12:36	11/10/2015-12:36	
Van Raalte, Derk IV	Motion/In Limine by defendant	Motion		09/11/2015-11:53	11/10/2015-11:53	
	Town's Response to plntff Mot/Reconsider, Alter or Amend	Filing		09/11/2015-11:51	11/10/2015-11:51	
Bluestein, Nathan	Motion/Motion Filing Fee	Filing		08/17/2015-15:56	11/10/2015-15:56	
	Plaintiffs Memo in Support of Mot/Reconsideration etc, srv	Filing		08/17/2015-09:35	11/10/2015-09:35	
Hood, Robert H.	Motion/Reconsideration and Clarification by plaintiff, srv	Motion		08/17/2015-09:33	11/05/2015-09:33	
Bluestein, Nathan	Order/Order Filing Fee	Filing		08/05/2015-14:46	11/10/2015-14:46	
	Order/Plntfs' mot for sum judg for breach contract is denied	Order		08/05/2015-09:44	11/10/2015-09:44	
	Master Order-plntffs' mot to reconsider etc is denied	Order		08/04/2015-16:33	11/10/2015-16:33	
	Master Order-defnts' mot for sum judg on plntffs causes	Order		08/04/2015-16:26	11/10/2015-16:26	
	Master Order-granting sum judg to defnts based on	Order		07/30/2015-09:19	11/10/2015-09:19	

Sullivans Island Town Council Etc	Master Order granting defnts' mot to strike damages claim	Order		07/30/2015-09:17	11/10/2015-09:17	
	Master/Master's Order for date certain trial	Order		07/21/2015-12:59	07/30/2015-12:59	
	Master Order-plntff's mot to depose 2 additional people for	Order		07/21/2015-12:57	07/30/2015-12:57	
	Plaintiffs Reply in support of Motion to Reconsider etc, srv	Filing		02/25/2015-16:07	07/30/2015-16:07	
	Plaintiffs Reply in support of Motion to Reconsider etc	Filing		02/25/2015-16:06	07/30/2015-16:06	
	Plaintiffs Reply in support of Motion to Reconsider etc, srv	Filing		02/25/2015-16:05	07/30/2015-16:05	
	Dfndnts Response to plntffs Mot/Reconsider, Alter or Amend	Filing		02/23/2015-10:54	07/30/2015-10:54	
	Dfndnts Response to plntffs Mot/Reconsider, Alter or Amend	Filing		02/23/2015-10:54	07/30/2015-10:54	
	Dfndnts Response to plntffs Mot/Reconsider, Alter or Amend	Filing		02/23/2015-10:53	07/30/2015-10:53	
Bluestein, Nathan	Motion/Motion Filing Fee	Filing		12/23/2014-09:21	07/30/2015-09:21	
Bluestein, Nathan	Motion/Motion Filing Fee	Filing		12/23/2014-09:19	07/30/2015-09:19	
Bluestein, Nathan	Motion/Motion Filing Fee	Filing		12/23/2014-09:18	07/30/2015-09:18	
	Plntffs Memo/Support of Mot/Reconsider, Alter or Amend, srv	Filing		12/23/2014-09:12	07/30/2015-09:12	
Hood, Robert H.	Motion/Reconsider, Alter or Amend by plaintiff, crt/srv	Motion		12/23/2014-09:11	07/30/2015-09:11	
Hood, Robert H.	Motion/Reconsider, Alter or Amend by plaintiff, crt/srv	Motion		12/23/2014-09:11	07/30/2015-09:11	
	Plntffs Memo/Support of Mot/Reconsider, Alter or Amend, srv	Filing		12/23/2014-09:09	07/30/2015-09:09	
	Plntffs Memo/Support of Mot/Reconsider, Alter or Amend, srv	Filing		12/23/2014-09:08	07/30/2015-09:08	
Hood, Robert H.	Motion/Reconsider, Alter or Amend by plaintiff, crt/srv	Motion		12/23/2014-09:04	07/30/2015-09:04	
	Master order granting sum judg to defnts regarding unfair	Order		12/04/2014-14:13	07/30/2015-14:13	
	Master order granting sum judg to defnts regarding breach	Order		12/04/2014-14:11	07/30/2015-14:11	
	Master order granting sum judg to defnts regarding plntffs	Order		12/04/2014-14:09	07/30/2015-14:09	
Bluestein, Nathan	ADR/Mediation Results Report/Filing	Filing		07/29/2014-14:38	07/30/2015-14:38	
	Order/Defnt's mot for sum judg is granted etc	Order		05/21/2014-09:15	07/30/2015-09:15	
Bluestein, Nathan	Order/Order Filing Fee	Filing		04/18/2014-15:17	07/30/2015-15:17	
Hood, Robert H.	Motion/Motion to Conduct Inspection by plaintiff, crt/srv	Motion		04/18/2014-09:58	07/30/2015-09:58	
	Defendants Reply to plaintiffs Memorandum of Law	Filing		04/11/2014-14:34	07/30/2015-14:34	
	Plaintiffs Memo in Opposition to defendant Motions, crt/srv	Filing		03/31/2014-09:48	07/30/2015-09:48	
	Town's Memo in Reply to plaintiff Memo of Opposition	Filing		03/28/2014-11:16	07/30/2015-11:16	
	Town's Memo in Opposition to Mot/Summary Judgment	Filing		03/28/2014-11:14	07/30/2015-11:14	
Bluestein, Nathan	Motion/Motion Filing Fee	Filing		02/28/2014-14:41	07/30/2015-14:41	
	Defendants Memo in Support of Motion/Summary Judgment	Filing		02/28/2014-14:40	07/30/2015-14:40	
Van Raalte, Derk IV	Motion/Summary Judgment by the defendants	Motion		02/28/2014-14:40	07/30/2015-14:40	
	Defendants Memo in Support of Mot/Summary Judgment	Filing		02/28/2014-14:19	07/30/2015-14:19	
Van Raalte, Derk IV	Motion/Summary Judgment by defendant	Motion		02/28/2014-14:18	07/30/2015-14:18	
	Defendants Memo in Support of Mot/Partial Summary Judgment	Filing		02/28/2014-14:00	07/30/2015-14:00	
Van Raalte, Derk IV	Motion/Partial Summary Judgment by the defendants	Motion		02/28/2014-13:59	07/30/2015-13:59	
	Defendants Memo in Support of Motion to Strike	Filing		02/28/2014-13:58	07/30/2015-13:58	
Van Raalte, Derk IV	Motion/Strike by the defendants	Motion		02/28/2014-13:58	07/30/2015-13:58	
	Defendants Memo in Support of Mot/Partial Summary Judgment	Filing		02/28/2014-13:56	07/30/2015-13:56	
Van Raalte, Derk IV	Motion/Partial Summary Judgment by the defendants	Motion		02/28/2014-13:56	07/30/2015-13:56	
	Defendants Memo in Support of Mot/Partial Summary Judgment	Filing		02/28/2014-13:55	07/30/2015-13:55	
Van Raalte, Derk IV	Motion/Partial Summary Judgment by the defendants	Motion		02/28/2014-13:54	07/30/2015-13:54	
	Defendants Memo in Support of Mot/Partial Summary	Filing		02/28/2014-13:54	07/30/2015-13:54	

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	Judgment					
Van Raalte, Derk IV	Motion/Partial Summary Judgment by the defendants	Motion		02/28/2014-13:53	07/30/2015-13:53	
	Defendants Memo in Support of Mot/Partial Summary Judgment	Filing		02/28/2014-13:52	07/30/2015-13:52	
Van Raalte, Derk IV	Motion/Partial Summary Judgment by the defendants	Motion		02/28/2014-13:52	07/30/2015-13:52	
	Plaintiffs Memo in Opposition to Mot/Summary Judgment, srv	Filing		02/28/2014-13:26	07/30/2015-13:26	
Hood, Robert H.	Motion/Partial Summary Judgment by plaintiff, crt/srv	Motion		02/28/2014-13:21	07/30/2015-13:21	
	Plaintiffs Memo in Support of Mot/Prtl Summary Judgment, srv	Filing		02/28/2014-13:21	07/30/2015-13:21	
Sullivans Island Town Council Etc	Motion/Motion Filing Fee	Filing		02/28/2014-11:11	07/30/2015-11:11	
Sullivans Island Town Council Etc	Motion/Motion Filing Fee	Filing		02/28/2014-11:10	07/30/2015-11:10	
Sullivans Island Town Council Etc	Motion/Motion Filing Fee	Filing		02/28/2014-11:09	07/30/2015-11:09	
Sullivans Island Town Council Etc	Motion/Motion Filing Fee	Filing		02/28/2014-11:08	07/30/2015-11:08	
Sullivans Island Town Council Etc	Motion/Motion Filing Fee	Filing		02/28/2014-11:07	07/30/2015-11:07	
Sullivans Island Town Council Etc	Motion/Motion Filing Fee	Filing		02/28/2014-11:06	07/30/2015-11:06	
Sullivans Island Town Council Etc	Motion/Motion Filing Fee	Filing		02/28/2014-11:04	07/30/2015-11:04	
Sullivans Island Town Council Etc	Motion/Motion Filing Fee	Filing		02/28/2014-10:59	07/30/2015-10:59	
	Letter from Atty Hood re Removal of Atty Tom McCutcheon	Filing		01/14/2014-10:32	07/30/2015-10:32	
	Defendants Answer To 2nd Amended Complaint, JTD	Filing		12/16/2013-09:41	07/30/2015-09:41	
	Plaintiffs 2nd Amended Summons And Complaint	Filing		12/10/2013-10:04	07/30/2015-10:04	
	Master/Master's Scheduling Order	Order		12/03/2013-09:26	07/30/2015-09:26	
Bluestein, Nathan	Master Order- Plntff's mot to amend cmplnt is granted	Order		12/03/2013-09:25	07/30/2015-09:25	
	Plaintiffs Memo in Support of Mot/Amend Complaint, crt/srv	Filing		11/21/2013-11:22	07/30/2015-11:22	
	Letter from Brady Hair re Objectiom to Motion to Amend	Filing		04/25/2013-11:55	07/30/2015-11:55	
Bluestein, Nathan	Motion/Motion Filing Fee	Filing		04/16/2013-15:40	07/30/2015-15:40	
Hood, Robert H.	Motion/Motion to Amend Complaint by plaintiff, crt/srv	Motion		04/16/2013-09:32	07/30/2015-09:32	
	Order/Order of Protection	Order		12/06/2012-09:12	07/30/2015-09:12	
Bluestein, Nathan	Master/Master's Order of w/drawal of counsel	Order		04/17/2012-14:56	07/30/2015-14:56	
Bluestein, Nathan	Order/Referred to Master	Order		02/07/2012-10:59	07/30/2015-10:59	
Hood, Robert H.	Roster/Notice of Motions Roster Publication Sent	Action		05/19/2011-14:18	07/30/2015-14:18	
Hair, J. Brady	Roster/Notice of Motions Roster Publication Sent	Action		05/19/2011-14:18	07/30/2015-14:18	
	FORM4 IN RE:ORDER 20110124 9990 MAILED FIRST CLASS	Order		01/29/2011-00:00	07/30/2015-00:00	
	ORDER-DENY MOTION RE DEPOSITION & GRANT AS TO	Order		01/24/2011-00:00	07/30/2015-00:00	
	PLNTFFS' MEMO IN OPPOSITION TO JULIA M KHOURY'S	Filing		01/20/2011-00:00	07/30/2015-00:00	
	NOT/MOT TO QUASH SUBPOENA & CRT/SERV;SHAHID, A	Motion		01/06/2011-00:00	05/20/2011-00:00	
	ANSWER & AFFIRMATIVE DEFENSES ON BEHALF OF;VAN RAALE, D	Filing		09/24/2010-00:00	07/30/2015-00:00	
	1ST AMENDED CMPLNT	Filing		09/13/2010-00:00	07/30/2015-00:00	
	DEFNTS AMENDED ANSWER & AFFIRMATIVE DEFENSES;VAN RAALTE, D	Filing		08/31/2010-00:00	07/30/2015-00:00	
	DEFNTS ANSWER & AFFIRMATIVE DEFENSES ON BEHALF;RAALTE, D	Filing		08/19/2010-00:00	07/30/2015-00:00	
	ACCEPTANCE OF SERVICE	Filing		07/13/2010-00:00	07/30/2015-00:00	
	SUMMONS & COMPLAINT	Filing		07/08/2010-00:00	07/30/2015-00:00	
	RECEIPT #10-11496	Filing		07/08/2010-00:00	07/30/2015-00:00	
Bluestein, Nathan	Civil Converted Cost	Filing		07/08/2010-00:00	07/30/2015-00:00	

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Town of Sullivan's Island,	)	C/A No. 2022-CP-10-00846
	)	
Plaintiff,	)	**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR STAY OF DISCOVERY**
	)	
Versus	)	
	)	
Nathan Bluestein and Theodore Albenesius, III,	)	
	)	
Defendants.	)	

Defendants, Nathan Bluestein and Theodore Albenesius, III (hereinafter "Defendants"), by and through their undersigned counsel, submit the following memorandum as an Opposition to the Town of Sullivan's Island's (the "Town's") Motion for Summary Judgment and Stay of Discovery.

Introduction

In 2010, Defendants sued the Town for a variety of claims associated with its failure to manage the Accreted Land in accordance with its applicable restrictive covenants. *See Bluestein et al. v. Town of Sullivan's Island and Sullivan's Island Town Council*, C/A No. 2010-CP-10-05449 (the "Original Lawsuit").[1]

After ten (10) years of litigation, the Town entered into a settlement agreement with Defendants and resolved claims raised by Defendants (the "Settlement Agreement"). The Town executed this Settlement Agreement after the Town Council passed a resolution to adopt the same on October 2, 2020. But the Town did more; in addition to entering this binding contract, the Town also filed a consent motion for this Court to approve the Settlement Agreement. This Court

[1] In their Second Amended Complaint, Defendants specifically raised claims for declaratory judgment, temporary and permanent injunctions, mandamus, breach of contract, breach of contract with fraudulent intent, unfair trade practices, public and/or private nuisance, inverse condemnation, and violation of the Contract Clauses of the South Carolina and United States Constitution. Second Amd. Compl., Dec. 10, 2013, C/A No. 2010-CP-10-05449.

approved and adopted the Settlement Agreement by order dated October 15, 2020. Several months later, the Town again submitted a consent motion for this Court to approve an amended Settlement Agreement, which was ultimately entered on April 12, 2021.

Now, the Town has filed a new lawsuit seeking to avoid the obligations it undertook in the Settlement Agreement, to shirk its duty to act in good faith according to and in fulfilment of its terms, and to flout the order of this Court adopting the same. This most recent effort to delay, obstruct, and ignore the Town's responsibility to manage the Accreted Land – a responsibility evidenced by the reasonable provisions of the Settlement Agreement – must be rejected, and the Town's motion must be denied.

Relevant Background

The history of the Accreted Land that exists on Sullivan's Island has been extensively documented in the Original Lawsuit and the appeal taken from the same. *E.g., Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 839 S.E.2d 879 (2020). The central issue in the Original Lawsuit was whether the 1991 deed permitted the Town to enact ordinances that would result in maintaining the Accreted Land in a less restrictive way than it would have been maintained if the Town were to keep it in the condition it was in when the 1991 deed was issued. *Id*. A copy of the 1991 deed is attached hereto as **Exhibit 1**. The Supreme Court ultimately agreed that the Town was not entitled to summary judgment as to its interpretation of the 1991 deed and ruled in favor of the present Defendants (the plaintiffs in the Original Lawsuit). *Bluestein*, 429 S.C. at 464, 839 S.E.2d at 882 (holding that "the 1991 deed is ambiguous in terms of the Town's maintenance responsibilities towards the accreting land . . . this dispute may not be resolved as a matter of law. Genuine issues of material fact exist").

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After the Supreme Court ruled in favor of Defendants, the Town agreed to settle the Original Lawsuit's claims. At all relevant times in the process, including negotiation, resolution, meetings and hearings regarding the Settlement Agreement, the Town was represented and advised by counsel. As summarized by the Settlement Agreement itself, the parties agreed that "existing conditions . . . will continue to mature into an increasing problem." **Ex. 2**, Settlement Agreement at 3. These Defendants negotiated the Settlement Agreement in good faith and with the understanding that the Town was also acting in good faith. These Defendants, continuing in good faith, executed the Settlement Agreement with the Town and released the claims they maintained in the Original Lawsuit, in return for the Town's promise that it would perform all negotiated and agreed upon work described in the Settlement Agreement for management of the vegetation that has, over the course of the Original Litigation and still today, grown rampant.

The scope of work incorporated into the Settlement Agreement was agreed upon after consultation with experts and includes an identification of the specific trees to be trimmed within each Zone, the removal of non-native or invasive species, removal of vines with Town approval for the health of the tree, and the maintenance of beach paths with all work to be performed by the Town's approved contractor(s). Further mitigations are provided to ensure that the work takes place outside of the various breeding seasons for native wildlife. **Ex. 2**, Settlement Agreement at 9.

The Settlement Agreement describes a limited scope of work to be performed by the Town, which will be predominantly funded by property owners' contributions, and not by the Town.[2]

[2] "Homeowners . . . must provide sufficient funds with the Town . . .to cut the property of their block in accordance with the zone specifications contained herein." **Ex. 2**, Settlement Agreement at 6. While the Town attempts in its present Motion to suggest that "primary funding for a portion of the work" is to be contributed to by the Town, somehow necessitating a major budget action by the Town, *see* Mot. at 15, this portion by agreement deals only with the limited work to be performed in the narrow "Transition Zone" identified between the Accreted Land and private property and does not involve the vast majority of the work to be performed in the three larger "Zones" of Accreted Land. *See id.* Since the Town has refused to make any effort to even open bidding for its Transition Zone work, it is unclear precisely how much of a financial undertaking the Transition Zone work might actually be. Defendants can only speculate whether the actual cost of the limited Transition Zone work (funded by the Town) would be of greater or lesser cost

Further, Settlement Agreement provides that "[n]either of the Parties shall directly or indirectly, individually or through others, endeavor to interfere with . . . the completion of the work described herein" and "[t]he Parties covenant and agree to work in good faith to . . . complete the work agreed to and described herein." **Ex. 2**, Settlement Agreement at 6.

To ensure procedural requirements were met and to ensure a successive Town Council would complete the work as agreed, in October 2020 the parties submitted the Agreement to this Court and the Town adopted a Resolution to effectuate the settlement. The October 2, 2020, Town of Sullivan's Island Resolution is attached as **Exhibit 3**. This Court approved the Agreement and found it to be "proper and in the best interest of all Parties." This Court's Order Approving the Settlement Agreement is attached as **Exhibit 4**. As stated in the Court Order,

> *"[T]he Parties are hereby authorized to consummate the settlement referred to in the . . . Settlement Agreement and General Release . . . and to execute and deliver to the Defendants an appropriate Release terminating, releasing, and ending any and all claims and actions asserted or brought under or by virtue of any South Carolina Statute or by common law against the Defendants, Town of Sullivan's Island and Sullivan's Island Town Council, including their Mayor, council, officers . . .* ***predecessors and successor corporations or entities****. . . ."*

(emphasis added). The parties thereafter amended the Agreement, with such amended Agreement also being approved by this Court. *See* Order Amending Settlement, April 21, 2021, attached as **Exhibit 5**. This Court's Order approving the amended Settlement Agreement incorporates a Technical Narrative provided by Thomas & Hutton for the Settlement Agreement's scope of work and is attached as **Exhibit 5**. This amendment also specifies that "[n]o removal of vegetation that disturbs the soil will occur", including stumps. *Id.*

Subsequently, in May 2021, several new individuals were elected to the Sullivan's Island Town Council. Upon information and belief, many of the newly elected members campaigned on

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than the Town's decision to retain and pay for new special counsel to pursue the present lawsuit (which, presumably, is also being funded by the Town).

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promises to make every effort to subvert the Settlement Agreement or any other activity with respect to the management of the Accreted Land.[3]

On September 21, 2021, fourteen individuals occupied the public comment period during a regular meeting of Town Council and made lengthy presentations claiming that the Settlement Agreement is unenforceable. Upon information and belief, these presentations were coordinated by the interest group Sullivan's Island for All and designed to serve as a platform to prompt the filing of the present lawsuit. Though this topic was not on the agenda for the regular meeting and no notice of the discussion was provided, the Town determined it would evaluate its "rights and obligations" under the Settlement Agreement.

The following week, and with only minimal public notice, the Town held a special meeting to consult with its original special counsel about the Settlement Agreement. The Town provided no opportunity for public comment during this special meeting. Ultimately, in October 2021 the Town voted in favor to "move forward with a potential legal loophole in the Agreement"[4] by retaining a new, special outside counsel, who is now the Town's current counsel in the present matter. On February 21, 2022, the Town filed this suit seeking to invalidate the Settlement Agreement in the very Court where, less than two years prior, it had sought approval of the same.

On May 10, 2022, these Defendants served their First Set of Interrogatories and First Set of Requests for Production (the "Requests") on the Town. Less than two weeks later, the Town filed this Motion for Summary Judgment and Motion for Stay of Discovery.[5] On June 10, 2022, the

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[3] For example, an April 2021 Post and Courier article outlines each candidate's respective opinion on the Settlement Agreement and highlights that the Accreted Land was a crucial component in the May election. Chloe Johnson, *Vote to thin Sullivan's Island maritime forest weighs heavily on residents before election*. Post & Courier, Apr. 25, 2021.

[4] Scott Millimet, Comment during Town of Sullivan's Island Special Council Meeting, Oct. 12, 2021, at 5:12pm. http://sullivansislandsc.suiteonemedia.com/Web/Player.aspx?id=393&key=-1&mod=-1&mk=-1&nov=0.

[5] The Town had made no effort to confer with these Defendants as to the possibility of a stay of discovery before filing its motion. While there may be no duty under the South Carolina Rules of Civil Procedure to consult for motions for

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Town responded to this Defendants' Requests with only boilerplate, duplicative objections to each request, referencing its Motion to Stay Discovery. *See* Pl.'s Resp. to Def.'s First Set of Interrogs. and Req. for Produc., attached as **Exhibit 6**. Thus, the Town has effectively ignored its discovery obligations and unilaterally stayed all discovery pending the resolution of its Motion for Summary Judgment.

Argument

Summary judgment is appropriate *only* where there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. To determine whether an issue of material fact exists, the evidence and all inferences that can reasonably be drawn from the evidence is required to be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Every benefit of the doubt must be given to the nonmoving party. *Watters v. Terminix Serv. Inc.*, 376 S.C. 632, 635, 658 S.E.2d 110, 111 (Ct. App. 2008).

In addition, summary judgment is viewed as a drastic remedy that "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman v. AT&T*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (citing *Watson v. Southern Ry. Co.*, 420 F. Supp. 483, 486 (D.S.C. 1975)). Summary judgment is entirely inappropriate where further inquiry is necessary into the facts of the case to clarify application of the law. *BPS, Inc. v. Worthy*, 362 S.C. 319, 325, 608 S.E.2d 155, 159 (2005). In other words, summary judgment should not be granted "even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Id*. at 326, 608 S.E.2d at 159. In cases

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summary judgment, to consult on their motion to stay is a violation of Rule 11, SCRCP. The Town should not, and cannot, ignore its duties of good faith consultation by bootstrapping a request for additional relief into its summary judgment motion.

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applying the preponderance of the evidence standard, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Team IA, Inc. v. Lucas*, 395 S.C. 237, 244, 717 S.E.2d 103, 106 (Ct. App. 2011).

I. THE TOWN'S SUMMARY JUDGMENT MOTION SHOULD BE DENIED OR, IN THE ALTERNATIVE, DECLARATORY JUDGMENT ENTERED IN FAVOR OF DEFENDANTS.

A. This Court Should Deny Summary Judgment Because to Rule Otherwise Would Abrogate the Parties' Fundamental Right to Freedom of Contract.

It is well-settled in South Carolina courts that settlement agreements are enforced under the same legal standards as contracts. *Pee Dee Stores, Inc.v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009); *see also Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001) (enforcement of the terms of a settlement agreement is a matter of contract law); *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (a release agreement is a contract and contract principles of law should be used to determine what the parties intended); *Mattox v. Cassady,* 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct. App. 1986) (applying the general rules of contract construction to a settlement agreement). Under South Carolina common law, if the contract's language is unambiguous and can be subject to only one interpretation, "no construction is required and the contract's language determines the instrument's force and effect." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). To preserve the ***fundamental right*** to freedom of contract, "[a] court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *S.C. DOT. v. M&T Enters. Of Mt. Pleasant*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) (determining that, where a tenant conceded its lease contract was not ambiguous, the clear language of the contract controlled). Parties are therefore free to

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bind themselves by means of a contract without the intervention of the government, unless the contract is violative of the law or is contrary to public policy. *Id*. at 656, 667 S.E.2d at 14.

1. <u>A Factfinder Could find that the Town Fairly, Reasonably, and Properly Exercised its Proprietary Powers When it Entered the Settlement Agreement and Therefore the Agreement is in Accordance with Law and Public Policy</u>.

The Settlement Agreement is, fundamentally, a contract and should be enforced pursuant to South Carolina contract law. When the term of a contract extends beyond the term of the governing members of the municipality entering the contract, "the validity of the contract is dependent on the subject matter of the contract." *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 132, 459 S.E.2d 876 (Ct. App. 1995). It is true that "a council may not by contract bind its successors to forego or exercise their *legislative* functions." *Newman v. McCullough*, 212 S.C. 17, 25, 46 S.E.2d 252 (1948) (emphasis added); *see also City of Beaufort v. Beaufort-Jasper County Water & Sewer Auth.*, 325 S.C. 174, 480 S.E.2d 728 (1996) *Piedmont*, 319 S.C. 124, 459 S.E.2d 876. However, if the contract involves the exercise of the municipal corporation's business or proprietary powers, as is the case here, the contract may extend beyond the term of the contracting body and is enforceable absent some other ambiguity. *Piedmont*, 319 S.C. at 132, 459 S.E.2d at 876.

i. <u>Proprietary Function</u>: The Town properly utilized its proprietary powers by entering a valid settlement agreement which outlines a scope of work that fully resolves the litigated issues.

To determine if a contract is of a proprietary nature, courts look to whether the contract will deprive the municipality of a discretion which public policy believes should be left unimpaired. *Id*. However, South Carolina Courts have struggled to distinguished between contracts that are within a municipality's governmental or legislative functions that would not bind subsequent Town Councils, and contracts that are within proprietary powers which would be

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binding. *See, e.g., City of Beaufort*, 325 S.C. 174, 480 S.E.2d 728; *Newman*, 212 S.C. 17, 46 S.E.2d 252 (1948); *Piedmont*, 319 S.C. 124, 459 S.E.2d 876. Courts have determined that government functions that cannot be contracted beyond the terms of its own members include the appointment and removal of public officers and the provision of water and sewer service to residents. *See Newman*, 212 S.C. 17, 46 S.E.2d 252; *City of Beaufort*, 325 S.C. 174, 480 S.E.2d 728. Notably, a municipality's ability to control utility service and the specific actors who work for the Town are two areas which courts have concluded should be left unimpaired for reasons of public policy. *City of Beaufort*, 325 S.C. at 180, 480 S.E.2d at 732. The rationale for these rulings lies in the clear governmental nature of these types of decisions, which give life to the government as a body politic. *Id*. In fact, many cases involving the provision of utilities have been found not binding on successive councils because they involved a municipal entity at issue that was formed for the specific purpose of providing such service. *See City of Beaufort*, 325 S.C. at 181, 480 S.E.2d at 732; *G. Curtis Martin Investment Trust v. Clay*, 274 S.C. 608, 266 S.E.2d 82 (1980).

While South Carolina does not have any developed state law directly on point, federal courts within the federal Fourth Circuit Court Appeals is instructive. The Fourth Circuit strongly disfavors a municipality that attempts to avoid its obligations it previously agreed to in a settlement agreement. *See e.g., Moore v. Beaufort County*, 936 F.2d 159 (4th Cir. 1991); *Free State Recycling Sys. Corp v. Board of County Comm'rs*, 885 F. Supp 798 (D. Md. 1994). Notably, the Fourth Circuit Court of Appeals addressed a similar matter in the past. *See Moore*, 936 F.2d 159. In *Moore*, African American voters brought a class action under the Voting Rights Act due to no African American candidate being elected to the Board of County Commissioners in at least thirty years. *Id*. Thereafter, an oral agreement was reached between the parties to create an entirely new election method for years to come. *Id*. at 161. Drafts of the settlement agreement were composed

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and exchanged, but the board subsequently voted to reject the settlement terms because of sudden public opposition. *Id*. The Court found that an oral offer to settle litigation on specific and enforceable terms was enough to bind a county board. *Id*. The Court stated,

> *[a]ppellant's position would require that district courts modify voting plans each time that local governing bodies have a change of heart. At one point, the Board of Beaufort County felt that limited voting was desirable. Now it does not.* ***The district court is not required to gauge the current sentiment of the Board before implementing a plan that has previously been approved****. In enforcing this agreement, the district court will do no harm to the principles of federalism and deference.*

Id. at 164 (emphasis added).

If the Town's argument is correct, and the Settlement Agreement is legislative in nature and does not bind a subsequently elected municipality, then the same argument certainly should have succeeded with respect to the oral settlement agreement at issue in *Moore*. A settlement agreement enacted by a governing body to completely alter its election processes is far more "legislative" in nature than a settlement agreement which contemplates a scope of work for the maintenance of overgrown shrubbery, yet the Fourth Circuit Court of Appeals still bound successive board members by the settlement's terms. Though the Town confidently states that the "maintenance" of the Accreted Land is necessarily a legislative function, and the Settlement Agreement thus cannot bind successive Town Councils, no South Carolina common law supports this position. The Town has not cited a single case in which a valid, court-approved settlement agreement such as the agreement at issue here has been uniformly invalidated for being "legislative" in nature. This Court should not make such a finding here.

Nor did our Supreme Court, in adjudicating the appeal from the Original Lawsuit, take issue with the binding nature of the 1991 deed, whose restrictive covenants regarding maintenance of the Accreted Land were intended to last in "perpetuity" on subsequent Town council members.

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See Bluestein, 429 S.C. 458, 839 S.E.2d 879; *see also* **Ex. 1**, 1991 deed at 4.[6] In fact, these Defendants claim that the Settlement Agreement is proprietary in nature by virtue of the business-like functions its subject matter encompasses: the maintenance of Town-owned land, for which the Town regularly executes contracts, that extend beyond the staggered and relatively short terms of its council members.

Additionally, in suggesting that the very substance of the Settlement Agreement involves zoning functions which somehow make it legislative in nature (and thus not binding on a newly elected Town Council), the Town again attempts to make this matter about zoning. Our Supreme Court did not find this argument persuasive during the appeal of the Original Lawsuit and instead characterized it as an issue of contract. *See Bluestein*, 429 S.C. at 462, 839 S.E.2d at 880 ("[t]he dispute in this case revolves around the language and intent of the 1991 deed restrictions"). Here, again, the Town contends that "determinations concerning permissible uses of the Accreted Land are zoning issues" and "are by definition legislative and/or governmental." Mot. at 13. The Town further argues that the Settlement Agreement it signed and negotiated less than two years ago at the advice of its own counsel violates its 2005 ordinance that concerns the Accreted Land, because it is an improper divestment of legislative powers.

These arguments by the Town are not new; they were unsuccessfully raised by the Town and did not persuade our appellate courts during the Original Lawsuit's appeal. *See Bluestein*, 429 S.C. 458, 839 S.E.2d 879. Just as the Town sought to avoid the contractual obligations for Accreted Land maintenance which were embodied in the 1991 deed and at issue in the Original Lawsuit, the Town now is attempting to avoid the obligations it undertook to revolve by entering into the Settlement Agreement and resolving the Original Lawsuit. *See* **Ex. 2**, Settlement

[6] The binding nature of this deed is evidenced by the fifty-year term of the deed, which self-renews at a term of fifty years until 75% of town residents or 100% of Town council members vote to repeal it in its entirety.

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agreement. The present motion is but the latest example of the Town attempting to delay taking any meaningful action to manage the Accreted Land, and this effort should be rejected.

Even if these were new arguments that the Settlement Agreement did not already resolve, it is difficult to understand the Town's argument that a Settlement Agreement, which sets forth a reasonable and specific scope of work guided by experts, somehow inhibits the Town's ability to legislate and act in the public interest. It is simply illogical to contend that the Settlement Agreement hinders the Town's ability to legislate zoning involving the "use" of the land. Indeed, any "use" of its Accreted Land is already governed by the terms of the Lowcountry Land Trust's restrictive covenants, and has been since 1991. Moreover, it is well settled that maintenance of land is necessary for the public's health, welfare, and safety. Indeed, the Town itself regularly contracts and executes settlement agreements with other property owners on the Island for maintenance and management of property which binds successor iterations of the Town Council.[7] Were this not an appropriate, and valid, practice, an administrative nightmare would be created every time a new Town Council is elected as it would requiring the new Town Council to specifically ratify or seek judicial invalidation of each and every third party to a contract authorized by its predecessor councils.

The law in other jurisdictions is also instructive and supports the enforceability of the Settlement Agreement pursuant to its unambiguous terms. Other states often bind municipalities to their contractual promises made with third parties, especially in the context of settlement agreements. In Maryland, counties and municipalities are normally bound to their settlements to the same extent as private entities.

[7] In fact, the Town contracts and executes settlement agreements regarding zoning and the "use" of its land regularly. Attached hereto as **Exhibit 7** are four different settlement agreements, executed within the last ten years between the Town and various parties, which resolved zoning litigation with the Town, and whose terms run in "perpetuity."

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> *When the executive branch of the county government, in carrying out the laws and functions of government, enters a contract, such action constitutes the exercise of executive discretion. A requirement that the government adhere to that exercise of discretion, and be held to its contract, ordinarily does not constitute an unlawful interference with future executive discretion.*

Montgomery Cnty. v. Revere Nat'l Corp. 341 Md. 366, 671 A.2d 1 (1996). Similarly, Nebraska follows the rule that "[e]xcept where an important public policy would be violated, judgments entered by agreement or consent are generally given a conclusive effect and are res judicata." *Blazek v. City of Omaha*, 441 N.W2d 205, 207 (Neb. 1989). Other jurisdictions hold that as long as a municipality is conferred the power by the legislature to undertake an obligation, it may enter a settlement agreement to carry out its powers, including those agreements that may take many years to come to fruition. *See Mellette Cnty. v. Arnold*, 75 N.W.2d 641 (S.D. 1956); *Robinhood Plaza, Inc. v. City Council of Jersey City,* 2017 N.J. Super. Unpub. LEXIS 1408 (N.J. Super. Ct. 2017). The same result should be reached here. In short, a reasonable factfinder could find that the subject matter of the Settlement Agreement is a proprietary, business-like function that is wholly in accordance with law and public policy.

ii. <u>Fair, Reasonable, and Necessary</u>: the Settlement Agreement is fair, reasonable, and necessary for the Town of Sullivan's Island residents' health, safety, and general welfare.

If the Settlement Agreement is proprietary in nature, and it is as Defendants have demonstrated above, it is binding on successor bodies because, at the time it was executed, it was fair and reasonable and necessary or advantageous to the municipality. *Piedmont*, 319 S.C. at 132, 459 S.E.2d at 876. To determine whether a contract is fair, reasonable, and necessary, the court will look to the duration of the contract and how the municipality's power is restricted. *See, e.g., id*. A contract that is long in duration may be reasonable for some municipal contracts, but has been deemed unreasonable for an employment contract for a municipal position which is of utmost

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importance to the public. *Id*. at 136, 459 S.E.2d at 882. Because South Carolina courts have limited case law as to what constitutes "fair, reasonable and necessary," in *Piedmont*, the Court of Appeals relied on other jurisdiction's law to determine what a fair and reasonable duration is for a municipal contract. *See id*. (citing *City of Phoenix v. Long*, 761 P.2d 133 (Ariz. Ct. App. 1988) (contract extending beyond the term of office of the members of a public board, if made in good faith, is ordinarily valid, because the body is a continuously existing corporation); *Daly v. Stokell*, 63 So. 2d 644 (Fla. 1953) (when terms of commissioners are staggered, the commission is a continuing body and may contract for any reasonable time)).

Unlike an employment contract for an integral role with the municipality whose contract term must be limited, the negotiated contract for reasonable vegetation maintenance that this Settlement Agreement represents does not improperly restrict the power of subsequent Town Councils. As discussed above, the Original Lawsuit issues revolved around how the Town would maintain the vegetation in accordance with the 1991 deed. To settle the Original Lawsuit, a compromise was reached between the parties as to how the Accreted Land would be maintained, and specifically, that the Town would "maintain in similar conditions going forward" as contemplated by the Settlement Agreement. **Ex. 2**, Settlement Agreement at 3.

While the Town now complains of what it characterizes as the "perpetual," "unreasonable," and "unfair" nature of the Settlement Agreement, it does not explain why its position has changed so drastically from the time of its execution less than two years ago – a time at which the Town "agreed to a resolution of this long-standing dispute, pursuant to the [Settlement Agreement's] terms and conditions that have been approved and adopted by the Town Council", *id*. at 1; found that the Settlement Agreement "balances the competing needs of beachfront and inland island residents and the ecological and natural interests on one hand and human safety needs on the

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other", *id.*; and that the Settlement Agreement and associated scope of work was "necessary for the health, safety and general welfare of the Town." *Id.* at 2. Further, the Settlement Agreement's very nature is based on the fact that "[t]he Parties. . . considered . . . [t]he only way to address excessive vegetation growth and density is selective thinning" which must continue to occur to avoid the current hazardous conditions that led to the Original Lawsuit and which have continued unabated to this day. *Id*. at 1. Finally, the Town is a "municipality having a certificate of incorporation issued by the Secretary of State . . .declared to be [a] perpetual bod[y]." S.C. Code Ann. § 5-1-10 (1986). Consequently, while the term of office of the Town's council changes, the corporation continues unchanged and so too should a reasonable contract that is proprietary in nature. As such, the duration of this Agreement is reasonable.

The Settlement is also necessary. In fact, the Settlement Agreement itself explains why it is necessary, reasonable, and advantageous to the municipality. It expressly states "[t]he settlement, and implementing steps associated therewith, are necessary for the health, safety and general welfare of the Town. Reduction in pests and mosquitoes benefits public health, as does fire hazard reduction. Improved airflow is also beneficial. . ." **Ex. 2**, Settlement Agreement a 2. Second, to fail to reach a mutual agreement would result in cyclical litigation with the property owners. "The Town recognizes the need to develop a detailed implementation plan" and "failure to undertake the proposed settlement would subject the town and residents to the uncertainty inherent in a trial." *Id*. at 1, 3. In fact, in its Order approving the settlement less than two years ago, this Court found that the Settlement Agreement "is proper and in the best interest of all Parties." **Ex. 5**, Order at 1.

Therefore, a reasonable factfinder could easily find that the Settlement Agreement is proprietary, fair, reasonable, and necessary, and thus binding on subsequent town councils. If

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nothing else, the grappling of courts as to what is proprietary or legislative in nature indicates that there is a clear necessity in this case to further inquire into the facts to clarify the application of the law as it applies to this matter, such that the Town cannot succeed in meeting its burden for this Court to grant summary judgment in its favor.

2. Because a Factfinder Could Find the Settlement Agreement Does Not Violate Law or Public Policy, the Settlement Agreement's Plain Language Determines its Force and Effect and it Must be Enforced in Accordance Therewith.

It is apparent, as it has been conceded by both parties, that "there is no dispute as to the authenticity of the Settlement Agreement . . . [and it] is unambiguous." *See* Mot. at 10; *See also* Ans. ¶ 58. Because it does not violate law or public policy, this Settlement Agreement can be subject to only one interpretation: its unequivocal and unambiguous language which determines the Settlement Agreement's full force and effect on the parties. The plain terms of the Settlement Agreement exhibit the Town and these Defendants' intentions, as it relates to this matter, in various provisions. First, the parties intended a resolution. The Settlement Agreement notes the parties agree to "resol[ve] . . . this long-standing dispute, pursuant to the . . . terms and conditions that [were] approved and adopted by the Town Council." **Ex. 2**, Settlement Agreement at 1. Second, the parties sought this resolution to be final and absolve the Court, the parties, and the Town's taxpayers of this costly and tiresome dispute. In pertinent part, the Agreement states these Defendants were to release the Town **and their successors** from any and all claims related to the Original Lawsuit and dismiss the Original Lawsuit with prejudice. *Id*. at 8 (emphasis added). Third, the scope of work contemplated and agreed to by these parties under the Settlement Agreement is "necessary for the health, safety, and general welfare of the Town" and its "benefits. . . would outweigh any potential damage done" to the Accreted Land. *Id*. at 2. Finally, the

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Settlement Agreement "shall be ***binding upon and inure to the benefit of all the Parties, and their heirs, successors and assigns***." *Id*. at 8 (emphasis added).

Despite these clear and unambiguous terms to which the Town voluntarily entered, the Town now seeks to avoid its obligations and shirk its obligation to perform the scope of work to which Defendants, in good faith, agreed. But this is neither legally appropriate nor warranted, because the parties have conceded the Settlement Agreement is unambiguous, and a reasonable factfinder could find that the Settlement Agreement is valid under law and public policy as evidenced above, the contract must be enforced pursuant to its plain terms – terms which demonstrate the parties' intent at the time the Settlement Agreement was executed.[8] To preserve the process by which individuals enter contracts, restrictions should not be imposed on these parties who exercised their fundamental right to willingly enter the Settlement Agreement at issue here.

B. <u>The Town Had the Authority to Enter the Settlement Agreement</u>.

Even if the Settlement Agreement were deemed "legislative" in nature or unfair and unreasonable, a construction which Defendants maintain is incorrect, the Town had the authority and discretion to enter the Settlement Agreement. This Court should not restrict or nullify its contracting authority as the Town appears to be requesting in its present Motion. Pursuant to South Carolina Law,

> *[e]ach municipality of the State . . . may enact . . . resolutions . . . including the exercise of powers in relation to . . . health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it. . .*

[8] If the Town's position as to the validity of the Settlement Agreement is correct, then the releases contained in the Settlement Agreement were without consideration and would be equally invalid. Defendants are prepared to re-open the Original Lawsuit and proceed with trial on their original claims at the earliest opportunity.

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S.C. Code § 5-7-30 (2022). In addition, a municipality is free to perform ***any*** of its functions by contract with any individual or corporation. *Id*. § 5-7-60. The only limit the South Carolina legislature has imposed on this broad grant of statutory authority is that the action taken by the municipality be consistent with the Constitution and general laws of the state of South Carolina. *See Hospitality Ass'n of S.C., Inc. v. Cnty. of Charleston*, 320 S.C. 219, 464 S.E.2d 113 (1995). Further, the "tripartite system of government traditionally precludes the judicial branch from impinging on the legislature's exercise of a power vested in that body." *Town of Hilton Head Island v. Coalition of Expressway Opponents*, 307 S.C. 449, 455, 415 S.E.2d 801 (1992); *See also Hilton Head Island v. Fine Liquors, Ltd.*, 302 S.C. 550, 397 S.E.2d 662 (1990). "The exercise of police power is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose." *Atl. Coast Line R. Co. v. S.C. Public Serv. Comm.*, 245 S.C. 229, 139 S.E.2d 911 (1965).

In *Hilton Head Island*, the Supreme Court held a Town of Hilton Head ordinance was valid that prohibited internally illuminated signs which were visible from any public right of way because the ordinance promoted safety and aesthetics and sought to preserve the natural environment of the island. 302 S.C. at 553, 397 S.E.2d at 664. Fine Liquors used four internally lit red dot signs at its business and the Town of Hilton Head claimed it was in violation of an ordinance against the same. *Id* at 552, 397 S.E.2d at 663. Fine Liquors argued, in part, that the Town ordinance was an improper exercise of the Town's police power. *Id*. The Supreme Court disagreed, reasoning that under S.C. Code Ann. § 5-7-30, the ordinance was a reasonable exercise of the Town's police powers because it strove to protect the unique aesthetics of Hilton Head Island. *Id*. at 553-54, 397 S.E.2d at 664.

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There are no statutory or Constitutional grounds to restrict municipal leaders' authority to enter an agreement, which outlines a scope of work to maintain vegetation. Nor are there statutory or Constitutional grounds to assert that the Town did not have the absolute unfettered right to settle a lawsuit. Rather, the municipality is enabled by the legislature to use its broad grant of statutory authority to take action that it believes is necessary and proper for the Town's general welfare. While the Town's police powers were not used to enact an ordinance in executing the Settlement Agreement, the Town nonetheless had the discretion and authority to exercise its police powers to settle a lawsuit. Even more crucial to the safety and general welfare of individuals than the lit sign in *Hilton Head Island*, here, the Town of Sullivan's Island has entered a valid contract pursuant to its statutory authority to maintain an overgrown Maritime Forest, which has for years presented safety and environmental concerns to the Town's residents.

Indeed, the Town itself concluded this in the Resolution it adopted, stating "the . . . settlement adopted herein strikes the most advantageous possible outcome of the lawsuit and best balances the competing needs of . . . human needs and safety." **Ex. 3**, Resolution at 1–2. The Town joined in the motion to approve the Settlement Agreement made before this Court, which was ultimately granted. **Ex. 3**, Order. Yet now, the Town disturbingly comes into the same Court and requests this Court deem the Settlement Agreement, illegal, invalid, and unenforceable due to the Town's lack of authority to enter it in the first place. These tactics go against the very core of our judicial system.

Further, a municipal corporation is formed by the legislature, and as such, only the legislature may take its powers away. A municipality, having power to exercise legislative or governmental functions, is not vested with authority "to circumscribe, limit, or diminish efficiency of such powers, but must transmit them unimpaired to succeeding councils." *Newman*, 212 S.C.

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at 22, 46 S.E.2d at 255. The Town appears not to consider that its argument, if successful, may in reality have the effect of limiting the Town's power even more than it claims the Settlement Agreement already does (which it does not). First, for a Court to hold that this Settlement Agreement is invalid would likely render many other settlement agreements and contracts executed by the Town invalid as well. The Town would have far less discretion and guidance on not only how it may settle disputes, but also how it may proprietarily contract for the provision of services.

Second, the effect of this Settlement Agreement being deemed unenforceable and thus not binding on subsequent Town Councils may even call into question the validity of the 1991 deed itself. Indeed, the Town executed the 1991 deed with the Lowcountry Open Land Trust in a particular fashion to ensure certain restrictive covenants regarding Accreted Land trimming would last in "perpetuity" and bind all subsequent Town councils. Here, if the subject matter of the Settlement Agreement cannot bind successive Town councils, then it logically follows that the 1991 deed, with a nearly identical subject matter, cannot likewise bind this Town council in perpetuity. Surely this is not an outcome desired by the Town Council, as this would expose the Accreted Land to the very type of development against which the 1991 deed was designed to protect.

As a result, a factfinder could find that the facts of the instant matter demand that this Settlement Agreement is valid, that the Town had the authority to enter into the same, and that the Town's arguments as to its present Motion are entirely unpersuasive.

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C. <u>Even if this Court Were to Determine that the Prospective Obligations Undertaken by the Town in the Settlement Agreement Are Invalid, All Other Provisions Remain Enforceable Pursuant to the Severability Clause</u>.

In the event that any specific of this Settlement Agreement is found to be unenforceable, the Court must nevertheless enforce the remaining terms of the Settlement Agreement pursuant to its severability clause. *See* **<u>Ex. 2</u>**, Settlement Agreement at 9. A severable contract is one that by its nature and purpose is susceptible of division, having two or more parts, that are not necessarily dependent on each other. *See Columbia Architectural Grp., Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) (finding a lump-sum contract for services involved severable provisions despite interdependence of material terms); *see also Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 566 S.E.2d 863 (2002). "The entirety of severability of a contract depends primarily upon the intent of the parties rather than upon the divisibility of the subject." *Id*. at 64, 566 S.E.2d at 867 (citing *Columbia Architectural Group Inc.v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980). Importantly, the court has wide discretion in its determination for severability of a contract. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007); *Doe v. TCSC, LLC*, 430 S.C. 602, 615, 846 S.E.2d 874, 880 (Ct. App. 2020).

The Settlement Agreement states, in pertinent part, "[s]hould any portion, word, clause, phrase, sentence or paragraph of this Settlement Agreement be declared void or unenforceable, such portion shall be considered independent and severable from the remainder, the validity of which shall remain unaffected." **<u>Ex. 2</u>**, Settlement Agreement at 9. This severability clause, in addition to the multitude of terms in the ten-page original Settlement Agreement, clearly indicates that the parties' intent was to make the Settlement Agreement capable of being severable while still maintaining its plain meaning. Despite what the Town argues, even if a provision were to be

severed, a valid and enforceable contract to complete the scope of work still exists with which the Town is obligated to comply.

While Defendants maintain that the entire Settlement Agreement is enforceable as written, even if the Court considers the Town's argument appealing it should not gloss over the unambiguous contractual provisions of the document. However, because the Settlement Agreement was created in accordance with law and public policy and pursuant to the Town's valid authority, a factfinder could find that the Settlement Agreement is enforceable and none of its terms should be severed, such that it should instead be fully enforced consonant to its plain and unequivocal language, and summary judgment should thus be denied.

II. THE TOWN'S MOTION TO STAY DISCOVERY SHOULD BE DENIED.

The Town improperly included a request to stay all discovery as part of its summary judgment motion and has simultaneously refused to provide meaningful responses to these Defendants' discovery requests solely in light of the filing of its Motion. This additional, improper request should also be denied.

The South Carolina Rules of Civil Procedure provide a party is entitled to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . and . . . appears reasonably calculated to lead to the discovery of admissible evidence." SCRCP 26(b). Relevant information sought during litigation is that which is "specifically relevant to the issues involved in the litigation, not merely relevant to the subject matter of the litigation." *Hollman v. Woolfson*, 384 S.C. 571, 579, 683 S.E.2d 495, 499 (2009) (citing *Lafitte v. Bridgestone Corp*, 381 S.C. 460, 674 S.E.2d 154 (2009)). Trial judges are awarded broad latitude regarding the scope of a party's discovery requests. *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1993). Trial judges are encouraged to use their authority to ensure success

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by a party is not achieved "through abuse of the discovery rules rather than by the rule of the law." *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003).

"Because a motion to stay discovery is tantamount to a request for a protective order prohibiting or limiting discovery pursuant to [Rule 26(c)], a motion to stay discovery may be granted pursuant to [Rule 26(c)], but the moving party bears the burden of showing good cause and reasonableness." *Wilson v. Slager*, C/A No. 2:15-cv-02170-DCN, 2016 U.S. Dist. LEXIS 43062, at *8–9 (D.S.C. Mar. 31, 2016) (quoting 10A John Kimpflen et al. *Fed. Proc., L. Ed.* § 26.334 (2012)). The moving party bears the burden of demonstrating good cause and reasonableness. *Boudreaux Grp., Inc. v. Nexsen*, C/A No. 8:18-cv-1498-TMC, 2018 U.S. Dist. LEXIS 228859, at *9–10 (D.S.C. Nov. 20, 2018).

However, the mere filing of a dispositive motion does not constitute "good cause" and does not alone warrant the issuance of a stay. *Herring v. Lapolla Indus.*, C/A No. 2:12-cv-02705-RMG, 2013 U.S. Dist. LEXIS 201527, at *3 (D.S.C. Aug. 30, 2013) (citing *Hollins v. United States Tennis Ass'n*, 469 F. Supp. 2d 67, 78 (E.D.N.Y. 2006)). Imposing a stay of discovery pending the outcome of a dispositive motion requires a case-by-case analysis. *Id.* (citing *Skellerup Ltd. v. City of Los Angeles*, 163 F.R.D. 598, 601 (C.D. Cal. 1995)). Court considering this question have evaluated a number of factors including the breadth of discovery and burden of responding to it, the risk of unfair prejudice to a party opposing the stay, the nature and complexity of the action, the posture or stage of the litigation, and any other relevant circumstances. *Id.* (citing *Hollins*, 469 F. Supp. 2d at 78; *Skellerup Ltd.*, 163 F.R.D. at 601).

"The moving party may not rely on stereotyped and conclusory statements, to establish good cause; rather, the moving party must present a particular and specific demonstration of fact as to why a protective order staying discovery should issue." *Id.* at *9 (citing *Baron Fin. Cor. v.*

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Natanzon. 240 F.R.D. 200, 202 (D. Md. 2006) (internal quotation omitted)). Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing. *Nexsen*, 2018 U.S. Dist. LEXIS 228859, at *10. "In the context of a request to stay discovery, the moving party must come forward with a specific factual showing that the interest of justice and considerations of prejudice and undue burden to the parties require a protective order and that the benefits of a stay outweigh the cost of delay." *Id.* at *9.

The Town has not met this burden. Indeed, the Town cites no authority whatsoever in support of its request to stay discovery in the present Motion. Though the Town, in its separate Renewed Motion to Quash Defendants' Subpoenas, relies on *Boudreaux Group* as an illustration of its desired outcome, *Boudreaux Group* involved an imposition of a stay prior to the resolution of the defendants' motion to dismiss for lack of subject matter jurisdiction and a far more robust showing of "good cause" than what the Town has attempted to present. The *Bourdeaux Group* court noted that a discovery stay was appropriate in light of the parties' apparent agreement that an administrative action before the Office of the State Engineer must be resolved before the civil claims could proceed and in light of potential challenges presented by one defendant's insolvency. 2018 U.S. Dist. LEXIS 228859, at *11.

Neither of these circumstances (or analogous circumstances) is presented here, as the Town is relying on only its filing of its summary judgment motion in this action to justify its request for a discovery stay. Yet, the Town makes no attempt to address the law's recognition that "the mere presence of a potentially dispositive motion is not enough to establish 'good cause' to stay discovery". *Bourdeaux Grp.,* 2018 U.S. Dist. LEXIS 228859, at *10. Indeed, this statement of law is contained in *Bourdeaux Group* – the only case the Town cites in support of this argument. *Id.* The Town's filing of a summary judgment motion is not "good cause" to quash the subpoenas

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or to stay discovery in this case, and absent any other justification to stay discovery by the Town, good cause does not exist, and the present Motion should be denied.

The Town has been actively seeking to thwart its obligations under the Settlement Agreement. Upon information and belief, individual members of the Town Council have been acting in concert with at least interest group formed for the sole purpose of spreading misinformation and pressing the Town to breach the Settlement Agreement. The extent to which these efforts have undermined the democratic process and caused damage to the Defendants must be revealed.

The Defendants have been deprived of even the most basic discovery designed to determine the breadth of information that are relevant to the litigation at hand, including Defendants' counterclaims. It has provided only form, boilerplate objections to interrogatories and requests for production served by Defendants, even to the "standard" interrogatories afforded by Rule 33(b), SCRCP. *See* **Ex. 6**, Town's "Responses" to Defendants' Interrogatories and "Responses" to Defendants' Requests for Production, June 10, 2022. Nor has the Town provided any type of privilege log, or even a general description, of documents it contends are subject to any applicable privilege.

Additionally, the Town should not be rewarded for unilaterally, without consultation, proceeding as if it is entitled to stay discovery when it never conferred with counsel about the same. The Town's position does not render discovery afforded by the South Carolina Rules of Civil Procedure moot. Were such a position correct, parties throughout the state would be able to simply use an early-filed motion as a shield to avoid the robust discovery contemplated by the rules. The Court should deny the Town's Motion to Stay Discovery as improper and enable these parties to proceed with investigation into the facts relevant to this action the Town has brought.

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Conclusion

For the above reasons, the Town's Motion for Summary Judgment should be denied or, alternately, judgment finding the Settlement Agreement valid and enforceable in its entirety be entered. With such a ruling, Defendants' counterclaims do not fail as a matter of law and the Court should enter judgment to that effect as well. Finally, Defendants request that the Town's Motion for Stay of Discovery should be denied so these parties may conduct meaningful discovery for all claims and defenses of this litigation.

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Attorneys for the Defendants
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September 16, 2022
Charleston, South Carolina

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STATE OF SOUTH CAROLINA)
) TITLE TO REAL ESTATE
COUNTY OF CHARLESTON)

WHEREAS, the Lowcountry Open Land Trust (the "Grantor") is a nonprofit corporation whose purpose is to preserve and conserve natural areas; and

WHEREAS, the Grantor is the owner in fee simple of certain real property (hereinafter referred to as the "Property" which has aesthetic, scientific, educational, and ecological value in its present state as a natural area which has not been subject to development or exploitation, which property is described more on the attached Exhibit A;

WHEREAS, the parties desire to place restrictions upon the Property for the purposes of, inter alia retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants, or wildlife; and

WHEREAS, "natural, scientific, educational, aesthetic, scenic and recreational resource," as used herein shall, without limiting the generality of the terms, mean the condition of the Property at the time of this grant, evidenced by:

A) The appropriate survey maps from the United States Geological Survey, showing the property line and other contiguous or nearby protected areas;

B) An aerial photograph of the Property at an appropriate scale taken as close as possible to the date hereof; and

C) On-site photographs taken at appropriate locations on the Property;

and other documentation, which documentation shall be sufficient to establish the condition of the Property asof the date hereof which documentation shall be maintained in duplicate by both the Grantor and the Grantee hereof and made available to interested members of the public upon reasonable request for purposes of enforcing the restrictions contained herein.

KNOW ALL MEN BY THESE PRESENTS THAT the Lowcountry Open land Trust, a non-profit corporation, organized and existing under the laws of the State of South Carolina (the "Grantor"), in the state aforesaid in consideration of the sum of Ten and 00/100 ($10.00) Dollars, and other valuable consideration, to it in hand paid at and before the sealing of these presents by the Town of Sullivan's Island, South Carolina (the "Town"/"Grantee"), in the State aforesaid the receipt whereof is hereby acknowledged, have granted, bargained, sold and released and by these Presents do grant, bargain, sell and release unto the said the Town of Sullivan's Island, South Carolina, its successors and assigns, the following described property:

EXHIBIT 4

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FOR DESCRIPTION OF PROPERTY SEE EXHIBIT A ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE (THE "PROPERTY").

This conveyance is made subject to the following terms, conditions, restrictions, and covenants (hereinafter the "Restrictions"):

1. Except as otherwise provided or permitted in Paragraphs 2 and 3 hereof, the Property shall remain in its natural state, no changes shall be made to its topography or vegetation and no structures or improvements shall be erected on the Property.

2. Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of Paragraph 4, the Town Council is given the unrestricted authority to trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean and providing views of the ocean and beaches to its citizens.

3. Notwithstanding the provisions of Paragraph 1 hereof, and subject to the limitations of this Paragraph 3 and of Paragraphs 2 and 4, the Town Council of Sullivan's Island (the "Council") shall have the right to improve, change, modify or alter the Property only if such actions are to further or effect one or more of the following enumerated public objectives or policies ("Public Policies"):

a) Drainage
b) Mosquito control
c) Public walkways and emergency access to the Atlantic Ocean
d) Beach renourishment
e) Erosion control
f) Vegetation management
g) Educational programs
h) Public safety
i) Public health; and
j) Scenic enhancement.

Prior to taking any action affecting the Property to further or effect a Public Policy ("Public Action"), the Council shall make specific written findings of fact;

1) that the proposed Public Action is proposed solely for the purpose of furthering or effecting one or more of the enumerated Public Policies,

2) that the proposed Public Action is necessary for the health, safety or general welfare of the Town,

3) that the benefits of the proposed Public Action outweigh the damage done to the aesthetic, ecological, scientific, or educational value of the Property in its natural state, and

4) that in making its findings of fact, the Council has given due and reasonable consideration to

i) the cumulative effect of the proposed Public Action and past Public Actions on the natural state of the Property,

ii) the alternative methods, if any, of furthering or effecting the proposed Public Policy which do not impact adversely on the natural state of the Property, and

iii) the probable results of not taking the proposed Public Action.

The above described written findings of fact must be made prior to each individual Public Action relating to the Property and shall be specific to the circumstances of the proposed Public Action and not merely conclusive in nature. In no event shall any Public Action violate the provisions of Paragraph 4 hereof.

4. In all events, the following activities, improvements and structures shall be prohibited on the Property:

a) any building or structure with a roof

b) Asphalt pavement, concrete pavement or pavement of a non-porous material

c) electrical power lines, wires, conduit, stations or pads

d) sewer lines, pipes or lift stations

e) water lines, pipes or lift stations

f) commercial activities in any way related to the buying or selling of things, goods or services.

Notwithstanding the provisions of Paragraph 4(c), (d) and (e) the Council may allow utility easements for electrical, sewer and water lines to cross through the Property, provided no utility services are provided as a result to any improvements on the Property.

5. These Restrictions may be enforced by the Town, any property owner within the Town, or by any voter registered within the Town. Such persons may seek any appropriate remedy for any violation, including, but not limited to, injunctive relief to force a termination of the violation or to permit restoration of the area damaged by an prohibited activity. The forbearance to

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enforce the terms and provisions thereof in the event of a breach shall not be deemed a waiver of any rights granted hereunder. The Town shall not be liable to any person for any violation of these Restrictions by any person other than itself.

6. During the term of these restrictions, the Town shall cause to remain in effect an ordinance of the Town making it a violation of law for any person to violate the provisions of these Restrictions, as such Restrictions may be modified pursuant to Paragraph 8 hereof. The Town may enact ordinances and regulations affecting the Property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions.

7. If any provision of these Restrictions shall be invalid or for any reason become unenforceable, no other provision shall thereby be affected or impaired.

8. These Restrictions may be modified or repealed only upon an affirmative vote of both (a) seventy-five (75%) percent of the registered voters of the Town who vote in the referendum held pursuant to the terms hereof, and (b) one hundred (100%) percent of the members of Town Council. For purposes of these Restrictions, a registered voter in the Town shall mean any voter eligible to vote in Town elections who is registered 30 days prior to the referendum held pursuant to the terms hereof. At least 45 days prior to any referendum held pursuant to the terms hereof, the Council shall adapt reasonable regulations concerning the manner of voting hereunder. Nothing herein shall prohibit the Council from adopting regulations which allow voting by ballot on a designated day or days or by circulation of written petitions over a period of time.

9. These Restrictions shall remain in full force and effect for a period of 50 years and shall be automatically renewed and continued in effect for additional periods of 50 years each until such time as these Restrictions are repealed in accordance with the provisions of Paragraph 8 hereof. The terms of this Paragraph may be modified in accordance with the provisions of Paragraph 8 hereof.

GRANTEE'S ADDRESS: Town of Sullivan's Island
Town Hall
P. O. Box 427
Sullivan's Island, SC 29482

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said Town of Sullivan's Island, South Carolina, its Successors and Assigns forever.

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AND it does hereby bind itself and its Successors, to warrant and forever defend, all and singular the said Premises unto the said Town of Sullivan's Island, South Carolina, its Successors and Assigns, against it and its Successors, lawfully claiming, or to claim the same or any part thereof.

WITNESS its Hand and Seal, this 12 day of February, in the year of our Lord one thousand nine hundred and ninety-one and the two hundred and fifteenth year of the sovereignty and Independence of the Untied States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

LOWCOUNTRY OPEN LAND TRUST

By: [signature]
Its: President

By: Susan A. Kidd
Its: Vice President

STATE OF SOUTH CAROLINA)

CHARLESTON COUNTY)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named LOWCOUNTRY OPEN LAND TRUST by its authorized officer(s), sign, seal and as its act and deed, deliver the within written Deed, and that (s)he with the other witness named above witnessed the execution thereof.

SWORN to before me this 12
day of February A.D. 1991

(SEAL)
Notary Public for South Carolina
My commission expires: 4-2-96

(Signature of Witness)

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EXHIBIT A

All those lots, parcels and pieces of property located within the Town of Sullivan's Island, County of Charleston, State of South Carolina, being more specifically described as follows:

Parcel 1

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Star of the West Street, Middle Street, Station 12 Street, and the mean high water mark of the waters of the Atlantic Ocean and Charleston harbor. Said property is also shown as Parcel #1 on the below described plat attached hereto and marked Exhibit B.
TMS: 523-06-00-073

Parcel 2

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Palmetto Street, Poe Avenue, Station 16 Street, and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #2 on the below described plat attached hereto and marked Exhibit B.

SPECIFICALLY SAVING AND EXCEPTING all that land now owned by the United States Government.

SPECIFICALLY SAVING AND EXCEPTING all those lots, parcels and pieces of land know as Tract A and Tract B on a plat by William Porcher, dated April 21, 1989, entitled "Plat Showing Battery Logan Owned by Sullivan's Island Board of Township Commissioners, Being Subdivided into Tract A and Tract B, Sullivan's Island, Charleston County, South Carolina" being duly recorded in the R.M.C. Office for Charleston County on the 24th day of May, 1989, in Plat Book BW, at Page 28.
TMS: 523-07-00-124

Parcel 3

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 16 Street, Atlantic Avenue, Station 18 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #3 on the below described plat attached hereto and marked Exhibit B.
TMS: 523-12-00-077

Parcel 4

All that real property not previously conveyed by the Board of

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Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 18 Street, I'on Street, Station 18-1/2 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #4 on the below described plat attached hereto and marked Exhibit B.

SPECIFICALLY SAVING AND EXCEPTING Lots M, N, M2, N2, and property presently owned by the United States Coast Guard, along with West Atlantic Avenue as shown on plat entitled "Town of Sullivan's Island, Charleston County, South Carolina", dated May 18, 1964, attached hereto and incorporated herein as Exhibit B.

TMS: 529-09-00-112

Parcel 5

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 18-1/2 Street, Thee Street, the western boundary of the lands now leased by Charleston County School District No. 2 and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #5 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-09-00-112

Parcel 6

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated seaward beyond the boundaries of all that real property leased under School District No. 2 of Charleston County, State of South Carolina as more specifically shown by Grant of Lease dated the 23rd day of April, 1954, and recorded in the R.M.C. Office for Charleston County in Book N58, at Page 150. Said property is also shown as Parcel #6 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-09-00-112

Parcel 7

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by the eastern boundaries of the lands now leased by Charleston County School District No. 2, Pettigrew Street, Station 22 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #7 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-09-00-112

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Parcel 8

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 22 Street, East Atlantic Avenue and Station 22-1/2 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #8 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-09-00-112

Parcel 9

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 22-1/2 Street, Bayonne Street, Station 28 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #9 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-10-00-087

Parcel 10

All that real property not previously conveyed by the Board of Township Commissions, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 28 Street, Marshall Boulevard, Station 32 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as parcel #10 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-11-00-109

Parcel 11

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated and lying seaward of those lots known and described as Lots 1 through 5, Block 16 and Lots 1 through 7, Block 17, as more specifically shown on the below described plat which is marked Exhibit B. Said property is also shown as Parcel #11 on the below described plat attached hereto and marked Exhibit B.

The above tracts of land are more specifically shown and delineated as the colored portion of a plat entitled "Sullivan's Island, Charleston County, South Carolina", dated May 18, 1964, which is attached hereto and incorporated herein by reference and marked Exhibit B.

TMS: 529-12-00-116

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Being the same property conveyed to the Grantor herein by Deed of even date from the Town of Sullivan's Island which is recorded in the RMC Office for Charleston County prior to the recording of this deed but simultaneously herewith in Book _____, at Page _____.

Grantees address: P. O. Box 1293
450 King Street
Charleston, SC 29402

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Nathan Bluestein, Ettaleah Bluestein, Theodore Albenesius and Karen Albenesius	)	C/A No. 10-CP-10-5449
	)	
Plaintiffs,	)	**ORDER APPROVING SETTLEMENT**
	)	
Versus	)	
	)	
Town of Sullivan's Island and Sullivan's Island Town Council,	)	
	)	
Defendants.	)	

UPON Motion of all Parties, and it appearing that the said Parties deem the offer of settlement acceptable, advantageous, and to the best interest of all Parties and

IT FURTHER APPEARING in the discretion of this Court that such settlement is proper and in the best interest of all Parties, it is

ORDERED, ADJUDGED AND DECREED that the Parties are hereby authorized to consummate the settlement referred to in the within Settlement Agreement and General Release (Exhibit 1) and to execute and deliver to the Defendants an appropriate Release terminating, releasing, and ending any and all claims and actions asserted or brought under or by virtue of any South Carolina Statute or by common law against the Defendants, Town of Sullivan's Island and Sullivan's Island Town Council, including their Mayor, council, officers, directors, employees, agents, servants, attorneys, partners and representatives, predecessors and successor corporations or entities and their attorneys, heirs, assigns, executors, administrators, successors, subsidiaries, affiliated companies, parent companies, insiders, and any other indemnitors.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each side bear and pay their own costs, including court costs and attorneys' fees.

ELECTRONIC SIGNATURE PAGE TO FOLLOW.

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Charleston Common Pleas

Case Caption: Nathan Bluestein, plaintiff, et al VS Sullivans Island Town Of Etc, defendant, et al

Case Number: 2010CP1005449

Type: Order/Approval Of Settlement

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2020-10-14 12:20:57 page 2 of 2

EXHIBIT 1

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SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Settlement Agreement") is given by Nathan Bluestein and Theodore Albenesius, III (Plaintiffs) to the Town of Sullivan's Island and Sullivan's Island Town Council ("Town"), collectively referred to as "Parties", as of this 7th day of October, 2020.

Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius filed a lawsuit against the Town of Sullivan's Island and Sullivan's Island Town Council in the Court of Common Pleas for Charleston County, Case No. 2010-CP-10-5449, which was appealed and heard in the South Carolina Court of Appeals, App. No. 2015-002550 and the South Carolina Supreme Court, App. No. 2018-001888 ("Lawsuit"), concerning the municipal ordinances and restrictions regarding the land along the Atlantic Ocean in the Town under a conservation easement and donation to the Town in 1991. Since the Lawsuit was filed, Ettaleah Bluestein, M.D. passed away and Karen Albenesius was divorced from Theodore Albenesius and is no longer a participating Plaintiff in the litigation.

The Parties have now agreed to a resolution of this long-standing dispute, pursuant to the following terms and conditions that have been approved and adopted by the Town Council. This settlement agreement balances the competing needs of beachfront and inland island residents and the ecological and natural interests on the one hand and human needs and safety on the other.

I. RECITALS

Whereas, the Town owns property along the Atlantic Ocean which is known generally as The Accreted Land (AL); and

Whereas, the Town obtained title to the AL by way of a deed from the Low Country Open Land Trust; and

Whereas, the deed contained certain restrictions and covenants, both procedural and substantive; and

Whereas, the deed provides the Town with the unrestricted authority to trim and control the growth of vegetation; and

Whereas, after a decade of litigation the Town and Plaintiffs have reached a voluntary settlement; and

Whereas, the Town recognizes the need to develop a detailed implementation plan to use in conjunction with OCRM; and

Whereas, after preliminary consultation with the Land Trust the Town has received feedback that the Land Trust does not object to the settlement; and

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Whereas, the Town is permitted to undertake activity on the AL to enhance mosquito control, engage in scenic enhancement, and to control vegetation pursuant to the following specific written findings of fact;

II. Findings of Fact:

a. The settlement, and implementing steps associated therewith, are solely undertaken to further specifical enumerated, permissible public purposes under the Deed. In this instance, the Town Council believes that thinning of vegetation will serve the interests of improved mosquito control, improved vegetation management, enhanced public safety, improved public health, and scenic enhancement. The current thickness of vegetation, in significant part caused by the "hedging effect" of prior cutting rules, makes it extremely difficult for anti-mosquito treatments to penetrate. There is also an increased prevalence of pests correlated to the growth of the AL over past years with the 2005 cutting rule in effect. Additionally, the level of thickness significantly impedes airflow causing stagnant conditions that is not conducive to healthful and enjoyable living. Further, the thickness of vegetation on the AL allows for rapid spread of wildfire should favorable fire conditions exist. The thinning of myrtles and trees would improve all of these shortcomings. In addition, the cumulative effect of decades of growth has been to alter views from what existed at the time of deed signing. The proposed action would help restore views to a level closer to what were enjoyed at the time the Deed Restrictions were implemented. Finally, excessive plant density (stems per acre) can retard desirable maturation of plant life on the AL and that the thinning proposed herein will allow those stems retained to develop more fully and beneficially. The combination of these factors will not only improve the safety of human habitation on the island, but also improve the overall condition of flora and fauna on the island. The utilization of environmentally sensitive means (use of appropriate equipment, thinning techniques, naturalist approved seeding, etc) can avoid material problems with erosion, particularly in light of the decades of documented natural accretion in this area.

b. The settlement, and implementing steps associated therewith, are necessary for the health, safety and general welfare of the Town. Reduction in pests and mosquitoes benefits public health, as does fire hazard reduction. Improved airflow is also beneficial, allowing for (among other things) increased opportunities to avoid the need for artificial climate control during the course of a year.

c. The benefits of the proposed settlement, and implementing steps associated therewith, outweigh any potential damage done to the aesthetic, ecological, scientific and education value of the property in its natural state. The AL is proposed to remain in an undeveloped state. The proposed changes are intended to improve aesthetic conditions. They are also intended to improve wildlife habitat and allow maturation of retained vegetation. Given the diversity and number of stems remaining under the proposed plan, the scientific and educational value of the property will not be undermined but will be enhanced.

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d. The Parties have considered

i. The cumulative effect of actions pursuant to the proposed settlement and past AL related actions on the natural state of the Property. The Town's cutting rules have been unchanged for fifteen years and, in fact, bear striking resemblance to the rules in place at the time the deed restrictions were enacted. Consequently, there is no significant "cumulative" action to be considered. Regardless, the changes proposed here will either not harm or enhance the natural environment of the AL for flora and fauna and will do so in a manner that benefits the island as a whole.

ii. There are no suitable alternative methods of furthering the stated public benefits that would not adversely impact the natural state of the AL. The principle concern being addressed here is excessive vegetation growth and density leading to all of the problems previously enumerated. The only way to address excessive vegetation growth and density is selective thinning. The current plan represents a selective thinning plan carefully tailored to address these stated concerns while maximizing retained ecological, educational and scientific goals.

iii. First, the existing conditions (and trend toward increasing vegetation thickness and growth) will continue to mature into an increasing problem. In that sense, taking no action at this point would amount to "action" furthering the undesirable attributes. Second, failure to undertake the proposed settlement would subject the Town and residents to the uncertainty inherent in a trial.

III. Settlement of this litigation is agreed to on terms stated below:

<u>General Approach</u>:

- The Town would implement selective thinning of the Accreted Land (AL), based on initial cut parameters set forth below for each of the four Zones (Transition Zone, Zone 1, Zone 2, and Zone 3.) In order to maintain similar conditions going forward, with the help of a naturalist the Town would review changes in the condition of the AL on a recurring basis (for instance, once every five years) with an eye towards making whatever changes might be necessary to maintain appropriate levels of density and diversity. This would provide a mechanism to deal with natural attrition, growth, or other changes to the natural environment. Primary funding for transition zone work will be from the Town. Funding for work in Zones 1-3 is subject to receipt of adequate donations or grants.

- To facilitate resolution of this case, the Town retained Thomas and Hutton to perform a tree survey which is reflected in the attachments hereto. Due to the lapse of time from the tree survey to the actual performance of the work described herein, the Parties recognize the potential for further tree

growth from the time of the tree survey to the time of the work described. The trees meeting the dimensions for trimming described below and identified in the attached tree survey are the specific trees to be trimmed, cut or removed notwithstanding any growth during that interval.

Zones:

- Zone 1: Station 16 beach path to western edge of property line at 1715 Atlantic (TMS# 523-12-00-014)
- Zone 2: Eastern edge of Zone 1 to Eastern Edge of SIES property
- Zone 3: Eastern edge of Zone 2 to Station 28.5 beach path
- Transition Zone (TZ)

Beach Paths:

- All vegetation to be removed 4' on either side of town owned beach paths/boardwalks
- Private beach paths to be maintained at a width of 6.5' plus additional understory may be cleared to a maximum of 2' on either side (per draft plan 3a.) Cutting and maintenance shall be subject to the receipt by the Town of sufficient grants or donations.

Myrtles (All Zones):

- Allow for 50% of myrtles seaward of TZ to be removed with focus on saving myrtles located in low-lying topography areas
- All remaining myrtles may be cut to a height of 5'
- Property owners abutting town owned beach paths may trim myrtles from non-adjacent property line to beach path (eliminating "no man's land" currently existing in certain areas)
- Current town procedures will apply for annual cutting and payment thereof will apply

Zone 1:

- Keep all Live Oaks, Magnolias, Palmettos
- Remove all Cedar, Pine, Hackberry trees under 12" DBH

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- Remove all other tree species under 6" DBH
- Limbing of trees >16" DBH will be allowed with TOSI approval so long as proposed limbing would not harm health of tree.
- Vines on trees may be removed with TOSI approval for health of tree
- All non-native or invasive species may be removed

Zone 2:

- Keep all Live Oaks, Magnolias, Palmettos >6" DBH
- Remove all Cedar, Pine, Hackberry trees under 16" DBH
- Remove all other tree species under 8" DBH
- Limbing of trees allowed with TOSI approval so long as proposed limbing would not harm health of tree.
- Vines located on trees may be removed with TOSI approval for health of tree
- All non-native or invasive species may be removed

Zone 3:

- Keep all Live Oaks, Magnolias, Palmettos >6" DBH
- Remove all Cedar, Pine, Hackberry trees under 18" DBH
- Remove all other tree species under 10" DBH
- Limbing of trees will be allowed with TOSI approval so long as proposed limbing would not harm health of tree.
- Vines on trees may be removed with TOSI approval for health of tree
- All non-native or invasive species may be removed

Transition Zone:

- Trees to be preserved are only Live Oaks, Magnolias, Palm Trees 16" DBH or greater
- All other vegetation to be removed

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- 100' seaward of property line of adjacent properties (includes Bayonne right of way)

- Heavy machinery allowed landward of OCRM setback line

Permitting:

Permitting will be required through OCRM. Continued consultation with OCRM and the Land Trust will be important as the Town develops its implementation plan and permit application. The Town will need to engage an engineer and/or technical consultant to develop an appropriate, detailed plan specifying methods and objectives, and to make appropriate regulatory applications. We would expect environmentally appropriate overseeding to be a part of any such plan in order to assure continued soil stability. The Parties agree to cooperate as required to obtain any such permit. The Parties covenant and agree to work in good faith to obtain all permits and complete the work agreed to and described herein. Neither of the Parties shall directly or indirectly, individually or through others, endeavor to interfere with the permitting process.

Funding and Timing:

Thinning of the 2500 Block of Atlantic will proceed with all deliberate speed after formal settlement approval by Council and the funding of the block thinning cost by Plaintiff and/or homeowners in that block. The work shall be done by way of a contract signed by the Town and a vegetation management contractor as appropriate under the Town's procurement process.

Homeowners shall have the right to enter into an agreement with the Town whereby they must provide sufficient funds with the Town within 12 months of the settlement of Bluestein v. Town of Sullivan's Island to cut the property within their block in accordance with the zone specifications contained herein. As described above, using such funds the Town shall hire the approved contractor to complete the thinning. Such cutting will be done on a block by block basis after sufficient funds to thin a particular block are on-hand.

Appeals:

No party shall appeal the issuance of any permits issued for completion of work consistent with the settlement.

Compliance with Law required:

Implementation is subject to compliance with law.

Good Faith and Fair Dealing:

The Parties covenant and agree to work in good faith to obtain all permits and complete the work agreed to and described herein. No Party shall directly or indirectly, individually or through others, endeavor to interfere with the permitting process or the completion of the work described herein.

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Incorporation of Charts and Diagrams:

The supporting Charts and Diagrams are attached hereto and shall be incorporated as if set forth fully herein.

Submission of Applications:

The Town agrees to (1) authorize the necessary procurement actions in accordance with Town policy, (2) the development of detailed plans and applications, and (3) the submittal of applications necessary to effectuate this settlement.

IV. Mutual Release

In consideration of the covenants contained in this Settlement Agreement, Nathan Bluestein and Theodore Albenesius, III, their heirs, legal representatives, and assigns, do hereby release, cancel, acquit, relinquish and forever discharge the Town, together with its agents, representatives, attorneys, assigns, affiliates, predecessors, successors, officers, directors, employees, and any and all persons or entities in privity with them ("Releasees") from any and all claims, rights, demands, debts, liabilities, controversies, or causes of action, known or unknown, asserted or unasserted, liquidated or unliquidated, fixed or contingent, of any nature whatsoever including, but not limited to, those pertaining to (a) the Deed for AL; (b) the Ordinances related to the AL; (c) all claims under the Deed or Ordinances and the manner in which the Town interpreted those documents; (d) any claim asserted or assertable in the Lawsuit including, without limitation, claims in contract or in tort, common law or statutory, for actual, multiple, or punitive damages, attorneys' fees, interest and costs; and (e) all claims arising out of any act, transaction, or occurrence through the date hereof relating in any manner to the issues raised in the Lawsuit or which could have been raised in the Lawsuit.

In consideration of the covenants contained in this Settlement Agreement, the Town does hereby release, cancel, acquit, relinquish and forever discharge Nathan Bluestein and Theodore Albenesius, III, their heirs, legal representatives, and assigns, together with their agents,

representatives, attorneys, assigns, affiliates, predecessors, successors, officers, directors, employees, and any and all persons or entities in privity with them ("Releasees") from any and all claims, rights, demands, debts, liabilities, controversies, or causes of action, known or unknown, asserted or unasserted, liquidated or unliquidated, fixed or contingent, of any nature whatsoever including, but not limited to, those pertaining to (a) the Deed for AL; (b) the Ordinances related to the AL; (c) all claims under the Deed or Ordinances and the manner in which the Town interpreted those documents; (d) any claim asserted or assertable in the Lawsuit including, without limitation, claims in contract or in tort, common law or statutory, for actual, multiple, or punitive damages, attorneys' fees, interest and costs; and (e) all claims arising out of any act, transaction, or occurrence through the date hereof relating in any manner to the issues raised in the Lawsuit or which could have been raised in the Lawsuit.

V. Dismissal with Prejudice

Nathan Bluestein and Theodore Albenesius, III, agree that the Lawsuit shall be dismissed with prejudice, with each side bearing and paying their own costs, including court costs and attorneys' fees.

VI. Binding

This Settlement Agreement shall be binding upon and inure to the benefit of all the Parties, and their heirs, successors and assigns.

VII. Disputes

Any Party may commence a legal proceeding to enforce this Settlement Agreement. Any such action shall be brought exclusively in the Court of Common Pleas located in Charleston County, South Carolina.

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VIII. Miscellaneous Provisions.

a) Fees and Costs. Each Party shall be solely responsible for the fees and costs he, she, or it has incurred in connection with the Lawsuit.

b) Acknowledgements. Each Party acknowledges and agrees that this Settlement Agreement was negotiated and drafted with the full participation of the Parties and the Parties' respective counsel; that this Settlement Agreement was negotiated at arms' length and in good faith; that this Settlement Agreement was voluntarily executed after consultation with experienced legal counsel; that the Parties have carefully read the contents of this Settlement Agreement and understand its terms; that the consideration provided to the Parties under this Settlement Agreement is adequate; and that this Settlement Agreement is a legally binding contract with which the Partis will faithfully comply. Each individual signing this Settlement Agreement on behalf of one of the Parties to this Agreement has the authority to execute this Settlement Agreement and bind the entity or person on whose behalf this Settlement Agreement is executed.

c) Governing Law and Jurisdiction. This Settlement Agreement shall be interpreted and enforced, in all respects, according to the laws of the State of South Carolina.

d) Time is of the Essence. Time is of the essence as to every provision of this Settlement Agreement.

e) Interpretation and Severability. The paragraph headings contained in this Settlement Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Settlement Agreement. In interpreting this Settlement Agreement and construing its terms, neither of the Parties shall be deemed to have drafted this Settlement Agreement, and no drafting presumption against either of the Parties shall be applicable to this Settlement Agreement. Should any portion, word, clause, phrase, sentence or paragraph of this Settlement Agreement be declared void or unenforceable, such portion shall be considered independent and severable from the remainder, the validity of which shall remain unaffected.

f) Modification. This Agreement may not be modified or amended, nor may any of its provisions be waived, except upon mutual agreement of all Parties or their authorized agents in writing.

g) Counterparts. This Settlement Agreement may be executed in counterparts, each of which shall be deemed an original, all of which together shall constitute one and the same instrument. The Parties agree that as to this Settlement Agreement, electronic copies and signatures have the same force and effect as originals.

h) Entire Agreement. Each of the Parties acknowledge and agree that this Settlement Agreement constitutes the entire agreement of the Parties hereto with respect to the subject matter of this Settlement Agreement, and each of the Parties further acknowledge and agree that this Settlement Agreement supersedes any and all other agreements, understandings, negotiations, or discussions, either oral or in writing,

express or implied, between one or more of the Parties. The Parties each acknowledge that no representations, inducements, promises, agreements, or warranties, oral or otherwise, have been made by them, or anyone acting on their behalf, which are not embodied in this Settlement Agreement; that they have not executed this Settlement Agreement in reliance on any representation, inducement, promise, agreement, warranty, fact or circumstances, not expressly set forth in this Settlement Agreement; and that no representation, inducement, promise, agreement, or warranty not contained in this Settlement Agreement shall be valid or binding unless executed in writing and signed by all Parties to this Settlement Agreement.

IN WITNESS WHEREOF, we have hereunto set our hand this 7th day of October, 2020.

Nathan NB

~~Nicky~~ Bluestein
2513 Atlantic Ave.
Sullivan's Island, SC 29482

Teddy Albenesius
P.O. Box 60477
North Charleston, SC 29419

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IN WITNESS WHEREOF, I have hereunto set my hand this 7th day of October, 2020

ON BEHALF OF *Town of Sullivan's Island and Sullivan's Island Town Council ("Town")*:

Derk Van Raalte, Esquire
derk@bradyhair.com
Law Offices of Brady Hair
2500 City Hall Lane (29406)
P. O. Box 61896
North Charleston, SC 29419
P: (843) 572-8700/F: (843) 745-1082

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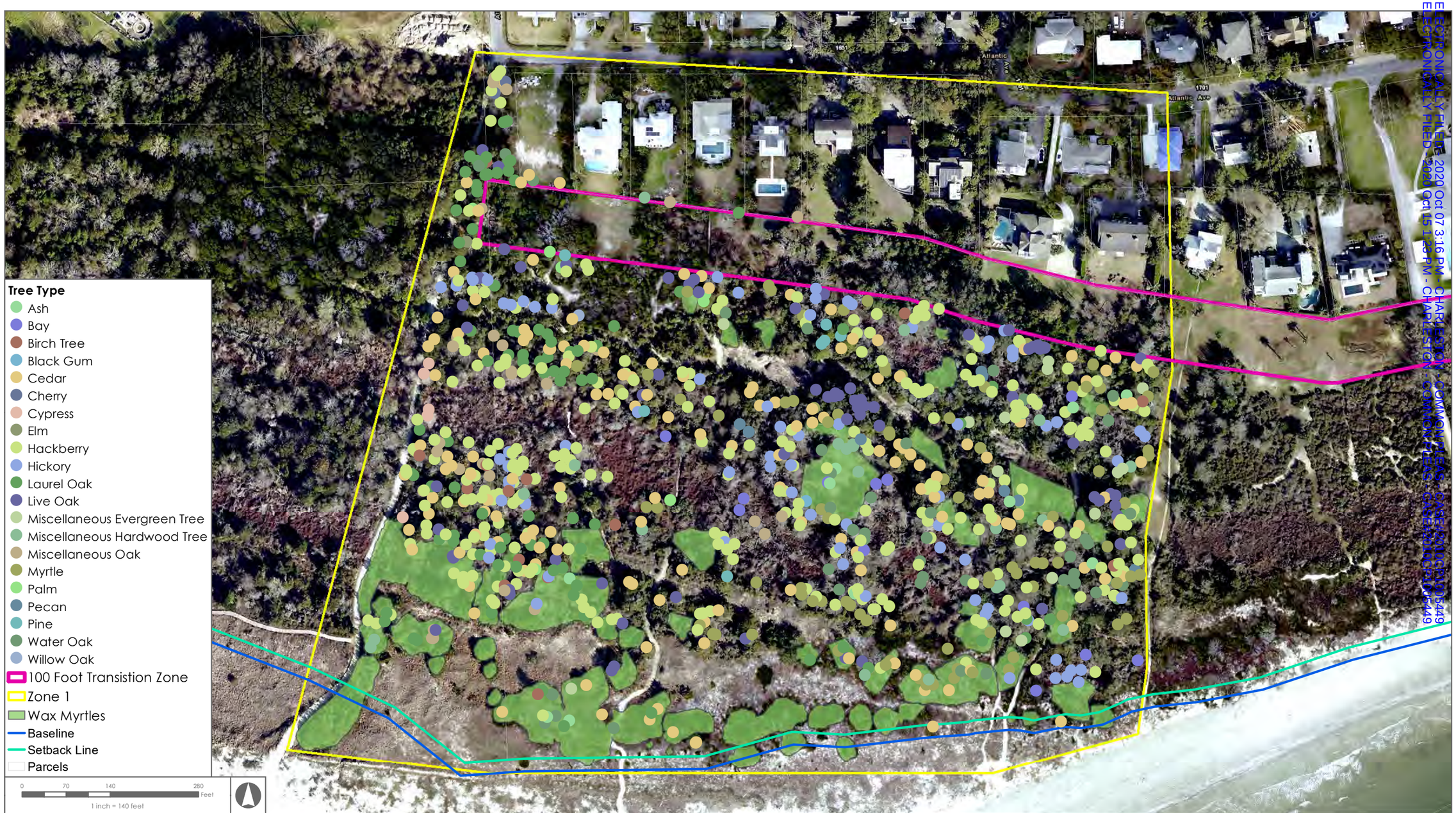

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File: Z:\25627\25627.GTHQ.GIS\MetfZone1_AllTrees_2020_11X17L.mxd				Vertical Datum:

Thomas & Hutton compiled the map information from the following sources:

Data	Source	Date
Tree Locations	T&H	2020

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Sullivans Island

Charleston County, South Carolina

Zone 1, All Trees, Surveyed Myrtle Areas

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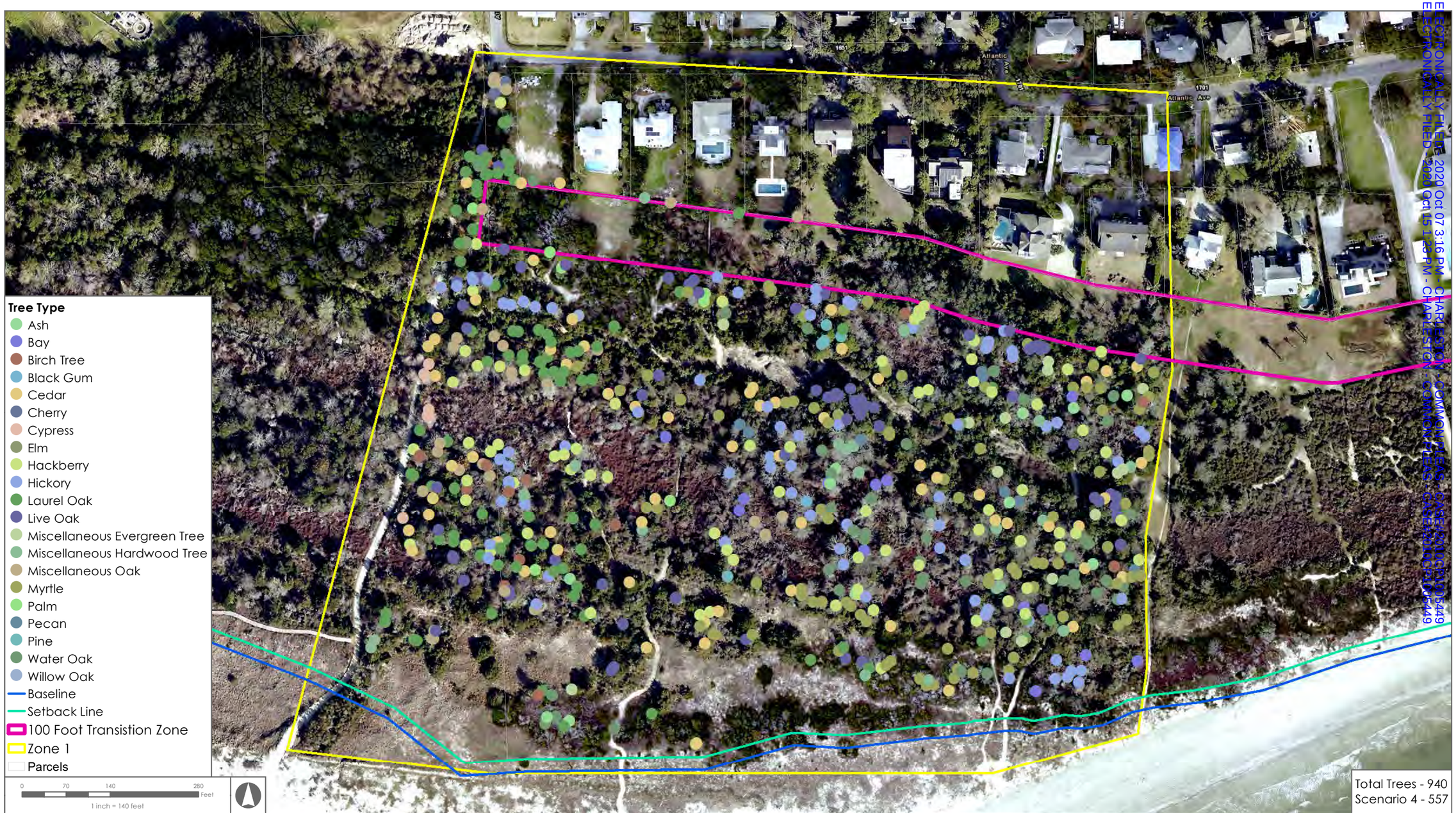

Tree Type

- Ash
- Bay
- Birch Tree
- Black Gum
- Cedar
- Cherry
- Cypress
- Elm
- Hackberry
- Hickory
- Laurel Oak
- Live Oak
- Miscellaneous Evergreen Tree
- Miscellaneous Hardwood Tree
- Miscellaneous Oak
- Myrtle
- Palm
- Pecan
- Pine
- Water Oak
- Willow Oak
- Baseline
- Setback Line
- 100 Foot Transistion Zone
- Zone 1
- Parcels

0 70 140 280 Feet

1 inch = 140 feet

Job Number: 25427	Produced: 9/9/2020	Produced By: PAE	Modified: 9/14/2020	Modified By:
File: Z:\25427\25427.GTHQ.GIS\Mxd\Scenario4_Zone 1_2020_11X17L.mxd				Vertical Datum:

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Tree Locations	T&H	2020

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Sullivans Island

Charleston County, South Carolina

Zone 1, Scenario 4

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Job Number: 25427 | Produced: 9/9/2020 | Produced By: PAE | Modified: 9/9/2020 | Modified By:
File: Z:\25427\25427.GTHQ\GIS\Mxd\Zone2_AllTrees_2020_11X17L.mxd | Vertical Datum:

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Sullivans Island

Charleston County, South Carolina

Zone 2, All Trees, Surveyed Myrtle Areas

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Sullivans Island

Charleston County, South Carolina

Zone 2, Scenario 4

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Job Number: 25427	Produced: 9/9/2020	Produced By: PAE	Modified: 9/9/2020	Modified By:
File: P:\25427\25427.GTM\2.GIS\Mesh\Zone3_AllTrees_2020_11X17L.mxd				Vertical Datum:

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Sullivans Island

Charleston County, South Carolina

Zone 3, All Trees, Surveyed Myrtle Areas

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Job Number: 25427	Produced: 9/9/2020	Produced By: PAE	Modified: 9/9/2020	Modified By:
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Sullivans Island

Charleston County, South Carolina

Transition Zone 1, All Trees, Surveyed Myrtle Areas

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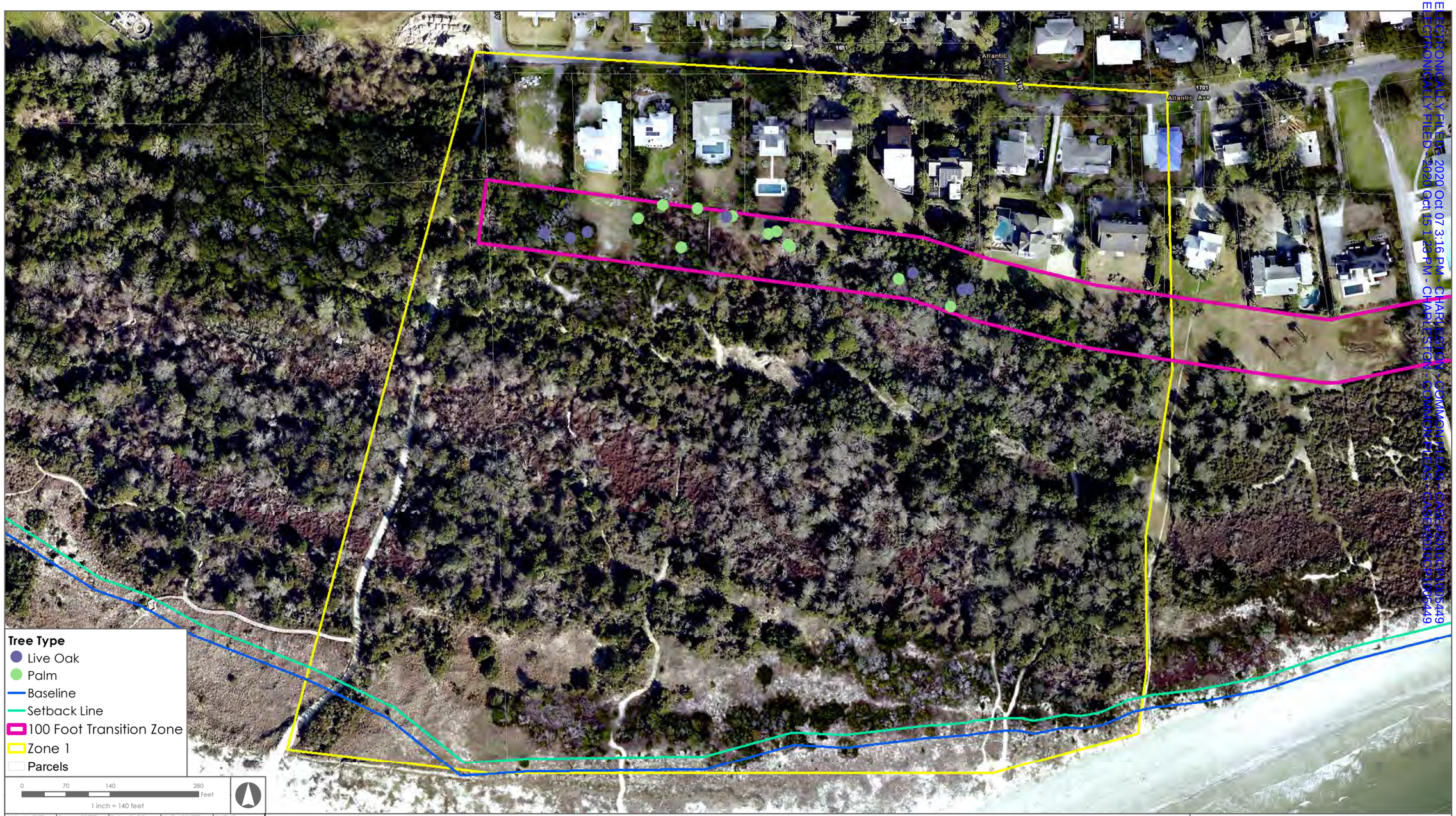

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Sullivans Island

Charleston County, South Carolina

Transition Zone 1, Reduced Scenario 2

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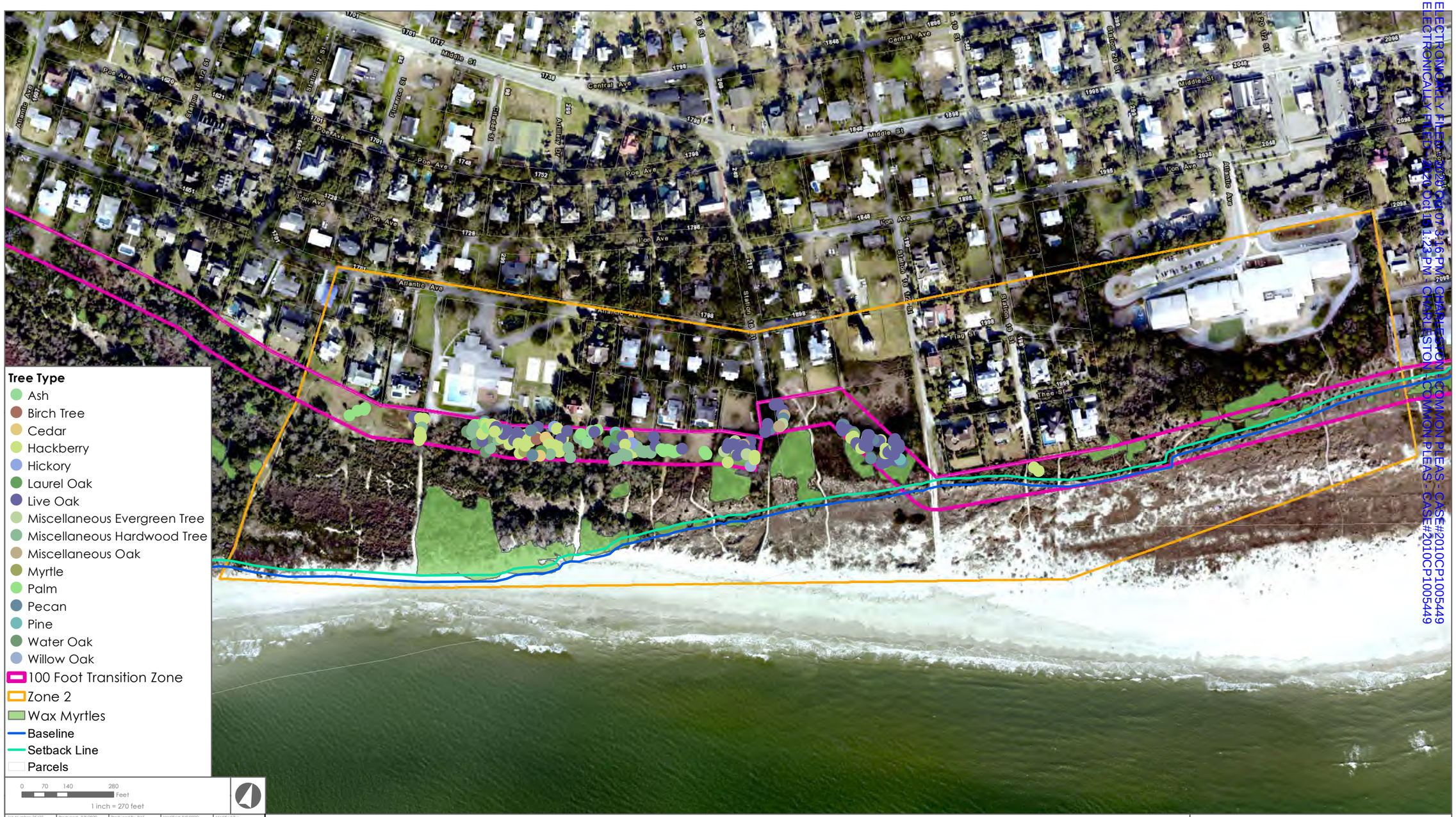

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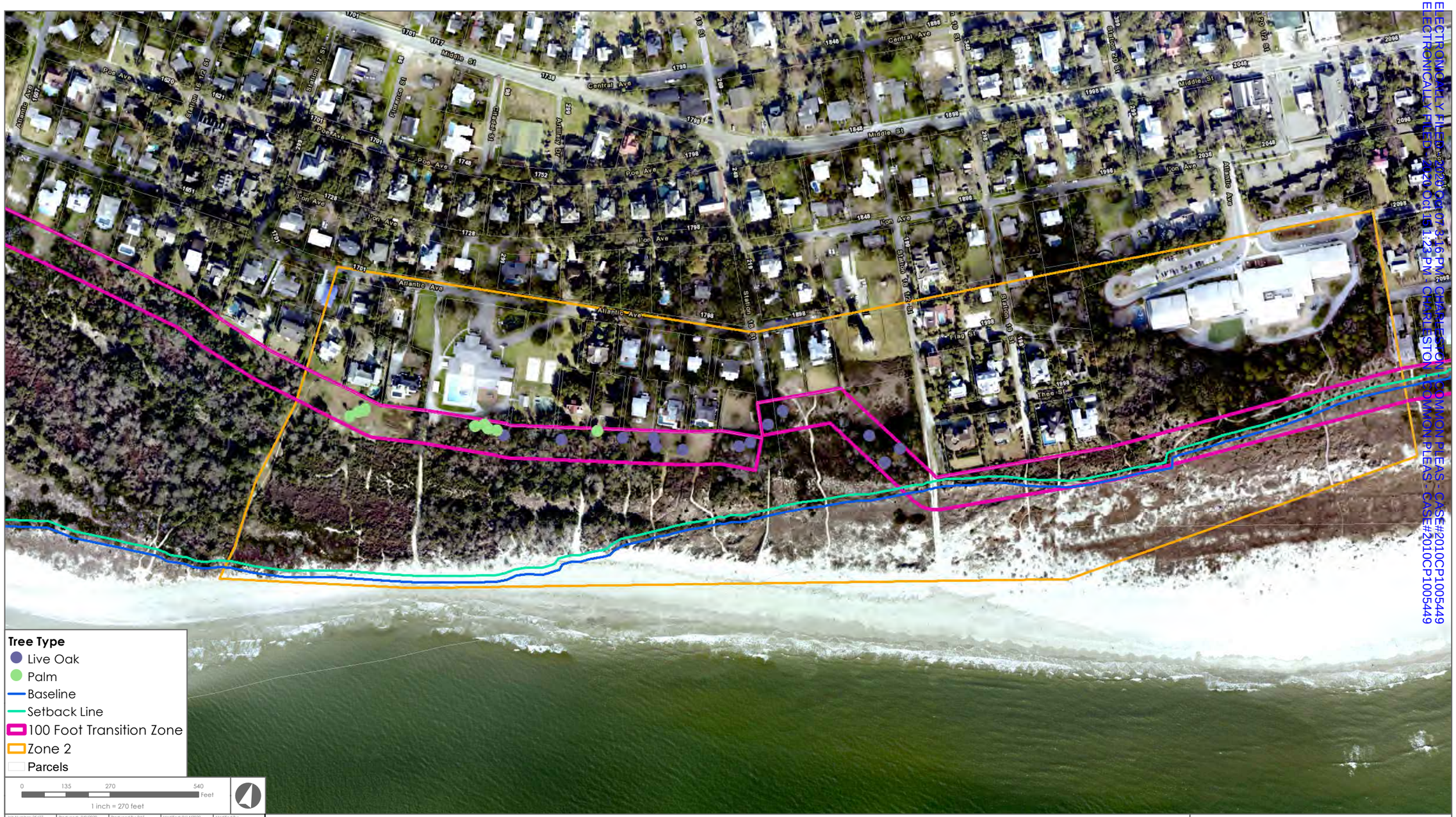

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Sullivans Island

Charleston County, South Carolina

Transition Zone 3, All Trees, Surveyed Myrtle Areas

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Charleston County, South Carolina

Transition Zone 3, Reduced Scenario 2

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MAYOR

TOWN COUNCIL
CHAUNCEY CLARK, MAYOR PRO TEM
SARAH CHURCH
GREG HAMMOND
TIM REESE
BACHMAN SMITH, IV
KAYE SMITH

TOWN OF SULLIVAN'S ISLAND

ANDY BENKE
TOWN ADMINISTRATOR

JASON BLANTON
DEPUTY ADMINISTRATOR/COMPTROLLER

LAWRENCE A. DODDS
TOWN ATTORNEY

GREG GRESS
WATER AND SEWER MANAGER

JOE HENDERSON
DIRECTOR OF PLANNING AND ZONING

CHRISTOPHER GRIFFIN
CHIEF OF POLICE

RANDY ROBINSON
BUILDING OFFICIAL

COURTNEY SOTTILE
TOWN CLERK

M. ANTHONY STITH
FIRE CHIEF

A Resolution

Making Specific Findings of Fact, Authorizing Settlement of Bluestein v. Sullivan's Island on the general parameters set forth below, and Authorizing Staff to Take All Actions Necessary and Proper to Implement the Described settlement including procurement actions in accordance with Town policy, the development of detailed plans and applications, and the submittal of applications necessary to effectuate this settlement.

WHEREAS, the Town owns property along the Atlantic Ocean which is known generally as The Accreted Land (AL); and

WHEREAS, the Town obtained title to the AL by way of a deed from the Lowcountry Land Trust; and

WHEREAS, the deed contained certain restrictions and covenants, both procedural and substantive; and

WHEREAS, the deed provides the Town with the unrestricted authority to trim and control the growth of vegetation; and

WHEREAS, after decade of litigation the Town and Plaintiff(s) have reached a voluntary settlement; and

WHERAS, the Town recognizes the need to develop a detailed implementation plan to use in conjunction with OCRM; and

WHERAS, after preliminary consultation with the Land Trust the Town has received feedback that the proposed settlement is consistent with the substantive deed restrictions; and

WHERAS, the Town is permitted to undertake activity on the AL enhance mosquito control, engage in scenic enhancement, and to control vegetation if accompanied by specific written findings of fact; and

WHERAS, the Town wishes this Resolution to constitute such specific written findings of fact; and

WHEREAS, the Town Council finds that the potential settlement adopted herein strikes the most advantageous possible outcome of the lawsuit and best balances the competing needs of

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beachfront and inland island residents and represents the best possible balance between ecological and natural interests on the one hand and human needs and safety on the other.

NOW THEREFORE, BE IT RESOLVED, by the Mayor and Town Council in Council Assembled, that:

1) Findings of Fact:
    a. The settlement, and implementing steps associated therewith, are solely undertaken to further specific enumerated, permissible public purposes under the Deed. In this instance, the Town Council believes that thinning of vegetation will serve the interests of improved mosquito control, improved vegetation management, enhanced public safety, improved public health, and scenic enhancement. The current thickness of vegetation, in significant part caused by the "hedging effect" of prior cutting rules, makes it extremely difficult for anti-mosquito treatments to penetrate. Members of Council have also noted an increased prevalence of pests correlated to the growth of the AL over past years with the 2005 cutting rule in effect. Additionally, by direct observation Council knows that the level of thickness significantly impedes airflow causing stagnant conditions that are not conducive to healthful and enjoyable living. Moreover, Council believes that the thickness of vegetation on the AL allows for rapid spread of wildfire should favorable fire conditions exist. Council believes that the thinning of myrtles and trees would improve all of these shortcomings. In addition, the cumulative effect of decades of growth has been to alter views from what existed at the time of deed signing. Council believes that the proposed action would help restore views to a level closer to what were enjoyed at the time the Deed Restrictions were implemented. Finally, Council believes that excessive plant density (stems per acre) can retard desirable maturation of plant life on the AL and that the thinning proposed herein will allow those stems retained to more fully and beneficially develop. Council believes that the combination of these factors will not only improve the safety of human habitation on the island, but also improve the overall condition of flora and fauna on the island. Finally, Council finds that the utilization of environmentally sensitive means (use of appropriate equipment, thinning techniques, naturalist approved seeding, etc) can avoid material problems with erosion, particularly in light of the decades of documented natural accretion in this area.

    b. The settlement, and implementing steps associated therewith, are necessary for the health, safety and general welfare of the Town. For the reasons set forth above, the Town finds that the settlement and implementation thereof are necessary steps to improve the health safety and welfare of the Town and its residents. Reduction in pests / mosquitoes benefits public health, as does fire hazard reduction. Improved airflow is also beneficial, allowing for (among other things) increased opportunities to avoid the need for artificial climate control during the course of a year.

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c. The benefits of the proposed settlement, and implementing steps associated therewith, outweigh any potential damage done to the aesthetic, ecological, scientific and education value of the property in its natural state. The Town finds this element to be met. The AL is proposed to remain in an undeveloped state. The proposed changes are intended to improve aesthetic conditions. They are also intended to improve wildlife habitat and allow maturation of retained vegetation. Given the diversity and number of stems remaining under the proposed plan the scientific and educational value of the property will not be undermined. In fact, Council finds it will be enhanced.

d. In making these fact findings, Council has considered

   i. The cumulative effect of actions pursuant to the proposed settlement and past AL related actions on the natural state of the Property. The Town's cutting rules have been unchanged for fifteen years and, in fact, bear striking resemblance to the rules in place at the time the deed restrictions were enacted. Consequently, there is no significant "cumulative" action to be considered. Regardless, the Council has carefully considered the changes proposed here and believe that they will either not harm or will enhance the natural environment of the AL for flora and fauna and will do so in a manner that benefits the island as a whole.

   ii. Alternative methods of furthering the stated public benefits that would not adversely impact the natural state of the AL. The Council finds that there are no suitable alternative methods. The principle concern being addressed here is excessive vegetation growth and density leading to all of the problems previously enumerated. The only way to address excessive vegetation growth and density is selective thinning. The current plan represents a selective thinning plan carefully tailored to address these stated concerns while maximizing retained ecological, educational and scientific goals.

   iii. The probable results of not taking the proposed settlement-related actions. The probable results of not taking the proposed settlement-related actions are two-fold. First, the existing conditions (and trend toward increasing vegetation thickness and growth) will continue to mature into an increasing problem. In that sense, taking no action at this point would amount to "action" furthering the undesirable attributes. Second, failure to undertake the proposed settlement would subject the Town and residents to the uncertainty inherent in a trial. Failure to prevail at a trial would mean that the Town would lose control of how the issues / concerns enumerated herein would be ameliorated. Instead, those decisions would be made by a judge not inherently familiar with the AL, or by a Plaintiff focused on his own interest rather than the balanced interests of the island

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as a whole (as reflected by this Council and the balancing of interests struck with this settlement.)

2) Settlement of Bluestein v. Sullivan's Island is authorized on terms stated below:

General Approach:

- The Town would implement selective thinning of the Accreted Land (AL), based on initial cut parameters set forth below for each of the four Zones (Transition Zone, Zone 1, Zone 2, and Zone 3.) These parameters are based upon the mapping and data used by the Parties in mediation and related regulatory discussions. In order to maintain similar conditions going forward, with the help of a naturalist the Town would review changes in the condition of the AL on a recurring basis (for instance, once every five years) with an eye towards making whatever changes might be necessary to maintain appropriate levels of density and diversity. This would provide a mechanism to deal with natural attrition, growth, or other changes to the natural environment. Primary funding for transition zone work would be the Town. Funding for work in the Zones 1-3 would be subject to the receipt of adequate donations or grants.

Zones:

- Zone 1: Station 16 beach path to western edge of property line at 1715 Atlantic (TMS# 523-12-00-014)

- Zone 2: Eastern edge of Zone 1 to Eastern Edge of SIES property

- Zone 3: Eastern edge of Zone 2 to Station 28.5 beach path

- Transition Zone (TZ)

Beach Paths:

- All vegetation to be removed 4' on either side of town owned beach paths/boardwalks.

- Private beach paths to be maintained at a width of 6.5' plus additional understory may be cleared to a maximum of 2' on either side (per draft plan 3a). Cutting and maintenance shall be subject to the receipt by the Town of sufficient grants or donations.

Myrtles (All Zones):

- Allow for 50% of myrtles seaward of TZ to be removed with focus on saving myrtles located in low-lying topography areas

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- All remaining myrtles may be cut to a height of 5'

- Property owners abutting town owned beach paths may trim myrtles from non-adjacent property line to beach path (eliminating "no man's land" currently existing in certain areas)

- Current town procedures will apply for annual cutting and payment thereof will apply

Zone 1:

- Keep all Live Oaks, Magnolias, Palmettos

- Remove all Cedar, Pine, Hackberry trees under 12" DBH

- Remove all other tree species under 6" DBH

- Limbing of trees >16" DBH will be allowed with TOSI approval so long as proposed limbing would not harm health of tree.

- Vines on trees may be removed with TOSI approval for health of tree

- All non-native or invasive species may be removed

Zone 2:

- Keep all Live Oaks, Magnolias, Palmettos >6" DBH

- Remove all Cedar, Pine, Hackberry trees under 16" DBH

- Remove all other tree species under 8" DBH

- Limbing of trees allowed with TOSI approval so long as proposed limbing would not harm health of tree.

- Vines located on trees may be removed with TOSI approval for health of tree

- All non-native or invasive species may be removed

Zone 3:

- Keep all Live Oaks, Magnolias, Palmettos >6" DBH

- Remove all Cedar, Pine, Hackberry trees under 18" DBH

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- Remove all other tree species under 10" DBH

- Limbing of trees will be allowed with TOSI approval so long as proposed limbing would not harm health of tree.

- Vines on trees may be removed with TOSI approval for health of tree

- All non-native or invasive species may be removed

Transition Zone:

- Trees to be preserved are only Live Oaks, Magnolias, Palm Trees 16" DBH or greater

- All other vegetation to be removed

- 100' seaward of property line of adjacent properties (includes Bayonne right of way)

- Heavy machinery allowed landward of OCRM setback line

Permitting:

Permitting will be required through OCRM. Continued consultation with OCRM and the Land Trust will be important as the Town develops its implementation plan and permit application. The Town will need to engage an engineer and/or technical consultant to develop an appropriate, detailed plan specifying methods and objectives, and to make appropriate regulatory applications. We would expect environmentally appropriate overseeding to be a part of any such plan in order to assure continued soil stability.

Funding and Timing:

Thinning of the 2500 Block of Atlantic will proceed with all deliberate speed after formal settlement approval by Council and funding of block thinning cost by Plaintiff. The work shall be done by way of a contract signed by the Town and a vegetation management contractor as appropriate under the Town's procurement process. Maintenance shall be subject to receipt of sufficient grants and/or donations

Homeowners shall have the right to enter into an agreement with the Town whereby they must provide sufficient funds with the Town within 12 months of the settlement of Bluestein v. Town of Sullivan's Island to cut the property within their block in accordance with the zone specifications contained herein. As described above, using such funds the Town shall hire the approved contractor to complete the thinning. Such cutting will be done on a block by block basis after sufficient funds to thin a particular block are on-hand. Maintenance and any subsequent thinning shall be subject to receipt of sufficient grants and/or donations.

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Appeals:

No party shall appeal the issuance of any permits issued for completion of work consistent with the settlement.

Compliance with Law required:

Implementation is subject to compliance with law.

The supporting Charts and Diagrams are attached hereto and shall be incorporated as if set forth fully herein.

3) Staff is hereby authorized including procurement actions in accordance with Town policy, the development of detailed plans and applications, and the submittal of applications necessary to effectuate this settlement

IN WITNESS WHEREOF, in writing I have hereunto set my hand and caused the Seal of the Town of Sullivan's Island to be affixed hereto on the 2nd day of October, 2020.

Patrick M. O'Neil, Mayor

Attest:

Courtney Sottile, Town Clerk

Andy Benke, Town Administrator

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Nathan Bluestein, Ettaleah Bluestein, Theodore Albenesius and Karen Albenesius	)	C/A No. 10-CP-10-5449
	)	
Plaintiffs,	)	**ORDER APPROVING SETTLEMENT**
	)	
Versus	)	
	)	
Town of Sullivan's Island and Sullivan's Island Town Council,	)	
	)	
Defendants.	)	

UPON Motion of all Parties, and it appearing that the said Parties deem the offer of settlement acceptable, advantageous, and to the best interest of all Parties and

IT FURTHER APPEARING in the discretion of this Court that such settlement is proper and in the best interest of all Parties, it is

ORDERED, ADJUDGED AND DECREED that the Parties are hereby authorized to consummate the settlement referred to in the within Settlement Agreement and General Release (Exhibit 1) and to execute and deliver to the Defendants an appropriate Release terminating, releasing, and ending any and all claims and actions asserted or brought under or by virtue of any South Carolina Statute or by common law against the Defendants, Town of Sullivan's Island and Sullivan's Island Town Council, including their Mayor, council, officers, directors, employees, agents, servants, attorneys, partners and representatives, predecessors and successor corporations or entities and their attorneys, heirs, assigns, executors, administrators, successors, subsidiaries, affiliated companies, parent companies, insiders, and any other indemnitors.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each side bear and pay their own costs, including court costs and attorneys' fees.

ELECTRONIC SIGNATURE PAGE TO FOLLOW.

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Charleston Common Pleas

Case Caption: Nathan Bluestein, plaintiff, et al VS Sullivans Island Town Of Etc, defendant, et al

Case Number: 2010CP1005449

Type: Order/Approval Of Settlement

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2020-10-14 12:20:57 page 2 of 2

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EXHIBIT 1

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Settlement Agreement") is given by Nathan Bluestein and Theodore Albenesius, III (Plaintiffs) to the Town of Sullivan's Island and Sullivan's Island Town Council ("Town"), collectively referred to as "Parties", as of this 7th day of October, 2020.

Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius filed a lawsuit against the Town of Sullivan's Island and Sullivan's Island Town Council in the Court of Common Pleas for Charleston County, Case No. 2010-CP-10-5449, which was appealed and heard in the South Carolina Court of Appeals, App. No. 2015-002550 and the South Carolina Supreme Court, App. No. 2018-001888 ("Lawsuit"), concerning the municipal ordinances and restrictions regarding the land along the Atlantic Ocean in the Town under a conservation easement and donation to the Town in 1991. Since the Lawsuit was filed, Ettaleah Bluestein, M.D. passed away and Karen Albenesius was divorced from Theodore Albenesius and is no longer a participating Plaintiff in the litigation.

The Parties have now agreed to a resolution of this long-standing dispute, pursuant to the following terms and conditions that have been approved and adopted by the Town Council. This settlement agreement balances the competing needs of beachfront and inland island residents and the ecological and natural interests on the one hand and human needs and safety on the other.

I. RECITALS

Whereas, the Town owns property along the Atlantic Ocean which is known generally as The Accreted Land (AL); and

Whereas, the Town obtained title to the AL by way of a deed from the Low Country Open Land Trust; and

Whereas, the deed contained certain restrictions and covenants, both procedural and substantive; and

Whereas, the deed provides the Town with the unrestricted authority to trim and control the growth of vegetation; and

Whereas, after a decade of litigation the Town and Plaintiffs have reached a voluntary settlement; and

Whereas, the Town recognizes the need to develop a detailed implementation plan to use in conjunction with OCRM; and

Whereas, after preliminary consultation with the Land Trust the Town has received feedback that the Land Trust does not object to the settlement; and

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Whereas, the Town is permitted to undertake activity on the AL to enhance mosquito control, engage in scenic enhancement, and to control vegetation pursuant to the following specific written findings of fact;

II. Findings of Fact:

a. The settlement, and implementing steps associated therewith, are solely undertaken to further specifical enumerated, permissible public purposes under the Deed. In this instance, the Town Council believes that thinning of vegetation will serve the interests of improved mosquito control, improved vegetation management, enhanced public safety, improved public health, and scenic enhancement. The current thickness of vegetation, in significant part caused by the "hedging effect" of prior cutting rules, makes it extremely difficult for anti-mosquito treatments to penetrate. There is also an increased prevalence of pests correlated to the growth of the AL over past years with the 2005 cutting rule in effect. Additionally, the level of thickness significantly impedes airflow causing stagnant conditions that is not conducive to healthful and enjoyable living. Further, the thickness of vegetation on the AL allows for rapid spread of wildfire should favorable fire conditions exist. The thinning of myrtles and trees would improve all of these shortcomings. In addition, the cumulative effect of decades of growth has been to alter views from what existed at the time of deed signing. The proposed action would help restore views to a level closer to what were enjoyed at the time the Deed Restrictions were implemented. Finally, excessive plant density (stems per acre) can retard desirable maturation of plant life on the AL and that the thinning proposed herein will allow those stems retained to develop more fully and beneficially. The combination of these factors will not only improve the safety of human habitation on the island, but also improve the overall condition of flora and fauna on the island. The utilization of environmentally sensitive means (use of appropriate equipment, thinning techniques, naturalist approved seeding, etc) can avoid material problems with erosion, particularly in light of the decades of documented natural accretion in this area.

b. The settlement, and implementing steps associated therewith, are necessary for the health, safety and general welfare of the Town. Reduction in pests and mosquitoes benefits public health, as does fire hazard reduction. Improved airflow is also beneficial, allowing for (among other things) increased opportunities to avoid the need for artificial climate control during the course of a year.

c. The benefits of the proposed settlement, and implementing steps associated therewith, outweigh any potential damage done to the aesthetic, ecological, scientific and education value of the property in its natural state. The AL is proposed to remain in an undeveloped state. The proposed changes are intended to improve aesthetic conditions. They are also intended to improve wildlife habitat and allow maturation of retained vegetation. Given the diversity and number of stems remaining under the proposed plan, the scientific and educational value of the property will not be undermined but will be enhanced.

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d. The Parties have considered

i. The cumulative effect of actions pursuant to the proposed settlement and past AL related actions on the natural state of the Property. The Town's cutting rules have been unchanged for fifteen years and, in fact, bear striking resemblance to the rules in place at the time the deed restrictions were enacted. Consequently, there is no significant "cumulative" action to be considered. Regardless, the changes proposed here will either not harm or enhance the natural environment of the AL for flora and fauna and will do so in a manner that benefits the island as a whole.

ii. There are no suitable alternative methods of furthering the stated public benefits that would not adversely impact the natural state of the AL. The principle concern being addressed here is excessive vegetation growth and density leading to all of the problems previously enumerated. The only way to address excessive vegetation growth and density is selective thinning. The current plan represents a selective thinning plan carefully tailored to address these stated concerns while maximizing retained ecological, educational and scientific goals.

iii. First, the existing conditions (and trend toward increasing vegetation thickness and growth) will continue to mature into an increasing problem. In that sense, taking no action at this point would amount to "action" furthering the undesirable attributes. Second, failure to undertake the proposed settlement would subject the Town and residents to the uncertainty inherent in a trial.

III. Settlement of this litigation is agreed to on terms stated below:

General Approach:

- The Town would implement selective thinning of the Accreted Land (AL), based on initial cut parameters set forth below for each of the four Zones (Transition Zone, Zone 1, Zone 2, and Zone 3.) In order to maintain similar conditions going forward, with the help of a naturalist the Town would review changes in the condition of the AL on a recurring basis (for instance, once every five years) with an eye towards making whatever changes might be necessary to maintain appropriate levels of density and diversity. This would provide a mechanism to deal with natural attrition, growth, or other changes to the natural environment. Primary funding for transition zone work will be from the Town. Funding for work in Zones 1-3 is subject to receipt of adequate donations or grants.

- To facilitate resolution of this case, the Town retained Thomas and Hutton to perform a tree survey which is reflected in the attachments hereto. Due to the lapse of time from the tree survey to the actual performance of the work described herein, the Parties recognize the potential for further tree

growth from the time of the tree survey to the time of the work described. The trees meeting the dimensions for trimming described below and identified in the attached tree survey are the specific trees to be trimmed, cut or removed notwithstanding any growth during that interval.

Zones:

- Zone 1: Station 16 beach path to western edge of property line at 1715 Atlantic (TMS# 523-12-00-014)
- Zone 2: Eastern edge of Zone 1 to Eastern Edge of SIES property
- Zone 3: Eastern edge of Zone 2 to Station 28.5 beach path
- Transition Zone (TZ)

Beach Paths:

- All vegetation to be removed 4' on either side of town owned beach paths/boardwalks
- Private beach paths to be maintained at a width of 6.5' plus additional understory may be cleared to a maximum of 2' on either side (per draft plan 3a.) Cutting and maintenance shall be subject to the receipt by the Town of sufficient grants or donations.

Myrtles (All Zones):

- Allow for 50% of myrtles seaward of TZ to be removed with focus on saving myrtles located in low-lying topography areas
- All remaining myrtles may be cut to a height of 5'
- Property owners abutting town owned beach paths may trim myrtles from non-adjacent property line to beach path (eliminating "no man's land" currently existing in certain areas)
- Current town procedures will apply for annual cutting and payment thereof will apply

Zone 1:

- Keep all Live Oaks, Magnolias, Palmettos
- Remove all Cedar, Pine, Hackberry trees under 12" DBH

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- Remove all other tree species under 6" DBH
- Limbing of trees >16" DBH will be allowed with TOSI approval so long as proposed limbing would not harm health of tree.
- Vines on trees may be removed with TOSI approval for health of tree
- All non-native or invasive species may be removed

Zone 2:

- Keep all Live Oaks, Magnolias, Palmettos >6" DBH
- Remove all Cedar, Pine, Hackberry trees under 16" DBH
- Remove all other tree species under 8" DBH
- Limbing of trees allowed with TOSI approval so long as proposed limbing would not harm health of tree.
- Vines located on trees may be removed with TOSI approval for health of tree
- All non-native or invasive species may be removed

Zone 3:

- Keep all Live Oaks, Magnolias, Palmettos >6" DBH
- Remove all Cedar, Pine, Hackberry trees under 18" DBH
- Remove all other tree species under 10" DBH
- Limbing of trees will be allowed with TOSI approval so long as proposed limbing would not harm health of tree.
- Vines on trees may be removed with TOSI approval for health of tree
- All non-native or invasive species may be removed

Transition Zone:

- Trees to be preserved are only Live Oaks, Magnolias, Palm Trees 16" DBH or greater
- All other vegetation to be removed

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- 100' seaward of property line of adjacent properties (includes Bayonne right of way)

- Heavy machinery allowed landward of OCRM setback line

Permitting:

Permitting will be required through OCRM. Continued consultation with OCRM and the Land Trust will be important as the Town develops its implementation plan and permit application. The Town will need to engage an engineer and/or technical consultant to develop an appropriate, detailed plan specifying methods and objectives, and to make appropriate regulatory applications. We would expect environmentally appropriate overseeding to be a part of any such plan in order to assure continued soil stability. The Parties agree to cooperate as required to obtain any such permit. The Parties covenant and agree to work in good faith to obtain all permits and complete the work agreed to and described herein. Neither of the Parties shall directly or indirectly, individually or through others, endeavor to interfere with the permitting process.

Funding and Timing:

Thinning of the 2500 Block of Atlantic will proceed with all deliberate speed after formal settlement approval by Council and the funding of the block thinning cost by Plaintiff and/or homeowners in that block. The work shall be done by way of a contract signed by the Town and a vegetation management contractor as appropriate under the Town's procurement process.

Homeowners shall have the right to enter into an agreement with the Town whereby they must provide sufficient funds with the Town within 12 months of the settlement of Bluestein v. Town of Sullivan's Island to cut the property within their block in accordance with the zone specifications contained herein. As described above, using such funds the Town shall hire the approved contractor to complete the thinning. Such cutting will be done on a block by block basis after sufficient funds to thin a particular block are on-hand.

Appeals:

No party shall appeal the issuance of any permits issued for completion of work consistent with the settlement.

Compliance with Law required:

Implementation is subject to compliance with law.

Good Faith and Fair Dealing:

The Parties covenant and agree to work in good faith to obtain all permits and complete the work agreed to and described herein. No Party shall directly or indirectly, individually or through others, endeavor to interfere with the permitting process or the completion of the work described herein.

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Incorporation of Charts and Diagrams:

The supporting Charts and Diagrams are attached hereto and shall be incorporated as if set forth fully herein.

Submission of Applications:

The Town agrees to (1) authorize the necessary procurement actions in accordance with Town policy, (2) the development of detailed plans and applications, and (3) the submittal of applications necessary to effectuate this settlement.

IV. Mutual Release

In consideration of the covenants contained in this Settlement Agreement, Nathan Bluestein and Theodore Albenesius, III, their heirs, legal representatives, and assigns, do hereby release, cancel, acquit, relinquish and forever discharge the Town, together with its agents, representatives, attorneys, assigns, affiliates, predecessors, successors, officers, directors, employees, and any and all persons or entities in privity with them ("Releasees") from any and all claims, rights, demands, debts, liabilities, controversies, or causes of action, known or unknown, asserted or unasserted, liquidated or unliquidated, fixed or contingent, of any nature whatsoever including, but not limited to, those pertaining to (a) the Deed for AL; (b) the Ordinances related to the AL; (c) all claims under the Deed or Ordinances and the manner in which the Town interpreted those documents; (d) any claim asserted or assertable in the Lawsuit including, without limitation, claims in contract or in tort, common law or statutory, for actual, multiple, or punitive damages, attorneys' fees, interest and costs; and (e) all claims arising out of any act, transaction, or occurrence through the date hereof relating in any manner to the issues raised in the Lawsuit or which could have been raised in the Lawsuit.

In consideration of the covenants contained in this Settlement Agreement, the Town does hereby release, cancel, acquit, relinquish and forever discharge Nathan Bluestein and Theodore Albenesius, III, their heirs, legal representatives, and assigns, together with their agents,

representatives, attorneys, assigns, affiliates, predecessors, successors, officers, directors, employees, and any and all persons or entities in privity with them ("Releasees") from any and all claims, rights, demands, debts, liabilities, controversies, or causes of action, known or unknown, asserted or unasserted, liquidated or unliquidated, fixed or contingent, of any nature whatsoever including, but not limited to, those pertaining to (a) the Deed for AL; (b) the Ordinances related to the AL; (c) all claims under the Deed or Ordinances and the manner in which the Town interpreted those documents; (d) any claim asserted or assertable in the Lawsuit including, without limitation, claims in contract or in tort, common law or statutory, for actual, multiple, or punitive damages, attorneys' fees, interest and costs; and (e) all claims arising out of any act, transaction, or occurrence through the date hereof relating in any manner to the issues raised in the Lawsuit or which could have been raised in the Lawsuit.

V. Dismissal with Prejudice

Nathan Bluestein and Theodore Albenesius, III, agree that the Lawsuit shall be dismissed with prejudice, with each side bearing and paying their own costs, including court costs and attorneys' fees.

VI. Binding

This Settlement Agreement shall be binding upon and inure to the benefit of all the Parties, and their heirs, successors and assigns.

VII. Disputes

Any Party may commence a legal proceeding to enforce this Settlement Agreement. Any such action shall be brought exclusively in the Court of Common Pleas located in Charleston County, South Carolina.

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VIII. Miscellaneous Provisions.

a) Fees and Costs. Each Party shall be solely responsible for the fees and costs he, she, or it has incurred in connection with the Lawsuit.

b) Acknowledgements. Each Party acknowledges and agrees that this Settlement Agreement was negotiated and drafted with the full participation of the Parties and the Parties' respective counsel; that this Settlement Agreement was negotiated at arms' length and in good faith; that this Settlement Agreement was voluntarily executed after consultation with experienced legal counsel; that the Parties have carefully read the contents of this Settlement Agreement and understand its terms; that the consideration provided to the Parties under this Settlement Agreement is adequate; and that this Settlement Agreement is a legally binding contract with which the Partis will faithfully comply. Each individual signing this Settlement Agreement on behalf of one of the Parties to this Agreement has the authority to execute this Settlement Agreement and bind the entity or person on whose behalf this Settlement Agreement is executed.

c) Governing Law and Jurisdiction. This Settlement Agreement shall be interpreted and enforced, in all respects, according to the laws of the State of South Carolina.

d) Time is of the Essence. Time is of the essence as to every provision of this Settlement Agreement.

e) Interpretation and Severability. The paragraph headings contained in this Settlement Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Settlement Agreement. In interpreting this Settlement Agreement and construing its terms, neither of the Parties shall be deemed to have drafted this Settlement Agreement, and no drafting presumption against either of the Parties shall be applicable to this Settlement Agreement. Should any portion, word, clause, phrase, sentence or paragraph of this Settlement Agreement be declared void or unenforceable, such portion shall be considered independent and severable from the remainder, the validity of which shall remain unaffected.

f) Modification. This Agreement may not be modified or amended, nor may any of its provisions be waived, except upon mutual agreement of all Parties or their authorized agents in writing.

g) Counterparts. This Settlement Agreement may be executed in counterparts, each of which shall be deemed an original, all of which together shall constitute one and the same instrument. The Parties agree that as to this Settlement Agreement, electronic copies and signatures have the same force and effect as originals.

h) Entire Agreement. Each of the Parties acknowledge and agree that this Settlement Agreement constitutes the entire agreement of the Parties hereto with respect to the subject matter of this Settlement Agreement, and each of the Parties further acknowledge and agree that this Settlement Agreement supersedes any and all other agreements, understandings, negotiations, or discussions, either oral or in writing,

express or implied, between one or more of the Parties. The Parties each acknowledge that no representations, inducements, promises, agreements, or warranties, oral or otherwise, have been made by them, or anyone acting on their behalf, which are not embodied in this Settlement Agreement; that they have not executed this Settlement Agreement in reliance on any representation, inducement, promise, agreement, warranty, fact or circumstances, not expressly set forth in this Settlement Agreement; and that no representation, inducement, promise, agreement, or warranty not contained in this Settlement Agreement shall be valid or binding unless executed in writing and signed by all Parties to this Settlement Agreement.

IN WITNESS WHEREOF, we have hereunto set our hand this 7th day of October, 2020.

Nathan NB

~~Nicky~~ Bluestein
2513 Atlantic Ave.
Sullivan's Island, SC 29482

Teddy Albenesius
P.O. Box 60477
North Charleston, SC 29419

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IN WITNESS WHEREOF, I have hereunto set my hand this 7th day of October, 2020

ON BEHALF OF *Town of Sullivan's Island and Sullivan's Island Town Council ("Town")*:

Derk Van Raalte, Esquire
derk@bradyhair.com
Law Offices of Brady Hair
2500 City Hall Lane (29406)
P. O. Box 61896
North Charleston, SC 29419
P: (843) 572-8700/F: (843) 745-1082

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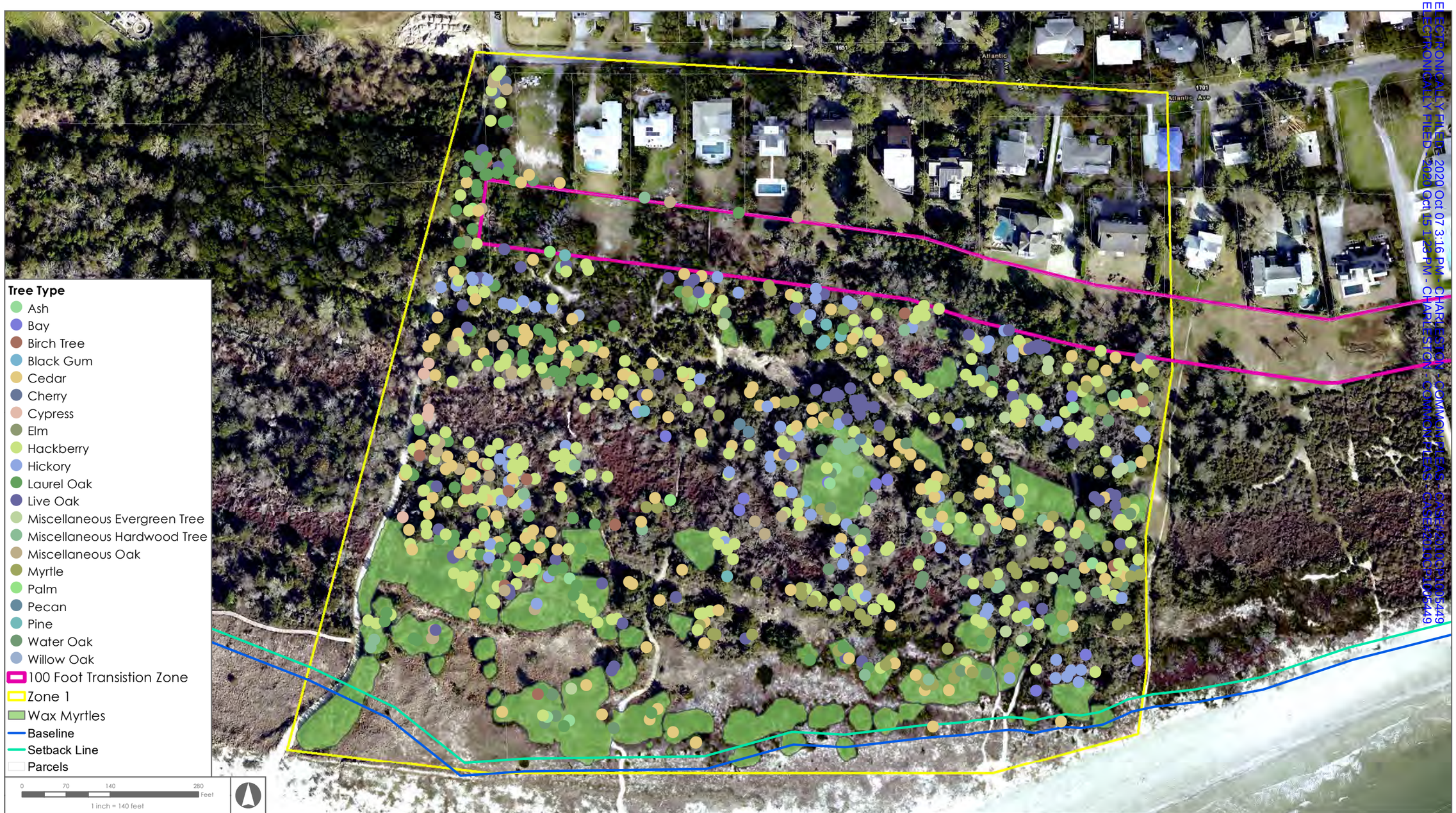

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Thomas & Hutton compiled the map information from the following sources:

Data	Source	Date
Tree Locations	T&H	2020

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Sullivans Island

Charleston County, South Carolina

Zone 1, All Trees, Surveyed Myrtle Areas

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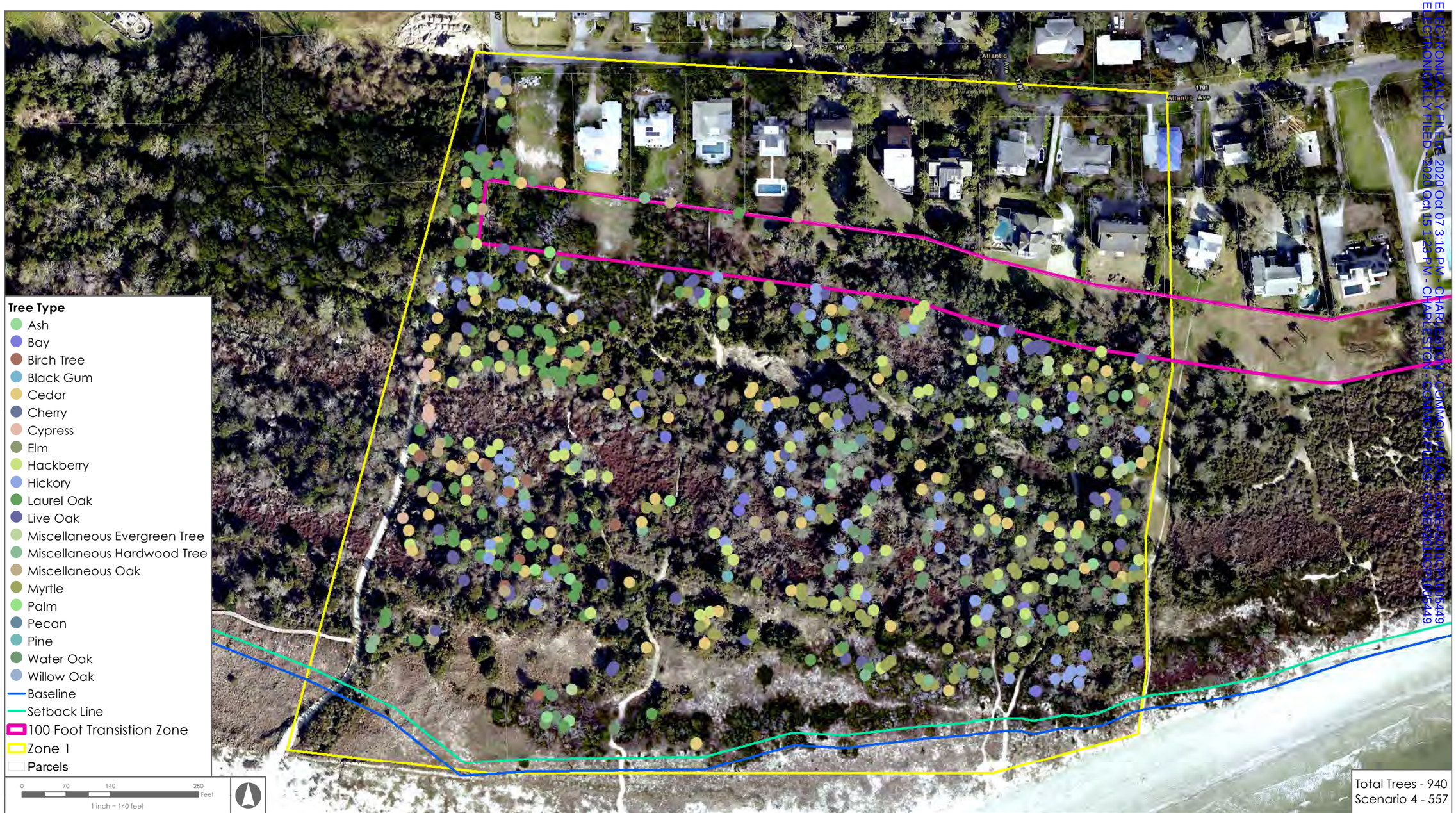

Tree Type

- Ash
- Bay
- Birch Tree
- Black Gum
- Cedar
- Cherry
- Cypress
- Elm
- Hackberry
- Hickory
- Laurel Oak
- Live Oak
- Miscellaneous Evergreen Tree
- Miscellaneous Hardwood Tree
- Miscellaneous Oak
- Myrtle
- Palm
- Pecan
- Pine
- Water Oak
- Willow Oak
- Baseline
- Setback Line
- 100 Foot Transistion Zone
- Zone 1
- Parcels

0 70 140 280 Feet

1 inch = 140 feet

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Zone 1, Scenario 4

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Sullivans Island

Charleston County, South Carolina

Zone 2, All Trees, Surveyed Myrtle Areas

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Sullivans Island

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Zone 2, Scenario 4

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Charleston County, South Carolina

Zone 3, All Trees, Surveyed Myrtle Areas

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0 225 450 900 Feet

1 inch = 450 feet

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Size: P:\25627\25627.GTM\GIS\Map\Scenario4_Rev_Zone3_2020_1\1175.mxd				Vertical Datum:

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Sullivans Island

Charleston County, South Carolina

Zone 3,Scenario 4 Revision

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File: Z:\25427\25427.GTHQ.GIS\Mesh.All\Trees_Transition\zone1_2020_11317L.mxd				Vertical Datum:

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Tree Locations	T&H	2020

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Sullivans Island

Charleston County, South Carolina

Transition Zone 1, All Trees, Surveyed Myrtle Areas

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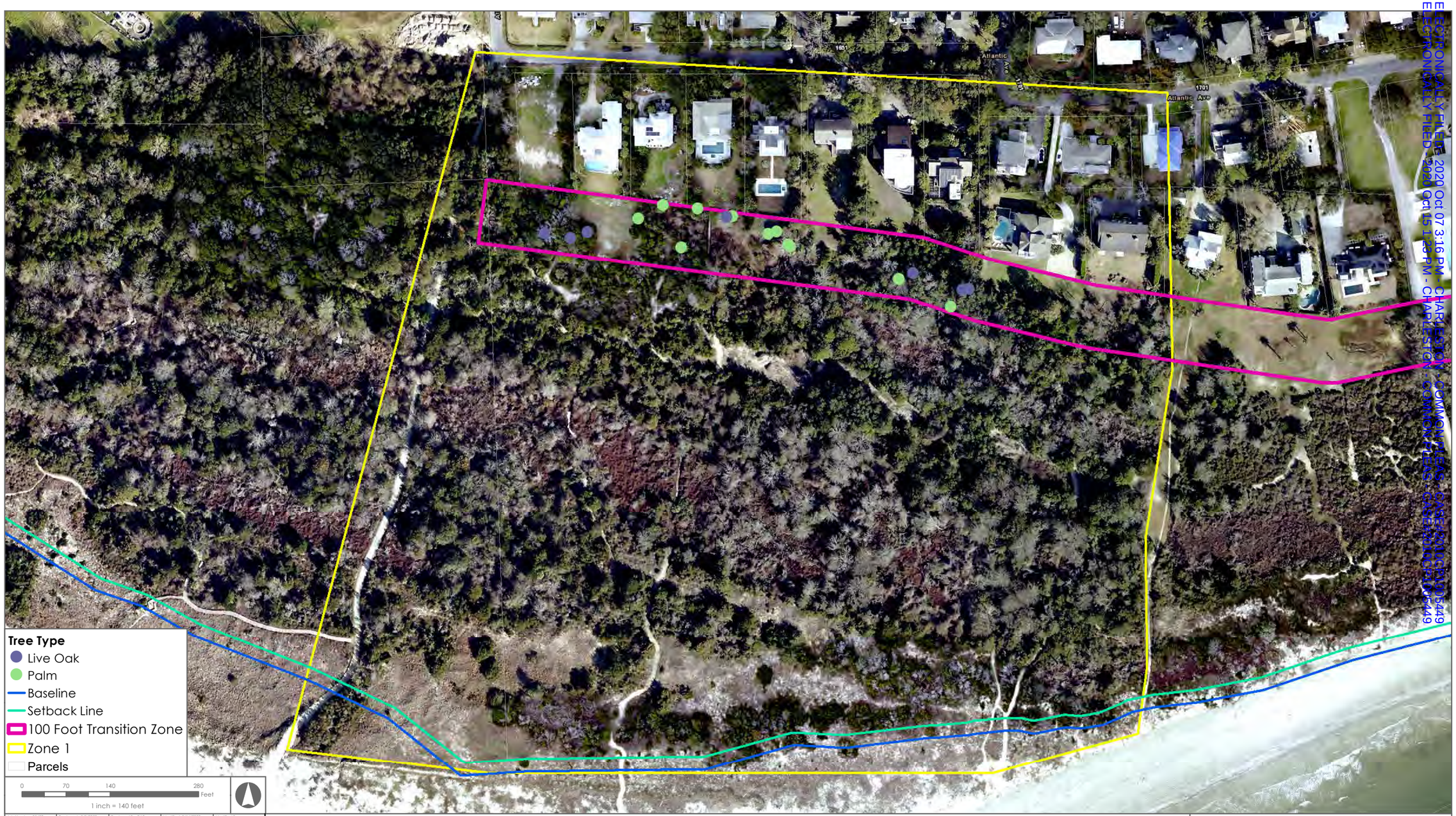

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File: Z:\25427\25427.GTHGY.GIS\MapfileScenario2_TransitionZone1_2020_114175.mxd				Vertical Datum:

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Sullivans Island

Charleston County, South Carolina

Transition Zone 1, Reduced Scenario 2

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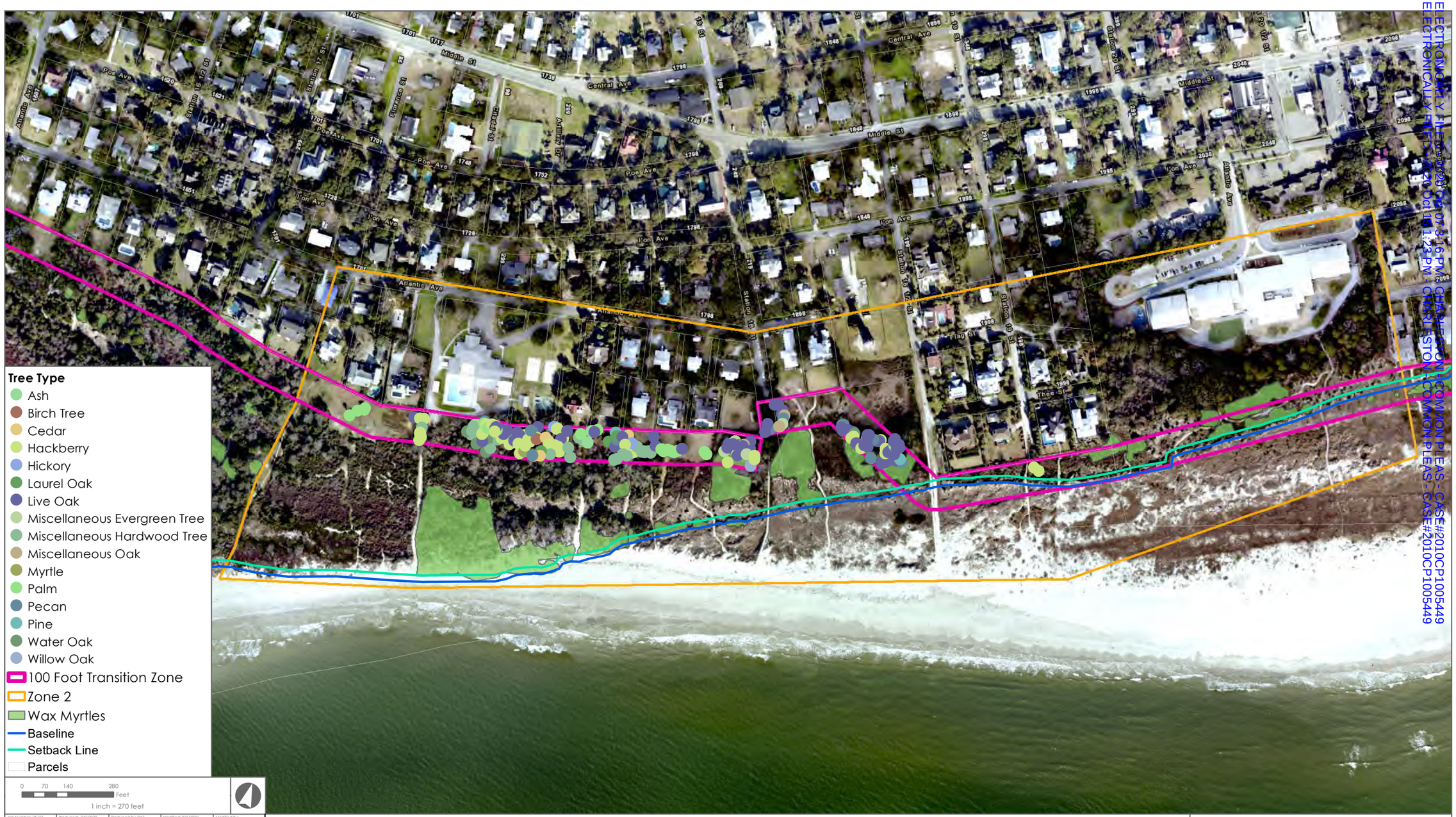

Sullivans Island

Charleston County, South Carolina

Transition Zone 2, All Trees, Surveyed Myrtle Areas

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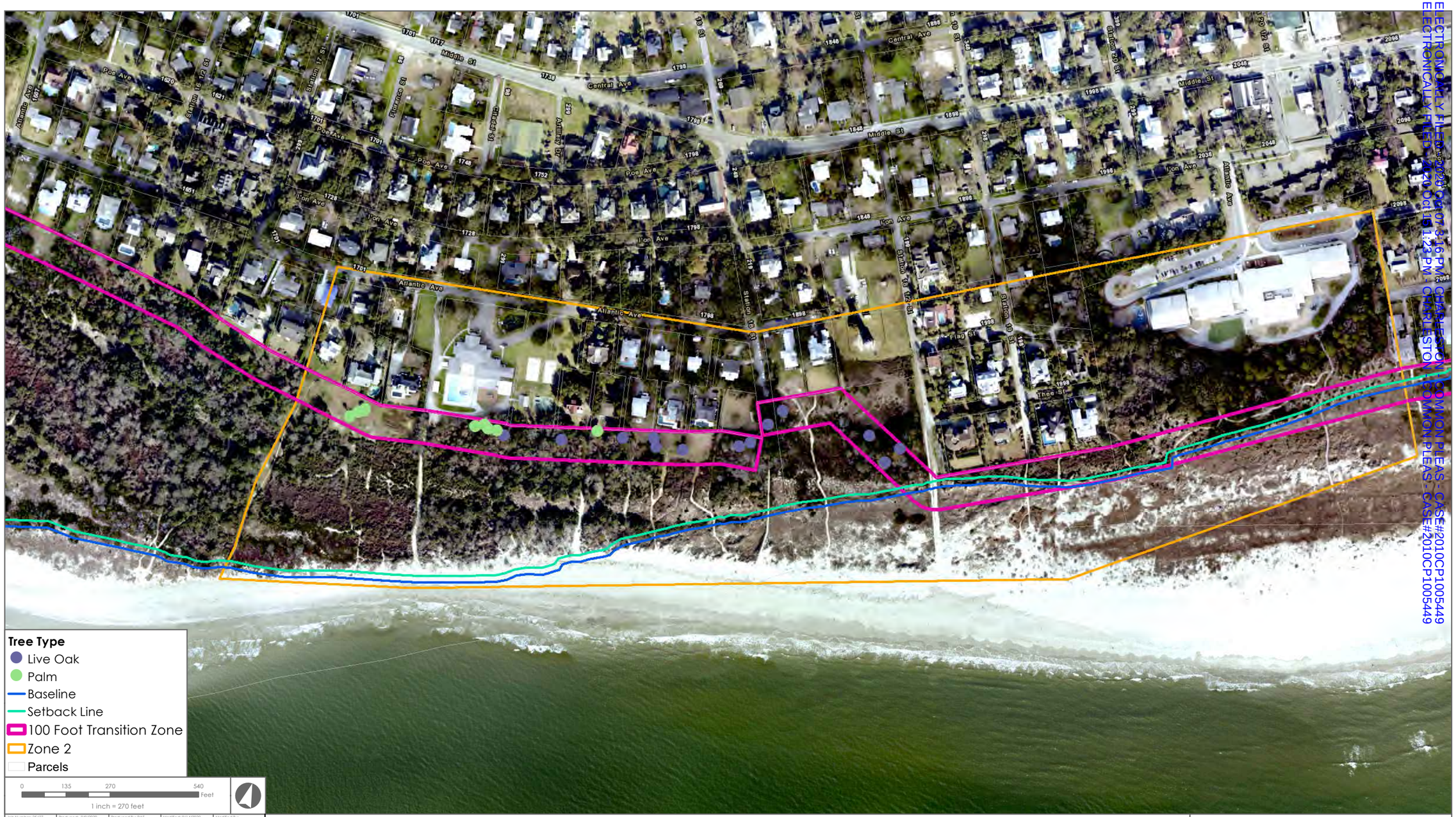

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Sullivans Island

Charleston County, South Carolina

Transition Zone 2, Reduced Scenario 2

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Sullivans Island

Charleston County, South Carolina

Transition Zone 3, All Trees, Surveyed Myrtle Areas

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Sullivans Island

Charleston County, South Carolina

Transition Zone 3, Reduced Scenario 2

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Nathan Bluestein, Ettaleah Bluestein, Theodore Albenesius and Karen Albenesius	)	C/A No. 10-CP-10-5449
	)	
Plaintiffs,	)	**ORDER AMENDING SETTLEMENT**
	)	
Versus	)	
	)	
Town of Sullivan's Island and Sullivan's Island Town Council,	)	
	)	
Defendants.	)	

WHEREAS, this Court previously entered a Consent Order approving settlement of the above-captioned litigation based upon terms and conditions jointly agreed upon by the Parties; and

WHEREAS, the execution of the terms of that settlement Order required the Parties to obtain various permits and authorizations from State and/or Federal regulatory agencies; and

WHEREAS, based on field conditions encountered during the preparation of regulatory applications, all Parties agree that amendment of the Settlement terms and conditions would be mutually beneficial in order to properly address anticipated third-party regulatory concerns; and

WHEREAS, based on the above, it appears that relief under Rule 60(b)(5) is appropriate because it would not be equitable or desirable for the parties to further seek to implement the settlement as originally written and the Parties are in agreement that the revised terms attached hereto further the spirit of the original settlement agreement and allow the flexibility needed to conform with guidance from third-party regulatory agencies.

IT FURTHER APPEARING in the discretion of this Court that such settlement, as amended, is proper and in the best interest of all Parties, it is

ORDERED, ADJUDGED AND DECREED that this Court's Prior Order be Amended as follows:

1. The Work Plan attached hereto as Exhibit A shall replace the scope of work described in the original Settlement Order. Should third-party regulatory feedback or guidance be received suggesting further work plan changes the Parties may jointly agree to further modify this plan to address such feedback or guidance. Should one Party decline a modification suggested based on third-party regulatory feedback or guidance the other Party shall not be deemed at-fault or held responsible if permitting fails on that basis. The Town shall not unreasonably withhold consent to a proposed modification so long as the proposed modification would not result in cutting/trimming/pruning that is more aggressive than that detailed on the subject in the Settlement Agreement and Order originally executed in this case.
2. The twelve (12) month period referenced on page 6 of the Original Settlement Agreement, which originally commenced as of the date of original settlement, shall now commence on the date the Town receives necessary regulatory approvals to allow the proposed scope of work to proceed.
3. For the purpose of clarification, tree measurements referenced in this document and the Settlement Agreement refer to the size of specific trees as reported in geothinQ by the name "Sullivan's Island Tree Survey, 2015."
4. The Parties' statements of general intent, goals, and desire to balance various interests as described in the original Settlement Agreement remain valid.

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5. As a guiding principle, it is generally intended that trees and other vegetation designated for removal under the original settlement plan that will now be retained under this work plan will be trimmed / pruned by TOSI in a manner to promote adequate views and breezes, provided a Town arborist opines that the proposed extent of such trimming / pruning will not likely endanger the long-term survival of the plant.

ELECTRONIC SIGNATURE PAGE TO FOLLOW.

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Charleston Common Pleas

Case Caption: Nathan Bluestein, plaintiff, et al VS Sullivans Island Town Of Etc, defendant, et al

Case Number: 2010CP1005449

Type: Order/Amend

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2021-04-12 10:29:02 page 4 of 4

EXHIBIT A

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TO: USACOE, OCRM, SCDHEC-BOW

FROM: Tony M. Woody, PE
Thomas & Hutton

DATE: March 10, 2021

SUBJECT: Sullivan's Island Accreted Lands
Work Plan

JOB NO.: 25357.0002

1.0 NARRATIVE

On October 7, 2020 the Town of Sullivan's Island entered into a Settlement Agreement to end a decade long lawsuit and agreed to thin the vegetation on the Accreted Lands to serve the interest of improved mosquito control, improved vegetation management, enhanced public safety, improved public health, and scenic enhancement. The vegetation thinning will be accomplished by utilization of environmentally sensitive means (use of appropriate equipment, thinning techniques, naturalist approved seeding, etc) and can avoid material problems with erosion, particularly in light of documented natural accretion in the area.

The Accreted Lands are located on the southern portion of Sullivan's Island in TMS #523-12-00-077, 529-09-00-112 (two parcels), 529-10-00-087, and a portion of TMS #529-09-00-068. The total area is approximately 147 acres, and is divided into three Zones… 1, 2, and 3, and a Transition Zone that is part of all three Zones. The Zones were established to identify different thinning approaches to better represent the different environments of each zone.

The attached Work Plan Exhibit identifies the three Zones, and the Transition Zone, the Beach Front Baseline and Setback Line, the Dune Line (in Zone 3), and the delineated Freshwater Wetlands (pending USACOE review). The description below identifies the work to be accomplished along with the means and methods within each zone, inside and outside of the Freshwater Wetlands, landward and seaward of the Beach Front Setback Line, and landward and seaward of the Dune Line.

The goal of this technical paper is to describe the work (thinning and removal of existing vegetation) along with the means and methods of accomplishing the work with enough clarity and in enough detail to allow Federal and State agencies with permitting authority to determine if the proposed activities will require a permit.

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2.0 GENERAL

A. In order to be respectful of habitat during breeding seasons, work to be planned to commence and conclude during the period between November 1st and February 28th. If field or other unexpected conditions delay progress on work commenced during this period then such work will be completed as near as possible to February 28th.

B. TOSI will retain expertise to determine on a daily basis if conditions are suitable to work during the work period identified above. The determination will include weather patterns and soil moisture condition.

C. When present, stumps will remain in place and treated with a herbicide approved for use in the associated environment to prevent new growth.

D. No removal of vegetation that disturbs the soil will occur and no fill including incidental fill will be placed in Freshwater Wetlands.

E. Unless otherwise specified below, trees and other vegetation removed from the Accredited Lands will be transferred to an inland site on Sullivan's Island outside of the Accreted Lands, chipped, and disposed of in accordance with Local and State regulations.

F. Existing beach access paths will be used to the maximum extent practicable. Alternate routes and dispersed routes may be utilized where it appears that geographically dispersed activity, rather than concentrated activity, would be more protective of the natural environment.

3.0 TRANSITION ZONE LANDWARD OF SETBACK LINE IN ZONES 1, 2, AND LANDWARD OF DUNE LINE IN ZONE 3

A. Retain all Live Oaks, Magnolias, and Palm trees 16" DBH or greater. Lesser size species and other species will be cut to the extent reasonably practicable given existing field conditions.

B. Trees and shrubs 3" DBH and smaller shall be cut at ground level and mulched in place if located outside of wetland or removed if located inside a wetland. Cutting of such material will be by chainsaw or similar device if located inside a wetland.

C. Trees and shrubs removed greater than 3" DBH shall be cut by chainsaw and carried offsite with small non powered equipment.

D. Stumps will remain in place.

E. Vines will be removed as determined by TOSI.

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4.0 TRANSITION ZONE SEAWARD OF SETBACK LINE IN ZONES 1, 2, AND SEAWARD OF DUNE LINE IN ZONE 3

A. No tree or shrub removal proposed.

B. Vegetation will be pruned or trimmed by TOSI after receipt of an arborist opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant material.

C. Vines will be removed as determined by TOSI.

5.0 ZONE 1 OUTSIDE OF TRANSITION ZONE AND LANDWARD OF THE SETBACK LINE

A. Myrtles that are inside Freshwater Wetlands – All myrtles to be trimmed to a minimum height of 3 feet.

B. Myrtles that are outside of Freshwater Wetlands – 50% of myrtles to be cut at the ground. Remaining 50% to be trimmed to 5 feet. TOSI to identify the areas to be cut and retained based on field conditions, aesthetics, habitat, and natural considerations.

C. Trees and shrubs 3" DBH and smaller that are specified for removal shall be cut at ground level and mulched in place outside of wetland areas, and shall be cut at ground level and removed from the site inside wetland areas.

D. Trees specified for removal that are greater than 3" DBH shall be cut at ground level and removed from the site.

E. Retain all Live Oaks, Magnolias and Palmettos. Retain all non-specified tree species if 6" DBH or larger. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.

F. Retain all non-specified tree species if 6" DBH or larger. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.

G. Retain all Cedar, Pine, and Hackberry Trees 12" DBH or greater. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.

H. Remaining plant material will be trimmed or pruned as determined by TOSI after receipt of an arborist's opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant.

I. Vines will be removed as determined by TOSI.

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6.0 ZONE 2 OUTSIDE OF TRANSITION ZONE AND LANDWARD OF SETBACK LINE

A. Myrtles that are inside Freshwater Wetlands - All myrtles shall be trimmed to a minimum height of 3 feet.

B. Myrtles that are outside of Freshwater Wetlands - 50% of myrtles shall be cut at the ground. Remaining 50% shall be trimmed to 5 feet. TOSI to identify the areas to be cut and retained based on field conditions, aesthetics, habitat, and natural considerations.

C. Trees and shrubs 3" DBH and smaller that are specified for removal shall be cut at ground level and mulched in place outside of wetland areas, and shall be cut at ground level and removed from the site inside wetland areas.

D. Trees and shrubs specified for removal that are greater than 3" DBH shall be cut at ground level and removed from the site.

E. Retain all Live Oaks, Magnolias and Palmettos 6" DBH or greater. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.

F. Retain all non-specified tree species if 8" DBH or larger. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.

G. Retain all Cedar, Pine, and Hackberry Trees 16" DBH or greater. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.

H. Remaining plant material will be trimmed or pruned as determined by TOSI after receipt of an arborist's opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant.

I. Vines will be removed as determined by TOSI.

7.0 ZONES 1 AND 2 SEWARD OF SETBACK LINE

A. Myrtles shall be trimmed to a minimum height of 3'.

B. No tree or shrub removal proposed.

C. Vines will be removed as determined by TOSI.

D. Vegetation other than myrtles will be pruned or trimmed by TOSI after receipt of an arborist's opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant material.

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8.0 ZONE 3 OUTSIDE OF TRANSITION ZONE AND LANDWARD OF DUNE LINE

A. Myrtles that are inside Freshwater Wetlands - All myrtles shall be trimmed to a minimum height of 3 feet.

B. Myrtles that are outside of Freshwater Wetlands - 50% of myrtles shall be cut at the ground. Remaining 50% shall be trimmed to 5 feet. TOSI to identify the areas to be cut and retained based on field conditions, aesthetics, habitat, and natural considerations.

C. Retain all Live Oaks, Magnolias and Palmettos 6" DBH or greater. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.

D. Non-specified species 10" DBH or greater shall be retained. Lesser size specimens may be cut at ground level to the extent reasonably practicable given existing field conditions.

E. Retain all Cedar, Pine, and Hackberry Trees 18" DBH or greater. Lesser size specimens may be cut at ground level to the extent reasonably practicable given existing field conditions.

F. Trees and shrubs 3" DBH and smaller shall be cut at ground level and mulched in place outside of freshwater wetland areas, and shall be cut at ground level and removed from the site inside freshwater wetland areas.

G. Remaining plant material will be trimmed or pruned as determined by TOSI after receipt of an arborist's opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant.

H. Vines will be removed as determined by TOSI.

9.0 ZONE 3 SEAWARD OF THE DUNE LINE

A. Myrtles shall be trimmed to a minimum height of 3'.

B. No trees or shrubs to be removed.

C. Vegetation other than myrtles will be trimmed or pruned as determined by TOSI after receipt of an arborist's opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant.

TMW/ala

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS
TOWN OF SULLIVAN'S ISLAND, Plaintiff, vs. NATHAN BLUESTEIN and THEODORE ALBENESIUS, III, Defendants.	Case No. 2022-CP-10-00846 **PLAINTIFF'S ANSWERS TO DEFENDANTS' FIRST SET OF INTERROGATORIES**

TO: JAMES B. HOOD, ESQUIRE, ATTORNEY FOR DEFENDANT

Plaintiff Town of Sullivan's Island ("Town"), pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, hereby answers Defendant's Interrogatories, as follows:

GENERAL OBJECTIONS

1. The Town objects to each interrogatory to the extent that the interrogatory purports to seek attorney-client communications, attorney work-product, or any other privileged communication on the grounds that such interrogatories are beyond the scope of discovery permitted under the South Carolina Rules of Civil Procedure.

2. By responding to these interrogatories, the Town does not intend to waive the attorney-client privilege, the work-product doctrine, or any other privilege, objection, or limitation upon discovery as to that interrogatory or any other discovery request.

3. The Town objects to each interrogatory to the extent that the interrogatory seeks to impose obligations inconsistent with, incongruent with, or in addition to those required by the South Carolina of Civil Procedure.

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4. The Town objects to each interrogatory to the extent that the interrogatory is ambiguous, overly broad, unduly burdensome, oppressive, intended to annoy or embarrass, vague, or seeks information that is not relevant to the subject matter involved in the litigation or reasonably calculated to lead to the discovery of admissible evidence.

5. The Town reserves the right to supplement and/or amend its answers to these interrogatories as information is obtained through discovery in this matter.

6. These answers to interrogatories are made without waiver of, and with preservation of:

all questions of competency, relevancy, confidentiality, materiality, privilege, and admissibility or other issues related to evidentiary concerns;

the right to object on any ground at any time to a demand or request for further discovery; and

the right at any time to revise, correct, supplement, or clarify any of the responses contained herein,

ANSWERS TO INTERROGATORIES

1. Give the names and addresses of person known to You to be a witness concerning the facts of the case and indicate whether or not a written or recorded statement has been taken from the witness and indicate who has possession of such a statement.

ANSWER: The Town objects to this Interrogatory on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion (referred to collectively as the "Motion"). The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. Subject to and without waiving the foregoing objection, the Town will supplement its answer to this Interrogatory at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

2. For each person known to You to be a witness concerning the facts of the case, set forth a summary sufficient to inform the other party of the important facts known to or observed by such witness, or alternatively provide a copy of any written or recorded statements taken from such witness.

ANSWER: The Town objects to this Interrogatory on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. Subject to and without waiving the foregoing objection, the Town will supplement its answer to this Interrogatory at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

3. Set forth a list of photographs, plats, sketches or other prepared documents in Your possession, custody or control that relate to any claim or defense involved in this matter.

ANSWER: The Town objects to this Interrogatory on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Interrogatory to the extent it seeks documents or information protected by the attorney-client privilege, the work product doctrine, or which are otherwise not discoverable under the South Carolina Rules of Civil Procedure. Subject to and without waiving the foregoing objections, the Town will supplement its answer to this Interrogatory, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

4. Identify all expert witnesses who may be called to testify at trial on Your behalf. For each expert identified, provide a statement of that expert's qualifications; a summary of that expert's opinions which he or she intends to offer at trial; and a list of any and all materials that expert has relied upon in forming his or her opinions or will rely on at trial.

ANSWER: The Town objects to this Interrogatory on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Interrogatory to the

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extent it seeks documents or information protected by the attorney-client privilege, the work product doctrine, or which are not otherwise discoverable under the South Carolina Rules of Civil Procedure. Subject to and without waiving the foregoing objections, the Town will supplement its answer to this Interrogatory, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

5. Set forth an itemized statement of all damages You claim to have sustained, if any.

ANSWER: The Town objects to this Interrogatory on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. Subject to and without waiving the foregoing objection, the Town will supplement its answer to this Interrogatory at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

6. Set forth the names and addresses of all insurance companies who may have liability insurance coverage relating to any claim raised by any party in the above-captioned Lawsuit and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

ANSWER: The Town objects to this Interrogatory on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. Subject to and without waiving the foregoing objection, the Town will supplement its answer to this Interrogatory at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

7. Set forth all sources of funding for the legal expenses and costs associated with pursuing this Lawsuit and defending against Defendant's counterclaims raised in this Lawsuit.

ANSWER: The Town objects to this Interrogatory on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Interrogatory as overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Interrogatory to the extent it seeks documents or information

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protected by the attorney-client privilege, the work product doctrine, or which are otherwise not discoverable under the South Carolina Rules of Civil Procedure. Subject to and without waiving the foregoing objections, the Town will supplement its answer to this Interrogatory, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

8. Identify each and every individual or entity who has provided an opinion, position, or statement to you regarding the enforceability of the Settlement Agreement, when such an opinion was provided and to whom, and whether such opinion was provided in writing or orally.

ANSWER: The Town objects to this Interrogatory on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Interrogatory as overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Interrogatory to the extent it seeks documents or information protected by the attorney-client privilege, the work product doctrine, or which are otherwise not discoverable under the South Carolina Rules of Civil Procedure. Subject to and without waiving the foregoing objections, the Town will supplement its answer to this Interrogatory, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

9. Identify and describe with particularity each and every communication or correspondence You or any consultant You have hired has had with SCDHEC regarding the Original Lawsuit, the Settlement Agreement, any consultation or discussion regarding the scope of work which might or could have been incorporated into the Settlement Agreement, the permitting process relating to the performance of the work ultimately agreed-to in the Settlement Agreement, or any other communication at all relating to the Accreted Land from February 19, 2020 to the present.

ANSWER: The Town objects to this Interrogatory on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Interrogatory as impermissibly vague, overbroad, unduly burdensome, and not proportionate to the needs of the case. Subject to and without waiving the foregoing objections, the Town will supplement

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its answer to this Interrogatory, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

10. Identify and describe with particularity each and every communication or correspondence You or any consultant You have hired has had with the U.S. Army Corps of Engineers regarding the Original Lawsuit, the Settlement Agreement, any consultation or discussion regarding the scope of work which might or could have been incorporated into the Settlement Agreement, the permitting process relating to the performance of the work ultimately agreed to in the Settlement Agreement, or any other communication at all relating to the Accreted Land from February 19, 2020 to the present.

ANSWER: The Town objects to this Interrogatory on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Interrogatory as impermissibly vague, overbroad, unduly burdensome, and not proportionate to the needs of the case. Subject to and without waiving the foregoing objections, the Town will supplement its answer to this Interrogatory, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

11. Identify and describe with particularity each and every communication You have had with any consultant, contractor, engineer, landscaping professional, regarding the Accreted Land or the scope of work ultimately agreed-to in the Settlement Agreement from February 19, 2020 to the present.

ANSWER: The Town objects to this Interrogatory on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Interrogatory as overbroad, unduly burdensome, and not proportionate to the needs of the case. Subject to and without waiving the foregoing objections, the Town will supplement its answer to this Interrogatory, to the extent it is not objected to, at an appropriate time in the future, once

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the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

12. Identify and describe each and every quote, scope, or proposal You have received for the work You agreed to perform under the Settlement Agreement or any portion of the same.

ANSWER: The Town objects to this Interrogatory on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Interrogatory as overbroad, unduly burdensome, and not proportionate to the needs of the case. Subject to and without waiving the foregoing objections, the Town will supplement its answer to this Interrogatory, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

13. Identify all official, business and personal telephone numbers, including cellular or mobile telephone numbers from February 19, 2020 forward, maintained by each member of the Sullivan's Island Town Council from February 19, 2020 forward.

ANSWER: The Town objects to this Interrogatory on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Interrogatory as overbroad, unduly burdensome, and not proportionate to the needs of the case. Subject to and without waiving the foregoing objections, the Town will supplement its answer to this Interrogatory, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

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s/William W. Wilkins
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Attorneys for the Town of Sullivan's Island

June 10, 2022
Charleston, South Carolina

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the Plaintiff's Answers to Defendants' First Set of Interrogatories by email on June 10, 2022 upon the following as follows

VIA EMAIL: James.hood@hoodlaw.com

James B. Hood
Hood Law Firm, LLC
172 Meeting Street
Charleston, SC 29401

Nexsen Pruet, LLC
205 King Street, Suite 400
Charleston, SC 29401
(843) 577-9440

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS
TOWN OF SULLIVAN'S ISLAND, Plaintiff, vs. NATHAN BLUESTEIN and THEODORE ALBENESIUS, III, Defendants.	Case No. 2022-CP-10-00846 **PLAINTIFF'S RESPONSES TO DEFENDANTS' FIRST REQUEST FOR PRODUCTION**

TO: JAMES B. HOOD, ESQUIRE, ATTORNEY FOR DEFENDANT

Plaintiff Town of Sullivan's Island ("Town"), pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, hereby answers Defendant's Requests for Production, as follows:

GENERAL OBJECTIONS

1. The Town objects to Defendants' Requests to the extent they seek information protected by the attorney-client privilege and/or the work product doctrine.

2. The Town objects to Defendants' Requests to the extent they seek information to which they have equal or greater access than Plaintiff.

3. The Town objects to Defendants' Requests to the extent they attempt to require the Town to obtain or compile information from third parties, or are beyond its possession, custody, or control.

4. The Town objects to Defendants' Requests to the extent that they are overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The Town further objects to Defendants' Requests to the extent that they are not limited in temporal scope.

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5. The Town objects to Defendants' Requests to the extent they go beyond the South Carolina Rules of Civil Procedure either by purporting to impose obligations upon the Town not set forth in the Rules or seeking information beyond the scope of discovery as defined by the Rules.

6. These responses are made for the purpose of this litigation only. Each response is subject to all appropriate objections (including but not limited to objections concerning competency, relevancy, materiality, propriety and admissibility), which would require the exclusion of any requested information if the information sought were to be introduced into evidence at the time of trial. All such objections and grounds are reserved and will be interposed at the time of trial or other appropriate proceedings.

RESPONSES TO REQUESTS FOR PRODUCTION

1. Produce all documents, memoranda or other communications or correspondence sent or received by You relating to the Accreted land from February 19, 2020 to the present.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion (referred to collectively as the "Motion"). The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Request to the extent it seeks documents or information in the possession of Defendants or third parties, or which are otherwise not in its possession, custody, or control. The Town further objects to this Request to the extent it seeks documents or information protected by the attorney-client privilege, the work product doctrine, or which are otherwise not discoverable under the South Carolina Rules of Civil Procedure. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

2. Produce all official records maintained by You for any meeting of the Sullivan's Island Town Council at which the Accreted Land or the Settlement Agreement was discussed from February 19, 2020 to the present.

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RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Request to the extent it seeks documents or information in the possession of Defendants or third parties, or which are otherwise not in its possession, custody, or control. The Town further objects to this Request to the extent it seeks documents or information which are equally available to the propounding parties, which are protected by the attorney-client privilege, the work product doctrine, or which are otherwise not discoverable under the South Carolina Rules of Civil Procedure. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

3. Produce all documents provided to, reviewed by, considered by, or discussed by the Sullivan's Island Town Council before or during any meeting at which the Accreted Land or the Settlement Agreement was discussed from February 19, 2020 to the present.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request as impermissibly vague, overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Request to the extent it seeks documents or information in the possession of Defendants or third parties, or which are otherwise not in its possession, custody, or control. The Town further objects to this Request to the extent it seeks documents or information protected by the attorney-client privilege, the work product doctrine, or which are otherwise not discoverable under the South Carolina Rules of Civil Procedure. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

4. Produce all internal documents, file material, or other materials in Your possession, custody or control relating to the South Carolina Supreme Court's February 19, 2020 order regarding the Original Lawsuit, the inclusion or exclusion of any particular action or activity in the scope of work ultimately included in the Settlement agreement, the consideration and ultimate

approval of the Settlement Agreement by You and by the Charleston County Court of common Pleas, or regarding the work You agreed to perform under the Settlement Agreement.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request as stated, and as impermissibly vague, overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Request to the extent it seeks documents or information protected by the attorney-client privilege, the work product doctrine, or which are otherwise not discoverable under the South Carolina Rules of Civil Procedure. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

5. Produce all documents containing, reflecting or discussing all reports, opinions, recommendations, suggestions, or other materials generated or received from any source which provide any basis or justification for the Town's position that the Settlement Agreement is not enforceable and/or that the Town is not required to perform the actions it agreed to perform in the Settlement Agreement.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request as stated, and as impermissibly vague, overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Request to the extent it seeks documents or information in the possession of Defendants or third parties, or which are otherwise not in its possession, custody, or control. The Town further objects to this Request to the extent it seeks documents or information protected by the attorney-client privilege, the work product doctrine, or which are otherwise not discoverable under the South Carolina Rules of Civil Procedure. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

6. Produce all documents, communications, correspondence or other materials

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evidencing or reflecting communications, discussions, evaluations or other considerations by You or any of Your agents, employees, or other representatives relating to the Town's decisions (i) not to perform any work within the Transition Zone identified by the Settlement Agreement; (ii) not to perform or authorize the performance of any work within areas of the Accreted Land on the landward side of the critical line and/or setback line established by SCDHEC; and (iii) not to perform or authorize the performance of any work within areas of the Accreted Land on the seaward side of the critical line and/or setback line established by SCDEC.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request as stated, and as impermissibly vague, overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Request to the extent it seeks documents or information in the possession of Defendants or third parties, or which are otherwise not in its possession, custody, or control. The Town further objects to this Request to the extent it seeks documents or information protected by the attorney-client privilege, the work product doctrine, or which are otherwise not discoverable under the South Carolina Rules of Civil Procedure. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

7. Produce all contracts, quotes, proposals or other documents reflecting any contractor's proposal or estimate to perform any portion of the scope of work identified by the Settlement Agreement.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Request to the extent it seeks documents or information in the possession of Defendants

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or third parties, or which are otherwise not in its possession, custody, or control. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

8. Produce all materials You have provided to any expert or consultant regarding or relating to the Accreted Land or the Settlement Agreement.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request to the extent it seeks documents or information which are not discoverable under the South Carolina Rules of Civil Procedure. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

9. Produce certified copies of any insurance policies identified in Your responses to Defendants' First Interrogatories.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request to the extent it seeks "certified" copies, or documents or information which are not in its possession, custody or control. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

10. Produce any reservation of rights letter You may have received from any insurer of insurer's attorney relating to this Lawsuit.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved

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to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. Subject to and without waiving the foregoing objection, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

11. Produce any agreements, contracts, memoranda of understanding, letters, or other documents memorializing any agreement for any other entity to fund, contribute to, or pay for Your legal expenses and costs associated with pursuing this Lawsuit and defending against Defendants' counterclaims raised in this Lawsuit or reflecting payments, contributions or funding of the same.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. Subject to and without waiving the foregoing objection, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

12. Produce all communications or correspondence You have had with SCDHEC regarding the Original Lawsuit, the Settlement Agreement, any consultation or discussion regarding the scope of work which might or could have been incorporated into the Settlement Agreement, the permitting process relating to the performance of the work ultimately agreed-to in the Settlement Agreement, or any other communication at all relating to the Accreted Land from February 19, 2020 to the present.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request as impermissibly vague, overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Request to the extent it seeks documents or information in the

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possession of Defendants or third parties, or which are otherwise not in its possession, custody, or control. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

13. Produce all communications or correspondence You have had with the U.S. Army Corps of Engineers regarding the Original Lawsuit, the Settlement Agreement, any consultation or discussion regarding the scope of work which might or could have been incorporated into the Settlement Agreement, the permitting process relating to the performance of the work ultimately agreed-to in the Settlement Agreement, or any other communication at all relating to the Accreted Land from February 19, 2020 to the present.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request as impermissibly vague, overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Request to the extent it seeks documents or information in the possession of Defendants or third parties, or which are otherwise not in its possession, custody, or control. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

14. Produce all communications or correspondence You have had with any employee, agent, representative, elected official, or person associated with the government of the State of South Carolina regarding the Original Lawsuit, the Settlement Agreement, any consultation or discussion regarding the scope of work which might or could have been incorporated into the Settlement Agreement, the permitting process relating to the performance of the work ultimately agreed-to in the Settlement Agreement, or any other communications at all relating to the Accreted Land from February 19, 2020 to the present.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion

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for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request as impermissibly vague, overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Request to the extent it seeks documents or information in the possession of Defendants or third parties, or which are otherwise not in its possession, custody, or control. The Town further objects to this Request to the extent it seeks documents or information protected by the attorney-client privilege, the work product doctrine, or which are otherwise not discoverable under the South Carolina Rules of Civil Procedure. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

15. Produce all communications or correspondence You have had with any member of the media whether "on" or "off" the record, including but not limited to television, radio, and/or web-based outlets, regarding the Original Lawsuit, the Settlement Agreement, any consultation or discussion regarding the scope of work which might or could have been incorporated into the Settlement Agreement, the permitting process relating to the performance of the work ultimately agreed-to in the Settlement Agreement, or any other communication at all relating to the Accreted Land from February 19, 2020 to the present.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request as impermissibly vague, overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Request to the extent it seeks documents or information in the possession of Defendants or third parties, or which are otherwise not in its possession, custody, or control. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

16. Produce all communications or correspondence You have had with any special interest, citizen's interest, for-profit, non-profit or other organization regarding the Original

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Lawsuit, the Settlement Agreement, any consultation or discussion regarding the scope of work which might or could have been incorporated into the Settlement Agreement, the permitting process relating to the performance of the work ultimately agreed-to in the Settlement Agreement, or any other communication at all relating to the Accreted Land from February 19, 2020 to the present.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request as impermissibly vague, overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Request to the extent it seeks documents or information in the possession of Defendants or third parties, or which are otherwise not in its possession, custody, or control. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

17. Produce all communications or correspondence You have had with any contractor, service provider, landscaping vendor, or other professional regarding the Original Lawsuit, the Settlement Agreement, any consultation or discussion regarding the scope of work which might or could have been incorporated into the Settlement Agreement, the permitting process relating to the performance of the work ultimately agreed-to in the Settlement Agreement, or any other communication at all relating to the Accreted Land from February 19, 2020 to the present.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request as impermissibly vague, overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Request to the extent it seeks documents or information in the possession of Defendants or third parties, or which are otherwise not in its possession, custody, or control. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or

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pursuant to an order from the Court.

18. Produce all communications or correspondence You have had with any member of the general public regarding the Original Lawsuit, the Settlement Agreement, any consultation or discussion regarding the scope of work which might or could have been incorporated into the Settlement Agreement, the permitting process relating to the performance of the work ultimately agreed-to in the Settlement Agreement, or any other communication at all relating to the Accreted Land from February 19, 2020 to the present.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request as impermissibly vague, overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Request to the extent it seeks documents or information in the possession of Defendants or third parties, or which are otherwise not in its possession, custody, or control. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

19. Produce all internal memoranda, communications, correspondence, or other documents memorializing, evidencing or otherwise reflecting any oral communication regarding the Accreted Land with (i) SCDHEC or an of its agents or employees, (ii) any other employee, agent, representative, elected official, or person associated with the government of the State of South Carolina, (iii) any member of the media, whether "on" or "off" the record, including but not limited to television, radio, and/or other organization, whether incorporated or unincorporated; or (v) any member of the general public.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request as impermissibly

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vague, overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Request to the extent it seeks documents or information in the possession of Defendants or third parties, or which are otherwise not in its possession, custody, or control. The Town further objects to this Request to the extent it seeks documents or information protected by the attorney-client privilege, the work product doctrine, or which are otherwise not discoverable under the South Carolina Rules of Civil Procedure. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

20. Produce all telephone records and/or call logs reflecting telephone conversations with (i) SCDHEC or any of its agents or employees, (ii) any other employee, agent, representative, elected official, or person associated with the government of the State of South Carolina; (iii) any member of the media, whether "on" or "off" the record, including but not limited to television, radio, and/or web-based media outlets; (iv) any special interest, citizen's interest, for-profit, non-profit or other organization, whether incorporated or unincorporated; or (v) any member of the general public regarding the Original Lawsuit, the Settlement Agreement, any consultation or discussion regarding the scope of work which might or could have been incorporated into the Settlement Agreement, the permitting process relating to the performance of the work ultimately agreed-to in the Settlement Agreement, or any other communication at all relating to the Accreted Land from February 19, 2020 to the present.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request as impermissibly vague, overbroad, unduly burdensome, and not proportionate to the needs of the case. The Town further objects to this Request to the extent it seeks documents or information in the possession of Defendants or third parties, or which are otherwise not in its possession, custody, or control. The Town further objects to this Request to the extent it seeks documents or information protected by the attorney-client privilege, the work product doctrine, or which are otherwise not discoverable under the South Carolina Rules of Civil Procedure. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate

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time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

21. Produce all documents or other materials referenced in, relied upon, or which You consulted in preparing Your response to Defendants' First Interrogatories.

RESPONSE: The Town objects to this Request on the grounds that it has a Motion for Summary Judgement pending which may resolve all claims in this case and has moved to stay discovery pending resolution of the summary judgment motion. The Town's Motion can be resolved without the need for discovery, and a stay of discovery best serves the interests of judicial economy. The Town further objects to this Request to the extent it seeks documents or information protected by the attorney-client privilege, the work product doctrine, or which are otherwise not discoverable under the South Carolina Rules of Civil Procedure. Subject to and without waiving the foregoing objections, the Town will supplement its response to this Request, to the extent it is not objected to, at an appropriate time in the future, once the Court has had an opportunity to rule on the Town's Motion or pursuant to an order from the Court.

s/William W. Wilkins
William W. Wilkins, SC Bar No. 6112
Clarence R. Turner, IV, SC Bar No. 104766
NEXSEN PRUET, LLC
104 South Main Street, Suite 900
P.O. Box 10648
Greenville, SC 29601
Telephone: 864.370.2211
BWilkins@nexsenpruet.com
CTurner@nexsenpruet.com

Alexandra H. Austin, SC Bar No. 102646
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
Telephone: 843.577.9440
AAustin@nexsenpruet.com

Attorneys for the Town of Sullivan's Island

June 10, 2022
Charleston, South Carolina

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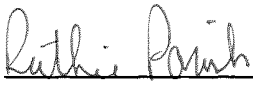
CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the Plaintiff's Responses to Defendant's First Requests for Production by email on June 10, 2022 upon the following as follows

VIA EMAIL: James.hood@hoodlaw.com

James B. Hood
Hood Law Firm, LLC
172 Meeting Street
Charleston, SC 29401



Nexsen Pruet, LLC
205 King Street, Suite 400
Charleston, SC 29401
(843) 577-9440

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2019-CP-10-1916
	)	
ELIZABETH BROOKE HURT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**SETTLEMENT AGREEMENT**
	)	
TOWN OF SULLIVAN'S ISLAND and and SULLIVAN'S ISLAND BOARD OF ZONING APPEALS,	)	
	)	
Respondents,	)	
	)	
of whom ELIZABETH BROOK HURT,	)	
	)	
Appellant.	)	

WHEREAS, Elizabeth Brook Hurt ("Hurt") is the owner of the property located on Sullivan's Island identified as TMS No 5291000026 (the "Property") and also identified at [redacted] Sullivan's Island S.C., having purchased the Property on December 8, 2015.

WHEREAS, the Property is located in the RS Single Family Residential Zoning District.

WHEREAS, the Town of Sullivan's Island ("Town") Ordinance § 21-20(A)(1) provides that "[o]ne single family detached dwelling per lot, designed for and occupied exclusively as a residence by one family, either owner or renter occupied" is permitted in the RS district.

WHEREAS, the Town of Sullivan's Island ("Town") Ordinance § 21-20(B)(4) provides for a conditional use for lots with two existing dwellings at the time of the adoption of the 1977 Zoning Ordinance provided three elements are met:

(a) Documentation that since August 1, 1977, both dwellings have been continually occupied by a family member or under a long-term rental agreement;

(b) If one or both buildings remain unoccupied or not rented for a period of more than one (1) year, then the right to occupy one of the two buildings shall be terminated; and,

(c) If rented, a current rental agreement must be on file with the Town.

WHEREAS, in 2016 Hurt applied for a long-term rental license for a portion of the Property and was denied by the Town Zoning Administrator because the requirements for a condition use permit had not been satisfied.

WHEREAS, Hurt appealed the decision to the Board of Zoning Appeals ("BZA"), which held a public hearing on September 8, 2016 and denied the appeal.

WHEREAS, Hurt appealed the BZA's decision to the Charleston County Circuit Court which unanimously affirmed the BZA's decision.

WHEREAS, in 2018 after waiting more than two years, as required by Town Ordinance 21-175(G), Hurt applied to the Town Zoning Administrator for a conditional use permit for two dwellings on one lot.

WHEREAS, the 2018 application included additional evidence Hurt asserted supported the request for the requested conditional use permit.

WHEREAS, the Town Zoning Administrator again denied the application.

WHEREAS, the BZA held a public hearing on February 7, 2019 and the Town Zoning Administrator's decision was not overturned because the BZA was deadlocked at vote of 3-3.

WHEREAS, on April 15, 2019, Hurt filed a Notice of Appeal and Request for Mediation pursuant to South Carolina Code § 6-29-825.

WHEREAS, a mediation was conducted on August 5, 2019.

WHEREAS, Hurt asserts that all three requirements of Town Ordinance § 21-20(B)(4) are satisfied by the documentation presented to the Zoning Administrator and BZA.

WHEREAS, the Town and the BZA dispute that assertion.

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NOW, THEREFORE, through mediation, the parties have resolved the appeal on the following terms:

1. The Town will issue a conditional use permit to Hurt pursuant to §21-20(b)(4) for lots containing two occupied dwellings and a new Certificate of Occupancy stating that "the structure contains two nonconforming attached single-family dwelling units in accordance with the settlement agreement dated November 19, 2019".

2. Hurt hereby recognizes and acknowledges by the execution of the attached deed restriction that both the larger and the smaller units are legal, non-conforming as to both the structure and the uses, and that neither structure, nor use can be enlarged, expanded or relocated in any way. As provided in the attached deed restriction, in the event that either the structure is destroyed or damaged by fire, Acts of God or similar events, the nonconforming structure(s) may be rebuilt or built as provided in the zoning ordinance in effect at the time of such event.

3. The Town agrees to assign the second unit a unique street address pursuant to normal address assignment protocols.

4. Pursuant to South Carolina Code § 6-29-825(D), the terms of this Settlement Agreement will take effect upon the approval of the terms and execution of the Settlement Agreement by The Town of Sullivan's Island Town Council, in public session; and the approval of the Circuit Court for Charleston County. The approval by the Circuit Court will end the appeal. If either Town Council or the Circuit Court fail to approve this Settlement Agreement, it shall be null and void.

5. The Town, the BZA and Hurt agree that they are solely responsible for the payment of any and all costs, including attorney's fees, that they have incurred or may incur relating to the appeal, and each party expressly waives any claim or right that it may have to the

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payment of costs of any kind, including attorneys' fees, incurred in pursuing or defending the appeal.

6. This Settlement Agreement constitutes and contains the entire agreement and understanding between the parties concerning the subject matters addressed herein and supersedes and replaces all prior negotiations and all agreements proposed or otherwise, whether written or oral, concerning the subject matter hereof. This is an integrated document.

7. In consideration of the above stated terms, the receipt of which is hereby confirmed and acknowledged, Hurt hereby releases and discharges the Town, the BZA, and their staff and agents from any and all claims, demands, damages, actions, causes of action, or suits, at law or in equity that could have been asserted in the appeal.

8. Each party has cooperated in the drafting and preparation of this Settlement Agreement. Hence. in any construction or interpretation of this Settlement Agreement, the same shall not be construed against any party on the basis that the party was the drafter.

9. This Settlement Agreement may be executed in counterparts, which shall have the same force and effect if the parties executed the same copy of the Settlement Agreement.

10. It is understood by the by the parties below that by reason of agreeing to this compromise that there is no admission of any sort by any party.

11. The parties expressly recognize and affirm that pursuant to S.C. Code 6-29-825(E) that this settlement is "effective only as to the real property which is the subject of the mediation, and a settlement agreement sets no precedent as to other parcels of real property."

Witness

Elizabeth Brooke Hurt

Elizabeth Brooke Hurt

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Date: 11/19/19

Witness
Date: 11/19/19

Date: 11/18/19

Town of Sullivan's Island
By: PATRICK M. O'NEIL
Its: Mayor
Date: 11/19/19

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ELECTRONICALLY FILED - 2019 Dec 18 5:33 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP1001916

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2019-CP-10-1916
	)	
ELIZABETH BROOKE HURT,	)	
	)	
Plaintiff,	)	
vs.	)	**ORDER APPROVING SETTLEMENT AND DISMISSING CASE WITH PREJUDICE**
	)	
TOWN OF SULLIVAN'S ISLAND and SULLIVAN'S ISLAND BOARD OF ZONING APPEALS,	)	
	)	
Respondents,	)	
	)	
of whom ELIZABETH BROOK HURT,	)	
	)	
Appellant.	)	

Based upon the joint motion of Appellant and Respondents, and the Court's review and consideration of the Settlement Agreement, it is hereby ORDERED, that the settlement is approved and made the Order of the Court, it is further, ORDERED, that the above-captioned case be ended and the same is hereby dismissed with prejudice pursuant to Rule 41(a)(2) SCRCP.

AND IT IS SO ORDERED.

_____
Circuit Court Judge

December _____, 2019

Charleston, SC

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Charleston Common Pleas

Case Caption: Elizabeth Brooke Hurt VS Sullivans Island Town of

Case Number: 2019CP1001916

Type: Order/Approval Of Settlement

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

Electronically signed on 2019-12-18 16:11:59 page 2 of 2

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973 Houston Northcutt Blvd.
Suite 101
Mt. Pleasant, SC 29464

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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

QUIT-CLAIM DEED

KNOW ALL MEN BY THESE PRESENTS that **WARD V. B. LASSOE ("Grantor")** in the State aforesaid, for and in consideration of the sum of FIVE and no/100 ($5.00) Dollars, to him in hand paid at and before the sealing and delivery of these presents by **TOWN OF SULLIVAN'S ISLAND, a municipal corporation ("Grantee")**, the receipt and sufficiency of which is hereby acknowledged, has remised, released and forever quit-claimed, and by these presents does remise, release and forever quit-claim, subject to those matters set forth on Exhibit "A", unto the said Grantee, its successors and assigns forever, all of his right, title and interest in and to the following described real property, to wit:

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the said premises before mentioned unto the said Grantee, its successors and assigns forever, so that neither the Grantor nor his heirs or assigns, nor any other person or persons claiming under the Grantor or his heirs or assigns, shall at any time hereafter, by any way or means, have, claim or demand any right or title to the aforesaid premises or appurtenances, or any part or parcel thereof, forever.

IN WITNESS WHEREOF, the Grantor has hereunto set his hand and seal this 20th day of August, 2018.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Ward V. B. Lassoe

STATE OF SOUTH CAROLINA)
) ACKNOWLEDGMENT
COUNTY OF CHARLESTON)

I, the undersigned Notary Public for the State of South Carolina, do hereby certify that the Grantor personally appeared before me this 20th day of August, 2018, and acknowledged the due execution of the foregoing instrument.

Notary Public for South Carolina
My Commission Expires: 7 Oct. 2019 (SEAL)

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EXHIBIT "A"
LEGAL DESCRIPTION

ALL that certain piece, parcel or lot of land, situate, lying and being located in the Town of Sullivan's Island, County of Charleston, State of South Carolina, being shown and described as "area 78, 108, 6, 66, 78 0.26 acres 11169 sq ft" on that certain plat prepared by Niemyer & Peabody, LLC entitled, "PLAT SHOWING A RESOLUTION OF THE SIDE LOT LINES FOR LOT NUMBERS 177, 178, 179, 180, 181, AND 182, A PART OF ATLANTICVILLE, SULLIVAN'S ISLAND, SOUTH CAROLINA.", dated November 18, 2003, last revised April 10, 2004, and recorded April 23, 2004 in the ROD Office for Charleston County in Plat Book DE at Page 94 (the "Plat").

TOGETHER WITH, all that property located within the extension of the above-described property's eastern and western boundary lines extending from the Northern boundary line of the above-described land to the low water mark of the tributary of Conch Creek.

ALSO TOGETHER WITH, all that property located within the extension of the right-of-way shown as Station 28 Street from the southern boundary line of the above-described property and extending to the low water mark of the tributary of Conch Creek.

BUTTING AND BOUNDING on the North by the low water mark of the tributary of Conch Creek; on the East by Lot 178 and other lands of the Town of Sullivan's Island, South Carolina; on the South by Lot 177; and on the West by the western boundary of the extension of Station 28 Street right of way.

Grantee's Address: [redacted]
Sullivans Island SC
29482

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

AFFIDAVIT

(DATE OF TRANSFER OF TITLE
(CLOSING DATE: Aug. 20, 2018

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.

2. The property being transferred by **Ward V. B. Lassoe to Town of Sullivan's Island, a municipal corporation** on Aug. 20, 2018.

3. Check one of the following: *The DEED is*
   (a)___ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
   (b)___ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
   (c)_X_ EXEMPT from the deed recording fee because (exemptions 1-12) (If exempt, please skip item 4-6, and go to item 7 of this affidavit.) #1 - value of realty is less than $100

4. Check one of the following if either item 3(a) or item 3(b) above has been checked.
   (a)___ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of $ _____.
   (b)___ The fee is computed on the fair market value of the realty which is $_____.
   (c)___ The fee is computed on the fair market value of the realty as established for property tax purposes which is $ _____.

5. Check YES__ or NO_X_ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES," the amount of the outstanding balance of this lien or encumbrance is $ _____.

6. The DEED Recording Fee is computed as follows:
   (a) $_____ the amount listed in item 4 above.
   LESS (b) $_____ the amount listed in item 5 above (no amount place zero).
   TOTAL (c) $_____ Subtract Line 6(b) from Line 6(a) and place the result.

7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: GRANTOR

8. Check if Property other than Real Property is being transferred on this Deed.
   (a) _____Mobile Home
   (b) _____Other

9. _____DEED OF DISTRIBUTION – ATTORNEY'S AFFIDAVIT: Estate of_____deceased CASE NUMBER _____. Personally appeared before me the undersigned attorney who, being duly sworn, certified that (s)he is licensed to practice law in the State of South Carolina: that (s)he has prepared the Deed of Distribution for the Personal Rep. in the Estate of _____ deceased and that the grantee(s) therein are correct and confirm to the estate file for the above named decedent.

10. I understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

SIGNED: _____
Ward V. B. Lassoe
(Grantor, Grantee, or Attorney that prepared form)

Sworn to before me this 20th
day of Aug., 2018.

_____
Notary Public for South Carolina
My Commission Expires: 7 Oct. 2019

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RECORDER'S PAGE

No TMS for AREA - Atty's Office P.G.

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ATTORNEYS AT LAW
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Date:	October 26, 2018
Time:	3:45:36 PM

Book	Page	DocType
0756	296	Q/Claim

Elaine H. Bozman, Register
Charleston County, SC

MAKER:
LASSOE WARD V B

RECIPIENT:
TOWN OF SULLIVAN'S ISLD

Original Book:

Original Page:

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# of Pages: 5

Recording Fee	$ 10.00
State Fee	<EXEMPT>
County Fee	<EXEMPT>
Extra Pages	$ -
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Chattel	$ -
TOTAL	$ 10.00

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CLERK	ECP

AUDITOR STAMP HERE
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Oct 30, 2018
Peter J. Tecklenburg
Charleston County Auditor

PID VERIFIED BY ASSESSOR
REP MKD
DATE 10/31/2018
31

0756	296	10/26/2018	5
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Mt. Pleasant, South Carolina 29464

STATE OF SOUTH CAROLINA	)	**ACCESS EASEMENT AGREEMENT AND**
	)	**RESTRICTIVE COVENANT**
COUNTY OF CHARLESTON	)	

THIS ACCESS EASEMENT AGREEMENT AND RESTRICTIVE COVENANT (this "*Agreement*"), dated as of the 20th day of Aug, 2018, is made and entered into by and between **Ward V.B. Lassoe** ("*Lassoe*") and **The Town of Sullivan's Island, a South Carolina Municipal Corporation** ("*the Town*"). Lassoe and the Town are referred to collectively herein as the "*Parties*".

RECITALS:

WHEREAS, Lassoe is the owner of that certain real property located on Sullivan's Island in the County of Charleston, State of South Carolina, being more particularly described as follows:

> ALL that lot, piece or parcel of land with the buildings and improvements thereon, situate, lying, and being on Sullivan's Island in the County of Charleston and Sate aforesaid, known as lot number one hundred seventy-seven (177) on a plat prepared by Herbert A Niemyer, Jr., Surveyor, dated November 18, 2003, last revised April 10, 2004 and recorded April 23, 2004 in the Office of the Register of Deeds for Charleston County, South Carolina in Plat Book DE at Page 94 (the "Plat"), containing 0.51 acres, more or less, and butting and bounding on the North by property of the Town of Sullivan's Island; on the East by Lot 178; on the South by Jasper Boulevard S.C. RTE 703 (100' r/w); and on the West by Station 28 Street 40' R/W.
>
> Being the same property conveyed to Ward V.B. Lassoe by deed of Mitchell D. Feller dated August 29, 2005 and recorded in the Office of the Register of Deeds for Charleston County, South Carolina in Book Z-552 at Page 001; said deed being re-recorded in Book K-582 at Page 593; and also being the same property conveyed to Ward V. B. Lassoe by Quit Claim deed of Mitchell D. Feller dated April 20, 2015 and recorded May 4, 2015 in Book 0473 at Page 280.
>
> Charleston County TMS No.: 529-07-00-024
>
> Property Address: [redacted]
> Sullivan's Island, SC 29482

(the "***Lassoe Property***"); and

WHEREAS, the Town is the owner of that certain parcel of real property located to the North of the Lassoe Property shown on the above-described Plat as "Claimed by Town of Sullivan's Island", along with all property lying further north of said parcel including the property within the extension of Station 28 Street right of way extending to the low water mark of the tributary of Conch Creek (the "***Town Property***");

WHEREAS, the Lassoe Property and the Town Property are adjacent parcels of land;

WHEREAS, Lassoe and the Town have agreed to certain benefits and restrictions for their properties in order to resolve a dispute between them; and

WHEREAS, Lassoe and the Town have resolved any differences over the ownership of the Town Property and the Town has agreed to grant a temporary easement to Lassoe and to create certain restrictions on the Town Property;

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements set forth herein, the receipt and sufficiency of which is hereby acknowledged, Lassoe and the Town agree as follows:

1. Easement Agreement. The Town hereby grants, bargains and sells unto Lassoe personally, for a period of twenty (20) years, for the following purposes:

(i) a temporary easement for pedestrian access, ingress and egress, maintenance of landscaping on, over, under and across that certain twenty (20') foot strip of land extending from the Lassoe Property to the dock to be built by Lassoe described herein below, said easement beginning at the above-referenced date and continuing for period of twenty (20) years, unless sooner terminated under Paragraph 1(ix) and (xii), with all payments described below being due to the Town by January 1st of each year, beginning on January 1, 2019. Said easement shall terminate on the 20th day of Aug 2038, if not sooner terminated;

(ii) Lassoe shall pay to the Town the sum of Two Thousand and No/100 ($2,000.00) Dollars per year for the first ten (10) years of this Agreement and Lassoe shall pay Four Thousand and No/100 ($4,000.00) Dollars per year for the second ten (10) years of this Agreement;

(iii) the easement may be transferred by Lassoe with the sale of the Lassoe Property, subject to the increased payment of Ten Thousand ($10,000.00) Dollars per year for the remaining years of the term of this Agreement. Any new owner of the Lassoe Property shall be required to enter into an agreement with the Town agreeing to all terms and conditions contained herein this Agreement;

(iv) in the event of Lassoe's death, the easement may pass via inheritance with the party taking title to the Lassoe Property paying Five Thousand and No/100 ($5,000.00) per year for the remaining years of the term of this Agreement. Any new owner of the Lassoe Property shall be required to enter into an agreement with the Town agreeing to all terms and conditions contained herein this Agreement;

(v) at the end of the initial twenty (20) year term, the easement shall automatically terminate unless the Town, in its sole discretion, agrees in writing to renew.. The Town shall have no obligation to extend the easement beyond the twenty (20) year term;

(vi) during the term of this Agreement, Lassoe shall have the right to construct, install, locate, maintain, use, operate, repair, and replace a dock on the Town Property for the benefit of the Lassoe Property, as approved by the South Carolina Department of Health and Environmental Controls Office of Ocean and Coastal Resource Management, at Lassoe's sole cost and discretion. At the end of the initial twenty (20) year term, or upon termination by Lassoe or upon default by Lassoe, all improvements on the Town Property, including the to-be-constructed dock, shall immediately revert to the Town and neither Lassoe nor any heirs, successors or assigns of Lassoe shall have any rights, title or interest in the dock or the Town Property

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(vii) Lassoe shall (a) obtain liability insurance with a minimum of One Million ($1,000,000.00) Dollars in liability coverage, (b) shall have the Town named as an additional insured, and (C) shall provide annually a certificate of insurance listing the Town as an additional insured along with the annual payments. Lassoe shall pay all costs for insurance, upkeep, maintenance and repair of the dock;

(viii) Lasseo shall pay any ad valorem taxes assessed on the Town's Property within thirty (30) days of Charleston County issuing a tax bill;

(ix) in the event of hurricane or other disaster causing damage to the dock, Lassoe, his heirs, successors, and assigns, in their sole discretion, may rebuild the dock or terminate this Agreement;

(x) Lassoe, his heirs, successors, and assigns may terminate this Agreement at any time in their sole discretion;

(xi) the Town shall be indemnified and held harmless by Lassoe, his heirs, personal representatives and assigns from any damages, claims, injuries, or causes of action arising from the construction or use of the dock and the Town Property by Lassoe, his distributes, licensees, invitees, business invitees or social guests during the duration of this Agreement, except and to the extent such damages, claims, injuries, or causes of action are solely the direct and proximate result of the negligence of the Town;

(xii) this Agreement does not create any right of first refusal for Lassoe, his heirs, successors or assigns; and

(xiii) Lassoe's failure to do any of the following will be deemed an event of default and result in the immediate termination of the easement and this Agreement: (a) make payments as required under Paragraph 1(i)-(iv); (b) maintain insurance as required under Paragraph 1(vii); and (c) pay ad valorem taxes on Town Property as required under Paragraph 1(viii)..

2. Development Restriction of Town Property. The Town, on behalf of itself, its successors and assigns, if applicable, covenants and agrees that no buildings, improvements, structures, or any development of any nature shall occur on the Town Property as long as the easement set forth in Paragraph 1 is in effect.

3. Easements and Covenants to Run with the Land. The rights, covenants, obligations, duties, benefits, burdens, easements, and other provisions created, declared, or contained in this Agreement shall benefit the Lassoe Property and bind the Town Property, respectively, as long as the Agreement remains in effect. The easements, covenants, rights and privileges granted, established and declared herein are not subject to extinguishment through merger or by operation of any law or rule of law, or by virtue of any present or future common ownership of any of the properties described herein.

4. Entire Agreement. This Agreement contains the entire agreement and understanding by and between the parties and no representations, promises, agreements, or understandings, written or oral, relating thereto and not contained herein shall be of any force or effect. This agreement may be amended at any time only by mutual consent of the parties hereto, with any such amendment to be invalid unless in writing, signed by all of the parties hereto, their respective heirs, successors and/or assigns and recorded in the Office of the Register of Deeds for Charleston County, South Carolina

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5. Default and Remedies. In the event of a breach or any attempted or threatened breach of any of the terms, covenants and provisions hereof, the aggrieved party or parties hereunder shall be entitled forthwith to exercise all available legal and equitable remedies for the consequence of such breach, including, but not limited to, injunctive relief, and shall further be entitled to all legal fees, costs and expenses of any such suit or proceedings. Each of the rights created hereunder shall be specifically enforceable in a court of equity, all parties hereto recognizing and agreeing that damages at law would be an inadequate remedy.

6. Severability. The invalidity, illegality or unenforceability of any provision hereof shall not render invalid, illegal or unenforceable any other provision hereof.

7. Governing Law. This Agreement and the legal relations between the parties shall be governed by and construed in accordance with the laws of the State of South Carolina.

[SIGNATURES ON FOLLOWING PAGES]

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IN WITNESS WHEREOF, Ward V.B. Lassoe, has hereunto set his hand and seal this 20th day of August, 2018

WITNESSES:

Ward V.B. Lassoe

Witness No. 1

Witness No. 2

STATE OF SOUTH CAROLINA)
) ACKNOWLEDGEMENT
COUNTY OF CHARLESTON)

I, the undersigned notary public, do hereby certify that **Ward V. B. Lassoe** personally appeared before me and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 20th day of August, 2018.

(SEAL)
Print Name: G. Hamilton O'Kelley III
Notary Public, State of South Carolina
My Commission Expires: 7 Oct. 2019
[Affix official notarial seal or stamp]

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IN WITNESS WHEREOF, the Town of Sullivan's Island, a South Carolina municipal corporation, has hereunto set its hand and seal this 16th day of October, 2018

WITNESSES:

Town of Sullivan's Island,
a South Carolina municipal corporation

Witness No. 1

Witness No. 2

Town of Sullivan's Island
By: Courtney E. Liles
Its: Town Clerk

STATE OF SOUTH CAROLINA)
) ACKNOWLEDGEMENT
COUNTY OF CHARLESTON)

I, the undersigned notary public, do hereby certify that Courtney Liles, in his capacity as Town Clerk for the Town of Sullivan's Island, a South Carolina municipal corporation, personally appeared before me and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 16 day of October, 2018.

(SEAL)
Print Name: Bridget Welch
Notary Public, State of South Carolina
My Commission Expires: December 12, 2026
[Affix official notarial seal or stamp]

BRIDGET WELCH
My Commission Expires
NOTARY PUBLIC
12-12-2026
STATE OF SOUTH CAROLINA

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RECORDER'S PAGE

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Filed By:

DODDS HENNESSY & STITH LLP
ATTORNEYS AT LAW
973 HOUSTON NORTHCUTT BLVD STE 101
MT. PLEASANT SC 29464

RECORDED

Date:	October 26, 2018
Time:	3:50:59 PM

Book	Page	DocType
0756	300	Misc

Elaine H. Bozman, Register
Charleston County, SC

MAKER:
LASSOE WARD V B

RECIPIENT:
TOWN OF SULLIVAN'S ISLD

Original Book:

Original Page:

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# of Pages:	7
# of References:	
Recording Fee	$ 10.00
Extra Reference Cost	$ -
Extra Pages	$ 2.00
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TOTAL	$ 12.00

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CLERK	ECP

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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

RESTRICTIVE COVENANT

This agreement is entered into effective as of this 20th day of May 2016, by and between S.I. Wild Olive Group, LLC and the Town of Sullivan's Island.

RECITALS

WHEREAS, S.I. Wild Olive Group, LLC ("Covenantor") is the owner of real property located at [redacted] Sullivan's Island, South Carolina, TMS #5290900128 (the "Property").

WHEREAS, Covenantor, among others, brought an action in Court of Common Pleas, for Charleston County, 2015-CP-10-0449 (the "Lawsuit") against the Town of Sullivan's Island (the "Town").

WHEREAS, the Lawsuit has been resolved.

WHEREAS, a material term of settlement of the Lawsuit requires that the terms of the Settlement Agreement be a Restrictive Covenant that runs with the land and that a Restrictive Covenant, which incorporates the Settlement Agreement shall be executed and filed in the Register Mesne Conveyance (RMC) Office in Charleston County.

NOW THEREFORE, KNOWN ALL MEN BY THESE PRESENTS that in consideration of the settlement of the Lawsuit, Covenantor for itself, its successors and assigns, hereby covenants with the Town of Sullivan's Island that it will forever abide by restrictions included in the Settlement Agreement attached hereto as Exhibit A.

IN WITNESS WHEREOF, the Covenantor has hereunto set its hand(s) and Seal(s) this 20th day of May 2016.

IN THE PRESENCE OF:

COVENANTOR:
S.I. Wild Olive Group, LLC

By: MP Bailey

Its: Managing Member

Date: 05-20-16

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

PERSONALLY appeared before me the undersigned witness who, being duly sworn, deposes and says that s/he saw the above named S.I. Wild Olive Group, LLC, by Doug Godely, its Managing Member, sign, seal and as its act and deed deliver the written Restrictive Covenant and that s/he, together with the other witnesses above named, witnesses the execution thereof.

SWORN before me this
20 day of May, 2016

Deborah L. Bussey
NOTARY PUBLIC FOR SOUTH CAROLINA
My commission expires: 3.9.19

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EXHIBIT A

SETTLEMENT AGREEMENT

WHEREAS, S.I. Wild Olive Group, LLC and S.I. Wild Olive Restaurant Group, LLC d/b/a Obstinate Daughter ("Obstinate Daughter") (collectively "Plaintiffs") brought an action in Court of Common Pleas, for Charleston County, 2015-CP-10-0449 (the "Lawsuit") against the Town of Sullivan's Island (the "Town").

WHEREAS, S.I. Wild Olive Group, LLC is the owner of real property located at [redacted] Sullivan's Island, South Carolina, TMS #5290900128 (the "Property").

WHEREAS, the Obstinate Daughter operates a restaurant on the Property.

WHEREAS, the use of the Property as a restaurant is currently a nonconforming use under the Town's Zoning Ordinance.

WHEREAS, as asserted in the Amended Complaint, Plaintiffs seek a ruling in the Lawsuit that the Town's Zoning Ordinance does not preclude the addition of outdoor seating on the patio in front of the Obstinate Daughter. Plaintiffs assert that the use of the lot, including the patio, as a restaurant is a legal, non-conforming and vested right.

WHEREAS, the Town has answered the Lawsuit and asserted numerous defenses; including but not limited to, the assertion that the addition of outdoor seating would be an expansion of the non-conforming restaurant use and such an expansion is prohibited by law.

WHEREAS, the parties to this Settlement Agreement desire to end, settle, and compromise all of the disputes among them, fully and finally; and

NOW; THEREFORE, the parties have resolved the lawsuit on the following terms:

1. The Obstinate Daughter may have up to 20 seats for outdoor patron seating. The Obstante Daughter's outdoor seating shall not exceed 20 seats or 20 patrons at any given time.

2. The outdoor seats referred to above must all be located within the 520 square foot area designated on the drawing attached hereto as exhibit A.

3. There shall be no overlap in the seating with Maybank Restaurant Group, LLC d/b/a Beardcat's Sweet Shop's (the coffee shop) outdoor seating, which is limited 96 square feet of outdoor patio area in the front left side of the building.

4. The outdoor seating area and all patrons are subject to the Town's noise ordinances 14-15 and 14-16. Additionally, the parties specifically agree that there will be no outdoor entertainment or speaker system of any kind.

5. The tables to be utilized for the outdoor seating are allowed to have umbrellas. A host/setup stand may be used, but must be removed and stored at the close of business

each night. Portable heaters may be used in the event of cold weather, but must be removed and stored at the close of business each night that they are used. Other than the tables, up to 20 seats, umbrellas, portable host/setup stand, and temporary portable heaters, there shall be no other structure or furniture placed or installed (on a temporary or permanent basis) in the 520 square foot area. For example, no additional chairs, no benches, no portable tents, no awing(s) and no canopies shall be placed or installed (on a temporary or permanent basis) in the 520 square foot area.

6. The outdoor seating area will be cleared of any and all food, drinks, and patrons by 11:00 pm each night.

7. Any lighting or changes to lighting will be non-intrusive and comply with Town's Ordinances, including section 21-62 governing the approval of site lighting in the CC-District (Community Commercial).

8. Plaintiffs expressly agree that this Settlement Agreement shall be binding as to themselves, representatives, affiliates, predecessors, successors, transferees, licensees, assigns, employees, partners, members, lessors, or sub-lessors.

9. Should Plaintiffs materially violate the above terms, as determined in an action or proceeding to enforce or for breach of this Settlement Agreement, the authorization for the outdoor seating shall be revoked. The parties shall enter into a consent order of dismissal of the Lawsuit, which shall incorporate this Settlement Agreement and provide that the Circuit Court for Charleston County shall retain jurisdiction for the enforcement of this Settlement Agreement, including that should Plaintiffs violate the above terms, the Circuit Court shall have jurisdiction to enforce the Settlement Agreement by revoking the above authorization for the outdoor seating.

10. There shall be no future expansion of outdoor seating or the restaurant use at the Property. The terms of this Settlement Agreement shall be a restrictive covenant that runs with the land. A document titled "Restrictive Covenant", which incorporates this Settlement Agreement, shall be executed and filed in the Register Mesne Conveyance (RMC) Office in Charleston County.

11. The parties enter into this Settlement Agreement to settle this controversy solely to avoid the expense and imposition of further litigation. The parties hereto agree and acknowledge that this agreement is a compromise and settlement to compromise doubtful and disputed claims, and that the agreements herein are not an admission or concession of liability or concession of any legal argument or position. This settlement does not create a precedent.

12. The terms of this Settlement Agreement will take effect upon the approval of the terms and execution of the Settlement Agreement by the Town of Sullivan's Island Town Council, in public session. However, before the outdoor seats may be added to the

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patio, the Town of Sullivan's Island Design Review Board must review and approve an updated parking plan. Should the Town of Sullivan's Island Design Review Board fail to review and approve the parking plan, this settlement agreement shall be null and void.

13. The parties to this Settlement Agreement agree that they are solely responsible for the payment of any and all costs, including attorney's fees, that they have incurred or may incur relating to the appeal, and each party expressly waives any claim or right that it may have to the payment of costs of any kind, including attorneys' fees, incurred in pursuing or defending the appeal.

14. This Settlement Agreement constitutes and contains the entire agreement and understanding between the parties concerning the subject matters addressed herein and supersedes and replaces all prior negotiations and all agreements proposed or otherwise, whether written or oral, concerning the subject matter hereof. This is an integrated document.

15. Each party has cooperated in the drafting and preparation of this Settlement Agreement. Hence, in any construction or interpretation of this Settlement Agreement, the same shall not be construed against any party on the basis that the party was the drafter.

16. This Settlement Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. A scanned electronic copy containing the signature of a party to this Settlement Agreement shall be of the same legal force and affect as the original signature on the original signature page in question.

17. The parties agree to cooperate fully and execute any and all supplementary documents (including the Consent Order and Restrictive Covenant) and to take any additional actions which may be necessary to give full force and effect to this Settlement Agreement.

Witness

Town of Sullivan's Island
By: PATRICK M. O'NEIL
Its: MAYOR
Date: 20 MAY 2016

Witness

S.I. Wild Olive Group, LLC
By: _____

patio, the Town of Sullivan's Island Design Review Board must review and approve an updated parking plan. Should the Town of Sullivan's Island Design Review Board fail to review and approve the parking plan, this settlement agreement shall be null and void.

13. The parties to this Settlement Agreement agree that they are solely responsible for the payment of any and all costs, including attorney's fees, that they have incurred or may incur relating to the appeal, and each party expressly waives any claim or right that it may have to the payment of costs of any kind, including attorneys' fees, incurred in pursuing or defending the appeal.

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17. The parties agree to cooperate fully and execute any and all supplementary documents (including the Consent Order and Restrictive Covenant) and to take any additional actions which may be necessary to give full force and effect to this Settlement Agreement.

_____	_____
Witness	Town of Sullivan's Island
	By: _____
	Its: _____
	Date: _____
_____	_____
Witness	S.I. Wild Olive Group, LLC
	By: Marvin Douglas Godley

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Witness

Its: Managing Member
Date: 5-20-16

MD Godley

S.I. Wild Olive Restaurant Group, LLC d/b/a
Obstinate Daughter
By: Marvin Douglas Godley
Its: Managing Member
Date: 5-20-16

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RECORDER'S PAGE

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Filed By:
PRATT-THOMAS, & WALKER, P.A.

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CHARLESTON SC 29413-2247

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Date:	June 24, 2016
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Charlie Lybrand, Register
Charleston County, SC

MAKER:
S I WILD OLIVE GROUP LLC

RECIPIENT:
N/A

Original Book:

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# of Pages:	8
# of References:	

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Extra Reference Cost	$	-
Extra Pages	$	3.00
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TOTAL	$	13.00

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JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C/A NO.: 2015-CP-10-0421
MAYBANK RESTAURANT GROUP, LLC Appellant, v. TOWN OF SULLIVAN'S ISLAND and TOWN OF SULLIVAN'S ISLAND BOARD OF ZONING APPEALS, Respondents.	)	CONSENT ORDER OF DISMISSAL WITH PREJUDICE

This matter is before the Court upon the joint motion of the Appellant, by and through their undersigned attorneys, Richard D. Bybee, Esquire and M. Brent McDonald, Esquire and the Respondents, by and through their undersigned attorneys, G. Trenholm Walker, Esquire and John P. Linton, Jr., Esquire.

Heretofore, the Appellant timely filed their Notice of Appeal and Request for Pre-Litigation Mediation as reflected in the record of this case. Subsequent thereto, the parties have reached a Settlement Agreement, the original of which is attached hereto and incorporated herein by reference, which resolves all issues pending between the parties in this Appeal from a decision of the Sullivan's Island Board of Zoning Appeals without the necessity of a further hearing before the Court. The parties, by and through their undersigned attorneys, seek an Order of this Court pursuant to Rule 41(a) (2) SCRCP dismissing this Appeal with prejudice and approving the Settlement Agreement pursuant to South Carolina Code Section 6-29-825, as attached, making the same the Order of this Court. The Court finds that the Settlement Agreement has a rational basis

RMD/lc

and should be approved by the Court since it resolves the dispute between the parties at large.

Based upon the joint motion of the Appellant, by and through their undersigned attorneys, and the Respondents, by and through attorneys, it is hereby

ORDERED, that the Settlement Agreement, the original of which is attached hereto and incorporated herein by reference, is approved and made the Order of the Court, it is further,

ORDERED, that the above-caption case be and the same is hereby dismissed with prejudice pursuant to Rule 41(a)(2) SCRCP.

AND IT IS SO ORDERED!

Judge

June 3, 2015

Charleston, South Carolina

I so Move:

Richard D. Bybee
M. Brent McDonald
Smith, Bundy, Bybee & Barnett, PC
Post Office Box 1542
Mt. Pleasant, SC 29452-1542
(843) 881-1623
rdb@s3blaw.com
bmcdonald@s3blaw.com

ATTORNEYS FOR APPELLANT
MAYBANK RESTAURANT GROUP, LLC

5.27, 2015

I so move

G. Trenholm Walker
John P. Linton, Jr.
Pratt Thomas Walker, PA
Post Office Drawer 22247
Charleston, SC 29413-2247
(843) 727-2200
gtw@p-tw.com
jpl@p-tw.com

ATTORNEYS FOR RESPONDENTS
TOWN OF SULLIVAN'S ISLAND AND
SULLIVAN'S ISLAND BOARD OF
ZONING APPEALS

_____, 2015

RMOJ/2

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SETTLEMENT AGREEMENT

WHEREAS, Maybank Restaurant Group, LLC d/b/a Beardcat's Sweet Shop ("Beardcat's") sought a special exception to operate a coffee shop use at [redacted] Sullivan's Island, S.C., in the Community Commercial Zoning District, pursuant to the Town of Sullivan's Island's Zoning Ordinance section 21-50(C)(2). *See* Ex. A (Beardcat's BZA Application dated October 10, 2014)

WHEREAS, Beardcat's requested the special exception to allow inside seating and also patio seating (385 square feet of interior space and 96 square feet of outdoor patio area in the front of the building). *See* Ex. A.

WHEREAS, the Sullivan's Island Board of Zoning Appeals (BZA) held a public hearing on November 13, 2014; considered all of the factors for a special exception as provided in ZO § 21-178; and approved the special exception for the coffee shop use, including inside seating and also patio seating out front of the coffee shop. *See* Ex. B (BZA Order issued January 8, 2015)

WHEREAS, ZO § 21-178(D) Town of Sullivan's Island Zoning Ordinance authorizes the BZA to attach certain conditions to a special exception: "In approving a Special Exception, the Board of Zoning Appeals may attach to it such reasonable terms and conditions, as it may consider necessary to accomplish the intent of this Article and this entire Zoning Ordinance."

WHEREAS, the BZA's approval of the special exception was conditioned as follows: ". . . should the owner, who also owns the adjacent restaurant the Obstinate Daughter, attempt in any way through application or litigation to obtain seating on the patio, that this special exception will be revoked and Beardcat's Sweet Shop, LLC would have to come back to the Board to seek the special exception, and they are bound by the written application and the representations made tonight." Ex. B.

WHEREAS, on January 21, 2015, Beardcat's filed a Notice of Appeal and Request for Mediation pursuant to South Carolina Code § 6-29-825.

WHEREAS, by Consent Order dated March 27, 2015, S.I. Wild Olive Group, LLC and S.I. Wild Olive Restaurant Group, LLC d/b/a Obstinate Daughter were granted leave to intervene in this action for the Pre-Litigation Mediation, only.

NOW, THEREFORE, through mediation, the parties have resolved the appeal on the following terms:

1. The condition to Beardcat's special exception is removed.

2. Beardcat's special exception permitting a coffee shop use with inside 385 square feet of their interior space and 96 square feet of outdoor patio area in the front of the

PMO 5-19-15

building approved for patron seating remains in force. These areas are shown in exhibit C. The seating depicted on exhibit C is only illustrative of the arraignment of the 25 seats allowed within the approved patron seating areas. The approved seating is limited to 25 seats within the designated areas. Beardcat's may install such patron seating immediately upon approval of the Settlement Agreement in accord with § 6-29-825 (D).

3. To the extent approval is necessary, S.I. Wild Olive Group, LLC and S.I. Wild Olive Restaurant Group, LLC d/b/a Obstinate Daughter may seek such approval for outdoor seating without revocation of Beardcat's special exception.

4. Nothing in this Settlement Agreement will be interpreted to permit or prohibit S.I. Wild Olive Group, LLC or S.I. Wild Olive Restaurant Group, LLC d/b/a Obstinate Daughter to have any outdoor seating and shall not constitute an admission or concession by any party regarding whether S.I. Wild Olive Group, LLC or S.I. Wild Olive Restaurant Group, LLC d/b/a Obstinate Daughter is permitted to have outdoor seating under the applicable laws of the State of South Carolina and the Town of Sullivan's Island.

5. This Agreement in no way impacts or operates as a settlement of the case currently pending and captioned as S. I. Wild Olive Group, LLC, S. I. Wild Olive Restaurant Group, LLC d/b/a The Obstinate Daughter and Maybank Restaurant Group, LLC d/b/a Beardcat's Sweet Shop v. Town of Sullivan's Island and the Town of Sullivan's Island Board of Zoning Appeals, 2044-CP-10-00449.

6. Pursuant to South Carolina Code § 6-29-825(D), the terms of this Settlement Agreement will take effect upon the approval of the terms and execution of the Settlement Agreement by The Town of Sullivan's Island Town Council, in public session; and the approval of the Circuit Court for Charleston County. The approval by the Circuit Court will end the appeal.

7. The parties to this Settlement Agreement agree that they are solely responsible for the payment of any and all costs, including attorney's fees, that they have incurred or may incur relating to the appeal, and each party expressly waives any claim or right that it may have to the payment of costs of any kind, including attorneys' fees, incurred in pursuing or defending the appeal.

8. This Settlement Agreement constitutes and contains the entire agreement and understanding between the parties concerning the subject matters addressed herein and supersedes and replaces all prior negotiations and all agreements proposed or otherwise, whether written or oral, concerning the subject matter hereof. This is an integrated document.

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9. Each party has cooperated in the drafting and preparation of this Settlement Agreement. Hence, in any construction or interpretation of this Settlement Agreement, the same shall not be construed against any party on the basis that the party was the drafter.

Witness

Town of Sullivan's Island
By: Patrick M. O'Neil
Its: Mayor
Date: 5-19-15

Witness

Maybank Restaurant Group, LLC d/b/a
Beardcat's Sweet Shop
By: M. Doug Godley
Its: Managing Member
Date: 05-19-15

Witness

S.I. Wild Olive Group, LLC and
S.I. Wild Olive Restaurant Group, LLC d/b/a
Obstinate Daughter
By: M. Doug Godley
Its: Managing Member
Date: 05-19-15

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
Town of Sullivan's Island,	)	C/A No. 2022-CP-10-00846
	)	
Plaintiff,	)	**DEFENDANTS' MOTION TO ALTER OR AMEND ORDER GRANTING SUMMARY JUDGMENT**
	)	
Versus	)	
	)	
Nathan Bluestein and Theodore Albenesius, III,	)	
	)	
	)	
Defendants.	)	

The Defendants Nathan Bluestein and Theodore Albenesius, III (hereinafter "Defendants"), by and through their undersigned attorneys, submit this Motion to Alter or Amend of the Court's January 30, 2023 Order granting summary judgment in favor of the Town of Sullivan's Island pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure.

FACTS

In the present lawsuit, the Town of Sullivan's Island (hereinafter "Town" or "Plaintiff") seeks to avoid the performance of the duties, obligations and actions it undertook in a Settlement Agreement executed between itself and the Defendants. The original Settlement Agreement was adopted by the Town by resolution, signed by the Town, and approved by this Court in October 2020 and represented a comprehensive resolution of a lawsuit involving the Sullivan's Island Accreted Land that had spanned the prior ten (10) years (the "Original Lawsuit").[1] The Settlement Agreement also detailed a comprehensive plan for the management of the vegetation that has become overgrown and overly dense throughout the Accreted Land due to the Town's inaction – a plan developed collaboratively by both the Town and Defendants through consultation with

[1] *Bluestein et al v. Town of Sullivan's Island and Sullivan's Island Town Council*, C/a No. 2010-cp-10-05449. This Court's order approving the Settlement Agreement was entered on October 15, 2020 and an order approving a small amendment to the same was entered on April 12, 2021.

experts, which is designed to remove specific trees, remove invasive species and reasonably prune existing trees and shrubs. In consideration of the Town agreeing to perform this scope of work, with funding coming predominantly from property owners, Defendants released their claims in the Original Lawsuit and filed a Stipulation of Dismissal in the same.

During the pendency of the Original Lawsuit, including the negotiation of, consideration of, and ultimate adoption of the Settlement Agreement, the Town enjoyed the advice of special litigation counsel. For example, the Town received legal advice regarding the adoption of the resolution to approve the Settlement Agreement as well as a public presentation on the propriety of entering into the Settlement Agreement during a Special Meeting before ultimately passing the same on October 2, 2022.

Less than two years later, however, the Town initiated the present action for declaratory judgment to avoid performing the very work it agreed to in the Settlement Agreement – the work which is itself the consideration exchanged for Defendants' release of their original claims. Defendants responded to Plaintiffs' declaratory judgment Complaint and further counterclaimed for breach of contract, specific performance, and promissory estoppel.

On May 23, 2022, the Town filed a Motion for Summary Judgment in this matter, arguing that the Court should enter judgment as a matter of law and conclude that Settlement Agreement is invalid because it improperly binds or constrains the legislative function of future iterations of the Town's government (the Town Council). Defendants filed a memorandum in opposition to this Moton on September 16, 2022.

The Court conducted a hearing on the Town's Motion for Summary Judgment on September 22, 2022. Subsequently, on January 5, 2023, the Court requested that both the Town and Defendants submit proposed orders addressing the Town's summary judgment motion. These

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submissions were provided to the Court on January 17, 2023. See Ex. A, Town's Proposed Order, Jan. 17, 2023; Ex. B, Defendants' Proposed Order, Jan. 17, 2023.

On January 30, 2023, the Court entered an Order granting summary judgment to the Town and disposing of Defendant's counterclaims. Ex. C, Order, Jan. 30, 2023. This Order held that the Settlement Agreement entered in the Original Lawsuit is, as a whole, "invalid and unenforceable as a matter of law because it involves the legislative/governmental powers of the Town and purports to bind the current and future town councils." Ex. C, Order at 12.

It appears that this Order adopted the Town's proposed order in its entirety. However, this Order did not address Defendant's argument that, in the alternative to entering summary judgment in Defendants' favor, the Court should enforce the severability provision of the Settlement Agreement in order to remove only those aspects of the contract which required future iterations of Town Council to "review changes in the condition of the [Accreted Land] on a recurring basis (for instance, once every five years) with an eye towards making whatever changes might be necessary to maintain appropriate levels of density and diversity." Settlement Agreement at 3. The Order also did not address any steps the parties must take in relation to the Original Lawsuit, in light of the January 30th Order.

Argument

I. The Court Should Alter Its Entry of Summary Judgment in Favor of the Town and Instead Enter Judgment in Favor of Defendants Pursuant to Rule 59(e).

Rule 59(e) provides that a party must move for the alteration or amendment of a judgment within ten days after receipt of written notice of the entry of an order. Rule 59(e), SCRCP. This Rule permits a party to request reconsideration of matters properly encompassed in a decision on the merits. For all the reasons previously raised by Defendants in their memoranda in opposition

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to Plaintiff's summary judgment motion and at the hearing, the Court should reconsider its ruling in its entirety pursuant to Rule 59(e), SCRCP.

Additionally, where an issue was raised but not ruled upon by the trial court, it must be addressed on a motion to alter or amend brought pursuant to Rule 59(e), SCRCP before the issue is considered preserved for appeal. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). If the Court is not inclined to reconsider its summary judgment Order in its entirety, Defendants respectfully request that the Court alter or amend its Order to more specifically address Defendants' argument as to the severability of the Settlement Agreement and the impact of the Order on the Original Lawsuit.

A. **The Court Should Reconsider Its Ruling in Toto and Enter Summary Judgment on Favor of Defendants.**

In their original briefing and in their proposed order, Defendants demonstrated why and how the Court should enter judgment as a matter of law in their favor. Such a judgment would have been in harmony with South Carolina's common law regarding the enforceability of contracts entered into by municipal governments and would have furthered the unambiguous intent of the parties manifested in the terms of the Settlement Agreement itself.

A municipality or any other governing body should not be able to "legislate" itself out of a binding contract entered into in good faith, much less a binding contract that has been reviewed and approved by this Court and entered into the record in an Order. Yet, that is precisely what the Court has permitted the Town to achieve by granting summary judgment in favor of the Town. Rather than permit the Town to shirk its contractual obligations and nullify the consideration it provided in return for Defendant's releases in the Original Lawsuit pursuant to Rule 59(e), this Court should amend its judgment to find the Settlement Agreement not an improper constraint on the Town's legislative function and valid and enforceable in its entirety.

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B. Even if the Court Does Not Reconsider Its Ruling in its Entirety, the Court Should Amend its Judgment and Enforce the Severability Clause of the Settlement Agreement.

The Settlement Agreement states, in pertinent part, "[s]hould any portion, word, clause, phrase, sentence or paragraph of this Settlement Agreement be declared void or unenforceable, such portion shall be considered independent and severable from the remainder, the validity of which shall remain unaffected." Settlement Agreement at 9, Ex. 2 to Defendant's Mem. in Opp. to Mot. Summ. J.

"The entirety of severability of a contract depends primarily upon the intent of the parties rather than upon the divisibility of the subject." *Id*. at 64, 566 S.E.2d at 867 (citing *Columbia Architectural Group Inc.v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980). A severable contract is one that by its nature and purpose is susceptible of division, having two or more parts, that are not necessarily dependent on each other. *See Columbia Architectural Grp., Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) (finding a lump-sum contract for services involved severable provisions despite interdependence of material terms); *see also Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 566 S.E.2d 863 (2002).

The intent of the parties that the Settlement Agreement is severable is clearly and unambiguously apparent from its terms: "[s]hould any portion, word, clause, phrase, sentence or paragraph of this Settlement Agreement be declared void or unenforceable, such portion shall be considered independent and severable from the remainder, the validity of which shall remain unaffected." Settlement Agreement at 9. The Town conceded that the terms of the Settlement Agreement are unambiguous by filing its Motion for Summary Judgment, and the Court should enforce this unambiguous provision of the Settlement Agreement and further the parties' intent. This is not a scenario in which the parties asked a court to read an additional provision into a

contract in dispute; here, the unambiguous terms of the Settlement Agreement clearly provide that it is severable and that the parties intended it to be severable. In light of this clear and unambiguous expression of the parties' intent, the Court's contrary interpretation contained in pages 20 and 21 of its Order should not stand and should be amended. If the Court remains determined to invalidate any portion of the Settlement Agreement that it previously adopted and approved, then the Court should enforce the plain and unambiguous terms of the same and reject only the aspects of the contract which it finds operate to improperly constrain the legislative function of future Town Councils.

As Defendants argued in their briefing and at the hearing on this Motion, the Settlement Agreement adopted a plan for the management of vegetation throughout the Accreted Land that specifically conformed with and furthered the terms of the 1991 Deed issued by the Lowcountry Open Land Trust. It proscribed a detailed plan tailored for three "zones" within the Accreted Land and even went so far as to identify the specific types of trees within each of the three zones which would be pruned and what specific action would be taken for each species. See Settlement Agreement at 3–5. This scope of work was to be performed upon the Town's receipt, within one year of the execution of the Settlement Agreement, of sufficient funding from property owners on a block-by-block basis and upon receipt of all necessary and appropriate permits. Id. at 6.

After the completion of this work, the only prospective action contemplated by the Settlement Agreement is the parties' agreement as follows: "In order to maintain similar conditions going forward, with the help of a naturalist the Town would review changes in the condition of the [Accreted Land] on a recurring basis (for instance, once every five years) with an eye towards making whatever changes might be necessary to maintain appropriate levels of density

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and diversity." Settlement Agreement at 3. This language represents an undertaking no different than that to which the Town is already bound by the terms of the 1991 Deed.

In its Order, the Court accepted without question the Town's suggestion that all of the Settlement Agreement's terms are interdependent and therefore incapable of being severed. Neither the Town, nor the Court, addressed what impact would be achieved were the Court to enforce the severability clause solely to remove the requirement that future Town Councils "review changes in the condition of the [Accreted Land] on a recurring basis (for instance, once every five years), with an eye towards making whatever changes might be necessary to maintain appropriate levels of density and diversity." Settlement Agreement at 3. Such an analysis, had it been undertaken by the Court, would have largely preserved the Settlement Agreement while removing the purported future "constraint"[2] and permitted the bargained-for resolution of the Original Lawsuit to remain inviolate. The Court should alter its Order to find that the severability provision is enforceable and apply the same as suggested by Defendants' alternative argument.

Moreover, the Town made no argument (or even attempted to argue) as to how, after the completion of the work plan, the single prospective undertaking contained in the Settlement Agreement should be considered so interdependent that it could not be severed from the remainder, and the Court offered no further justification for this position in the face of the contract's plain terms. But, to the extent that this provision does constitute an improper constraint in the Court's eyes, the Court should revise its Order to reflect this analysis and enforce the unambiguous

[2] Indeed, contrary to the detailed work plan provided for the initial scope of work, the undertaking to "review changes in the condition of the [Accreted Land] on a recurring basis (for instance, once every five years)" is largely left to the discretion of future iterations of the Town Council. On its plain language alone, this undertaking should not be found to improperly interfere with the Town's legislative function. It leaves future Town Councils with the discretion to determine when such an evaluation will occur and what will be evaluated.

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severability clause to strike out only the prospective undertaking to "review changes in the condition of the [Accreted Land] on a recurring basis (for instance, once every five years)" while enforcing the remainder of the Settlement Agreement as a binding contract.

Additionally, the Town did not explain, nor the Court identify support for the conclusion, how the entire Settlement Agreement is somehow so interdependent that the severability clause should not be enforced. Even a cursory review of the Settlement Agreement itself belies this conclusion. For example, the scope of work identified with respect to one zone within the Accreted Land could be severed from the others, in the event that some future action by a regulatory agency made an aspect of such work unfeasible. Such flexibility, through the severability clause, is even necessary given the variety of different regulatory authorities who are responsible for permitting in different areas within each zone and the undertakings associated with funding the work on a block-by-block basis. Rather than accept, as it did, the broad brush assertion of the Town on this issue, the Court should apply the plain and unambiguous terms of the Settlement Agreement's severability clause and enter summary judgment in favor of the Defendants as to all aspects of its terms other than the agreement to revisit and review the state of the Accreted Land at some time in the future.

II. <u>Even if the Court is Not Inclined to Alter its Ruling, it Should Amend its Order to Address the Impact of the Same in the Original Lawsuit</u>.

The parties to a valid settlement agreement and court order must be able to rely on the Court to ensure that its orders are obeyed by holding all parties to its terms and taking enforcement measures where necessary. Not only is the integrity of the judicial system in providing meaningful relief jeopardized by a court's failure to uphold the terms of its own orders, but also the incentive for consensual resolution of disputes is eliminated when parties are not assured that their agreement will be backed by the force and effect of the law in the future. Yet, this is precisely

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what has happened here. Even if the Court is not inclined to alter or amend its Order, it should provide direction to the parties as to the effect the Order has in the Original Lawsuit.

As is abundantly clear from the pleadings in this case and the arguments put forth at the September hearing, the Town initiated this separate lawsuit seeking to avoid the obligations it undertook in the Settlement Agreement reached in resolution of the Original Lawsuit brought by the Defendants. In their arguments on the present Motion for Summary Judgment, Defendants cautioned against the entry of any order which invalidated the resolution of the Original Lawsuit or which would offer future elected officials of municipalities a template for how to successfully eschew and avoid the contracts of their predecessors.

Yet, in entering its January 30th Order finding that the Settlement Agreement is, as a whole, "invalid and unenforceable as a matter of law because it involves the legislative/governmental powers of the Town and purports to bind the current and future town councils", the Court offered no direction or clarification as to any of the following:

(1) whether, by entering and in light of the entry of the Order on January 30th, the Court rescinded its October 15, 2020 Order approving the Settlement Agreement or its April 12, 2021 Order approving the amendment of the same;

(2) whether, by entering and in light of the entry of the Order on January 30th, the Original Lawsuit must be reinstated to the active trial roster for Charleston County;

(3) whether, by entering and in light of the entry of the Order on January 30th, the Stipulation of Dismissal filed in the Original Lawsuit is set aside; or

(4) whether either of the parties is directed to file an appropriate motion to return the Original Lawsuit to the active roster for Charleston County, to set aside the Stipulation of Dismissal in the same, or to take any further appropriate action in relation to the Original Lawsuit in light of the January 30th Order invalidating the resolution of the same.

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Even if the Court is not inclined to grant Defendant's Motion to Alter or Amend pursuant to Rule 59(e), it should nevertheless provide direction to the parties as to the impact of its January 30th Order on the Original Lawsuit and Defendants' respectfully request that the Order by amended to reflect the same.

Conclusion

WHEREFORE, Defendants respectfully request that the Court alter or amend its January 30, 2023 Order entering summary judgment in this matter and amend the same in light of the above, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure.

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February 8, 2023
Charleston, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS
TOWN OF SULLIVAN'S ISLAND, Plaintiff, vs. NATHAN BLUESTEIN and THEODORE ALBENESIUS, III, Defendants.	Case No. 2022-CP-10-00846 **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO ALTER OR AMEND ORDER GRANTING SUMMARY JUDGMENT**

Plaintiff Town of Sullivan's Island ("Town" or "Town Council"), by and through its undersigned counsel, respectfully submits this Memorandum in Opposition to Defendants' Motion to Alter or Amend (the "Defendants' Motion") the Court's Order Granting the Town's Motion for Summary Judgment entered on January 30, 2023 (the "Order"). For the reasons set forth below, the Motion of Defendants Nathan Bluestein and Theodore Albenesius, III ("Defendants") should be denied.

LEGAL STANDARD

The decision to grant or deny a Rule 59 motion lies within the sound discretion of the trial court. *See Pollard v. City of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994). The granting of a motion to alter or amend a judgment under Rule 59(e) is "an extraordinary remedy which should be used sparingly." 11 Charles A. Wright *et al.*, *Federal Practice and Procedure* § 2810.1, at 124 (2d ed. 1995). "A party moving pursuant to Rule 59 must demonstrate more than 'mere disagreement' with the court's order to succeed on a Rule 59(e) motion." *PCS Nitrogen, Inc. v. Ross Development Corp.*, 126 F. Supp. 3d 611, 632 (D.S.C. 2015) (citation

omitted).[1] Given the limited nature of a motion to reconsider, courts have generally recognized only four basic grounds upon which a motion under Rule 59(e) may be granted: (1) where the motion is necessary to correct manifest errors of law or fact upon which the judgment is based; (2) where newly discovered or previously unavailable evidence comes to light after the judgment; (3) where the motion is necessary to prevent manifest injustice to the moving party; or (4) where there is an intervening change in the controlling law. Wright, *Federal Practice* § 2810.1, at 124-27.

ARGUMENT AND CITATION OF AUTHORITY[2]

The Defendants' Motion should be denied because it does not identify any valid basis on which the Court should alter or amend its Order. There is no reason for the Court to reconsider its ruling on the purely legal issues presented in this case. The Court has already considered the arguments raised by Defendants, and correctly determined the Settlement Agreement is invalid and unenforceable. To the extent Defendants ask the Court to address matters outside the scope of its Order—and, indeed, outside the scope of this lawsuit—such matters are not proper subjects of a Rule 59(e) motion and amount to a request for an impermissible advisory opinion.

A. The Court Correctly Determined the Settlement Agreement Is Invalid and Unenforceable and There Is No Reason It Should Alter or Amend Its Order.

Defendants ask the Court to reconsider its ruling in its entirety and find the Settlement Agreement valid and enforceable based solely on arguments already raised to, and considered by, the Court.[3] Mot. at 3-4. Indeed, the only grounds provided in the Defendants' Motion are "the

[1] Rule 59(e) of the South Carolina Rules of Civil Procedure is substantially the same as the Federal Rule. *See* Rule 59, SCRCP advisory committee notes.

[2] All capitalized terms used and not otherwise defined herein shall refer to and have the same meaning assigned to them in the Court's Order.

[3] The arguments presented in the Defendants' Motion are framed as though a ruling in favor of Defendants would have entitled them to summary judgment. However, Defendants were ***not*** a moving party under Rule 56 and did ***not*** seek summary judgment.

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reasons previously raised by Defendants." *Id*. at 3. Mere disagreement with the Court's Order, however, is insufficient to succeed on their Rule 59(e) Motion. *See PCS Nitrogen,* 126 F. Supp. 3d at 632. Defendants ask the Court to amend its Order, but do not identify any legitimate reason why the Court should reconsider its ruling nor present any argument that its ruling was incorrect.

To the contrary, the Court correctly determined the Settlement Agreement is invalid and unenforceable because it involves the legislative/governmental powers of the Town and unlawfully attempts to bind the current and future Town Councils. Order at 13-18. Further, that even if the Settlement Agreement could be said to involve only the proprietary/business functions of the Town, it is invalid and unenforceable because it unfairly, unreasonably and improperly restricts those functions. *Id*. at 18-20.[4] The Court's rulings on the purely legal issues were made after receiving extensive written and oral arguments from counsel. *Id.* at 1. These arguments were first made by Defendants in their pre-hearing written memorandum, again during lengthy oral argument, and a third time in their proposed order submitted to the Court. The Defendants now ask the Court to reconsider their same arguments for yet a fourth time. The Court should decline this invitation.

B. <u>The Court Considered Defendants' Severability Argument and Correctly Determined the Settlement Agreement Is Not Severable.</u>

The Defendants' Motion renews the argument previously raised by Defendants that the Court should sever the offending, "prospective" provisions and enforce the remainder of the Settlement Agreement. Mot. at 5-8. This argument ignores the inescapable conclusion, correctly

[4] For example, paragraph VI of the Settlement Agreement provides that it "shall be binding upon … all the Parties, and their heirs, successors and assigns." As the Court stated on page 19 of its Order, this and other provisions of the Settlement Agreement "evidences the perpetual, never-ending nature of the obligations imposed by it."

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reached by the Court, that because it involves the legislative/governmental powers of the Town, the Settlement Agreement cannot, as a matter of law, extend beyond the term of a ***prior*** town council which was a party to it. Order at 21. Because the Settlement Agreement was entered into by a ***prior*** town council, *id*. at 8, the Court's correct determination that the Settlement Agreement involves the legislative/governmental powers of the Town is conclusive that it is ***not*** binding on the current and future Town Councils, thus foreclosing any possibility of meaningful severability. *See City of Beaufort v. Beaufort-Jasper County Water and Sewer Authority*, 325 S.C. 174, 178, 480 S.E.2d 728, 731 (1997) (holding a municipal contract is invalid where it "extends beyond the term of the governing members of the municipality entering into the contract" and its subject matter involves the legislative/governmental powers of the municipal corporation); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002) (holding severance of an illegal provision requires "an otherwise valid contract").

In addition to being otherwise invalid and unenforceable, the offending provisions of the Settlement Agreement are not subject to meaningful severability. As the Court correctly determined, "the provisions requiring vegetation to be removed, or trimmed, cut, or pruned beyond what is permissible under the 2005 ordinance in effect would have to be severed as unenforceable, as would the provision requiring the Town to 'maintain similar conditions going forward.'"[5] Order

[5] Defendants appear to suggest that the "prospective" provisions of the Settlement Agreement are either valid and enforceable, or else are severable, because they are purportedly similar to those in the 1991 Deed and are "largely left to the discretion of future iterations of the Town Council." Mot. at 6-7. As a preliminary matter, the Court already decided, correctly, that the 1991 Deed, though not at issue in this litigation, is fundamentally different from the Settlement Agreement, and that the Settlement Agreement improperly bargains away the discretion of the current and future Town Councils to act in the public interest. Order at 23-24. However, and notwithstanding that it fails on the merits, Defendants' argument is also misplaced and does not go to the issue of severability.

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at 21. These provisions are central to the Settlement Agreement and are interdependent with the terms, nature and purpose of the agreement. *See Twillman*, 351 S.C. at 65, 566 S.E.2d at 864 (holding a contract is entire, and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent); *OrthAlliance, Inc. v. McConnell*, No. 8:08-2591-RBH, 2010 WL 1344988, at *6 (D.S.C. Mar. 30, 2010) (holding that, even where a contract contains a provision for the severability of void or unenforceable terms, contractual provisions that are interdependent may not be severable). *See also* 17A Am. Jur. 2d *Contracts* § 273 (holding that, to assess whether offending provisions can be severed, "a court considers whether the illegality is central or collateral to the purpose of the contract").

Severance of the offending provisions would require the Court to rewrite material terms of the Settlement Agreement, which is disfavored under South Carolina law. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 34, 644 S.E.2d 663, 673 (2007) (holding "the general principle in this State is that it is not the function of the court to rewrite contracts for parties") (citing *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002)); *see also Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 604, 879 S.E.2d 746, 751 (2022) (holding "blue-penciling" a material term of a contract is "strongly disfavored"). Even where an agreement contains a severability provision, courts are reluctant to sever the unenforceable provisions "when illegality pervades the entire agreement 'such that only a disintegrated fragment would remain after hacking away the unenforceable parts.'" *Damico*, 437 S.C. at 618, 879 S.E.2d at 758 (citing *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673)). "In those cases, judicial severing 'look[s] more like rewriting the contract than fulfilling the intent of the parties,'" *id*. at 618, 879 S.E.2d at 758-59, and courts have declined to enforce the severability provisions, *see, e.g.*, *Smith v. D.R. Horton, Inc.*, 403 S.C. 10,

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16-17, 742 S.E.2d 37, 41 (Ct. App. 2013) (declining to enforce severability provision due to the number of offending provisions).

Although it includes a standard severability clause, the Settlement Agreement itself recognizes that the implementation of its provisions "is subject to compliance with law." Order at 20. Any attempt to implement the severability clause would require the deletion of numerous mandated provisions. For example, regarding cutting, removal, and trimming of trees and vegetation on the Accreted Land, the applicable scope, substance, implementation and taxpayer funding-in-perpetuity provisions would have to be severed—all of which go to the heart of the agreement—reducing it to an agreement with no meaningful effect. Under these circumstances, the Court correctly determined the offending provisions cannot be severed.

Most importantly, the Court correctly determined that because the Settlement Agreement was entered into by Defendants and a prior town council and involves the legislative/governmental powers of the Town, the Settlement Agreement, ***as a whole***, is invalid and unenforceable against the current Town Council and future councils. This holding is dispositive of the severability question.

C. Matters Outside the Scope of the Court's Order—and, Indeed, Outside the Scope of This Lawsuit—Are Not the Proper Subject of a Rule 59(e) Motion.

Defendants ask the Court to "provide direction to the parties as to the effect the Order has in the Original Lawsuit," a term Defendants use when referring to a ***prior*** lawsuit. Mot. at 9. This request is not properly before the Court for consideration. "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (citation and internal quotation marks omitted). The impact of the Court's Order on a

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different lawsuit[6] is not properly encompassed in a ruling on the merits of the Town's claim or Defendants' counterclaims.

To the extent the Defendants' Motion could be interpreted as one for clarification of the Court's Order, the clarification sought may not exceed the scope of the Town's Motion for Summary Judgment on which the Court ruled.[7] *See Wellin v. Wellin*, No. 2:13-cv-1831-DCN, 2017 WL 3620061, at *3 (D.S.C. Aug. 23, 2017) (considering parties' motions to clarify the court's order and holding that clarification must not "exceed the bounds of the controversy presented by [the motion]"). Resolution of the Town's Motion for Summary Judgment presented solely questions of law, and the Court's Order decided the separate and distinct issue of the validity and enforceability of the Settlement Agreement against the Town. The effect on a prior, different lawsuit of a ruling on the merits in the present lawsuit now before the Court was not at issue in the Town's Motion for Summary Judgment, such that Defendants' Motion exceeds the scope of the Order they now seek to alter or amend, or which they seek to clarify.

The request that the Court "provide direction" on the hypothetical questions posed by Defendants amounts to a request for an impermissible advisory opinion. *See id*. (declining to issue a clarification which would amount to an advisory opinion where the parties asked the court to address facts or legal questions that were not presented in the motion on which the court ruled); *see also O'Shields v. McLeod*, 257 S.C. 477, 481-82, 186 S.E.2d 408, 409 (1972) (holding the law of this State is that courts "are without authority to issue advisory opinions") (citation omitted). Courts are not required "to give a purely advisory opinion which the parties might, so to speak,

[6] The prior lawsuit to which the Defendants refer involved an interpretation of certain deed restrictions found in a 1991 deed from the Lowcountry Open Land Trust to the Town of Sullivan's Island.

[7] It bears repeating that Defendants were ***not*** a moving party. *See supra* fn.3.

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put on ice to be used if and when the occasion might arise, or license litigants to fish in judicial ponds for legal advice." *Tourism Expenditure Review Committee v. City of Myrtle Beach*, 403 S.C. 76, 81-82, 742 S.E.2d 371, 374 (2013) (citing *City of Columbia v. Sanders*, 231 S.C. 61, 68, 97 S.E.2d 210, 213 (1957) (internal quotation marks omitted) (declining to rule on a declaratory judgment which would amount to an advisory opinion). *See also CNF Constructors v. Donohoe Constr. Co.*, 57 F.3d 395, 402 (4th Cir. 1995) (affirming district court's denial of motion to amend its order to clarify an issue that could conceivably arise at a later date, because to alter the order under such circumstances would "amount to an advisory opinion"); *Rust v. Electrical Workers Local No. 26 Pension Plan Trust Fund*, No. 3:10-cv-00029, 2012 WL 1190746, at *2 n.3 (W.D. Va. Apr. 9, 2012) (declining "to render an advisory opinion through the 'extraordinary remedy' of Rule 59(e), 'clarifying' an issue that would arise only upon the occurrence of a series of speculative events"). The Court should decline to do so here.

The matters raised by Defendants are outside the scope of the Court's Order and of the present litigation. The "direction" sought by Defendants pertains to hypothetical actions or events in a different lawsuit and, thus, are neither ripe for consideration nor proper for consideration on a Rule 59(e), SCRCP, Motion pertaining to an Order of this Court granting summary judgment in this present lawsuit.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Town's Motion for Summary Judgment and supporting memoranda, the arguments of its counsel, and in the Court's Order, and any others the Court may deem just and proper, Defendants' Motion should be denied.

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March 20, 2023
Charleston, South Carolina

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STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
)
COUNTY OF CHARLESTON) TRANSCRIPT OF RECORD

----------x
TOWN OF SULLIVAN'S ISLAND,)
)
Plaintiff,)
)
vs.) Case No. 2022-CP-10-00846
)
NATHAN BLUESTEIN and)
THEODORE ALBENESIUS III,)
)
Defendants.)
----------x

September 22, 2022

B E F O R E:

The Honorable Jennifer B. McCoy, Presiding Judge

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Recorded by: DCRP/Caressa Johnson

Transcribed by: Bobbi Fisher
SC Official Court Reporter III

1 I N D E X

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E X H I B I T S

(None.)

COURT REPORTER LEGEND

Dash (--)	Indicates an interruption in speech
Ellipses (...)	Indicates trailing off in speech
(ph)	Indicates phonetic word
[Verbatim]	Indicates the word is said as written
(Indiscernible)	[Transcription] Indicates word(s) is not known due to audio recording quality

1 P R O C E E D I N G S
2 (The following proceedings started at 10:32 a.m.:)
3 THE COURT: If you-all would just state your names
4 and who you represent for the record and we'll get
5 started.
6 MR. WILKINS: I'm Billy Wilkins. I represent the
7 Town of Sullivan's Island.
8 THE COURT: Good morning.
9 MR. HOOD: Jamie Hood on behalf of the defendants.
10 THE COURT: All right. Excellent. Well, I show, I
11 believe, three motions pending. Are these all still
12 viable motions?
13 MR. HOOD: They are, Your Honor.
14 THE COURT: Okay. All right. And they're all
15 filed, it looks like, on behalf of the plaintiff. So I'm
16 happy to hear them in whatever order you see fit.
17 MR. WILKINS: Thank you, Your Honor. May I approach
18 the podium?
19 THE COURT: Yes, sir. Of course.
20 ARGUMENT
21 MR. WILKINS: May it please the Court? The
22 defendants acknowledge that the settlement agreement
23 that's at the heart of this controversy is authentic and,
24 most importantly, it is unambiguous. We all agree, both
25 sides, to this.

1 There are no factual questions to be answered. The
2 sole issue, the settlement's enforceability, should be
3 determined by applying the applicable legal principles to
4 what is written within the four corners of this agreement.
5 Now, the applicable principals that are applicable
6 here that apply are two. There are two categories of
7 powers that any town council in South Carolina possesses.
8 One is identified as legislative governmental powers,
9 sometimes referred to as police powers. And it is those
10 powers that enable a town council to carry out its
11 responsibilities as a governing body.
12 The cardinal rule regarding legislative governmental
13 powers is that a current town council may not impair,
14 restrain, obligate, or dictate to successive town councils
15 what that new elected town council in the future may do or
16 may not do. And a current town council may not enter into
17 a contract or an agreement or pass an ordinance or
18 anything like that that would commit a successive town
19 council to any particular course of action.
20 Over the years, our Supreme Court has held time and
21 time again that -- and I quote -- "A council may not, by
22 contract, bind its successors to forego or to exercise
23 their legislative functions." Indeed, quoting from the
24 Supreme Court's decision in the *Newman* case, the Court
25 said this: "A current council may not tell a future

1 council what it must do and what it may not do. A current
2 town council may not restrict the legislative governmental
3 functions of successive town councils as they are elected
4 in the future."
5 On page 8 of their memorandum, the defendants
6 acknowledge by saying, "We agree this is true."
7 The other power of function of a town council is a
8 known as proprietary functions. A proprietary function by
9 a town council is something an act of a private citizen
10 could do. It involves activities routinely engaged in by
11 private citizens as the citizens carry on their -- in most
12 cases, their business dealings.
13 A private corporation may, for example, enter into
14 an agreement with a garbage collection firm to have their
15 garbage collected on a weekly basis. Likewise, a town
16 council could contract with a garbage company to have --
17 and with a contractor to have it collect all the garbage
18 here in the Town of Sullivan's Island or the Town of
19 Sullivan's Island could contract with a landscaping
20 company so that that company could cut the grass and
21 maintain the public grounds of the town as opposed to
22 having the employees of that town cut the grass and
23 conduct that maintenance and so forth.
24 But an agreement and a contract or an ordinance that
25 would require successive town council to enter into such

1 type of a contract is not permitted because that's a
2 legislative, governmental act requiring the town council
3 in the future to do something. Even though it could do it
4 on its own, it may not be required to do it.
5 So if the settlement agreement is not enforceable
6 against a successor town council because of the
7 legislative or governmental issues I just outlined, the
8 next question becomes is whether or not this was a
9 proprietary function that the council -- prior council
10 exercised in agreeing to in entering into this contract.
11 And that's permissible. And that contract can extend
12 beyond the term of the current council that entered into
13 the contract if it is for a reasonable time and for good
14 purpose.
15 So a garbage collection contract could extend beyond
16 the term of a council's four years, maybe to six years,
17 because the town council could get a much better price --
18 contract price by having a six-year contract as opposed
19 to, say, a four-year contract. So that extension of time
20 beyond the term of that council would be for a reasonable
21 time.
22 But I suggest to the Court that by any known
23 measure -- method of measurement of the reasonableness of
24 a length of a contract, the duration of a contract entered
25 into with town council that would last in perpetuity, that

1 would last forever, that would last generation after
2 generation, is not, by any stretch, of a reasonable
3 donation -- duration.
4 The defendant, on page 15 of its memorandum, says,
5 Well, that's not true. This is reasonable, perpetual,
6 lifetime, forever contract because -- because the
7 defendant -- I mean, the defendants say, the town is a
8 municipality, and by law, in South Carolina,
9 municipalities have a certificate of incorporation issued
10 to that town by the Secretary of the State, and that
11 certificate is of perpetual duration. So if the town
12 charter is forever, so a newly elected town council can
13 bind future town councils in perpetuity.
14 Let me refer just to a couple of cases, Your Honor,
15 just to illustrate. They all say the same thing just
16 about. One is *Simons vs. The City of Beaufort*. Now, this
17 is declaratory judgment. In this case, the City had 140
18 curbside parking meters that it wanted -- it wanted a
19 declaration to allow it to use the curbside parking
20 revenues to finance a bond or pay back a bond that would
21 establish off-street parking. And our Supreme Court --
22 and that contract -- the bond issue was going to last for
23 a period of 20 years. Here's what the Supreme Court said,
24 and I quote, "A City Council may not adopt a system of
25 on-street parking and make it irrevocable during the life

1 of the bond so as to preclude a future council from
2 adopting some other method of regulating traffic. A City
3 Council must be left unrestricted in the future to adopt
4 any parking regulations it believes is in the best
5 interest of the citizens of its city."
6 And the other case is *Newman vs. The City of*
7 *Greenville*. Newman was a City employee, 1942, Pearl
8 Harbor, and he wanted to serve in the armed forces. And
9 the City entered into an agreement with him. "We admire
10 your patriotism. When you come back after the war, we'll
11 guarantee you, you'll get your job back." Well, after the
12 war, he came back and applied for the job. There had been
13 a new city council elected since he left. That city
14 council said, "No, we're not going to honor that
15 agreement. We're not bound by that because it's a
16 contract entered into by former city council." Well, the
17 trial judge disagreed, and he issued an order restraining
18 the city council from denying this plaintiff, Mr. Newman,
19 who was the former City employee, from getting his job
20 back.
21 Well, the City appealed to the Supreme Court, and
22 the Supreme Court reversed the trial court in a unanimous
23 decision, and here's what it said, and I quote, "A council
24 may not contract -- by contract bind its successors to
25 forego or to exercise their legislative functions. It is

1 clear that a city council has no authority to make a
2 contract extending beyond the term -- its current term.
3 The acts of former councils relating to government
4 functions are without force and effect upon succeeding
5 councils. A successive council must be free to exercise
6 the governmental powers as it deems necessary and needful
7 in politic."
8 The agreement that I have been referring to and is
9 at the center of this controversy, I'd just like to point
10 out a couple of clauses, Your Honor. It's on page 2,
11 II-B, the agreement says, "The settlement in implementing
12 steps associated therewith are necessary for the health,
13 safety, and general welfare of the Town." That is, I'm
14 sure, a true statement to that council, but that council
15 may not dictate to future councils what it determines to
16 be in the best interest of the welfare of the citizens of
17 Sullivan's Island.
18 III on page 3, "The Town will implement selective
19 thinning of the accreted land based on initial cut
20 parameters set forth below for each of the four zones. In
21 order to maintain similar conditions going forward, with
22 the help of a naturalist, the Town will review changes in
23 the condition of the accreted land on a recurring basis,
24 once every five years."
25 Now, this is an attempt by the current council to

1 tell future Town councils, in the exercise of its
2 governmental powers, you may -- you must do exactly what
3 this says. You must implement the thinning process just
4 like we say in this agreement. You must hire a naturalist
5 to assist in that and so forth and requires the future to
6 fund the naturalist or the consultant or whomever would be
7 selected as required.
8 The last -- next-to-the-last sentence in that
9 paragraph says, "Primary funding for transition zone will
10 be from the Town." So this current council is saying,
11 Future Councils, you have got to fund this work. You have
12 got to make it part of your budget from the taxes that you
13 raise from the citizens of the town.
14 Page 4 under Myrtles -- Myrtle trees, "Current Town
15 procedures will apply for annual cutting and payment there
16 will apply." So we're telling you what trees you have got
17 to cut and how we're going to pay for it. You're going to
18 pay for it because we say, this current council, this is
19 what we're requiring you to do.
20 On page 6 under Permitting, "You're required to
21 engage an engineer and technical consultant to develop and
22 implement an appropriate plan specifying the methods set
23 forth and how they will be carried out." So, again, you
24 have got to use your funding, your future tax dollars to
25 be collected sometime in the future, and apply them to

1 hire an engineer because this agreement says you must do
2 so.
3 "The work must be done by way of a contract signed
4 by the Town and a vegetation management contractor, as
5 appropriate under the Town's procurement." So you have
6 got to fund to something else here, enter into a contract.
7 You have no authority not to do it. You must enter into
8 this contract, provide for a vegetative and management
9 contractor and so forth.
10 At the bottom, the same page down towards the end,
11 it says, "Appeals. No party shall appeal the issuance of
12 any permit issued for completion of work consistent..."
13 So you have no rights of appeal anymore under this
14 agreement going into the future.
15 Again on page 8, there's also procurement issues
16 where you have got to procure money and you have got to
17 use the procedures in place now and not some new
18 procedures you may think are more efficient or more
19 reasonable and benefit the County -- the Town in the
20 future.
21 Page 8, paragraph No. 6. "This agreement is binding
22 on all of the heirs, all of the successors, and all of the
23 assigns."
24 And lastly, Your Honor, on page 9 under paragraph
25 8(f), "Modification. This agreement may not be modified

1 or amended nor may any of its provisions be waived except
2 upon mutual agreement of all parties or their authorized
3 agents." This means that the defendants in this case, or
4 their authorized agents, have a veto over any action the
5 County -- that the Town may wish to take to change or
6 modify this agreement.
7 I want to refer the Court to *Martin v. Members of*
8 *the North Charleston Sewer District*. And this is the last
9 case I'll cite to you, Your Honor, but in this case, the
10 North Charleston Sewer District wanted to acquire a
11 private sewer system, and it did acquire that system, and
12 the primary owner of that newly acquired sewer system was
13 a fellow named T.L. Barnham. And under the contract, when
14 this sewer -- new sewer system was acquired, Barnham was
15 given the right to disapprove of any entity that sought to
16 be hooked up to this new system. He had veto power over
17 who could use this new system -- this new public system
18 and who could not.
19 Well, the circuit court granted summary judgment on
20 the basis that a private citizen cannot be delegated to
21 enforce public matters, and this was unlawful and against
22 public policy. Well, an appeal was taken to the Supreme
23 Court, and the Supreme Court used about as strong of
24 language as I have ever read in one of its opinions. The
25 Supreme Court said, "The situation in this case is

1 intolerable. The police power of a corporate or political
2 body cannot be exercised for private purposes or for the
3 benefit of particular individuals or classes."
4 So, Your Honor, I submit to you, for both reasons,
5 that this was an improper exercise of the legislative
6 governmental powers of the Town Council that entered into
7 this agreement. It was also a violation of its
8 proprietary function, which allows it to enter into
9 contracts that has some duration past its term, but that
10 term must be reasonable, and there's no case in South
11 Carolina, indeed no case that I have found in the United
12 States of America, under these circumstances, that
13 anywhere comes close to saying that a contract in
14 perpetuity is reasonable.
15 Thank you, Your Honor.
16 THE COURT: Yes, sir.
17 REPLY ARGUMENT
18 MR. HOOD: Good morning, Your Honor.
19 THE COURT: Good morning.
20 MR. HOOD: Jamie Hood on behalf of the defendants.
21 Before I get started, I do want to just highlight
22 that -- a couple of words that we did not hear:
23 Settlement, Court-approved settlement, settlement approved
24 by a submission of a consent order to the Court. That's
25 important, and I can explain why.

1 But in response to the argument that was just made,
2 Your Honor, there are three legal reasons why this
3 settlement agreement should stand and be enforced by this
4 Court and Your Honor should deny the motion and determine
5 that this settlement agreement is enforceable.
6 No. 1. The settlement agreement is the exercise of
7 proprietary power. It is, in and of itself, what common
8 citizens do when they have lawsuits 99 percent of the
9 time. There is nothing governmental about entering into,
10 participating in, or settling lawsuits. That is a
11 business proprietary function.
12 We did not hear a single case cited in any of the
13 briefing -- and I know they looked, and I did too -- where
14 any court in the United States has held a settlement
15 agreement in which a municipality entered into that
16 extends beyond the duration of that municipality is
17 unenforceable, and to find otherwise would upend the
18 proprietary business function of town councils across this
19 state and around the country. The reason for that is, we
20 see the Town of Sullivan's Island, in the exhibits that I
21 have provided, have a number of examples where they have
22 entered into settlement agreements with private litigants
23 that extend -- the duration of those agreements extend
24 beyond the Town Council.
25 And the reason for that is obvious. You can't do

1 the business of a Town if you're limited to a two-year
2 window when you have claims that are brought against the
3 Town like this one.
4 Reason No. 2, Your Honor, the settlement agreement
5 is fair, reasonable, and necessary. When we -- we'll go
6 through the settlement agreement in some detail, and I
7 will cover each of these elements, but the highlight that
8 I just heard was this perpetual in nature. And if Your
9 Honor will look at Findings of Fact No. 1 in the
10 settlement agreement, it indicates that "the settlement
11 agreement exists to implement the provisions found in the
12 deed."
13 So the settlement agreement and the obligations
14 exist -- coexist with the deed. That is for a finite
15 period of time. That is defined in the deed as 50 years.
16 We're 30 years in. And then the renewal provisions.
17 And there are also provisions by which the Town
18 Council of Sullivan's Island can seek to modify, change,
19 or revoke those deeds if you follow the modification
20 procedure. So it is not perpetual. It's tied
21 specifically to the deed and for good reason, which I'll
22 get into in a moment.
23 And reason No. 3, Your Honor -- we didn't hear about
24 this, but if you disagree with me and for the first time
25 in American jurisprudence we're going to overturn a

1 settlement agreement because a municipality does not like
2 it anymore, because there's a new town council and we're
3 going that direction, I think that we need to look at the
4 severability provision, because the severability provision
5 that is contained in the settlement agreement, which is a
6 contract, indicates that, if there is an unenforceable
7 provision, the Court can -- or it can be declared
8 unenforceable and the remaining aspects come out.
9 And what did we hear? We heard about a perpetual in
10 nature. We heard about the five-year reference. And I'm
11 going to come to those specifically because I don't think
12 they were accurately described. But this Court has the
13 ability to say, "Well, if y'all don't like it and this --
14 I'm going to determine it's not a reasonable duration, I
15 can go ahead and strike these provisions and enforce the
16 balance of the agreement and the work gets done as they
17 agreed."
18 In addition to these three legal reasons, Your
19 Honor, there are a host of additional policy reasons that
20 this settlement agreement should be enforced. For
21 example, our public policy promoting resolution of
22 settlements -- a resolution of lawsuits through
23 settlement. Preserving the right -- constitutionally
24 protected right in South Carolina and in the United States
25 of individuals to enter into contracts, and also because

1 the Town of Sullivan's Island sought and obtained Court
2 approval of the settlement representing that they have the
3 authority to enter into this in the beginning.
4 So, Your Honor, as you can see, this issue is near
5 and dear to me, so I am the only one who is speaking today
6 who has lived with this for the 12-plus years. So if
7 you'll indulge me for a moment, I would like to back up
8 and provide a little context because we are at the
9 beginning of the end or, if the Town has it their way, the
10 end of the beginning.
11 So, in 1991, Your Honor, the Town of Sullivan's
12 Island wanted to protect the accreted land from
13 development. They wanted to prevent cutting a road down
14 Bayonne extension and adding a row of, quote, "new beach
15 houses" to the front beach. And this is exactly what
16 happened on the Isle of Palms immediately after Hugo. All
17 of those old beach cottages -- they cut in a new road and
18 added new beach houses in front. Rightfully, the Town and
19 the residences there were concerned about that. You say,
20 "Well, is this something you really need to do?" What
21 Town would actually do that in today's environment? Well,
22 we just looked back a few years. The Town of Sullivan's
23 Island cut a new road on Raven Drive, extended that road
24 on the back of the island, added five new houses that are
25 marsh front, looking over the Intracoastal Waterway.

1 Beautiful homesites. And the point is that, given the
2 temptation to develop land, it will be developed if it's
3 not protected.
4 So how do they come about trying to preserve this?
5 Well, they had to do something more stringent than just
6 ownership. And I think, if you look around Charleston,
7 for example, you can tell that municipal ownership of
8 property does not preserve the property in its natural
9 state despite decades of protecting waterfront property.
10 We know today what happens when the City sells a property.
11 It's developed. And today's skyline of Charleston looks
12 very, very different than it did when Joe Riley retired.
13 So they came up with a system to protect this land
14 in a choreographed two-step transaction. And when I say,
15 "choreographed," I mean it. And so the idea was, "We're
16 going to -- the Town of Sullivan's Island, we're going to
17 give -- trade to you the land to Lowcountry Open Land
18 Trust for a sum of money, for adequate consideration."
19 The Lowcountry Open Land Trust will encumber the property
20 with restrictive covenants that we have seen in the deed
21 that's attached to our materials. And as a result of
22 that, they will then transfer the land back to the Town of
23 Sullivan's Island, who will own the property and have to
24 faithfully live up to its obligations under that deed.
25 The main point of it is that the property is protected

1 from development into the future.
2 And if you look at the deed summary that we have
3 added in our materials, Your Honor, there is a specific
4 provision in the deed summary itself that references this
5 specific conclusion. It says, the deed summary -- the
6 recorded deed summary says -- talking about the nature of
7 this transaction -- give me one second -- "A transfer of
8 ownership was necessary to ensure enforceability of the
9 restrictions and prevent a future Town council, with
10 different motivations, from changing or weakening the
11 restrictions or doing away with them altogether."
12 This was the summary of deed restrictions by the
13 Town of Sullivan's Island that is recorded. The intent of
14 the transaction, Your Honor, was to prevent subsequent
15 Town Councils from acting. Why do I mention that? The
16 reason is quite clear. The law of unintended consequences
17 would have ramifications in this case that are
18 significant. For example, if it -- if the Town of
19 Sullivan's Island cannot enter into a settlement agreement
20 with respect to its obligations under the deeds, in
21 conjunction with a breach of contract claim, because those
22 restrictions or those agreements would bind its hand, so
23 too do the restrictive covenants that they choreographed
24 in the very beginning.
25 Under that rationale, the deeds themselves are void.

1 Under that rationale, some person less scrupulous may come
2 in and say, "These restrictions are void. We want to
3 purchase the land. We're going to cut the road. We're
4 going to put the houses on." And seeing the real estate
5 market over there, I am fairly confident there are people
6 willing to do that.
7 So the Town of Sullivan's Island has created this --
8 almost a complete unicorn of a theory that takes out of
9 consideration all of the factors that go into what the
10 deed is.
11 And let me be perfectly clear. We and my clients do
12 not contend that the deeds are void nor do we want any
13 determination about that. My clients were part of the
14 people who participated in the original fund-raising to
15 try to preserve the land, and they want the land preserved
16 under the deeds. We simply had a dispute over the Town's
17 function of its obligations under the deeds, or the lack
18 thereof, really, which resulted in the underlying lawsuit.
19 So when you look at the settlement agreement itself,
20 Your Honor, the settlement agreement tracks the language
21 of the deeds. You know, I would just point out that
22 municipalities are given the unfettered discretion by
23 South Carolina statute to own and possess property without
24 limitation. That's codified in the South Carolina Code
25 Section 5-7-40.

1 So they can do what they want with their property
2 without limitation, which is what I believe they did in
3 conjunction with these deeds in the beginning, in which I
4 believe they did when they settled this case. And that's
5 pursuant to their grant of authority.
6 So we had a ten-year lawsuit, Your Honor, and the
7 whole time, the Town of Sullivan's Island said Mr. Hood's
8 clients are really bringing a zoning case. And I argued
9 until I was blue in the face in front of Judge
10 Scarborough, in front of the Court of Appeals, all of who
11 said, "No, this is zoning." And we see that same refrain
12 in the briefing here today. It wasn't until I was at the
13 Supreme Court of South Carolina that I had an audience
14 that acknowledged that this case is not about zoning.
15 It's a contract. It's about the deeds. And they remanded
16 the case for a judicial determination of what the Town's
17 obligations are under the deeds because we had a dispute
18 over what the Town was obligated to do.
19 This is not about zoning. Zoning is a governmental
20 function. Purchasing and selling real estate? That's a
21 business proprietary function. I certainly hope it is.
22 The placement of restrictive covenants? Proprietary
23 business function. Otherwise, you can't have
24 municipalities participating in conservation.
25 So we back up, we come back from Columbia the second

1 time, and the parties engage in a mediation. And we came
2 up with a potential solution. And I say "potential"
3 because the parties knew that that solution was only going
4 to be effective if it was approved by Town Council.
5 So what happens? We have, on October 2nd, 2020, a
6 Town Council meeting. Town Council presents this and they
7 enter into a Town Council resolution. And so the Town
8 can't speak on its own; it speaks through Town Council.
9 When Town Council's voice is heard, it comes through from
10 the mayor. Well, the mayor -- Mayor Pat O'Neil affixed
11 his signature, on October 2nd, to a resolution by the Town
12 agreeing to the terms of this settlement agreement, which
13 control how it will handle its property, how it will
14 administer its obligations under the deed. It was a
15 resolution of the conflicting interpretations of the deed.
16 And I would be remiss if I didn't address this void
17 argument in a different direction. When I appealed to the
18 Court of Appeals, the original briefing and the briefing
19 at the Supreme Court included an argument by the Town of
20 Sullivan's Island that my interpretation of the deed was
21 an impermissible limitation on governance. It sounds very
22 similar to what's being argued today.
23 Our Supreme Court, after taking a good, hard look at
24 this case, didn't conclude that, "Nope, there's no
25 ambiguity here because Jamie's interpretation would render

1 it void." They sent it back. And I submit to you that
2 the basic rules of contract construction mean that, if
3 there are two conflicting interpretations creating an
4 ambiguity and one renders the agreement void, that's not a
5 reasonable interpretation.
6 So if their argument were valid, it would have been
7 passed upon, it would have been looked at, it would have
8 been a silver bullet to avoid all of the things that have
9 come since then.
10 So then we have the board resolution, and we have a
11 settlement agreement that's entered into by the Town, and
12 that wasn't enough. The Town requested and the parties
13 agreed to seek Court approval of the settlement. And that
14 was done. And when the Town of Sullivan's Island came
15 before this Court with different counsel, who, by the way,
16 are some of the most experienced municipal lawyers in the
17 state of South Carolina -- Brady Hair and Derk Van Raalte
18 -- they brought to this Court a settlement agreement that
19 tracked the obligations set forth in the deed. It
20 included the findings of fact because the deed says that
21 the Town of Sullivan's Island can change, modify, or alter
22 the provisions in the deed under certain circumstances.
23 And it lays out that process. It has to identify public
24 policy reasons or public actions: Mosquito control,
25 scenic enhancement, and the like.

1 So the settlement agreement identifies specific
2 findings of fact consistent with that. And then, once you
3 identify those specific public actions that they're acting
4 pursuant, you then have to do it an assessment whether
5 it's reasonable and appropriate and whether they can
6 consider less intrusive options, for example. And they
7 did. And those are set forth in the resolution of Town
8 Council as well as the settlement agreement.
9 And the reason I keep talking about the resolution
10 of Town Council, Your Honor, is because this decision
11 would render the actions by the Town as invalid. And the
12 Town was exercising its governmental function in entering
13 into a resolution. The Town exercised its business
14 function in entering into a settlement agreement.
15 And in terms of whether the settlement agreement was
16 reasonable, the settlement agreement itself and the Town's
17 resolution contained findings of fact which reference all
18 of the reasons why it's appropriate. It talks about the
19 risk of fire in human health. It talks about the nuisance
20 that had developed. It talked about improving -- that
21 their vision was that it would improve the biohabitat of
22 the accreted land according to their statements in their
23 own resolution and the findings of fact that they signed.
24 So we go forward to a settlement agreement that
25 includes a provision of good faith and fair dealing, that

1 no party shall directly, indirectly, individually, or
2 through others endeavor to interfere with the permitting
3 process or the completion of the work described herein.
4 Why was that included? Because I have been dealing
5 with them for ten years, and I knew that, if there wasn't
6 a provision like that in there, that somebody would say,
7 "Let's just not do it. Let's make them jump through the
8 hoops. Let's tie this back up in court for a handful of
9 years." Because that's what's happened for ten-plus
10 years.
11 Your Honor, there is also, in the settlement
12 agreement that was submitted to you under Section 8,
13 Miscellaneous Provisions -- and I think it's important to
14 know what representations the Town of Sullivan's Island
15 made to the Court at that point in time. It says that,
16 "Each party acknowledges and agrees that the settlement
17 agreement was negotiated and drafted with the full
18 participation of the parties and the parties' respective
19 counsel." It was negotiated at arm's length and in good
20 faith. Well, good faith and negotiation should be --
21 result in a settlement that is executed incidentally.
22 The consultation -- or the agreement was executed
23 voluntarily after consultation with experienced legal
24 counsel.
25 "This settlement agreement, according to the Town

1 Council at the time, is a legally binding contract with
2 which the parties will faithfully comply." The settlement
3 agreement, the Town has the authority -- they represent
4 having the authority to execute this agreement.
5 Today, their argument is they could not have
6 submitted this because it was void and it was
7 impermissible. Again, this is a -- not just a single but
8 a series of fundamental misrepresentations if their theory
9 is accurate.
10 And what's different today than there was at the
11 time of the settlement agreement in October of 2020?
12 Nothing. No change in controlling law. No change in
13 facts. The only change, Your Honor, was a change of the
14 constitution or town council in terms of its constituents.
15 They had an election. They have a new town council.
16 Those town council don't like this, and so they say, "We
17 don't like it, even though we asked you to approve it,
18 even though it's enforceable contract, even though it
19 tracks the deed, even though there's nothing in South
20 Carolina ever done like this, please, Judge, throw it out,
21 tell them that this whole process has been void and
22 fraudulent and nefarious the entire time."
23 Your Honor, I want to take one second to talk about
24 the standard for proprietary. I know that -- I don't
25 believe there's any argument amongst counsel about what

1 the controlling laws are. I think we cite to the same
2 cases or a handful of cases. What I found interesting is
3 that the proposition in South Carolina about proprietary
4 and what the standard is for determining whether something
5 is proprietary comes from a case called *Plant Food Company*
6 *vs. Charlotte*. That's a 1938 Supreme Court case in North
7 Carolina. And that case, Your Honor, is where the North
8 Carolina Supreme Court held -- and this was what was
9 adopted by South Carolina -- the true test is whether the
10 contract itself deprives the governing body or its
11 successor of a discretion, which public policy demands
12 should be left unimpaired. That is a test. It is not a
13 particularly clear test, but it is the test.
14 And what's interesting is, if you continue reading
15 this case, instead of just noting the footnote, it goes on
16 to say, immediately after that quotation, Your Honor --
17 this is at page -- let me give you the citation page --
18 714 of the Southeastern Reporter.
19 It says, "It is obvious that a too rigid adherence
20 to the principle would leave the tow council nursing a
21 mere theory in the possession of an important governmental
22 power without practical means for its exercise and unable
23 to undertake any important public work since no concern
24 would equip itself and undertake the project when the
25 incoming administration, the product perhaps of political

1 accident, may repudiate the contract at will during its
2 performance."
3 The rationale set forth by the North Carolina
4 Supreme Court was that there are contracts that are
5 proprietary that can exceed the duration of the Town
6 Council because that's the only way that a town can
7 function. And when you look at the definition in the
8 tests set forth in that case, is there a discretion that
9 public policy demands be left unimpaired? Well, you have
10 conflicting public policy. We have a very, very
11 well-defined and strong public policy with respect to
12 settling lawsuits and the enforceability of that; in
13 addition, strong public policy about parties' ability to
14 enter into contracts.
15 Otherwise, no municipality would ever settle a case.
16 You would never have a BZA or a BAR settlement. You could
17 not even function -- all of these business functions that
18 take place on a daily basis in our government, if subject
19 to their interpretation, would render them void.
20 Settling a case is not a government function.
21 Litigating is not a government function. And so when you
22 look at the test set up, whether this settlement agreement
23 is proprietary, it fits squarely within it, because they
24 were resolving ten years of litigation that was seeking
25 significant monetary damages for impairing the property

1 value in addition to failing to abate a nuisance. So they
2 have an economic interest in addition to the desire to
3 resolve things, to bring some clarity to their -- to this
4 issue of the interpretation of the deeds, and to prevent
5 there from being a conclusion by a Court that my
6 interpretation of the deeds was, in fact, right, which
7 would be far more severe than what this settlement
8 agreement contemplates.
9 I do want to make a note because in the -- in the
10 reporting on this case in social media news outlets, they
11 make it sound as though my clients want to, you know, have
12 a full frontal assault on these deeds and want to
13 clear-cut the maritime forest. If Your Honor looks at the
14 settlement agreement itself in terms of its
15 reasonableness, because that's one of the criteria under
16 the proprietary function, you'll see that the settlement
17 agreement was set up in zones. Those zones track
18 different parts of the island where the forest is in
19 different levels of maturity. The idea was that we would
20 be less restrictive and farther up the beach and more
21 restrictive in front of the fort and the school where the
22 forest is thicker. We identified specific trees. We
23 identified sizes. There's a tree survey the Town had
24 done. We went to great lengths to balance in the
25 settlement agreement ultimately what would be taken out.

1 And when you look at the sort of consequences of the
2 settlement agreement, it's a reasonable solution.
3 Now, I want to -- and necessary. So let me address
4 necessary, because that's the last element, and then I
5 want to wrap up, Your Honor, focusing on another aspect.
6 In terms of necessary, you'll look at the deed
7 itself and the deed -- or, excuse me, the settlement
8 agreement, and it talks about the necessity. The Town
9 concluded it was necessary. It was necessary. It was the
10 only way to resolve the litigation was a settlement.
11 And short of that, it was going to result in a jury
12 trial and a judicial determination of what specifically
13 the deeds required the Town to do. And that segues into
14 some points that my friend was making in his argument
15 about the obligations of the Town.
16 So the Town undertook obligations when it acquired
17 this land by deed. Those obligations are what were at the
18 heart of our lawsuit. So the Town, defining what those
19 obligations are, can't be void if the deeds themselves are
20 enforceable.
21 So the Town's obligation that he talked about are
22 primarily two aspects that he found offensive in terms of
23 the future. One has to do with funding and the other has
24 to do with perpetual. And so I wanted to address those
25 two points.

1 Number one, funding. If you look at the settlement
2 agreement, the funding talks about a transition zone that
3 will be primarily paid for by Town Council. The history
4 on that is Town Council had already undertaken to create a
5 transition zone on Sullivan's Island, and they were paying
6 for it, and that was part of the settlement agreement,
7 talking about this globally.
8 The issue then became: What are they going to do
9 beyond the transition zone? So that was an obligation the
10 Town had already assumed. We contend that's an obligation
11 they have under the deed to fund it anyway.
12 But what's interesting about the settlement
13 agreement is it has a fee-shifting provision in it
14 whereby, to do any work in the accreted land beyond that
15 transition zone, the homeowners actually have to pay for
16 it. And that was a significant concession as part of the
17 negotiation. It was significant because the Town is the
18 one obligated to perform the work, meaning I can't go out
19 there and do the work myself. The Town has to control and
20 direct the work. But if the work is going to get done, it
21 has to be paid for by someone else.
22 And so what did we do after the settlement
23 agreement? We organized the island in blocks. We
24 identified block captains. We got commitments from people
25 to contribute pro rata on their block so they can, you

1 know, submit this money to the Town. All of that work has
2 been done on our end under the mistaken belief that the
3 Town would exercise good faith and enter into the
4 settlement -- or live up to the promises it made in the
5 settlement agreement.
6 So when we talk about the financial obligations, the
7 deed placed those responsibilities on the Town to begin
8 with it, and what the settlement agreement does is shifts
9 the burden of that financial burden to the property owners
10 who want to cut in the accreted land beyond the transition
11 zone.
12 Second has to do with cutting into the future. This
13 is contained under the general approach section, Your
14 Honor, Exhibit 3 to my brief. It says -- and I'll just
15 read the sentence in its entirety because the portion that
16 was excerpted, I don't think, was complete. It says, "In
17 order to main [verbatim] similar conditions going forward,
18 with the help of a naturalist, the Town would review
19 changes in the condition of the accreted land on a
20 recurring basis (for instance, once every five years) with
21 an eye towards making whatever changes might be necessary
22 to maintain appropriate levels of density and diversity."
23 So while Council may describe that as binding their
24 hands, what this provision does is gives them the
25 discretion to monitor the condition and maintain it

1 consistent with what has been seen, but ultimately, that
2 is the discretion of the Town.
3 So we have two fundamental issues that they contend
4 render this unfair that I have addressed, and I believe,
5 Your Honor, that our response to that adequately addresses
6 that this is a proprietary function and it meets the
7 elements.
8 But back to my third point, which is the
9 severability provision. If Your Honor concludes that this
10 settlement agreement is not enforceable as written because
11 these future obligation about the discretion for the Town
12 that I just alluded to under general approach and
13 information about the funding, then Your Honor has the
14 ability to redline, pencil through, determine that to be
15 unenforceable, and the balance remain in effect.
16 The severability provision that we included in the
17 settlement agreement under the miscellaneous provisions,
18 Your Honor, talks about whether any word, phrase, clause,
19 sentence, paragraph is declared -- determined to be
20 unenforceable. That's incidentally what happened recently
21 with the Heritage Act. It went in because they had a
22 super majority requirement that, if you were going to take
23 down any historical monuments, then you had to have a
24 super majority. The Court determined that to be invalid
25 because of the super majority requirement. And they went

1 in and they pencilled through that. And the Act stood on
2 its own beyond that.
3 I don't believe that this contract, Your Honor, this
4 settlement agreement is one that requires this because it
5 is a good faith negotiation between two parties to resolve
6 a lawsuit, and I believe that, when a Town enters into a
7 settlement agreement, it is doing so under its proprietary
8 business functions. That's why there's no case law that
9 talks about the unenforceability of settlement agreements.
10 And if you just think about the ramifications of a
11 town council not being able to define what it does with
12 its real estate because the implications it could have in
13 one or two years, there's nothing that you could do with
14 real estate.
15 So, Your Honor, I have gone long. You can tell this
16 issue is near and dear to me. I have spent more time than
17 any human should ever have to spend trying to get a Town
18 to get clarity on its deed and live up to its obligations,
19 but dang it, if every time there's some resolution, they
20 don't find some way to come back here and ask the Court to
21 do something different than the Town Council did -- and
22 I'm asking this Court to say enough is enough, the deed is
23 enforceable, perform under the deed, conduct discovery,
24 let me see if there has been any behavior that was
25 attempting to facilitate a breach of a contract that would

1 be actionable. If there is, we can have a trial on those
2 counterclaims. If there's not, they do the work, this
3 thing goes away.
4 Thank you, Your Honor.
5 THE COURT: Okay.
6 All right. I'll hear response, to the extent
7 necessary, from Plaintiff.
8 MR. WILKINS: I'll be very brief, Your Honor.
9 THE COURT: And then we can also -- after that, I'll
10 let you dovetail into the discovery issues we need to
11 address as well.
12 REBUTTAL ARGUMENT
13 MR. WILKINS: Thank you, Your Honor.
14 The Court does have the authority to sever
15 provisions from any contract, and if that were attempted
16 in this case, there would be nothing left because every
17 meaningful provision in this agreement is the result of
18 the exercise of that prior town council's legislative
19 governmental powers.
20 With regard to the exercise of legislative
21 governmental powers, the Supreme Court has been very
22 clear. As I referenced to the Court a few minutes ago, it
23 said, "A current council may not tell a future council
24 what it must do or what it must not do." And that, Your
25 Honor, is what the democratic process is all about.

1 With regard to the exercise of a proprietary
2 function, which I submit to the Court is not really at
3 play here because that's not involved in this agreement,
4 in that event, nevertheless, any agreement drawn up or
5 made because of the -- or with the -- because of the
6 proprietary powers must be of a reasonable duration. And
7 I submit to the Court that, in perpetuity, forever and
8 forever and 100 years plus another 100 is not a reasonable
9 duration.
10 And finally, Your Honor, with all respect, let me
11 just say that no town council may circumvent the law,
12 circumvent edicts from the Supreme Court since almost the
13 very beginning, and convert an unenforceable contract into
14 an enforceable one by seeking an attorney -- and obtaining
15 a consent order from the Court.
16 Thank you, Your Honor.
17 THE COURT: Okay. Thank you.
18 And I know there are two motions to quash. Who will
19 be arguing those?
20 MS. AUSTIN: I will. Alexandra Austin for the Town
21 of Sullivan's Island, Your Honor.
22 THE COURT: All right. Happy to hear from you.
23 MS. AUSTIN: Thank you.
24 THE COURT: Can they be addressed together or do
25 they need to be addressed separately?

1 MS. AUSTIN: They can. Thank you, Your Honor.
2 THE COURT: Okay.
3 MS. AUSTIN: There are two motions. They both are
4 essentially seeking the same relief. There were two that
5 were filed because there were subpoenas that were issued
6 and then withdrawn and then reissued, and that's why
7 there's two motions.
8 THE COURT: Okay.
9 MS. AUSTIN: But they essentially cover and seek the
10 same relief.
11 THE COURT: Okay.
12 MOTION TO QUASH ARGUMENT
13 MS. AUSTIN: May it please the Court, Your Honor.
14 We have moved for a stay of discovery and to quash
15 subpoenas that were issued to all of the Town Council
16 members and to a non-profit entity, Sullivan's Island For
17 All.
18 There are several grounds on which we don't believe
19 that they're proper at this time, and at the time at which
20 may become proper, we have some substantive objections to
21 those as well.
22 But as an initial matter, we just believe that
23 discovery, at this stage, is premature. We don't disagree
24 that the mere filing of a dispositive motion automatically
25 means that discovery is inappropriate. But in this case,

1 the parties agreed that the settlement agreement is at the
2 core of the issues before the Court; that the settlement
3 agreement is unambiguous. And until such time as that
4 purely legal issue is resolved, there's no discovery which
5 would aid the Court in a purely legal question.
6 So we primarily just believe that discovery at this
7 point is -- it's not economical for the Court, for the
8 parties, and it does not preserve the parties' resources.
9 If -- once the motion -- the dispositive motion has been
10 resolved, the relevant issues might be narrowed or
11 discovery might become unnecessary altogether.
12 Additionally, we have objected. I moved to quash
13 the subpoenas to the Town Council members and to the
14 entity, Sullivan's Island For All, as overbroad, unduly
15 burdensome, and not proportional to the needs of the case.
16 The subpoenas to the Town Council members, they seek
17 all documents and all communications with anybody in any
18 way related to any subject matter relating to the accreted
19 land. They're unrestricted in scope and time. That could
20 include -- that would sweep in such a vast swath of
21 documents that could not possibly have any relevance to
22 the issues in this case, such that they are overbroad and
23 would be unduly burdensome.
24 The subpoena to Sullivan's Island For All seeks
25 donation records, seeks documents relevant to its

1 formation and to its members. It seeks all documents and
2 communications with the Town, with Town Council, with
3 individual members of Town Council related in any way to
4 any subject matter having to do with the accreted land,
5 and, also, any communications relating in any way to the
6 accreted land with Nexsen Pruet.
7 The issues in this case are narrow. Even if summary
8 judgment, you know, were not granted and the case goes
9 forward, the claims in this case are the Town has sought a
10 declaratory judgment that the settlement agreement is
11 invalid and unenforceable, and the defendants have brought
12 counterclaims for a breach of contract, promissory
13 estoppel, and specific performance.
14 Again, we submit to the Court respectfully that if
15 the settlement agreement is found to be invalid, then
16 there will not be a breach of contract or any contract to
17 specifically perform.
18 So this is a very limited set of issues. What -- it
19 seems like, through the defendant's briefing and through
20 their arguments earlier, that they are interested in the
21 motivations of the individual town council members.
22 That's just simply not relevant to the issues in this
23 case, and it could have no potential relevance.
24 They also seek privileged communications. The Town
25 possesses an attorney-client privilege under both the

1 discovery rules and by statute that has not been waived.
2 So, you know, given the broad scope of the discovery
3 requests and the subpoena requests, you know, asking for
4 all communications related in any way to a subject matter
5 having to do with the accreted land, clearly sweeps in
6 many, many privileged documents. And by statute, public
7 bodies do not have to produce privileged documents. That
8 is not part of any public disclosure requirement.
9 The subpoenas to the town council members also seek
10 information from the town council members in their
11 official capacities as well as in their individual
12 capacities. We submit to the Court that discovery related
13 to their individual capacities is not relevant. This, you
14 know, was a settlement agreement that was, you know,
15 entered into by the Town. So, to the extent that they're
16 seeking discovery related to their individual capacities,
17 it's just not relevant and could not be relevant, and we
18 believe it is, you know, more designed to harass than to
19 lead to permissible discovery.
20 And the broad scope of discovery sought through the
21 subpoenas, it's simply just not proportional to the needs
22 of this case, which we do believe is particularly
23 important when, you know, you have a public entity
24 involved.
25 And, finally, Your Honor, to the extent that the

1 subpoenas -- that the Court finds that the subpoenas do
2 seek any permissible information, we believe, with respect
3 to the subpoenas to the Town Council members, that those
4 should be sought through ordinary discovery. The Town
5 Council members are parties to the litigation in the
6 sense -- in their individual capacities in the sense that
7 the Town Council makes up the Town of Sullivan's Island.
8 We are entitled, under the discovery rules, to discovery
9 in the least burdensome, least expensive means, and we
10 believe that the subpoenas attempt to skirt those
11 discovery rules and that this information should be sought
12 directly from the Town, through the Town's records should
13 discovery proceed in this case.
14 Thank you, Your Honor.
15 THE COURT: Okay.
16 MS. BISSO: Lisa Bisso for the defendants, Your
17 Honor.
18 REBUTTAL ARGUMENT
19 MS. BISSO: May it please the Court? Thank you,
20 Your Honor, and thank you for having me here today.
21 I'll say that we further elaborate on these points
22 in our briefings, but for the interest of your time and
23 the Court's time, I'll try to be as concise as possible
24 because I know you have heard a lot about this matter
25 today already.

1 Your Honor, what the plaintiffs have tried to do
2 here is file a dispositive motion and subsequently say
3 that they do not have to comply with discovery. Once they
4 filed their motion for summary judgment -- or prior to
5 that, Your Honor, we had sent discovery requests to the
6 plaintiff, which were responded to in what I can barely
7 call responses. They sent back boilerplate objections
8 that were merely copy-paste. That is simply inadequate,
9 Your Honor. A party cannot file a dispositive motion and
10 seek to just not engage in discovery absent good cause,
11 which the plaintiff has failed to show here today.
12 We believe the subpoenas served here are valid and
13 should be complied with. To begin, there's been no
14 compelling argument by the plaintiff that they even have
15 standing to object to these subpoenas and file motions to
16 quash on behalf of the town council members and the
17 separate entity, the non-profit Sullivan's Island For All.
18 We did request various communications from the Town
19 of Sullivan's Island town council members in their
20 individual capacity, and that's because we believe that,
21 in their official capacity, there is separate information;
22 for example, personal emails and personal text messages,
23 which we did seek to obtain for various reasons, which
24 I'll get into in a little bit.
25 As far as the Sullivan's Island For All non-profit,

1 again, that's a completely separate entity. The Town has
2 not shown any shared interest or privilege on behalf of
3 that non-profit as to why they can even file a motion to
4 quash on their behalf. But even if they did have
5 standing, Your Honor, we filed -- we served these motions
6 after -- one week after we received the discovery requests
7 that I referenced from the plaintiff in an effort to
8 obtain any information at all in relation to our
9 counterclaims, which is why we did serve these subpoenas,
10 because, as you have heard, the Town, less than a year
11 after signing the settlement agreement, suddenly changed
12 its position. And that was, in part, because a new town
13 council was elected, and, in part, because this new
14 non-profit came onto the scene, Sullivan's Island For All,
15 which suddenly presented a legal position to the Town and
16 urged them to thwart their obligations under the
17 settlement agreement.
18 We sought this information because the town council
19 members do have a duty to not interfere with this contract
20 and to act in good faith in their individual capacities,
21 despite having an official capacity on the town council
22 board.
23 The plaintiff also says that these requests are
24 overly broad, unduly burdensome, but has failed to present
25 any particularized harm with factual allegations as to why

1 it is such. Instead, they present broad allegations,
2 merely saying that it is without anything really to
3 substantiate those claims, especially as to Sullivan's
4 Island For All, a non-profit who has only even been in
5 existence for two years. It's a little bit, in my
6 opinion, silly to say that it's unduly burdensome to
7 access those records, which we do believe are relevant to
8 our counterclaims of breach of contract, to see if they
9 were interfering with the settlement agreement.
10 As far as the Town of Sullivan's Island subpoenas
11 being overly broad and unduly burdensome for the
12 communications, the Town has provided, in its factual
13 allegations in the complaint, a breadth of allegations
14 that are wide in scope as to time. And so we do seek
15 various information as to time but if Your Honor, in its
16 discretion, would like to limit the time as to those
17 subpoenas, then we would be happy to do so.
18 And as to privilege, the plaintiffs merely state
19 that everything is privileged without providing any sort
20 of privilege log, making an expressed assertion as to why
21 these documents are privileged, as to the nature of the
22 documents, so that we can assess this objection as to
23 privilege.
24 And finally, Your Honor, it's funny to me that, at
25 the same time, the plaintiff asks to request a stay of

1 discovery, they're saying we should seek this information
2 through ordinary means of discovery, which they have
3 refused to comply with. Again, they sent us boilerplate
4 copy-paste responses with no information at all. And we
5 just seek to move forward with this litigation and seek
6 the facts that are relevant to our counterclaims.
7 So, for those reasons, we would ask that you deny
8 the plaintiff's motion to quash, let discovery proceed,
9 and order that the subpoenas be complied with.
10 Thank you.
11 THE COURT: All right. Okay. I don't think a
12 response is necessary at this point, unless you --
13 anything outside of what you have already briefed.
14 MS. AUSTIN: Not that it's outside of the briefing,
15 Your Honor.
16 THE COURT: Yeah, yeah, the briefs -- all the
17 motions are fully incorporated for purposes of the record.
18 Obviously, I have got a lot of information to digest and
19 cases to read that have been cited by the attorneys. I
20 appreciate your preparation for today, and if I need a
21 proposed order, of course I'll let you know in an order.
22 I hope to be able to go through this in the next few weeks
23 and issue an order at that time after I have educated
24 myself a little more thoroughly on the topic. Okay?
25 MR. HOOD: Thank you, Your Honor.

1 THE COURT: Thank y'all.
2 MR. WILKINS: Thank you, Your Honor.
3 (The above matter concluded at 11:40 a.m.)
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1 CERTIFICATE OF TRANSCRIBER

2 CASE NAME/NUMBER: Town of Sullivan's Island v. Bluestein

3 2022-CP-10-00846

4 DATE OF HEARING: 9/22/2022

5 COURT REPORTER/MONITOR: DCRP/Caressa Johnson

6

7 I, Bobbi Fisher, do hereby certify that the foregoing

8 transcript is a true and correct record of the recorded

9 proceedings; that said proceedings were transcribed to the

10 best of my ability from the audio recording and supporting

11 information, and that I am neither counsel for, related

12 to, nor employed by any of the parties to this case, and I

13 have no interest, financial or otherwise, in its outcome.

14

15 Bobbi Fisher

17 _/s/ Bobbi Fisher_____

18 Bobbi Fisher, Certified Transcriber

19 Date Prepared: July 5, 2023

20

21

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas
Jennifer B. McCoy, Circuit Court Judge

Case No. 2022-CP-10-00846

TOWN OF SULLIVAN'S ISLAND,

Respondent,

vs.

NATHAN BLUESTEIN and
THEODORE ALBENESIUS, III,

Appellants.

NOTICE OF APPEAL

Nathan Bluestein and Theodore Albenesius, III appeal from the Order Granting Plaintiff's Motion for Summary Judgment, issued by the Honorable Jennifer B. McCoy, Circuit Court Judge, At Large, and filed on January 30, 2023, together with the order denying Defendants' motion to reconsider, filed on June 5, 2023.

The undersigned received written notice of entry of the order denying the motion to reconsider and ending the case on June 5, 2023.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this **5th** day of **July, 2023**, a copy of the NOTICE OF APPEAL on behalf of Appellants Nathan Bluestein and Theodore Albenesius, III was served by emailing a copy to the address listed below:

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Nathan Bluestein and Theodore Albenesius, III

July 5, 2023

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Amended Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

The undersigned further certifies that the Amended Record on Appeal complies with the Order of the South Carolina Supreme Court, dated April 15, 2014, RE: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, Appellate Case No. 2013-002681.

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January 23, 2024